THE U.S. FEMINIST JUDGMENTS PROJECT: REWRITING THE LAW, WRITING THE FUTURE

October 20-21, 2016

University of Akron School of Law
Quaker Square Ballrooms

Sponsored by
The Center for Constitutional Law at Akron Law
The University of Nevada, Las Vegas--William S. Boyd School of Law

Thursday, October 20

1:00 ***Welcome and Introduction*** (Ballroom C) Tracy Thomas

1:15-2:00 ***Plenary Session: Guiding the U.S. Feminist Judgments Project*** (Ballroom C)
Linda Berger, Bridget Crawford, Kathryn Stanchi, Berta Hernández-Truyol

2:00-3:30 Breakout Sessions

Panel 1: Reproductive Rights: Boundaries & Theory (Ballroom B)
Moderator: **Berta Hernández-Truyol**
Jamie Abrams, *The Polarization of Autono(me) in Reproductive Decision-Making and Autono(thee) in Parental Decision-Making*
Shoshanna Ehrlich, *Ministering (In) Justice: The Supreme Court's Misreliance on Abortion Regret in Carhart v. Gonzalez*
Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*

Panel 2: Intersectionality & Hierarchy (Plaza B)
Moderator: **Margaret Johnson**
Meghan Boone, *The Autonomy Hierarchy*
Teri McMurtry-Chubb, *"Burn This Bitch Down!": Mike Brown, Emmett Till, and The Gendered Politics of Black Parenthood*
Valorie Vojdik, *Theorizing Violence Against Men as Gender-Related Persecution Under U.S. Asylum Law*

Panel 3: What Next for Feminist Theory? (Ballroom C)
Moderator: **Martha Chamallas**
Danshera Cords, *Kathryn Cheshire v. Commissioner of Internal Revenue*
Jonathan Crock, *The Feminist Right to Democracy in International Law*
Phyllis Goldfarb, *Equality Writ Large*
Wilson Huhn, *The Impact of Justice Scalia's Replacement on Gender Equality Issues*

3:30-3:45 Break

3:45-5:15 ***Plenary Session: Judicial Perspectives on Feminist Judgments*** (Ballroom C)
Moderator: **Tracy A. Thomas**
Eve Belfance, City Attorney Akron, former Judge, Ohio Court of Appeals
Karen Nelson Moore, Judge, U.S. Court of Appeals for the Sixth Circuit
Mary Margaret Rowlands, Judge, Summit County Court of Common Pleas
Elinore Marsh Stormer, Judge, Ohio Probate Court

5:15-6:30 Reception (Quaker Ballroom Atrium)

Friday, October 21

8:30-9:00 Continental breakfast (Quaker Square Atrium)

9:00-10:30 Breakout Sessions

Panel 4: Women in the Legal Profession: Judges (Plaza B)
Moderator: **Shaakirrah Sanders**
Hannah Brenner and Renee Knake, *Shortlisted*
Meg Penrose, *The Way-Pavers: 11 Supreme Court-Worthy Women*
Tracy Thomas, *Reconsidering The Remedy of Gender Quotas*

Panel 5: State Responses to Gender-Based Harassment & Violence (Ballroom B)
Moderator: Anibal Rosario Lebrón
Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes In Britain & the United States*
Nancy Cantalupo, *"Sexual Assault Expected": Developing Theories of "Collective Entity" Responsibility for Gender-Based Violence in Tort*
Joanne Sweeny, *From Catcalling to Gamergate to Revenge Porn: Can (and Should) Law Prevent Intimidation of Women in Public Places?*
Corey Yung, *Rape Law Gatekeeping*

10:30-10:45 Break

10:45-12:00 Breakout Sessions

Panel 6: Women in the Legal Profession: Legal Education's Role (Plaza B)
Moderator: **Hannah Brenner**
Karen Gross, *Layer Cake Pedagogy and Andragogy: A Valuable Learning Approach*
Wendy Hess, *What is She Wearing? Navigating Professional Attire Expectations for Female Attorneys*
Kim Holst and Susie Salmon, *Reconstructing the Voice of Authority*

Panel 7: Feminist Theory in Public Policy & State Regulation of Families (Ballroom B)
Moderator: **Teri McMurtry-Chubb**
Elizabeth Kukura, *Obstetric Violence*
Kalyani Robbins, *Our Mother's Keepers: The Women We Rely on to Sustain the Earth*
Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes between Same-Sex Parents: Fair or Foul?*
Nicole Porter, *Mothers with Disabilities*

12:15-1:30 **LUNCH & KEYNOTE** (Ballroom C)

Sally Kenney, *The Difference Gender Makes to Judging*

1:30-1:45 Break

Friday, October 21 (*continued*)

1:45-3:15 Breakout Sessions

Panel 8: State Responses to Intimate Partner Violence (Plaza B)
Moderator: **Valorie Vojdik**
Margaret Johnson, *Towards Empowerment: Measuring the Role of Lethality Assessments*
Aníbal Rosario Lebrón, *Scorned Law: Rethinking Evidentiary Rules to Protect Women in Cases of Gender- Based Violence*
Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*

Panel 9: Developing Ideas (Ballroom B)
Moderator: **Kim Holst**
Emily Meyer, *The Wild, Wild West: Higher Ed's Response to Rape on Campus*
Navid Khazanei, *Reading Arendt after Sex and Obergefell: Education as the Solution for the Crisis in the Queer Revolution*
Shaakirrah Sanders, *The Gay Divorcee*
Deborah Saybolt, *The Last Taboo: Holding Hospitals Accountable for Sexual Assaults of Patients by Doctors*
Tara Willke, *Uncle Sam Can Draft Your Daughter, But Will He?*

3:15-3:30 Break

3:30-5:00 ***Plenary & Closing*** (Ballroom B)
Linda Berger, Bridget Crawford, Kathryn Stanchi, Martha Chamallas, Laura Rosenbury

5th Annual Symposium on Constitutional Law
U.S. Feminist Judgments Project: Rewriting the Law, Writing the Future
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FEMINIST JUDGMENTS

What would United States Supreme Court opinions look like if key decisions on gender issues were written with a feminist perspective? *Feminist Judgments* brings together a group of scholars and lawyers to rewrite, using feminist reasoning, the most significant U.S. Supreme Court cases on gender from the 1800s to the present day. The twenty-five opinions in this volume demonstrate that judges with feminist viewpoints could have changed the course of the law. The rewritten decisions reveal that previously accepted judicial outcomes were not necessary or inevitable and demonstrate that feminist reasoning increases the judicial capacity for justice. *Feminist Judgments* opens a path for a long overdue discussion of the real impact of judicial diversity on the law as well as the influence of perspective on judging.

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Feminist Judgments

REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT

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For Eddie, Kaitlyn, Paolo and Gianluca – KMS

For Tom and Michael – LLB

For my daughter – BJC

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Preface

What would United States Supreme Court opinions look like if key decisions on gender issues were written with a feminist perspective? To begin to answer this question, we brought together a group of scholars and lawyers to rewrite, using feminist reasoning, the most significant U.S. Supreme Court cases on gender from the 1800s to the present day. While feminist legal theory has developed and even thrived within universities, and feminist activists and lawyers are responsible for major changes in the law, feminist reasoning has had a less clear impact on judicial decision making. Doctrines of *stare decisis* and judicial language of neutrality can operate to obscure structural bias in the law, making it difficult to see what feminism could bring to judicial reasoning.

