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BRENNAN LECTURE

GENDER EQUALITY AND THE RULE OF LAW

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INTRODUCTION

A. *Brief Introductory Remarks and Acknowledgements*

Thank you, Lauren Goldman, for your kind introduction. I would also like to thank Dean Trevor Morrison, the Board of Directors of NYU School of Law, and the Institute of Judicial Administration (IJA), for the honor of delivering the Twenty-Sixth Annual William J. Brennan Jr. Lecture on State Courts and Social Justice. I am humbled to join the distinguished group of legal scholars who have been part of this lecture series throughout the past twenty-six years.

Today, I have the daunting task of following in the footsteps of those brilliant legal minds and accomplished jurists and must do so in the context of paying tribute to one of the great champions of social justice of the modern era: Supreme Court Justice William J. Brennan, Jr.

B. *Scope of the Lecture*

1. *In General Terms*

Gender Equality and the Rule of Law is a lofty title for this lecture, befitting the importance of the topic. It touches upon issues that are near and dear to me. Gender equality is central to the various projects and initiatives that we are working on and advancing in the Puerto Rico court system.¹

Because the Brennan Lecture is about the role of state courts in promoting social justice, I will focus on sharing my experience with specific initiatives that the Puerto Rico court system has developed and implemented.

2. *Justice Brennan's Legacy of Social Justice: Aspiration, Inspiration, and Homage*

I hope this lecture serves as a tribute to Justice Brennan's doctrine of equality based upon the premise of human dignity as a cornerstone of our social values, as well as his vision of the role that courts must play in achieving the goals of equality, fairness, and justice.²

Furthermore, I will illustrate how we are working toward reaching that goal of equality under the law through practical and real-life application of specific policy initiatives and programs.

Current Supreme Court Justice Ruth Bader Ginsburg³ said Justice Brennan "contributed monumentally to the advancement of

¹ See *infra* Section IV.B.

² In the words of Justice Brennan in his memoir reflecting upon his life and tenure on the Court: "[a]s I have said many times and in many ways, *our Constitution is a charter of human rights and human dignity. It is a bold commitment by a people to the ideal of dignity protected through law.*" William J. Brennan, Jr., *My Life on the Court*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 17, 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (emphasis added).

³ Sadly, Justice Ruth Bader Ginsburg passed away on September 18, 2020. *Press Releases*, SUPREMECOURT.GOV (Sept. 18, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20. As I highlight in this Article, she played a pivotal role—first as an attorney and later as a Supreme Court Justice—in advancing gender equality and women's rights. Her death leaves an immeasurable void on the Supreme Court which will painfully stress the importance and impact of the Judiciary on society. As Chief Justice, I will remain faithful to her legacy and will continue to ensure that our courts administer justice promoting and protecting fundamental rights for everyone.

liberty and justice, equal and accessible, for all.”⁴ Justice Ginsburg also spoke of what retired Supreme Court Justice David Souter, a colleague and close friend of Justice Brennan’s, termed “the gravitational pull of the Brennan total,” referring to Justice Brennan’s vast body of jurisprudence.⁵ Throughout his tenure on the Court, Justice Brennan used his platform to achieve social justice, which he believed was at the core of the U.S. Constitution and the Bill of Rights.⁶ In this pursuit, he continuously pushed his fellow Justices to take on a variety of seminal social issues. He was the architect of landmark decisions that secured the individual rights of racial minorities,⁷ led to reapportionment of voting districts,⁸ and enhanced First Amendment freedom for newspapers and other media,⁹ among many others.

Justice Brennan’s constitutional jurisprudence focused on the concepts of equality and liberty that are recognized in the Declaration of Independence, protected in the United States Constitution with its Bill of Rights, and further advanced by the Fourteenth Amendment.¹⁰ Yet little is discussed about the pivotal role he played in the evolution of gender equality in the United States.¹¹

The fact is that his belief in the dignity and the equality of all persons extended to seeking equal rights for women and it is reflected

⁴ Ruth Bader Ginsburg, *Closing Remarks for Symposium on “Justice Brennan and the Living Constitution,”* 95 CALIF. L. REV. 2217, 2217 (2007).

⁵ *Id.* at 2218.

⁶ See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986) (“[T]he Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being.”); see also Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. ST. L. REV. 665, 692–703 (2013) (describing how Justice Brennan’s constitutional jurisprudence advanced equality and liberty). See generally *Brennan’s Approach to Reading and Interpreting the Constitution*, 43 N.Y.L. SCH. L. REV. 41 (1999) (featuring a panel debate on Justice Brennan’s jurisprudence).

⁷ See, e.g., *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968) (reaffirming and strengthening the seminal holding in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), that “separate but equal” segregation based on race is inherently unequal and denies equal protection of the laws guaranteed by the Fourteenth Amendment).

⁸ See, e.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that redistricting qualifies as a justiciable question and a potential violation of the Fourteenth Amendment).

⁹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (holding that a government official must prove “actual malice” in order to bring a libel claim).

¹⁰ Roy, *supra* note 6, at 667–68.

