

Now, of course, the previous law did not require the woman in her scenario to run away if doing so would have jeopardized her safety. But the message is clearly one of empowerment of women.

On closer analysis, the feminist argument here is not as feminist as it first appears. Basically, Hammer's message is that women in modern times are vulnerable outside the home—outside, that is, the protection their husbands are expected to provide them in the castle—and, therefore, women need to be armed. But once we arm these vulnerable women, we are essentially being told that women should not have to retreat because they can be as macho as men and stand their ground. Thus, the NRA project simultaneously “embraces feminine”—we are the weaker sex and need a gun as an equalizer—“and feminist rhetoric.”

These new no-retreat laws have effected changes inside the home as well. When a person uses defensive force against someone unlawfully and forcibly attempting to enter a dwelling (or occupied vehicle) or against one who has already entered the residence, the new law creates a presumption that the defender “held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another.” Although this is a rebuttable presumption, prosecutors have typically



treated the presumption as virtually conclusive. One can shoot the intruder almost at will.

The latter in-home rule is not particularly feminist or even pseudo-feminist in character. However, Florida law (followed by some other states) *does* provide explicit benefits to domestic violence victims, presumably usually women, in the home. Under the new law, if a victim of domes-

tic violence receives a protective order against another person—including a spouse or live-in partner—and if that person seeks to enter her *or their* home in violation of the protective order—even if he is entering, for example, to pick up his belongings—the legal presumption I just described applies to the woman living there. If she kills in these circumstances, the legal presumption is that she killed lawfully. . . .

So we learn that some feminists are Real Women, just like their Real Men comrades-in-arms. Still, I am gratified that, as other feminists demonstrate, one can surely be a feminist and not believe that arming women with concealed weapons, inviting them to kill their abusers in the home, and abandoning the retreat rules outside the home are signs of cultural progress. Indeed, I would rather consider the abandonment of the retreat rule as, primarily, an NRA victory, perhaps disguised in feminist rhetoric, and not one truly supported by most feminists. ■

Annual Women Judges Night

When Judicial Gender Divisions Really Aren't

In a speech to the 30th annual Women Judges Night in Milwaukee in April, the Hon. Diane S. Sykes, L'84, of the U.S. Court of Appeals for the Seventh Circuit, discussed her views on why the gender of judges is generally not relevant to analyzing their work. In this excerpt, she recounted cases that occurred during her time on the Wisconsin Supreme Court from 1999 to 2004 when the court split along gender lines in reaching decisions. Chief Justice Abrahamson and Justice Ann Walsh Bradley (as well as a newer member of the Court, Justice Annette Kingsland Ziegler, L'89) were in attendance.

During my tenure at the state Supreme Court, there were only three cases that divided the court along gender lines. The first two were *State v. Huebner* and *State v. Franklin*, which raised related issues regarding the use of a six-person jury in

misdemeanor cases. The court had recently held that the statute authorizing a jury of six in misdemeanor cases was unconstitutional; the issue in *Huebner* was whether a defendant who had not objected to the six-person jury at trial could obtain relief on appeal, and *Franklin* raised the

issue of whether counsel's failure to object was ineffective assistance of counsel. The court held in *Huebner* that the failure to object was a forfeiture that the court would not remedy. In *Franklin* the court held that counsel's failure to object was not ineffective assistance of counsel. I joined Chief Justice Shirley Abrahamson's dissent in both cases, as did Justice Ann Walsh Bradley. The gender split among the justices went unnoticed.

The same cannot be said of the third case. *State v. Oakley* was a case about a deadbeat dad who was hopelessly and criminally in arrears on his child support. David Oakley had fathered nine children by four women and owed more than \$25,000 in back child support. He was charged with nine counts of felony intentional nonsupport and pleaded guilty to three of them, facing a possible 15 years in prison. The circuit-court judge imposed a short prison term followed by lengthy probation, and, as a condition of probation, barred Oakley from having any more children unless he could demonstrate to the court that he was supporting those he already had and had the financial ability to support another. The judge imposed and stayed a sentence of eight years, so a violation of the no-procreation condition would mean eight years in prison. As will be obvious by now, Oakley challenged the constitutionality of the ban on procreation, and his case deeply divided our court.

In a majority opinion by Justice Jon Wilcox, the court concluded that the no-procreation probation condition was constitutional. Justice Bradley and I separately dissented, and Chief Justice Abrahamson joined us. Justices William Bablitch and Patrick Crooks each wrote concurrences responding to different points in the dissents. The issue was novel, so we were in uncharted legal territory, and the case was difficult for the court. It was agreed that the no-procreation condition implicated a fundamental right; we also agreed on the severity of the crime and the strength of the state's interest in protecting women and children from the harsh consequences of chronic deadbeat dads like David Oakley. We disagreed over whether the no-more-children condition was an overbroad encumbrance on the procreation right in light of the conditional nature of the defendant's liberty interest. There was a lot of back-and-forth in the opinions about how to characterize the no-procreation condition and how the constitutional inquiry should be framed. For the all-male majority, it was the defendant's intentional and ongoing disregard

of the rights of his children and their mothers that mattered most. For the all-female minority, banning the birth of a child was a constitutionally overbroad response to the problem.

Now, as you might imagine, the court's decision in *State v. Oakley* made some news—in the conventional media and beyond. The case was tailor-made for talk radio and television and was picked up by local and national talk shows. This is where the court's gender split was noticed. A few days after the court's decision in *Oakley* was released, I was at home in the evening folding laundry in my kitchen. The television was on in the background, tuned to the Fox News Channel. (Surprise! You were expecting maybe MSNBC?) I was only half paying attention, but I heard Bill O'Reilly's voice saying: "Coming up on *The Factor*, the case of a Wisconsin deadbeat dad with nine kids ordered not to have any more children!" So I started to pay attention, and after the commercial break, Bill O'Reilly came back on and introduced the story this way: He put photos of the three dissenting justices up on the screen—the Chief, Justice Bradley, and me—and alongside our photos was David Oakley's mug shot. Now, David Oakley was kind of a creepy-looking guy, so I could sense where this was going. With these photos on the screen, Bill O'Reilly said: "Why do *these* women want *this* man to have more children?"

Well, of course that's *not* what we had said, but there it was, on national television, on a show watched by millions of people. This was not going to be a problem for Shirley and Ann, of course, because they don't know anybody who watches the Fox News Channel. But I know a lot of people who watch the Fox News Channel, and as Bill O'Reilly continued to discuss the David Oakley case, my phone started ringing, and I spent the rest of the evening explaining to family members what the case was really about.

Our court returned to the *Oakley* case in a different forum a couple of years later. As many of you know,

