

Certainly I hope that we can always recognize the very great importance that the State court system has in our overall system of justice in this country. Indeed, the vast number of all criminal cases and all other cases, for that matter, are handled in the State court system. That is the system that is doing the bulk of the work, even though I know that you here in the Senate are hearing a great deal about the great pressures that are being experienced in the Federal courts due to their increase in business. However, if you look at it overall it is the State courts that are handling such great bulk of our work.

It is important that those courts function well, that they have capable jurists, that they have an opportunity for training, and I believe in good training of judges. It is possible to go to school and learn something about being a judge, and we have programs like that that are available. They are good programs and merit support.

We have to be mindful of the interrelationship of the State and Federal courts, and I hope give some finality where it is possible to State court decisions, even in the Federal area. That is one of the points that we just discussed, so I think there are ways to improve it. Indeed, the occasion for that issue of the William & Mary Law Review to which you refer was an interesting one which brought together representatives of both the State and the Federal court systems to give an overall view of the problems of the interrelationships and to make some suggestions.

Senator SIMPSON. Well, to me it is an exciting prospect that you bring that additional dimension, which is not really discussed greatly but I think is very important.

Mr. Chairman, thank you for being very gracious to me in recognizing a special problem I have, and I appreciate that very much.

Thank you, Judge.

The CHAIRMAN. We will now stand in recess until 2:30.

[Whereupon, at 1:55 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

After the gavel raps, the press and photographers will withdraw. Senator Kennedy?

#### DISCRIMINATION EXPERIENCE

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge O'Connor, I do not think that there is any question in the minds of millions of Americans that your nomination represents a great victory for equality in our society, and millions of Americans obviously are looking to you with a rightful sense of pride. You have had a long and distinguished legal career.

I would like to ask you whether you have experienced discrimination as a woman over the period of that career and, if so, what shape or form that has taken.

Judge O'CONNOR. Senator Kennedy, I do not know that I have experienced much in the way of discrimination. When I was admitted to law school I was very happy that I was admitted to law school at a fine institution. My only disappointment I think came

when I graduated from law school at Stanford in 1952 and looked for a position in a law firm in the private sector. I was not successful in finding employment at that time in any of the major firms with whom I had interviewed.

However, I did then find employment in the public sector. I became a deputy county attorney in San Mateo County, Calif. It was my experience at that time that in the public sector it was much easier for young women lawyers to get a start. It was a happy resolution for me in the sense that I really spent the bulk of my life in the public sector. Therefore, that start turned out to be very beneficial.

#### DISCREPANCY IN PAY

Senator KENNEDY. You were active in several efforts in Arizona in the State senate to revise employment, domestic relations, and property laws which discriminated against women. I think at that time you pointed out the sharp discrepancies between the pay which men and women often receive for similar work.

As you may have seen, recently there was a report by the EOC about the continued aspects of job discrimination on the basis of sex, and the pay discrepancy is still widespread. Do you find that it is still widespread? Is this a matter of concern to you?

Judge O'CONNOR. It has always been a matter of concern to me. I have spoken about it in the past and have addressed the fact that there does seem to be a wide disparity in the earnings of women compared to that of men.

We know that perhaps a portion of that is attributed to the fact that women have traditionally at least accepted jobs in lower paying positions than has been true for men, and that may be a factor.

When I went to the legislature in Arizona we still had on the books a number of statutes that in my view did discriminate against women. Arizona is a community property State, and the management of the community personal property was placed with the husband, for example. These were things that had been in place for some years. I did take an active role in the legislature in seeking to remove those barriers and to correct those provisions.

Senator KENNEDY. From your own knowledge and perception, how would you characterize the level of discrimination on the basis of sex today?

Judge O'CONNOR. Presently?

Senator KENNEDY. Yes.

Judge O'CONNOR. I suppose that we still have areas from State to State where there remain some types of problems. We know that statistically the earnings are still less than for men. I am sure that in some cases and some instances attitudes still have not followed along with some of the changes in legal provisions.

However, it is greatly improved. It has been very heartening to me as a woman in the legal profession to see the large numbers of women who now are enrolled in the Nation's law schools, who are coming out and beginning to practice law, and who are serving on the bench. We are making enormous changes. I think these changes are very welcome.

Senator KENNEDY. In your response to the committee's questionnaire—I think it is question No. 2—you gave an extensive answer that mentions your concern and involvement in efforts to provide greater equality for women and for many other groups. You specifically mention the legal aid for the poor. You mention the rights of institutionalized persons. You refer to religious nondiscrimination. You mention native Americans. You mention the mentally ill.

However, you do not mention two of the most obvious groups who also have suffered from injustice and inequality; that is, black Americans and Hispanic Americans. I wonder if you briefly would discuss your perception of the degree to which black Americans or Hispanic Americans are denied equality in our society.

Judge O'CONNOR. A great deal of the concern that has been expressed through the courts and in legislation and otherwise in our Nation has been obviously over the situation of blacks. This perhaps has been the worst chapter in our history and one in which great effort has been undertaken to try to correct it.

In our community in Phoenix the black population is basically small, relatively speaking. On the other hand, the Hispanic population in our community is rather large, and it is one which of course is a concern to all of us.

I frankly feel that Arizona has been greatly blessed, Senator Kennedy, with a cultural diversity that we have in that State. I have regarded the Hispanic heritage which we have enjoyed and the Indian American population which we have in Arizona as being one of the great blessings of that State. I think our State at least seems to be working well in relation to trying to eliminate vestiges of discrimination.

Senator KENNEDY. Is it your sense that as a result of continuing discrimination that exists in our society that one of the important priorities is a vigorous enforcement of the civil rights laws that prohibit discrimination?