¹¹ See, e.g., Frank Askin, In Memoriam, *Justice William J. Brennan, Jr. (1906–1997) The Jurisprudence of Remedies*, 49 RUTGERS L. REV. 1277 (1997) (memorializing Justice Brennan’s life and jurisprudence); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988) (examining Justice Brennan’s record of dissent to analyze his jurisprudence). *But see* Rebecca Korzec, *Justice Brennan’s Gender Jurisprudence*, 25 AKRON L. REV. 315 (1991) (analyzing Justice Brennan’s gender jurisprudence); Roy, *supra* note 6, at 695–97 (discussing Justice Brennan’s advocacy for a strict scrutiny standard for gender discrimination).

in his gender jurisprudence.¹² As Justice Ginsburg stated, *Frontiero v. Richardson*¹³ was “the first in a line of Brennan opinions holding that our living Constitution obligates government to respect women and men as persons of equal stature and dignity.”¹⁴ In *Frontiero*, Justice Brennan sought to extend the strict scrutiny standard applied to racial discrimination to claims of gender discrimination. Taking a strong stand on the issue, he stated: “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”¹⁵

He further recognized that “the position of women in America has improved markedly in recent decades” but that “women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.”¹⁶

Almost fifty years after *Frontiero*, Justice Brennan’s words still ring true.

3. *The Essential and Outsized Role of State Courts and Judges in the Promotion of Gender Equality and the Rule of Law*

As I indicated, this topic is of enormous importance on a legal and social level. Moreover, it is fundamental to *me* on a personal level. I speak before you not only as Chief Justice of the Supreme Court of Puerto Rico, but also as a daughter, a wife, and a mother to Mar and Borja, our twenty-month-old twins.

The societal context in which I am giving this lecture is, undoubtedly, a difficult and complex one, polarized and turbulent. The political, economic, and social crises are causing great divisions, as well as tremendous uncertainty and fear for the future.

Since my appointment as Chief Justice in 2016, and more so after the devastation brought upon Puerto Rico by Hurricane María,¹⁷ by

¹² Korzec, *supra* note 11, at 334 (“To all familiar with his gender jurisprudence, Justice Brennan shall be remembered as one of the most innovative protectors of equal treatment before the law.”).

¹³ 411 U.S. 677 (1973).

¹⁴ Ginsburg, *supra* note 4, at 2219.

¹⁵ 411 U.S. at 684 (plurality opinion) (holding that statutory difference in treatment of male and female military personnel for purposes of determining dependent benefits violated the Due Process Clause of the Fifth Amendment).

¹⁶ *Id.* at 685–86.

¹⁷ See Sigfrido Steidel Figueroa, *Emergencia y Respuesta Judicial: El Poder Judicial de Puerto Rico ante El Huracán María* [Emergency and Judicial Response: The Judicial Power of Puerto Rico in the Face of Hurricane María], 87 REV. JURÍDICA U.P.R. [REV. JUR. U.P.R.] 789, 798–804 (2018); see also RAMA JUDICIAL DE P.R., INFORME A LA

the political and governmental turmoil on the island after the summer of 2019,¹⁸ and by the earthquakes that displaced thousands of families in the southwestern part of the island,¹⁹ my work has centered on providing Puerto Rico with a strong and independent judiciary, one that assures the constancy of the rule of law and provides equal justice for all, never more important than in times of crisis.

As judges, we strive to be fair arbiters of legal controversies, but we must never divorce ourselves from the real-life consequences our decisions have for those that seek resolution or redress in our court system. As such, we must look beyond the abstract definitions of the two terms that comprise the title of this lecture: “gender equality” and “the rule of law.”

In our role as judges, we must not only understand what “gender equality” means, or is supposed to mean, conceptually—particularly in relation to the normative “rule of law”—but we must use that knowledge and *apply* it in every single case, always taking into consideration the specific circumstances of the parties.

While this principle holds true to the management and resolution of cases that come before our federal courts, it is of particular salience in our state courts. This is because it is in state courts that the vast majority—a staggering ninety-five percent²⁰—of the issues and controversies affecting the day-to-day lives of all people are seen and adjudicated. Matters as diverse as those that fall under the rubric of family law (divorce, child custody, and child support disputes) and state criminal law (from the most serious offenses to the most minor ones) are adjudicated in state courts.²¹ As such, the impact of state

COMUNIDAD: LA RAMA JUDICIAL DE PUERTO RICO ANTE EL PASO DE LOS HURACANES IRMA Y MARÍA [REPORT TO THE COMMUNITY: THE JUDICIAL BRANCH OF PUERTO RICO IN THE FACE OF HURRICANES IRMA AND MARÍA] (2018) [hereinafter LA RAMA JUDICIAL DE PUERTO RICO ANTE EL PASO DE LOS HURACANES IRMA Y MARÍA] (describing the emergency plan and response of the Judicial Branch of Puerto Rico during and after the devastation brought by Hurricanes Irma and María).

¹⁸ Senado de P.R. v. Gobierno de P.R., No. CT-2019-0004, 2019 WL 3848756, at *13 (P.R. Aug. 7, 2019) (Oronoz Rodríguez, C.J., concurring) (illustrating that in the summer of 2019, protests by Puerto Ricans of all ages, ideologies, backgrounds, and beliefs led to the resignation of the governor); Patricia Mazzei & Frances Robles, *Ricardo Rosselló, Puerto Rico's Governor, Resigns After Protests*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/rossello-puerto-rico-governor-resigns.html>.

¹⁹ Frances Robles, *Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/us/puerto-rico-earthquakes-fema.html>.

²⁰ *What Is the CSP?*, CT. STAT. PROJECT, <http://popup.ncsc.org/CSP.aspx> (last visited Aug. 30, 2020).

²¹ See COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2018 DATA 11–14 (2018), http://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf.

courts upon our society is substantial and pervasive, in great part due to the sheer number of individuals and entities that are directly involved in the myriad cases that come before our state courts.