The twenty-five opinions in this volume demonstrate that judges with feminist viewpoints could have changed the course of the law. The rewritten decisions show that previously accepted judicial outcomes were not necessary or inevitable and demonstrate that feminist reasoning increases the judicial capacity for justice, not only for women but for many other oppressed groups. The remarkable differences evident in the rewritten opinions also open a path for a long overdue discussion of the real impact that judicial diversity has on law and of the influence that perspective has in judging.

Kathryn M. Stanchi
Linda L. Berger
Bridget J. Crawford

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We received technical and administrative support from Maria Campos, Caitlin Harrington, Judy Jaeger, Shyam Nair, and Rebecca Schatschneider.

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We are grateful to John Berger for his guidance and assistance throughout the publication process.

Finally, each of us would like to thank those people who supported and inspired us throughout the hard work of this project. Kathy would like to thank her husband, Frank Fritz, whose strength and support of this project was unflagging; she also would like to thank her family, who supported her in all their different ways, but especially her parents, for sacrificing much to

educate her even though they grew up in a time and culture that believed it a waste of time and money to educate girls. Linda Berger thanks Terry Pollman, Ann McGinley, Leslie Griffin, Andi Orwoll, Maria Campos, Dan Hamilton, and Boyd School of Law. Bridget Crawford thanks Horace Anderson, Lolita Buckner Inniss, Catharine MacKinnon, Dan Renkin, and Michelle Simon.

About the cover art

On the cover, *Little Girl from Harlem* © Soraida Martinez

Soraida Martinez is a New York-born artist of Puerto Rican heritage who, since 1992, has been known for creating the art of "Verdadism," a contemporary form of the style of hardedge painting where every painting is accompanied by a written social commentary. Soraida's paintings depict her life experiences for the purpose of promoting peace, tolerance, and understanding. Soraida's Verdadism art can be seen at soraida.com.

Commentary on Little Girl from Harlem

As a little girl living in Harlem, I always knew that Harlem was some kind of exile. What I didn't know was why I had to be there. There were happy times as well as sad times … but, to escape, I would always daydream. I would daydream of a backyard, of growing up and going to art school, and of moving away. As an adult, I was always embarrassed to say that I was born in Harlem and that I had lived there until I turned fourteen … because people were quick to judge me. Most people assume that I grew up middle-class and came from a middle-class neighborhood. Little do they know that there are lots of people from Harlem that are just like me.

– Soraida Martinez 1995

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PART I

Introduction and overview

1

Introduction to the U.S. feminist judgments project

Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford

How would U.S. Supreme Court opinions change if the justices used feminist methods and perspectives when deciding cases? That is the central question that we sought to answer by bringing together a group of scholars and lawyers to carry out this project. To answer it, they would use feminist theories to rewrite the most significant gender justice cases decided by the U.S. Supreme Court from the passage of the final Civil Rights Amendment in 1870 to the summer of 2015.

As an initial matter, we provided no guidance to our contributors on what we meant by "feminism." We wanted our authors to be free to bring their own vision of feminism to the project. Yet it would be disingenuous to suggest that we ourselves do not have a particular perspective on what "feminism," "feminist reasoning," or "feminist methods" are. Indeed, without such a perspective, we would not have undertaken the project.

We recognize "feminism" as a movement and perspective historically grounded in politics, and one that motivates social, legal, and other battles for women's equality. We also understand it as a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law.[1] We believe that "feminism" is not the province of women only, and we acknowledge and celebrate the multiple, fluid identities contained in the category "woman."[2] Within this broad view, we acknowledge that feminists can disagree (and still be feminist) and that there are no unitary feminist methods or reasoning processes. So when we refer to feminist methods or feminist reasoning processes, we mean

[1] So-called "third-wave" feminists particularly see feminism as a broader social justice issue. *See, e.g.*, Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 *Mich. J. Gender & L.* 99, 102 (2007); Kristen Kalsem and Verna L. Williams, *Social Justice Feminism*, 18 *UCLA Women's L.J.* 131, 169–72 (2010).

[2] *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 830 (1990).

"methods" and "reasoning processes" *plural*, all the while acknowledging that there is a rich and diverse body of scholarship that has flourished under the over-arching label "feminist legal theory." Indeed, those are the methods and reasoning processes examined and employed by many of the authors represented in the book.

Nevertheless, in shaping the project from its early stages through the finished pages, we as editors have been motivated by a broad and expansive view of what "feminism" is. This capacious understanding undoubtedly shaped the project in many ways, including our choice of cases, our selection of authors, and our edits, even if we did not define feminism for our contributors. We leave it to readers to explore the varieties of feminism that are reflected in these pages.

Feminist legal theory and scholarship have developed and even thrived within universities over the last thirty to forty years. Feminist activists and lawyers are responsible for major changes in the law of employment discrimination, sexual harassment, marital rape, reproductive rights, family relationships, and equitable distribution, to name just a few areas. Feminism has had a less discernable impact on judging, however, and it is relatively rare to see explicitly feminist reasoning in judicial decisions. More common are judicial reliance on the doctrine of *stare decisis* and judicial use of the language of apparent neutrality. Both of these moves tend to obscure embedded and structural biases in the law, making it difficult to recognize that feminism offers a critical expansion of the field for judicial decision making.

The twenty-five opinions in this volume demonstrate that judges who are open to feminist viewpoints could have arrived at different decisions or applied different reasoning to reach the same (or different) results in major decisions of the U.S. Supreme Court. As the authors reworked their opinions related to gender, they applied feminist theory or methods. The resulting feminist judgments demonstrate that neither the initial outcome nor the subsequent development of the law was necessary or inevitable. Feminist reasoning expands the judicial capacity for equal justice and can help make more attainable political, economic, and social equality for women and other disadvantaged groups.

GOALS OF THE PROJECT

Although the project has a number of goals, one priority is to uncover that what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies. That is, all legal actors – judges, juries, litigants, lawyers – engage in their decision making within

a situated perspective that is informed by gender, race, class, religion, disability, nationality, language, and sexual orientation. For judges, that (often unacknowledged) situated perspective can be crucial to the reasoning and the outcome of cases. The situated perspective of the decision maker may drive American jurisprudence as much as – if not more than – *stare decisis* does. A judge's worldview may inform the choices that the judge makes about the doctrinal basis for an opinion. For example, a judge may need to choose whether a lawsuit should be decided as a substantive due process case about privacy rights or as an equal protection case about gender equality. Recognizing that all decision making involves a situated perspective reveals that decision makers are affected by assumptions and expectations of norms relating to gender, race, class, sexuality, and other characteristics. Despite the alleged neutrality of the rules and processes of decision making within the U.S. judicial system, values and beliefs shaped by experience may exert a significant, if difficult-to-see, influence on the judges' interpretation and application of the law.

The U.S. Feminist Judgments Project turns attention to the U.S. Supreme Court. Contributors to this volume challenge the formalistic concepts that U.S. Supreme Court opinions are, or should be, written from a neutral vantage point and that they are, or should be, based on deductive logic or "pure" rationality. When the project's authors brought their own feminist consciousness or philosophy to some of the most important (and supposedly "neutral") decisions and assertions about gender-related issues, the judicial decisions took on a very different character. Feminist consciousness broadens and widens the lens through which we view law and helps the decision maker overcome the natural tendency to see things the same way or do things "the way they've always been done." Through this project, we hope to show that systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers. These inequalities may derive from processes and influences that tend to reinforce traditional or familiar approaches, decisions, or values. In other words, if we can broaden the perspectives of the decision makers, change in the law is possible.

In addition to exposing the contextual nature of judicial decision making, another goal of the project was to learn what "feminist" judging and decision making would look like, both from a substantive and rhetorical standpoint. What would the world look like if women and men with self-identified feminist consciousness were judges? With regard to substance, we wondered which of the many feminist theories would have practical application in judging and decision making and which laws contained the greatest potential for

feminist application. Would we see some feminist theories or methods more frequently used than others? Which ones?