Judge O'CONNOR. Yes. I think that enforcement of those laws which the Congress has seen fit to enact is a very necessary part of the obligation of both the executive and the judicial branches insofar as those things come before them.

I am sure you recognize that in the case of the judicial branch it does not reach out to seek matters; rather, it receives those cases and controversies that come before it.

Senator KENNEDY. Is there anything special in your background that would indicate a special commitment to equal justice for these two groups? I know that you received some civic awards and have been involved in various societies.

Judge O'CONNOR. Yes.

Senator KENNEDY. I am interested in whether there is anything you would like to mention for the record that would show involvement and personal commitment in these areas.

Judge O'CONNOR. In response to the question I have listed a number of activities in which I personally have been concerned and which are addressed to the attention of the disadvantaged in our society. It has been my effort as a legislator and as a citizen to give my attention to these things. I would expect to always have that concern.

Senator KENNEDY. As you can tell, we are moving from area to area quite quickly in order to cover as much ground as possible. Hopefully, we will be able to come back to some of these questions.

However, in this first round of questions I want to come back to an area which some of my colleagues have talked about. That is the issue of judicial activism. There was some exchange about that during the course of the questioning earlier today.

Some years ago at Justice Stevens' confirmation hearing when I asked him about his view about judicial activism, he commented on the issue. I would like to read it very briefly and then perhaps get your reaction. Perhaps it summarizes or states your view or maybe you would like to make some additional comment.

I quote:

I think as a judge of course one must decide the cases as they come. One does not really get the opportunity to address the problem in society at large. In a particular case if he has a particular violation of a serious magnitude that gives rise to an extreme remedy, a district judge at his discretion may feel that the way to solve this particular problem is to take some extreme remedial action which would not normally be appropriate, and then the question on appeal is whether he has abused his discretion. Normally one does not find an abuse of discretion. There are many, many cases in which such affirmative remedies are found to be appropriate and would be sustained on appeal.

This is what effectively Justice Stevens told us at his confirmation hearing. I wonder whether you agree with his observation that there are cases where judicial activism in that sense is appropriate as part of a judge's duty.

Judge O'CONNOR. I think we are all aware of school desegregation cases, for example, in which it has become the role and function of the Federal district courts to review the factual situation, and where it has found an intentional or purposeful policy of segregation within the public schools to direct appropriate remedial action if that action is not forthcoming from the school districts or school district itself.

In that connection, the court has on occasion entered a variety of orders for corrective action. I think Justice Stevens has observed correctly that it then becomes the function ultimately of the Supreme Court if an appeal or review is sought to review the action of the Federal district court to see whether any of those orders of the court have amounted to an abuse of discretion.

In that particular area, as you are aware, the Supreme Court has upheld, for example, in the *Swan v. County Board of Mecklenberg* case a variety of remedial actions as being possible in the case of the purposeful or intentional policy of segregation.

Senator KENNEDY. That might also include reapportionment cases where there is State or local prison or hospital discrimination as well?

Judge O'CONNOR. There is a variety of cases in which the Federal district court enters orders that might be regarded as affirmative in nature.

Senator KENNEDY. That is effectively to vindicate constitutional rights of the individuals or inmates or patients? That would be, I imagine, the justification for such intervention, would it not?

Judge O'CONNOR. This has occurred.

Senator KENNEDY. In some earlier questions—I think by the chairman—you were asked your position on birth control and abor-

tion. Have your positions changed at all over the years or are they the same as indicated in your votes and statements or comments?

Judge O'CONNOR. I have never personally favored abortion as a means of birth control or other remedy, although I think that my perceptions and my knowledge of the problems and the developing medical knowledge, if you will, has increased with the general explosion of knowledge over the past 10 years. I would say that I believe public perceptions generally about this particular area and problem have increased greatly over the past 10 years. I would have to say that I think my own perceptions and awareness have increased likewise in that interval of time.

Senator KENNEDY. Does that mean your position has altered or changed or just that you have developed a greater understanding and awareness of the problem?

Judge O'CONNOR. The latter I think, Senator, is what I was trying to express.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Laxalt?

#### EXCLUSIONARY RULE

Senator LAXALT. Thank you, Mr. Chairman.

You have discussed at length judicial activism, social philosophy, and so forth. I think I will spare you that for the next several moments and inquire into something that I deem to be very relevant for any judicial position, particularly the highest court—that is your legal philosophy.

We deal from time to time in this committee in the whole area of criminal law. I have been struck by the broad range of experience that you have had in this area as a judge, and most particularly with some of your rulings.

I would like to ask you about the exclusionary rule, if I may. You have touched on that in a couple of the cases that you have had.

Of course, with a dramatically increasing crime rate and an even greater rise in the number of violent crimes, increasing attention has been given to the laws governing law enforcement. Many of us on this committee happen to believe that perhaps some of the problems we have in connection with crime are procedural.

On that particular matter, in *State v. Morgan*—and I am sure you remember that—you ruled that the defendant had waived her right to appeal on the failure to exclude as “fruits of the poisoned tree evidence alleged to have been procured illegally.” I agree totally with that result.

As a matter of policy, do you believe that the exclusionary rule may be too narrow, overprotecting the rights of defendants while impeding the ability of the law enforcement people to enforce the law? I am talking about as a matter of general legal philosophy.

Judge O'CONNOR. Senator Laxalt, the exclusionary rule, of course, is one that has caused general public discontent on occasion with the function of the criminal justice system, to the extent that perfectly valid, relevant evidence is excluded solely on the basis that it was obtained in violation of some occasionally technical requirement.