I

“GENDER EQUALITY” AND “THE RULE OF LAW”: HOW THESE CONCEPTS INTERSECT, INTERACT, AND ARE INTERDEPENDENT

A. *Defining the Basic Terms: “The Rule of Law” and “Gender Equality”*

1. *“The Rule of Law,” as Used in the Context of This Lecture and as Applied to the Concept of “Gender Equality”*

Much has been written on the definition and implications of the term “the rule of law.” Since the time of Aristotle, scholars, judges, and lawyers in various countries, particularly in recent years, have tried to define the meaning of this concept.²² While there is general agreement amongst scholars regarding the scope of the term, it is not an uncontested matter. That said, I shall focus briefly on its direct impact on my dual role as a judge and as Chief Justice and administrator of the court system in Puerto Rico.

a. Definition of “the Rule of Law”

There appear to be two main schools of thought as to what the term “rule of law” should encompass.²³ When I refer to “the rule of law,” I look at it through the wide lens of the term, which places the

²² Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 185 (2019). In researching what others have written about the rule of law, one can find a number of previous attempts to define the rule of law. *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 3–5, 8 (2010) (“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107–22 (Liberty Fund reprinted 8th ed. 1982) (1885) (defining the term rule of law); Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3–21 (Robert L. Cunningham ed., 1979) (same).

²³ A comparative analysis is well beyond the purposes of this lecture. Yet, as Professor Alcardo Zanghellini explains in a nutshell, scholars and jurists often “disagree on what institutional and procedural arrangements the rule of law requires . . . and on whether or not it imposes substantive constraints on the content of law.” Alcardo Zanghellini, *The Foundations of the Rule of Law*, 28 YALE J.L. & HUMAN. 213, 213 (2016). These disagreements mark a distinction between adherents of “formal” and “substantive” currents of thought: The formal thought “states that the rule of law is satisfied when laws conform to certain formal and procedural requirements: legal rules should be general, prospective, clear, non-contradictory” while the substantive conception of the rule of law “demands that law be, in some nontrivial sense, substantively just . . . [and] is taken to mean that the law must take fundamental rights seriously.” *Id.* at 213–14.

pursuit of the “public good”²⁴ as an essential element thereof, and which then leads us to the goals of achieving equality under the law—including, and specifically, gender equality—as essential to the achievement of the respect for, adherence to, and promotion of the rule of law.

In this vein, the term “the rule of law” has been defined as signifying “the empires of law and not of men,”²⁵ indicating that it entails “the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good.”²⁶

In her 2018 lecture before this very forum, New York Chief Judge Janet DiFiore defined the term similarly and then stated that “[t]he rule of law has guided our democratic system and served us extraordinarily well, supporting a civil society that, despite serious flaws and historic injustices, has been characterized by freedom, opportunity, and human progress.”²⁷ She added that, “[h]owever, we cannot be complacent. The vibrancy, vitality, and viability of the rule of law can never be taken for granted.”²⁸

b. Definition of “Gender Equality” Under the Law²⁹

A background paper for the 2012 World Development Report on Gender Equality and Development defined gender equality in its legal

²⁴ For a restrictive reading of the term “the public good,” see, for example, Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232 (2012), and the references contained within said article. Basically, the author defines the term “the rule of law” as wholly divorced from any notions of public good, and states that the definition of the term is simple: “government officials and citizens are bound by and abide by the law.” *Id.* at 233. As will be evident in our discussion, the concept of the rule of law that I subscribe to is much broader and necessarily includes the pursuit of the “public good” as an intrinsic part of its definition, which then includes the more specific goal which is the main subject of this lecture, the place of “gender equality” within the broader concept of “the rule of law.” See Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> (“[T]he Rule of Law is not just about government. . . . [L]egal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes, and protect them against the abuses of public and private power.”).

²⁵ Mortimer N.S. Sellers, *What Is the Rule of Law and Why Is It So Important?*, in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 4 (James R. Silkenat, James E. Hickey, Jr. & Peter D. Barenboim eds., 2014).

²⁶ *Id.*

²⁷ Janet DiFiore, *Brennan Lecture: The Excellence Initiative and the Rule of Law*, 93 N.Y.U. L. REV. 1053, 1055–56 (2018).

²⁸ *Id.* at 1056.

²⁹ For a brief discussion of the evolution of constitutional jurisprudence on gender discrimination and gender inequality, highlighting the pivotal role played by Justice Ginsburg as an advocate and then as a jurist, see Lenora M. Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 149 (2019).

dimension as “the distribution among women and men of rights and entitlements and the different capacities of women and men to access mechanisms for claiming and enforcing these rights and entitlements.”³⁰

The authors of the background paper added that:

Because of the central role that law and justice institutions play in fostering or hindering gender equality, any approach to justice reform needs to take into consideration how gender comes into play – that is, how differences in women’s and men’s social, economic and legal endowments affect the way they experience law and justice in their lives, and how their everyday experience of law and justice simultaneously shapes patterns of social, economic and legal endowments.³¹

At its most fundamental level, and as defined by the United Nations, “equality between women and men . . . refers to the equal rights, responsibilities and opportunities of women and men and girls and boys.”³² It “does not mean that women and men will become the same but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they are born” or identify themselves as “male or female.”³³ Consequently, applying the concept of equality, as both a principle and as a right, does not mean seeking a magical mathematical formula. On the contrary, it simply “implies that the interests, needs, and priorities of both women and men are taken into consideration” when it comes to rights and access to resources.³⁴

II

ALL OUT IN THE OPEN: THE IMPORTANCE OF DISCUSSION AND EDUCATION ON GENDER EQUALITY AS A PREREQUISITE TO ACHIEVING THAT GOAL

A. *Gender Inequality and Discrimination Based on Sex from a Human Rights Perspective*

The relevance and importance of addressing the various forms and manifestations of gender inequality—both those that are obvious and overt, as well as those that are more insidious—cannot be overstated. It is our duty to bring the issue of gender inequality out into

³⁰ REA ABADA CHIONGSON, DEVAL DESAI, TERESA MARCHIORI & MICHAEL WOOLCOCK, *THE ROLE OF LAW AND JUSTICE IN ACHIEVING GENDER EQUALITY* 7 (2011).