In terms of language, we wondered whether some feminist judges might use language or rhetorical strategies that differed from the original opinions in describing the facts or issue of a case, or the applicable law or reasoning.[3] To some scholars, the very label "feminist judgments" will suggest a particular feminist language, but the idea that feminists might speak in a "different" language or voice is a controversial one.[4] As our sister-editors in the U.K. observed, law is "a powerful and productive social discourse that *creates* and reinforces gender norms … [L]aw does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities."[5] We wanted our book to open a small vista on what law might look like if feminists were able to contribute, in a meaningful way, to that powerful, constitutive discourse.

INTELLECTUAL ORIGINS OF THE PROJECT

The U.S. Feminist Judgments Project is inspired by a similar project in the United Kingdom. In 2013, Kathy Stanchi attended the Applied Legal Storytelling Conference in London where she heard Professor Erika Rackley speak about the U.K. Feminist Judgments project, a volume of rewritten decisions from the House of Lords and Court of Appeal. The U.K. Project, itself inspired by the Women's Court of Canada,[6] united fifty-one feminist professors, practitioners, and research fellows to supply the "missing" feminist voice in British jurisprudence by rewriting, using feminist reasoning, key cases on parenting, property and markets, criminal law, public law, and equality. The

[3] Some legal scholars have criticized certain traditional aspects of the judicial voice as intertwined with the class, race, and gender bias in the law. *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 888 (1989); Kathryn M. Stanchi, *Feminist Legal Writing*, 39 *S.D. L. Rev.* 387, 402–03 (2002).

[4] *Compare* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543, 592–613 (1986) *with* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 45 (1987) ("take your foot off our necks, then we will hear in what tongue women speak").

[5] Feminist Judgments: From Theory to Practice 6–7 (Rosemary Hunter, Clare McGlynn and Erika Rackley eds., 2010) (referencing Carol Smart, Feminism and the Power of Law (1989)).

[6] The Women's Court of Canada brought together a group of academics and practitioners who rewrote several cases involving section 15 (the equality clause) of the Canadian Charter of Rights and Freedoms. Their opinions are now online. *Decisions of the Women's Court of Canada*, TheCourt.ca (Sept. 9, 2015, 12:52 PM), www.thecourt.ca/decisions-of-the-womens-court-of-canada/.

U.K. Project has spawned similar projects covering Irish, Australian, and New Zealand law, as well as a project devoted to the field of international law.[7]

Having long wondered why feminist legal theory, despite its rich and vibrant academic history in the U.S., had not made greater inroads into American jurisprudence, we realized that the body of U.S. common law was overdue for feminist rewriting. Kathy Stanchi, Linda Berger, and Bridget Crawford agreed to serve as the project's editors, and a group of informal advisors organized by Kathy Stanchi met at the 2014 Annual Meeting of the Association of American Law Schools to discuss how many and which cases to choose for rewriting. Searching for a unifying theme that would tie the cases together, Bridget Crawford suggested limiting the selection to U.S. Supreme Court cases because of the Court's influence on the legal knowledge and awareness of the American public. Although restricting the project to U.S. Supreme Court cases limited the doctrinal coverage and excluded important state and lower court cases, the benefit of a unifying focus outweighed the detriments.

The editors realized early on that this could be the first of many U.S. feminist judgment projects. Like the U.K. project, the U.S. project might inspire feminist treatment of the decisions of other courts or other subject matters. For example, future projects might focus on decisions of state courts, appellate courts, and administrative agencies. Alternatively, future projects might be organized by following traditional subject-matter lines (e.g., torts, criminal law, property, civil procedure), or by developing areas of interest (e.g., entertainment law, farming law), or by applying additional critical theories (e.g., critical race theory, Lat Crit, critical tax theory). We welcome and invite such future work.

METHODOLOGY

Even after deciding to limit the project to decisions of the U.S. Supreme Court, we still had to narrow the scope. Beginning with the active duty of Chief Justice John Jay in 1789, the U.S. Supreme Court has decided more than 1,700 cases. In keeping with the impetus for the project, we decided to limit our pool of potential cases to those related to gender, although we all agreed that many other cases could benefit from a feminist rewriting. Our initial list contained nearly sixty cases.

[7] *See* Feminist Judgments Project, www.kent.ac.uk/law/fjp/ (last visited Sept. 9, 2015); Northern/Irish Feminist Judgments Project, www.feministjudging.ie/ (last visited Sept. 9, 2015); Australian Feminist Judgments Project, www.law.uq.edu.au/the-australian-feminist-judgments-project (last visited Sept. 9, 2015).

To minimize the influence of personal preferences and to benefit from the views of a range of diverse and knowledgeable experts, we assembled an Advisory Panel to help us select the cases most appropriate for rewriting. The panel included twenty-three scholars with expertise in feminist theory, constitutional law, or both. Its members were diverse in race, gender, sexuality, and academic background. We were honored to have the advisory participation of Kathryn Abrams, Katharine Bartlett, Devon Carbado, Mary Anne Case, Erwin Chemerinsky, April Cherry, Kimberlé Crenshaw, Martha Albertson Fineman, Margaret Johnson, Sonia Katyal, Nancy Leong, Catharine MacKinnon, Rachel Moran, Melissa Murray, Angela Onwuachi-Willig, Nancy Polikoff, Dorothy Roberts, Daniel Rodriguez, Susan Deller Ross, Vicki Schultz, Dean Spade, Robin West, and Verna Williams. We asked them to evaluate all sixty cases for possible feminist rewriting. Their feedback was surprisingly consistent, and we narrowed our initial list of sixty to thirty potential cases.

Having decided to follow the U.K. model of publishing a rewritten opinion accompanied by an expert commentary that would frame and provide context for the revision, we next issued a public call inviting potential authors to apply to rewrite one of the thirty cases or to comment on a rewritten opinion. Providing commentary for each rewritten opinion was important because the original opinions would not be included in the volume. The commentary describes the original decision, places it within its historical context, and assesses its continuing effects. Equally important, the commentary analyzes the rewritten feminist judgment, emphasizing how it differs both in process and effect from the original opinion. By following this format of matching rewritten opinion and commentary throughout the writing and editing process, we were able not only to include additional voices but also to gain the benefits of productive collaboration among opinion writers, commentators, and editors.

In response to the call for authors, we received more than one hundred applications, mostly from law professors, but also from practitioners, clerks, and others. Our applicants represented a range of subject-matter specialties, expertise, and experience. They were well-known feminist legal theorists of established reputation and standing as well as more junior scholars, both tenured and untenured. Some were firmly grounded in theory while others were more familiar with the substance and methods of law practice, including practicing attorneys, clinicians, and legal writing professors.

As editors, we were committed to diversity on many levels. In terms of cases, our almost-final list of twenty-four cases was chosen to represent a range of gender-related issues. In terms of authors, we sought contributors who were diverse in perspective, expertise, and status as well as race, sexuality, and gender.

In addition to the forty-eight authors selected to write the twenty-four opinions and their matching commentaries, we invited Professor Berta Esperanza Hernández-Truyol to write a chapter that would provide an overview of feminist legal theory and an account of feminist judging. The project was well underway in June 2015 when the U.S. Supreme Court decided *Obergefell v. Hodges*,[8] a landmark case on the constitutionality of same-sex marriage. We immediately added that case, along with the authors of *Obergefell*'s rewritten opinion and commentary, to the book. The final volume thus includes twenty-five cases and represents the contributions of fifty-one authors and the three editors.