³¹ *Id.*

³² *Gender Mainstreaming: Concepts and Definitions*, U.N. WOMEN, <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited Aug. 27, 2020).

³³ *Id.*

³⁴ *Id.*

the open, and to address the nefarious consequences that gender inequality has in our society, to promote and achieve a more just world for all.

As Justice Brennan highlighted in *Frontiero*, a paternalistic attitude has become “firmly rooted in our national consciousness;”³⁵ furthermore, empirical evidence around the globe demonstrates that it is still the cause of discrimination and violence against women.³⁶ The data clearly show that gender inequality is a major cause and effect of poverty, as it is commonly the result of exclusion and the absence of equal opportunities.³⁷

“Historical denial of autonomy, lack of access to education and support services, together with women’s minimal participation in decision-making processes, have also had the detrimental effect of

³⁵ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

³⁶ International bodies have eloquently articulated the connections between violence, discrimination, and gender inequality rooted in a patriarchal culture. The Declaration on the Elimination of Violence Against Women states that “[v]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to prevention of the full advancement of women” and “violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.” G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women, at 2 (Dec. 20, 1993). Other U.N. reports have independently situated the cause of violence and discrimination against women in the historical, social, and cultural norms of patriarchal institutions. See, e.g., U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶¶ 69–77, U.N. Doc. A/61/122/Add.1 (July 6, 2006). Also, the Special Rapporteur on Violence Against Women has bluntly characterized violence against women as “a systematically used tool of patriarchal control” and “a logical outcome of unequal social, cultural and economic structures, rather than . . . a social aberration or a ‘law-and-order’ problem.” Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences (1994–2009) - A Critical Review*, ¶¶ 88, 91, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) (emphasis added). In addition, a United Nations report on the Progress of Women, which includes comprehensive statistics, compelling stories, and keen analysis on the topic, has stated: “In all societies, women are less powerful than men and the two areas in which women’s rights are least protected, where the rule of law is weakest and men’s privilege is often most entrenched, are first, women’s rights in the private and domestic sphere,” which include “their rights to live free from violence and to make decisions about their sexuality, on marriage, divorce and reproductive health; and second, women’s economic rights, including the right to decent work and the right to inherit and control land and other productive resources.” U.N. WOMEN, PROGRESS OF THE WORLD’S WOMEN 2011–2012: IN PURSUIT OF JUSTICE 11 (2011) [hereinafter PROGRESS OF THE WORLD’S WOMEN].

³⁷ See *Facts and Figures*, U.N. WOMEN, <https://www.unwomen.org/en/news/in-focus/commission-on-the-status-of-women-2012/facts-and-figures> (last visited Aug. 27, 2020) (explaining that if women who are part of the agricultural labor force in developing countries had equal access to productive resources as men, yields on farms would increase, which would reduce world hunger).

leaving women at the periphery of societies.”³⁸ Other harmful practices persist, such as sexual harassment at work and in institutions of higher education; unequal pay; and unequal access to, and control over, capital and property.³⁹

These are all forms of discrimination based on sex, which unfortunately are also the root of gender-based violence.⁴⁰ In fact, in the United States, one in four women experiences domestic violence in its different manifestations; that is, physical injury, sexual aggression, psychological trauma, and stalking, among others.⁴¹ This is beyond alarming, considering that studies indicate violence against women and girls is not only an extreme human rights violation that strips them of their dignity and well-being, but it also generates huge economic costs for women and families, as well as for communities and society.⁴² We should all be worried by the negative impact that gender-based violence has on women’s participation in education, employment, and civic life, as it clearly perpetuates poverty and limits progress.

Promoting gender equality and empowering women can transform societies. Equality between women and men is not only a human rights issue but also a catalyst for sustainable development and economic growth.⁴³ There is nowhere on earth where women have

³⁸ Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), Second Rep. on the Independence of Judges and Lawyers, ¶ 21, U.N. Doc. A/HRC/17/30 (April 29, 2011).

³⁹ PROGRESS OF THE WORLD’S WOMEN, *supra* note 36, at 28–45; see also Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (arguing that patriarchal social structures and individuals should be challenged because they create and reproduce inequalities).

⁴⁰ See PROGRESS OF THE WORLD’S WOMEN, *supra* note 36, at 28–45.

⁴¹ NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457.

⁴² See TANIS DAY, KATHERINE MCKENNA & AUDRA BOWLUS, THE ECONOMIC COSTS OF VIOLENCE AGAINST WOMEN: AN EVALUATION OF THE LITERATURE 6–13 (2005), <https://www.un.org/womenwatch/daw/vaw/expert%20brief%20costs.pdf> (describing the different indirect and direct costs of violence against women); U.N. Assistant Secretary-General & Deputy Executive Director of U.N. Women, Remarks at the High-Level Discussion on the Economic Cost of Violence Against Women (Sept. 21, 2016), <https://www.unwomen.org/en/news/stories/2016/9/speech-by-lakshmi-puri-on-economic-costs-of-violence-against-women> (describing how violence against women leads to substantial economic costs to any society, upwards of billions and trillions of dollars).

⁴³ See U.N. WOMEN, GENDER EQUALITY AND INCLUSIVE GROWTH: ECONOMIC POLICIES TO ACHIEVE SUSTAINABLE DEVELOPMENT 20–40 (Diane Elson & Anuradha Seth eds., 2019) [hereinafter GENDER EQUALITY AND INCLUSIVE GROWTH] (arguing that economic growth is an inherently gendered process and that gender-based inequalities are barriers to shared prosperity among men and women).

achieved true equality.⁴⁴ The World Economic Forum projects that equality in the United States is still another 208 years away.⁴⁵ This means that it will take five more generations for us to see gender equality. This is terrible news for our daughters and sons, and it must concern and fully engage men, as well as all sectors of society, from government to academia to private industry.

B. Implicit Bias: The Invisible Hurdle for Judges for Fair and Equitable Adjudication of Cases

An in-depth discussion of the concept of implicit bias—both in general terms as well as in its application to judges in the administration of justice—is outside of this lecture’s scope. However, because of the role that “implicit bias” plays in unequal treatment and outcomes in the management and resolution of otherwise similarly situated cases, I briefly touch upon the subject. In the particular case of the Puerto Rico judiciary, we are addressing the problematic implications of the phenomenon for the egalitarian administration of justice through, among other things, mandatory judicial training and continuous education on the matter. This is consistent with the mandate of the Puerto Rico Judiciary Act,⁴⁶ and essential to our commitment to equality for all in the application of the rule of law—including on the basis of gender.

In very broad terms, the phenomenon and concept of implicit bias in our judicial system has been described as follows:

Numerous studies have shown that even though we may not be aware of the bias that lurks within, our acculturation results in implicit bias in each of us that is imprinted onto our subconsciousness and is as intractable in its placement as it is pervasive in its influence. This bias is present in all jurisdictions, at all levels of our justice system, and in all types of cases. It affects our judgment as well as our actions and thereby infects the very institution that we depend upon for fairness and the just resolution of disputes: the courts.⁴⁷

⁴⁴ *Gender Equality: Strategy Overview*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/what-we-do/global-growth-and-opportunity/gender-equality> (last visited Aug. 29, 2020).

⁴⁵ Saadia Zahidi, *Accelerating Gender Parity in Globalization 4.0*, WORLD ECON. F. (June 18, 2019), <https://www.weforum.org/agenda/2019/06/accelerating-gender-gap-parity-equality-globalization-4>.

⁴⁶ P.R. LAWS ANN. tit. 4, § 24g (2003) (mandating continuous training and education for judges in Puerto Rico).

⁴⁷ Theodore McKee, *Preface* to ENHANCING JUSTICE: REDUCING BIAS, at v, vi (Sarah E. Redfield ed., 2017).

Therefore, in practice, despite the good intentions of the judiciary, unconscious and pervasive biases permeate the judicial system and its decisionmaking process. Numerous studies on fairness in the courts show that these biases most often impact historically disadvantaged groups—like women and racial minorities, some of the very groups that are the subject of anti-discrimination legislation meant to protect their rights.⁴⁸

*C. The Role and Responsibility of Court Administrators in
Addressing Implicit Bias and the Training of Judges to
Ensure Equity and Fairness in the Resolution of
Controversies*

While the problem of implicit bias is complex, there are measures that court administrators may take so that the judiciary is well-equipped to handle all cases in a fair and equitable manner, including those cases that implicate gender issues. Even though “[t]here is no smart pill that judges can take or failsafe protocol” that can be followed,⁴⁹ when it comes to gender there are various countermeasures to minimize the impact of implicit bias in judicial decisions. Training can help judges understand the extent of their biases and promote self-correction.⁵⁰ Furthermore, continuing judicial education and special protocols can enable judges to bring a gender perspective to adjudication.⁵¹

This is what is known as gender mainstreaming, a concept drawn from international law, recognized by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵² and

⁴⁸ *Id.* at vi–vii; PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II & JENNIFER K. ELEK, NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS 1–4, B-7 (2012).

⁴⁹ Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE: REDUCING BIAS, *supra* note 47, at 87, 104. Specifically, stereotypes can distort perceptions and result in decisions based on preconceived beliefs and myths rather than relevant facts. *Id.* at 98–99. For instance, some judges may adopt rigid standards about appropriate behavior for women. *Id.* at 89. In turn, these perceptions can penalize those who do not conform to these stereotypes. This can be critical particularly in issues relating to sexual and gender-based violence. In these cases, many victims who seek help from the court can be further victimized by the process or by their experiences in the judicial system.

⁵⁰ *Id.* at 106–08.

⁵¹ *See id.* at 107 (noting that repeated counter-stereotype training helps reinforce any benefit obtained from previous trainings). The National Center for State Courts has published resources used in implicit bias trainings on its website. *Helping Courts Address Implicit Bias: Resources for Education*, NAT’L CTR. FOR ST. CTS., <https://www.ncsc.org/ibeducation> (last visited Aug. 28, 2020).