GUIDELINES FOR THE OPINIONS AND COMMENTARY

The purpose of the U.S. Feminist Judgments Project is to show, in a practical and realistic way, that U.S. Supreme Court decisions could have been decided differently had the justices approached their decisions from a more complex and contextualized vantage. To illustrate this point, we asked the opinion writers to engage in a re-envisioning of the decision-making process, drawing on their own knowledge of feminist methods and theories, but bound by the facts and law that existed at the time. Opinion authors were limited as well to 8,000 words (far less than many U.S. Supreme Court opinions) but were free to choose to write a majority opinion, a dissent, or a concurrence, depending on their goals. A major practical difference between this project and real judging is that our authors were not constrained by the necessity of persuading other justices. It would have been unrealistic to require, across the board, that the authors speculate (in some uniform way) about what might have been accomplished through the formal (but not uniform) give-and-take that traditionally happens between justices at conference and in the more informal discussions among peers in the halls and chambers.

Authors were limited in the sources they could use in writing their opinions. They could draw only on facts and law in existence at the time of the original opinion. Many of our authors chafed at this constraint. But we felt strongly that such a source constraint, one of the hallmarks of the U.K. project, was essential to the legitimacy and goals of the U.S. project. To make the point that law may be driven by perspective as much as *stare decisis*, it was critical that the feminist justices be bound, just as the original justices were, to the law and precedent in effect at the time.

[8] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

In terms of materials other than the facts and law in existence at the time of the opinion, we recognized that our opinion writers likely would be unable to avoid using feminist arguments and critiques that emerged after the original opinion. This was especially true with respect to cases decided before the 1970s, when the modern women's liberation movement gained traction in the United States. Opinion writers could draw upon theories and philosophies that became familiar and widely used after the original decision, but they were required to cite only to contemporaneous sources. This struck us as a fair compromise. After all, we believe that it is an inherent and unavoidable aspect of judging that the decision makers bring to the law their own cultural and social assumptions (often uncited). So like any judges, our authors could espouse cultural or social views and bring their perspectives to their interpretation and application of the law.

As it turned out, these restrictions on sources of authority were less inhibiting than expected. Many of our authors reported that, to their surprise, the feminist analyses, social theories, and arguments that they wished to rely on were in circulation at the time of the original decision, and sometimes even well represented in the amicus briefs before the Court. This was true even of our oldest decision in *Bradwell v. Illinois*,[9] a U.S. Supreme Court case denying a woman admission to the bar. Professor Phyllis Goldfarb, the author of the revised opinion in *Bradwell*, reports that advocates of women's rights in the late 1800s had introduced into the mainstream public discourse feminist egalitarian ideals about women's participation in professional and public life, and they made strong arguments within the existing legal framework to advance these ideals. Reports like this from our authors confirm that our initial hypothesis had been correct: it is not that feminist arguments did not exist at the time of particular decisions, but rather that feminist consciousness has often been ignored or erased in U.S. Supreme Court jurisprudence.

We asked the opinion rewriters to employ a judicial voice and to observe the conventions of appellate opinion writing. Accepting the limitations of the genre, we wanted the opinions to sound like opinions – not like legal scholarship or advocacy, which is what most of our authors are accustomed to writing. This was important to the project's realism. Some of our authors found this requirement to be both liberating and constraining.[10] While the judicial voice is powerful, commanding and declarative, it is also a public voice in which

[9] *Bradwell v. Illinois*, 83 U.S. 130 (1873).

[10] As noted in the U.K. Feminist Judgments Introduction, "writing a judgment imposes certain expectations and constraints on the writer that inevitably affect – even infect – her theoretical purposes." Feminist Judgments, *supra* note 5, at 5.

the judge speaks not just for herself but also for her office. This public, official characteristic has traditionally required a certain dignity and forbearance in tone as well as a writing style that conveys candor, fairness, and dispassion. And while we wanted our authors to have the freedom to write as feminists, however they defined the term, we also asked them to honor legal conventions such as procedural rules and traditions. For example, while the authors could expand on the factual narrative contained within the original opinion, they had to limit themselves to the legal record before the Court, unless it was appropriate to use judicial notice for an easily verifiable fact.[11]

The authors of the commentaries had a formidable task, one perhaps even more difficult than that of the authors of rewritten opinions. Besides providing a summary of and context for the original opinion, the commentary also had to shed light on the feminist and theoretical underpinnings of the rewritten feminist judgment. Thus, when the feminist justice implicitly relied on non-precedential authority, such as theories or studies that were published after the date of the opinion, we encouraged the commentary author to discuss and cite those works to give credit to the feminist thinkers who made the reasoning possible. The commentators had to accomplish all this in 2,000 words.[12]

Within these guidelines, the contributors were free to pursue their particular feminist visions. Mindful of the many diverse feminist views, as noted above we did not define what "feminism" is or what the preferred feminist view of a particular case should be. While our edits occasionally suggested that authors consider the implications of certain works or theories, we did not interfere with their freedom to see the case, and its importance, in their own ways. Again within the constraints of the judicial opinion writing style already noted, we allowed authors to use the argument frameworks, wording choices, and writing style that they determined were most consistent with their feminist approach to the case.

In some cases, we as editors disagreed strongly with a contributor's approach. And, in several cases, the opinion writer and the commentator disagreed with each other. We expressed views in multiple rounds of edits, but each

[11] This also was potentially constraining, as feminist legal theorists have argued that the law often dismisses as irrelevant facts, circumstances, and contexts relevant to an outsider perspective. *See* Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. Sch. L. Rev. 123 (1992). We recognized this problem, of course, but, on balance, decided that any project could not address every problem of outsider invisibility.

[12] The Australian Feminist Judgments Project offered an interesting alternative: opinion and commentary together could be 7,000 words, and the author and commentator could split that up however they saw fit.

contribution reflects its author's view and choices. The reader will see occasional evidence of disagreements between opinion writers and commentators, or might detect a failed compromise between the editors, on the one hand, and a particular contributor, on the other, with respect to a piece's substance, tone or style. Rather than suppress these disagreements, though, we celebrate them as part of, and a worthy extension of, the rich and diverse debate that marks a dynamic field like feminist legal theory.

TOPICS AND ORGANIZATION OF CASES

The twenty-five cases cover a wide range of doctrinal areas, but a majority concern constitutional law doctrines, such as equal protection and due process, or interpretation of federal statutory law such as Title VII and Title IX. Nearly half raise equal protection issues, and six address Title VII claims. The cases touch on numerous legal issues related to justice and equality, including reproductive rights, privacy, violence against women, sexuality, and economic and racial justice. Included are core cases related to gender and feminism that are familiar and expected (like *Roe*,[13] *Meritor*,[14] *Geduldig*[15]), but also some less well-known cases that were nevertheless worthy of feminist attention, in part to demonstrate that issues of subordination can arise indirectly as well as directly. Thus, we also included cases on immigration (*Nguyen*[16]), the Commerce Clause (*Morrison*[17]), and pensions (*Manhart*[18]), to name just three.