⁵² CEDAW is the first convention to comprehensively address women’s rights. Since its adoption in 1979, 189 countries have ratified it. The United States is one of only seven

the Beijing Declaration and Platform for Action,⁵³ which is defined as “the process of assessing the implications for women and men of any planned action.”⁵⁴

III

THE OUTSIZED ROLE OF OUR STATE COURTS IN ADVANCING AND SUPPORTING GENDER EQUALITY IN THE ADJUDICATION OF CASES AND INTERPRETATION OF THE LAW

A. *State Courts Are the Backbone of the U.S. Judicial System*

An independent, fair, and impartial judiciary is indispensable to our system of justice. Moreover, strong, autonomous, and inclusive judicial institutions are necessary for upholding the rule of law and eliminating all forms of discrimination, as affirmed in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, adopted in 2012.⁵⁵

As I mentioned, state courts are the backbone of the American judicial system.⁵⁶ As the face of the justice system, state courts and judges are on the frontlines working to resolve the most sensitive and complex problems that affect the lives, liberty, property, and safety of our people: foreclosures, domestic and gender violence, child abuse and neglect, drug-related offenses, and juvenile delinquency, among others.

Every day, our local courthouses, particularly our lower courts, deal directly with many people and a variety of controversies. That is why—as current statistics continue to reflect ongoing patterns of women’s poverty, exclusion from the public sphere, and increased exposure to violence and unequal rights⁵⁷—the importance of the judiciary and state courts as change agents toward gender equality cannot be overstated.

countries that have not ratified CEDAW. Convention on the Elimination of All Forms of Discrimination Against Women, Signatories, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

⁵³ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

⁵⁴ U.N. GAOR, 52d Sess., 33d mtg. at 24, U.N. Doc. A/52/3/Rev. 1 (July 18, 1997). For further information on the concept and execution of “mainstreaming,” see, for example, Glòria Poyatos i Matas, *Juzgar con Perspectiva de Género: Una Metodología Vinculante de Justicia Equitativa* [*Judging with Gender Perspective: A Binding Equitable Justice Methodology*], 2 IQUAL. REV. DE GÉNERO E IGUALDAD [IQUAL.] 1 (2019) (Spain).

⁵⁵ G.A. Res. 67/1, at 2 (Nov. 30, 2012).

⁵⁶ See *supra* Introduction B.3.

⁵⁷ See GENDER EQUALITY AND INCLUSIVE GROWTH, *supra* note 43; JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, at 13, 15 (2019) (finding that the poverty rate for women continues to be higher than for men).

Judicial decisions play a major role in defining the character of the democratic state and in giving meaning to the rule of law. For this reason, gender equality is further advanced by having independent and impartial courts where judges base their decisions on relevant facts, evidence, and the law, without discrimination or prejudice. Society expects judges to be objective, knowledgeable, independent, discerning, practical, sensitive, and, above all, fair.⁵⁸ Consequently, they must discharge their responsibilities to the highest standards, in order to maintain the trust and confidence of the public, which is critical to upholding the rule of law.

IV

THE PUERTO RICO COURTS AND GENDER EQUALITY

A. *The Dual Roles of the Chief Justice of the Puerto Rico Supreme Court: Jurist and Administrator of the Court System*

Pursuant to the provisions of the Constitution of Puerto Rico⁵⁹ and of the Puerto Rico Judiciary Act, the Chief Justice of the Puerto Rico Supreme Court serves a dual role: The first role is to serve as jurist, entrusted—in conjunction with the eight other justices—with being the final arbiters of most of the cases that come before the Court.⁶⁰ The other role is to administer the workings of the Judicial Branch and set its public policy and priorities.⁶¹ This is more heterogeneous and lends itself to the establishment of programs and initiatives which will potentially impact the daily lives of most people living in Puerto Rico.

⁵⁸ Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 785–86 (1996) (citing Rosalie Silberman Abella, *The Dynamic Nature of Equality*, in EQUALITY AND JUDICIAL NEUTRALITY (Sheilah L. Martin & Kathleen E. Mahoney eds., 1987)).

⁵⁹ P.R. CONST. art. V, § 7 (“The Chief Justice shall direct the administration of the courts and shall appoint an administrative director who shall hold office at the will of the Chief Justice.”).

⁶⁰ P.R. LAWS ANN. tit. 4, § 24r (2010) (“The Supreme Court shall be the court of last resort in Puerto Rico, and shall be comprised of the Chief Justice and eight (8) Associate Justices.”).

⁶¹ P.R. LAWS ANN. tit. 4, § 24j (2003) (“The Chief Justice of the Supreme Court shall direct the administration of the General Court of Justice, shall be responsible for the efficient operation of the courts, promote the accountability of the judges . . . and shall see to their compliance with the principles and objectives of this chapter.”).

B. On Process: Particular Initiatives in the Puerto Rico Court System Designed to Promote the Fair and Equitable Administration of Justice for All People

Among some of the initiatives that state courts should promote are the expansion of specialized courts designed specifically to deal with the most common modality of gendered crime—domestic violence⁶²—whether in the form of restraining order applications or the filing of criminal charges. These courts improve access by providing specially-trained judges and personnel who can process cases more efficiently and deliver integrated services with the required sensibility.

Despite the progress made, Puerto Rico is still plagued by alarming rates of inequality,⁶³ homophobia,⁶⁴ and gender-based violence.⁶⁵ Statistics offer a chilling snapshot of the endemic nature of domestic violence in Puerto Rico. A recently published report found 266 femicides in Puerto Rico during the five-year period from 2014 to 2018.⁶⁶ This means that one woman is victim to gender-based violence every seven days.⁶⁷ I can assure you that the numbers are much higher. These rates of gender-based violence require the urgent intervention of all sectors of our society, and that, of course, includes the state judiciary.