The cases appear in the volume in chronological order from the earliest (1873, *Bradwell*) to the most recent (2015, *Obergefell*). This will allow readers to consider the evolution of feminism and feminist thought, both in the types of legal issues that the Court addressed and the manner in which the issues are approached. We considered alternatives for organizing the cases, such as by doctrinal categories (e.g. "Equal Protection" and "Substantive Due Process") or by traditional areas of feminist inquiry (e.g. "Reproductive Freedom" or "The Regulation of Sexuality"). We determined that these divisions were artificial for most of the innovative rewrites in the volume.[19] Most of the feminist

[13] *Roe v. Wade*, 410 U.S. 113 (1973).
[14] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).
[15] *Geduldig v. Aiello*, 417 U.S. 484 (1974).
[16] *Nguyen v. INS*, 533 U.S. 53 (2001).
[17] *United States v. Morrison*, 529 U.S. 598 (2000).
[18] *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).
[19] The cases in the U.K. feminist judgments book are separated into traditional doctrinal categories such as "Parenting," "Property and Markets," and "Criminal Law and Evidence."

judgments exceed the boundaries of both traditional legal categories and more feminist ones. We embraced the chronological organization as the most neutral and free from editorial influence.

COMMON FEMINIST THEMES IN THE FEMINIST JUDGMENTS

As we expected given the diversity of feminist thought, the feminist judgments vary widely in their approaches. In the sections that follow, we have attempted to identify common feminist themes and methods used in the rewritten judgments. Although we have categorized the theories and methods used by the authors of the opinions, this categorization is loose at best. All of the opinions cut across boundaries or fall into multiple categories.

In categorizing the common themes that emerged, we found that we covered some of the same theoretical ground as Professor Berta Hernández-Truyol does in Chapter 2. To the extent our description or analysis of the theories differs from that of Professor Hernández-Truyol, we note again the wide variety of perspectives and interpretations that can arise within the feminist legal community. We acknowledge that our views, experience, and situated perspectives as editors influenced our creation of theoretical and methodological categories as well as our decisions about which opinions to place in which category.

The volume contains fifteen re-imagined majority opinions, four concurring opinions, five dissenting opinions, and one partial concurrence/dissent.

The majority opinions are almost equally divided between those that changed the ruling (eight), and those that changed the reasoning but not the ruling (seven). One author of a majority opinion, Professor Deborah Rhode in *Johnson v. Transportation Agency*, attempted to write an opinion that could have garnered a majority of votes based on the composition of the Court at the time. Most majority authors, however, wrote as if their opinions were persuasive enough to have garnered enough votes of their colleagues without regard to the practical or political realities of the time. Authors pursuing the first approach made somewhat limited feminist changes to the original opinion or incorporated changes that reflected substantial compromises while authors in the second group tended to write more expansive opinions with the potential for transformative results.

Similarly, many of the feminist authors cite to feminist scholarship more liberally than mainstream American jurisprudence does, taking the implicit view that feminist scholarship is a legitimate and appropriate source of authority. Citation to feminist scholarship as an authoritative source can be seen in Professor Aníbal Rosario Lebrón's dissenting opinion

in *United States v. Morrison* and Professor Angela Onwuachi-Willig's majority opinion in *Meritor v. Vinson*, among others.

In terms of substance, the feminist authors in many of the opinions decided the case on the same legal grounds as the original, such as substantive due process or hostile work environment under Title VII. Others, however, changed the legal basis for the opinion or added additional rationales. Interestingly, these rationales often raised equality and liberty points in cases where the U.S. Supreme Court seemingly did not. For example, Professor Laura Rosenbury's *Griswold v. Connecticut* rejects the famous "penumbra" privacy analysis of the original, finding that the contraception ban at issue implicated equal protection and personal liberty. Similarly, Professor Kim Mutcherson's concurring opinion in *Roe v. Wade* rejects Justice Blackmun's controversial "trimester approach." She acknowledges that abortion raises privacy concerns, emphasizing that government efforts to control the reproductive decisions of women and not men violates equal protection. Similar changes in the legal underpinning of the decision occur in Professor Ruthann Robson's *Lawrence v. Texas*, Professor Carlos Ball's *Obergefell v. Hodges*, Professor Phyllis Goldfarb's *Bradwell v. Illinois*, and Professor Leslie Griffin's *Harris v. McRae*.

Judging from the substance of their opinions, the dissenting authors found a true freedom in being able to write separately. In her dissent in *Dothard v. Rawlinson*, for example, Professor Maria Ontiveros would have made *Dothard* the first U.S. Supreme Court opinion to recognize and endorse a Title VII claim for hostile work environment sexual harassment. Similarly, Professor Ann Bartow takes an unusual approach in her dissent in *Gebser v. Lago Vista Independent School District*, focusing almost wholly on the problems with the majority's treatment of the story of the case and only partly on the troublesome legal standard. In writing a dissenting opinion in *Michael M. v. Superior Court*, Professor Cynthia Godsoe found that a gender-specific statutory rape law violated the Equal Protection Clause. These dissenting opinions add a feminist voice where previously there was none.[20]

[20] Three of the cases in which the authors dissented, *Michael M. v. Superior Court*, *Gebser v. Lago Vista Independent School District*, and *United States v. Morrison*, were decided on a 5–4 vote. While it is impossible to know, such close votes invite speculation about whether the addition of a feminist justice (in *Michael M.*, decided by all men, or in *Gebser* and *Morrison*, in which Justice Ruth Bader Ginsburg dissented) might have changed the results in these important cases.

FEMINIST METHODS

A. Feminist practical reasoning

Feminist practical reasoning recognizes that what counts as a problem and effective resolutions of that problem will depend on "the intricacies of each specific factual context."[21] It brings together the voices and stories of individual women's lived experiences with the broader historical, cultural, economic, and social context described in historical and social science research. Feminist practical reasoning rejects the notion that there is a monolithic source for reason, values and justifications, a notion that is often a hallmark of traditional legal reasoning (consider the ubiquitous "reasonable person" in tort law). Rather, feminist practical reasoning seeks to identify sources of legal reasoning and values by drawing on the perspectives of "outsiders," or those excluded from or less powerful in the dominant culture. It also is more open to conceding the bias inherent in any form of human reasoning or decision making, including its own.[22] Professor Lucinda Finley's opinion in *Geduldig v. Aiello* is an example of feminist practical reasoning as are the feminist rewrite of Professor Pamela Laufer-Ukeles in *Muller v. Oregon* and the feminist rewrite of *Town of Castle Rock v. Gonzales* by Professor Maria Isabel Medina.

B. Narrative feminist method

Related to feminist practical reasoning is the use of narrative to illuminate the effects of the law on individual plaintiffs. While feminist practical reasoning may address both the individual story of the case and the broader context in which the law is applied, narrative feminist method focuses on presenting the facts of the particular case as a story. The story of the case is critical to the legal outcome; how the decision maker sees the story, what that person sees as relevant and irrelevant, and what inferences the decision maker draws from the facts often drive the ultimate decision.[23] Because of the centrality of story to law, feminists and other critical legal scholars have embraced narrative as a distinctive method of subverting and disrupting the

[21] Bartlett, *supra* note 2, at 851.

[22] *Id.* at 857–58.

[23] *See, e.g.*, Brian J. Foley and Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 Rutgers L.J. 459 (2001); Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17 (2008).

dominant legal discourse. Feminist narrative method seeks to reveal and oppose the bias and power dynamics inherent in the law's purported neutrality by including and asserting the relevance of facts that are important to those outside the mainstream account in law. Feminist narrative also shines a light on facts or topics that the law often shies away from or euphemizes, such as sexuality, the law's racism, or the details of rape or other violence against women. By euphemizing or obscuring ugly truths about society, legal arguments and legal decisions allow them to proliferate because they remain invisible.[24] Narrative method also humanizes the law by focusing on the actual people involved in the cases and the harms done to them rather than on abstract rules and ideals.

Many of the authors expanded on, added to, or structurally altered the factual recitations of the original opinions. While our guidelines, in accordance with legal convention, restricted the authors to the record before the U.S. Supreme Court, many authors delved into that record to uncover facts that had been overlooked, dismissed as legally irrelevant, or otherwise deleted from the narrative on which the decision was ultimately based. Expanded or re-envisioned narratives are used in several feminist judgments, including those by Professor Deborah Rhode in *Johnson v. Transportation Agency*, Professor Ann McGinley in *Oncale v. Sundowner Offshore Services, Inc.*, Professor Ann Bartow in *Gebser v. Lago Vista Independent School District*, Professor Teri McMurtry-Chubb in *Loving v. Virginia*, and Professor Lucinda Finley in *Geduldig v. Aiello*.

C. Breaking rhetorical conventions

Some feminist authors used conventional and traditional judicial tone and language, but others pushed the boundaries of the genre. The editors flagged the oppositional language and discussed it among ourselves and with the authors and commentators. On balance, however, the editors honored the author's wishes if the author felt that the language was essential to her feminist vision. Several of our authors argued that it was sometimes important to depart from conventional language and rhetoric because the bias inherent in the substance of the opinions is likely to be reflected, or further obscured, by the conventions of judicial writing that counsel in favor of neutral word choices

[24] *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 *Cal. L. Rev.* 971, 971–73 (1991). *See also* Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 *Harv. Women's L.J.* 185 (1994).

and a judicious, impersonal tone. In other words, they could not conform to those conventions and fully realize their feminist vision.[25]

Thus, in some of the narratives of the feminist judgments, readers will see an unusual level of frankness as well as a conscious use of bold and explicit language or a humbler approach to the Court's power. So, for example, in Professor Ruthann Robson's rewrite of *Lawrence v. Texas*, readers will see the U.S. Supreme Court explicitly apologize for the damage caused by a mistaken prior ruling in *Bowers v. Hardwick*,[26] an unprecedented rhetorical approach in U.S. Supreme Court jurisprudential history. In *United States v. Virginia*, Professor Valorie Vojdik states that the Virginia Women's Institute for Leadership, the remedy offered by VMI to cure its male-only policy, is not a remedy, but "misogyny," marking the first time that the U.S. Supreme Court would have used the word "misogyny" in this way. Finally Professor Laura Rosenbury's opinion in *Griswold v. Connecticut* uses explicit sexual language, including a reference to orgasm and the joy of sexual relationships, to convey a refreshing endorsement and approval of sexuality as a core liberty and relational interest.

D. Widening the lens[27]

Although some authors took an unconventional approach to judicial opinion writing, many wrote opinions that are indistinguishable in style, tone, and structure from prototypical judicial decisions. In this category, we place opinions in which the authors shifted their focus by looking at what assumptions were being made and whose interests were at stake in the original opinions.[28] While staying within the boundaries of existing legal doctrine and using recognizably paradigmatic modes of legal reasoning, they relied on alternative legal rules; they framed issues more narrowly or more broadly; and they presented different rationales. In this category, we would put Professor Phyllis Goldfarb's *Bradwell v. Illinois*, Professor Tracy Thomas's *City of Los Angeles Department of Water & Power v. Manhart*, and Professor Martha Chamallas's *Price Waterhouse v. Hopkins*, among others.

[25] *See, e.g.*, Finley, *supra* note 3, at 888; Stanchi, *supra* note 3, at 404.

[26] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[27] Similar results may be seen when the authors engage in the feminist method that Katharine Bartlett describes as asking the woman question: "identifying or challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups." Bartlett, *supra* note 2, at 831.

[28] *See generally id.* at 848.

FEMINIST THEORIES

A. Formal equality

Given the history of sex discrimination, many of the opinions confront laws that explicitly differentiate on the basis of sex (e.g., *Frontiero*,[29] *Manhart*[30]) and consequently, the feminist judgments rest on notions of formal equality. Formal equality is among the earliest of feminist legal philosophies. It grew out of a time when sex differences were seen as inherent and unchangeable, and as a result, discrimination based on sex was acceptable and overt. Formal equality seeks to fix explicit sex discrimination by asserting that similarly situated people should be treated the same regardless of sex or gender and that invidious use of a sex classification is presumptively unlawful.[31]

Several feminist judgments rely on formal equality principles, including Professor Cynthia Godsoe in *Michael M. v. Superior Court* and Professor Karen Czapanskiy in *Stanley v. Illinois*. Two of the majority opinions dealing with equality, Professor Dara Purvis's *Frontiero v. Richardson* and Professor Lisa Pruitt's *Planned Parenthood v. Casey*, explicitly mandate strict scrutiny for gender classifications, a change that would no doubt have effected a major transformation in law and culture. In *Frontiero*, four of the nine justices in the original decision voted for strict scrutiny, so only one additional vote was needed to change the course of legal history. That close vote certainly invites speculation about "what could have been" had the justices come from a more diverse cross-section of society.

B. Anti-subordination/dominance feminism

Although formal equality succeeded in eradicating most of the explicitly discriminatory laws, many feminist advocates realized that formal equality's "sex neutral" approach was little help in dealing with more subtle or ingrained structural oppressions. As Catharine MacKinnon notes, gender neutrality in law will always favor men because "society advantages them before they get into court, and law is prohibited from taking that preference into account

[29] *Frontiero v. Richardson*, 411 U.S. 677 (1973).

[30] *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

[31] *See* Katie Eyer, Brown, *Not* Loving, 125 *Yale L. J. F.* 1, 1–2 (2015) ("In the statutory domain, [formal equality] generally takes the form of an explicit statutory proscription on discrimination on the basis of a particular characteristic, and, in the contemporary constitutional domain, generally takes the form of 'protected class' status triggering heightened scrutiny.")

because that would mean taking gender into account … So the fact that women will live their lives, as individuals, as members of the group women, with women's chances in a sex discriminatory society, may not count, or else it is sex discrimination."[32] The limitations of formal equality were first apparent in the context of pregnancy, but, as many of the cases in this volume show, the doctrine is entrenched in law, often to women's detriment. As a result, many of the feminist judgments in this volume embrace anti-subordination doctrine and related theories such as substantive equality and structural feminism. In several of the judgments, the influence of Catharine MacKinnon's work is also apparent.

Anti-subordination feminism is a theory based on the recognition of social oppression of certain groups. The theory posits that even facially neutral policies are invidious and illegal if they perpetuate existing oppressions and hierarchies based on categories like race and sex.[33] This theory seeks to eradicate the more subtle forms of discrimination and injustice without sacrificing helpful laws that differentiate based on group affiliation, such as affirmative action. Like anti-subordination theory, the related structural feminism locates the primary sources of oppression in social structures such as patriarchy and capitalism.[34] Professor MacKinnon's work adds a layer to these theories, positing that not only are there manifest power imbalances between men and women rooted in the basic building blocks of law and society, but also that these power imbalances are eroticized and sexualized to women's detriment, particularly in laws related to rape, spousal abuse and pornography.[35]

These theories, often in conjunction with others, appear throughout several of the feminist judgments, including Professor Valorie Vojdik's concurring opinion in *United States v. Virginia* and Professor Angela Onwuachi-Willig's majority opinion in *Meritor v. Vinson*, among others.

[32] Catharine A. MacKinnon, *On Difference and Dominance, in* Feminism Unmodified 35 (1987) ("whenever a difference is used to keep us second class and we refuse to smile about it, equality law has a paradigm trauma and it's crisis time for the doctrine").

[33] Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. Rev.* 1003, 1007–10 (1986).

[34] *See generally* MacKinnon, *supra* note 32; Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. Rev.* 1037, 1098–99 (1996).