Given the enormous social impact of this horrific reality, notwithstanding the difficulties that we have faced in the past few years, our Judicial Branch has focused many of its resources on promoting gender equality: by equipping our courts for eradicating violence against women and providing access to justice.

⁶² WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 2 (2013); see also Susana T. Fried, *Violence Against Women*, 6 HEALTH & HUM. RTS. J. 88, 94 (2003) (noting that domestic violence is one of the most pervasive types of gender-based violence).

⁶³ See INSTITUTO DE ESTADÍSTICAS DE P.R., INFORME SOBRE DESARROLLO HUMANO EN PUERTO RICO 2016 [HUMAN DEVELOPMENT REPORT OF PUERTO RICO 2016] 269–71 (2016) (describing the alarming inequality in Puerto Rico, and noting the empirical evidence that demonstrates the degree of the problem).

⁶⁴ See, e.g., Frances Robles, *Killing of Transgender Homeless Woman Sparks Outrage in Puerto Rico*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/us/puerto-rico-alexa-transgender-killing.html> (describing Puerto Rico's contentious history of violence against gay and transgender people amidst a publicized murder of a transgender woman).

⁶⁵ See PROYECTO MATRIA & KILÓMETRO CERO, LA PERSISTENCIA DE LA INDOLENCIA: FEMINICIDIOS EN PUERTO RICO 2014–2018 [THE PERSISTENCE OF INDOLENCE: FEMICIDES IN PUERTO RICO 2014–2018] (2019) (outlining and presenting solutions to the persistent problem of gendered violence and femicide in Puerto Rico).

⁶⁶ *Id.* at 17.

⁶⁷ *Id.* at 6.

In 2017, before, during, and after the unprecedented challenges unleashed by Hurricane María's landfall, our focus was on providing access to the most disadvantaged communities. One of the principal issues that we prioritized during the emergency was attending to cases of domestic violence. Between September and December 2017, judges were readily available to serve victims and provide protection against their abusers, and the local courts issued 2469 protective orders.⁶⁸

Additionally, despite budget cuts and other challenges in the aftermath of the natural disasters, we continue to expand access to justice through our Specialized Domestic Violence Courts.⁶⁹ These courts were created in 2007 to promote the safety of the victim, to hold the aggressor accountable, and to strengthen the coordination of support services through collaboration with different entities, all within a secure environment that facilitates the fair and fast solution of controversies.

In 2018, just nine months after Hurricane María, we inaugurated our seventh Specialized Court in Carolina.⁷⁰ Later, in 2019, we established a new Specialized Court in Ponce for the benefit of the southern part of the island.⁷¹ With this expansion, we are currently able to serve about eighty-three percent of the population of Puerto Rico, which can now directly access services and specialized attention in domestic violence cases.⁷²

In addition, we recently established our first Gender Violence Court in the mountainous region of Utuado.⁷³ With this pilot program, the Judicial Branch of Puerto Rico is, I believe, at the forefront

⁶⁸ LA RAMA JUDICIAL DE PUERTO RICO ANTE EL PASO DE LOS HURACANES IRMA Y MARÍA, *supra* note 17, at 34.

⁶⁹ For a detailed accounting and further specifics regarding both the statistics and the nature of the initiatives and programs listed below, see RAMA JUDICIAL DE P.R., INFORME A LA COMUNIDAD 2019 DE LA RAMA JUDICIAL DE PUERTO RICO [THE JUDICIAL BRANCH OF PUERTO RICO'S 2019 REPORT TO THE COMMUNITY] (2019) (reporting the general status of the Judicial Branch, the cases handled, judicial performance, and the implementation of programs and initiatives, among other things).

⁷⁰ RAMA JUDICIAL DE P.R., INFORME A LA COMUNIDAD 2018 DE LA RAMA JUDICIAL DE PUERTO RICO [THE JUDICIAL BRANCH OF PUERTO RICO'S 2018 REPORT TO THE COMMUNITY] 19–20 (2018).

⁷¹ Press Release, Rama Judicial de Puerto Rico, Jueza Presidenta Oronoz Rodríguez Inaugura Sala Especializada en Casos de Violencia Doméstica en la Región Judicial de Ponce [Chief Justice Oronoz Rodríguez Inaugurates Specialized Domestic Violence Court in the Judicial Center of Ponce] (Nov. 6, 2019), <https://www.ramajudicial.pr/Prensa/Galerias/2019/11-06-19/index.htm>.

⁷² *Id.*

⁷³ See Andrea González-Ramírez, *In Puerto Rico, an Epidemic of Domestic Violence Hides in Plain Sight*, TYPE INVESTIGATIONS (June 30, 2020), <https://www.typeinvestigations.org/investigation/2020/06/30/in-puerto-rico-an-epidemic-of-domestic-violence-hides-in-plain-sight>.

in handling gender-based violence cases, becoming the first jurisdiction in the United States to manage sexual violence and domestic violence cases—both civil and criminal—through the same Specialized Court model.⁷⁴

In advancement of these goals, we are complying with the mandate of continuous education for members of the judiciary⁷⁵ through seminars on gender-related matters, such as domestic violence, and are in the process of perfecting a gender-sensitive curriculum by which judges can build their capacity to employ a gender perspective when deciding cases.