[35] *See generally* MacKinnon, *supra* note 32. Some refer to Professor MacKinnon's work under the heading "dominance feminism," but she herself does not like that term, saying "it's as much about subordination as dominance." Emily Bazelon, *The Return of the Sex Wars*, N.Y. Times Magazine at 56, September 10, 2015, www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?_r=0. On power imbalances and related issues, see also Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 *Yale L.J.* 1533, 1549 (1994).

C. Anti-stereotyping

Anti-stereotyping doctrine critiques the law's adherence to sex roles and its normative judgments about what a woman (and a man) should be. Related to anti-essentialism, anti-stereotyping seeks to disrupt the law's reinforcement of traditional roles for men and women. Some commentators credit Ruth Bader Ginsburg with bringing anti-stereotyping doctrine to U.S. jurisprudence in the 1970s. They argue that fighting gender roles was at the core of Ginsburg's litigation strategy.[36] Perhaps due to Ginsburg's efforts, anti-stereotyping has found its way into U.S. Supreme Court jurisprudence to a certain extent, most notably in *Price Waterhouse v. Hopkins*[37] as well as Ginsburg's opinion in *United States v. Virginia*.[38] This provided a rich foundation for our authors to build upon for their revised versions as they rejected common, fixed impressions of men and women widely held in American society and law. Anti-stereotyping theory is evident in Professor David Cohen's majority opinion in *Rostker v. Goldberg*, and Professor Maria Ontiveros's concurrence/dissent in *Dothard v. Rawlinson*, among others.

In the anti-stereotyping realm, several of the feminist judgments employ and cite social science data, readily available at the time of the opinion, that undermine widely held beliefs about women and men. The use of contemporaneous social science data is a critical tool to demonstrate that law and legal reasoning are often intertwined with and based on unsupported and stereotypical normative assumptions about sex roles, masculinity and femininity. A key foundation for Professor Martha Chamallas's concurring opinion in *Price Waterhouse v. Hopkins*, for example, is that courts should carefully examine and credit expert testimony by social scientists over the mechanical application of traditional ideas about sex and sex roles.

Masculinities theory, a relative newcomer to feminist legal theory, also plays a strong role in some of the rewritten opinions. Masculinities theory is an anti-stereotyping theory, but where some of the early anti-stereotyping theory focused exclusively on women's idealized roles, masculinities theory posits that damaging stereotypical assumptions about manhood also infect our culture, and, consequently, our laws. The theory focuses on deconstructing the norm of masculinity as damaging not just to women, but also to men who fail to conform to that norm. Still recognizing that as a group, men have

[36] Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 88–96 (2010).

[37] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[38] *United States v. Virginia*, 518 U.S. 515 (1996).

more power than women, masculinities also encapsulates the idea that men competing to prove an idealized notion of manhood often use women and non-conforming men as "props" to enhance their own status power within the masculinist hierarchy and to denigrate women and the feminine.[39] The masculinities branch of anti-stereotyping theory is evident in Professor Ann McGinley's revised majority opinion in *Oncale v. Sundowner*, for example.

D. Multi-dimensional theories: anti-essentialism and intersectionality

Another common theme in some of the judgments was anti-essentialism – challenging the notion, prevalent in law and in much of early feminist theory, that there is a fixed and identifiable "essence" that characterizes a certain set of human beings, such as women.[40] Relatedly, some of the feminist judgments explore themes of intersectionality, a legal approach that recognizes that gender is only one potential axis of discrimination and that discrimination against women is often combined with and compounded by oppression based on race, sexuality, class, and ethnicity. Beyond the recognition of multiple forms of oppression, intersectionality provides a theoretical framework through which the law can recognize and remedy those multiple oppressions instead of forcing a case into one distilled category of discrimination.[41] These theories are evident in the opinions of Professor Lisa Pruitt in her rewritten majority opinion in *Planned Parenthood v. Casey*, Professor Teri McMurtry-Chubb in her majority opinion in *Loving v. Virginia*, and Professor Ilene Durst in her majority opinion in *Nguyen v. INS*, among others.

E. Autonomy and agency

Several authors also relied on agency and autonomy rationales, noting that in addition to arguments based on deprivations of liberty under the Due Process Clause, the Constitution provides support for the argument that the government must act affirmatively to provide opportunities for full citizenship.

[39] Masculinities and the Law: A Multidimensional Approach 1–5 (Frank Rudy Cooper and Ann C. McGinley eds., 2012).

[40] *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990).

[41] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139; Devon W. Carbado and Mitu Gulati, *The Fifth Black Woman*, 11 *J. Contemp. Legal Issues* 701, 702 (2001) ("particular social groups (e.g., black people) are constituted by multiple status identities (e.g., black lesbians, black heterosexual women, and black heterosexual men)" and the different status identity holders within any given social group face discrimination that is different in both quantity and quality from discrimination faced by others).

Related to agency and autonomy, a true joy in sexual awareness and liberation can be seen in several of the feminist judgments. This sex-positive feminism is often attributed to third-wave feminists, who celebrate the joy of sexuality and sexual agency and tend to reject the tropes of passive victimhood that some associate with the second wave.[42] Though, to be fair, the emphasis on the centrality of sexual experience is related to, and may have developed from, ideas of relational, or hedonic, feminists, who criticize feminism for ignoring women's happiness and emphasize the importance of human relationships to women's approach to life and law.[43] Sexual autonomy rationales appear in Professor Carlos Ball's majority opinion in *Obergefell v. Hodges* and Professor Kim Mutcherson's majority opinion in *Roe v. Wade*, among others. They are especially vivid in Professor Laura Rosenbury's rewrite of *Griswold v. Connecticut*.

CONCLUSION

The richness and diversity of the rewritten opinions, as well as the incisive analysis of the commentaries, exceeded our expectations and goals. The opinions and commentaries reveal the breadth and depth of feminism and demonstrate the viability and practicality of using feminist legal theories and feminist methods to decide legal questions. Illustrating applied feminism, the opinions and commentaries reflect their authors' informed and distinctive choices about the grounds of legal reasoning, the forms of legal arguments, and the effects of language use. The volume reveals clearly the situated perspective inherent in judging, but also shows that widening the range of potential perspectives can make a significant difference. In other words, the law can be a dynamic and vibrant source of change, especially if its interpretation and formation includes judges of different experiences, backgrounds, and worldviews. We hope that the book will be an instructive, educational, and even inspirational resource for academics, students, lawyers, and judges alike.

The volume is both an academic text and a practical illustration of applied feminism. We hope it will arouse interest beyond the legal academic market. The book embraces an educational function regardless of audience. Students might learn about the law and feminism. The legal community and the wider public might learn about the way law works, what cases mean, and how the identity and philosophy of judges matter. For every reader, the book is an

[42] Crawford, *supra* note 1, at 117–22.

[43] *See, e.g.*, Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wisc. Women's L.J.* 81 (1987).

opportunity to contemplate the arc of justice, and the important role that feminism can play in achieving it for women and all people who challenge traditional gender roles.

A final note on the order of the editors' names. Because Kathy Stanchi brought the three of us together as editors, we decided that her name should be listed first. A coin toss determined the order of the other two editors' names.

From the time the three of us began to work together on the project, this has been a collaborative endeavor to which we contributed equally. In keeping with our feminist philosophy, we aimed to achieve unanimity on all editorial decisions. Thus, while we know that citation conventions traditionally use only the first editor's name, this convention does not reflect accurately the equal contributions of the editors to the project. Accordingly, we ask that those citing our work use all three editors' names in the citation. Feminism should make a difference not only in judging, but also in scholarship and the conventions of attribution.

We hope that you are as pleased and excited as we are at the results of this collaborative project. Enjoy!