We see judicial adjudication with a gender perspective as a mechanism to effectuate the right to equality.⁷⁶ We are convinced this approach allows courts to achieve substantive and procedural equality through the interpretation and application of the law. Hence, using a gender perspective when deciding cases implies that the principle of equality will control how judges conduct their legal analysis.⁷⁷ This new curriculum intends to educate judges on how to incorporate a gender-sensitive approach that can attempt to redress gender inequalities by taking into account the differences between women's and men's needs and realities.⁷⁸ To achieve this, we must, among other things, learn to read and interpret the facts of a case without the contamination that comes from our own stereotyped conceptions of the parties involved.

We must also learn to question the facial neutrality of laws and norms and evaluate the disparate impacts that facially neutral laws may impose. In addition, judges must learn to question if their expectations of the parties would be different if they were replaced with a heterosexual man. For example, would the expectations of a victim's response be different if we imagine her being replaced by a man? Would our expectations of behavior change if we assign a stereotypi-

⁷⁴ Currently, there are eight Specialized Domestic Violence Courts throughout the island operating in the Judicial Centers of Arecibo, Bayamón, Caguas, Carolina, Fajardo, San Juan, Utuado, and Ponce. In the Judicial Regions of Aguadilla and Guayama there are no Specialized Courts, but they offer a Project of Specialization of Services for Domestic Violence Cases. RAMA JUDICIAL DE P.R., GUÍA INFORMATIVA COMUNITARIA: VIOLENCIA DOMÉSTICA [COMMUNITY INFORMATION GUIDE: DOMESTIC VIOLENCE] 6 (2019). Through this court program we aim to have specialized judges and personnel that can manage the courtroom to provide a judicial process which can support and validate—rather than minimize or undermine—the experience of victims of violence through the provision of adequate support mechanisms and empathy.

⁷⁵ P.R. LAWS ANN. tit. 4, § 24g (2003).

⁷⁶ NAT'L SUPREME COURT OF MEX., JUDICIAL DECISION-MAKING WITH A GENDER PERSPECTIVE: A PROTOCOL 73 (Hilary Hammell & Jessica E. Powell trans., 2014).

⁷⁷ *Id.* at 81.

⁷⁸ *Id.*

cally “feminine” role to a party? What if it were a man asking for paternity leave? A gender perspective would allow a judge to see beyond, to identify how gender assumptions can affect people’s lives, and to determine if a different approach is necessary and legitimate.

Adjudication with a gender perspective not only expands access to justice but also helps combat impunity, discrimination, and inequality, as well as send a message that human rights violations can be prevented, recognized, and remedied. It is a bold method that has long been recognized at the international level, and I believe that it can be a new approach for promoting the goal of gender equality.⁷⁹

Because of Puerto Rico’s unique legal system and history, we benefit from our participation, not only at the Conference of Chief Justices here in the United States, but also at the Ibero-American Judicial Summit, which is a cooperation and experience-exchange body composed of the Judicial Entities of the Ibero-American region’s countries that share common cultural heritage.

As a member of the Permanent Gender and Access to Justice Commission, I am working together with the judiciaries of Mexico, Argentina, Chile, Spain, and Nicaragua to strengthen and eventually implement a guide for mainstreaming gender in the delivery of justice. The Commission is working on a tool that can help judges decide cases with a gender perspective by consulting and correcting stereotypes that perpetuate discrimination against women and other vulnerable groups. With the aid and collaboration of the Ibero-American Judicial Summit, we hope to adopt a protocol for judicial decision-making with a gender perspective in Puerto Rico. In the end, we hope that the result of implementing this approach to judicial decision-making is greater access to justice for those who, because of their biological, physical, sex, or gender characteristics, are at risk of having their rights ignored.

Furthermore, in conformity with my belief that education is the most effective way to transform our society and promote equality between men and women, the most recent initiative by the Judicial Branch involves a public service campaign designed to educate the community about gender equality and the judicial remedies available for domestic violence cases.⁸⁰

⁷⁹ See Melissa Bellitto, *Gender Mainstreaming in the United States: A New Vision of Equality*, 22 UCLA WOMEN’S L.J. 125, 137–38, 150 (2015) (arguing that the United States could address gender inequality through gender mainstreaming, an international norm, which would survive constitutional scrutiny).

⁸⁰ *Violencia no es Amor [Violence Is Not Love]*, LA RAMA JUDICIAL DE P.R., <http://ramajudicial.pr/violencianoesamor/index.htm> (last visited Oct. 18, 2020).

Finally, and without being exhaustive, in May of 2020 we will hold, as our annual Judicial Congress, a conference entitled Justice with a Gender Perspective: From Theory to Practice. It will be the first conference of judicial education in Puerto Rico dedicated exclusively to the topic of gender.⁸¹

CONCLUSION

Despite the progress, epic challenges remain to achieve gender equality.

The experience in Puerto Rico, however, demonstrates that the courts play a crucial role in the effective protection of human rights and the advancement of equality. Meeting these aspirational—yet ultimately achievable—goals requires a significant investment in time and resources. Thus, any initiative must be selected carefully and only after identifying those with the highest success rates and the potential for replicability throughout the judicial system across the island.

Again, while the goals of egalitarian access, treatment, and outcomes within the judicial system are challenging to achieve, we will not stop striving to attain them. They are essential to the notions of fundamental fairness that must guide the efforts and actions of all actors within the Judicial Branch.

It is with this thought that I leave you with a quote from the ultimate striver for equal treatment under the law for all people, Justice Brennan:

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.⁸²

Thank you so much for the opportunity to address you, and for the attention that you have given me here tonight.

⁸¹ This conference was postponed due to the COVID-19 pandemic.

⁸² Brennan, *supra* note 6, at 445.