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Thinking about gender and judging

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ABSTRACT *Reviewing the work of three political scientists who studied women judges provides an opportunity for rethinking the concept of gender and how to do gender-based research. Scholarship on women judges sometimes veers toward an essentialist view of women and gender differences, despite empirical evidence to the contrary. A close reading of this early work reveals some essentialist missteps but also offers strong examples of research across many methodologies that should serve as exemplars for current research across disciplines. If we move beyond the question of whether women decide cases differently from men, using sex as a variable, like other gender-based research strategies, can provide useful feminist insights.*

1. Introduction

How should we think about gender differences in ways that are theoretically sophisticated, empirically true, and do not lead to women's disadvantage? Political scientists who study women judges have been grappling with this problem for 30 years. Carefully examining the body of work of three pioneering scholars, Beverly Blair Cook, Elaine Martin and Sue Davis, yields insights beyond the particular subject matter and helps us to understand sex and gender more generally. Legal academics, sociologists, historians, and other scholars are increasingly studying gender and judging across jurisdictions and legal systems (Schultz & Shaw, 2003). Yet rarely does that work incorporate the insights of political scientists—a pity since political scientists advance gender theory, apply social science research methods, and understand judicial selection as a political process. Overlooking this early relevant work contributes to two problems in contemporary research. First, although she frequently functions as a straw woman, educational psychologist Carol Gilligan's work as applied to the question of whether women judges reason in a different voice has come to define *the* feminist approach to gender and judging and hampers our ability to theorise effectively about difference. Second, this dominance worsens rather than recedes over time. As new scholars take up questions of gender and

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judging, rather than build on their predecessors, many fall into the same predictable trap of essentialism. Even some of the later work of the three scholars I consider in depth falls into essentialism. Therefore, this essay argues that the earliest work in the field offers insights that repay careful consideration.

In this essay, I review the work of Beverly Blair Cook, Elaine Martin and Sue Davis. These three scholars are exemplary in at least four ways relevant to contemporary scholars. They theorise gender as a social process rather than treat sex as an essential difference. They investigate sex differences empirically rather than assume them. They treat women as a varied group and see feminism as something women (as well as some men) espouse to different degrees (if at all). They investigate gender beyond the question of whether women judges decide cases differently from men. Their work spans different research methods. My analysis is not confined to one approach; rather, I shall show how each methodological approach can illuminate the production of gender. Similarly, scholars have produced deeply flawed work within each method. I begin by defining my concepts of sex and gender and discuss sex as a variable. I then examine scholarship that treats sex as a variable: first, women judges in the political opportunity structure, second, judges' attitudes as inputs to decisions, and third, sex differences in judicial decisions, in general, in cases on sex discrimination, and in cases of divorce.

2. Sex and gender

Sex, meaning biological sex differences, has dropped from the lexicon, in favour of gender, making the distinction more confused than ever. Most feminists now theorise gender as a social process rather than an essential dichotomous difference, and use the word as both an adjective—gendered—as well as a verb. While gender differentiation is ubiquitous, which activities or attributes become the basis of differentiation vary, even within different groups (classes or races) of the same society at the same time, as well as across time and cultures. Gender differentiation thus does not flow inevitably from sex differences; rather it is the process by which we attach meaning to sex differences, most often to devalue whatever society associates with women (Chamallas, 2003). We must explore the construction of and asserted content of gender differences empirically rather than assume them (Kenney, 1996). Using gender to mean a sex binary may distort and conceal as much as it illuminates. Scientists have shown repeatedly that women differ as much from other women as they do from men, whether the attribute is strength, mathematical reasoning ability, or the ability to calm toddlers. The categories are overlapping bell curves not two non-intersecting wholes. Regardless of this fact, even though studies often find no differences, scholars continue to look for them and assume they are merely masked rather than address squarely what these inconsistent findings mean for gender theory.

3. Sex as a variable

Although postmodernism leads feminists to be sceptical of binaries such as male and female, not all attempts to use sex as a variable are misguided. Evidence does occasionally show differences worthy of feminists' attention. In some cases we are

right to question the sample size from which a sex difference is declared. Findings based on a few trial judges in Wisconsin, a few women agonising over abortion in Massachusetts, or even all judges in Michigan at one point in time do not prove essential sex differences. The problem is not the finding, but the meanings attached to it. If we abandoned the search for the essential sex difference that persists across time and place, we might be able to say some more interesting things about gender differences with empirical support. Rather than discovering an essentially different voice, we might uncover tendencies particular to a cohort. Why is it, for example, that we can generalise about baby boomers, or the approach of German judges on the International Court of Human Rights or European Court of Justice, in ways that do not lead to the same sort of essentialising we see when we find sex differences? If we could find a way to talk about tendencies and overlaps—if sex were one variable among many—feminist scholars might not have to be so worried about essentialism.

Besides the dangers of overgeneralisation that lead to claims of a false dichotomy, such research may wrongly claim sex to be the explanation when sex masks other determinants. President Carter, for example, appointed more judges to the federal bench than all other presidents combined and a higher percentage of women judges than any other president until President Clinton. If one finds sex differences among federal judges, it may merely be an artefact of the appointing president. But if one avoids this second pitfall by controlling for party, ideology, even such things as experience as a prosecutor versus experience as a public defender, then one is left with the concept of sex as a residual variable. Such an approach is at odds with a growing tendency to think of gender intersectionally within feminist theory.[1] Identity categories work in many intersecting ways that are patterned if not true for all members of the group. Not all black women think alike, but black women lawyers who went to law school in the 1970s were likely to have had many common experiences. By stripping away class, race, sexual orientation, to drill down to the core of what constitutes sex differences, one inevitably approaches sex as a biological category (one that feminists reject) instead of gender as a social process, a process that is intersectional, not just something that happens to women who are otherwise privileged. If using sex as a variable has a number of limitations, it also has great utility for feminist scholars when done well.

3.1. *Women judges in the political opportunity structure*

Unfortunately, comparisons between men and women continue to expose unfairness. Such an approach has radical implications for thinking about merit and the best process for choosing judges. By comparing the treatment of women lawyers considered (or not) for judgeships, and studying women's progress (or lack thereof) up the hierarchy, we can document differential treatment because of sex, the doctrinally simplest form of sex discrimination which, unfortunately, remains pervasive. The first political scientist to study women judges was Beverly Blair Cook and she did so at a time when women in political science, as well as research on gender, were both unwelcome. Although Cook came from a strong judicial behaviour background,[2] her use of sex as a variable is not reductive; she explored gender as a social process.

In her 1980 chapter, "Political Culture and Selection of Women Judges in Trial Courts", Cook laid a foundation for future scholars by identifying every woman who has ever served as a judge on state or federal courts in the United States. Cook wrestled with how to think about the position of these women she will come to call tokens. Anticipating feminist standpoint theory, she recognised feminist consciousness does not flow inevitably from women's experience (1980b, 49) and that women who do operate in the world of men may not be advocates for women or even themselves. As she considered the obstacles to feminist consciousness and advocacy, Cook implicitly assumed that women's difference exists and would have an impact but for these systemic barriers. She would later look for evidence of these hypothesised latent differences empirically.

Before she did so, Cook sought to explain the variation in the number of women in different jurisdictions. Some states had no women judges while California had 20. Differences in state subcultures provided some explanatory power for these differences. She found the size of the court mattered enormously but the method of selection did not. In an earlier study, Cook documented women's exclusion from higher prestige courts, and the efforts of judges to shunt women into special jurisdictional courts dealing with family and juvenile law (1978b). How many women should we expect to be serving on the bench given the pool of eligibles, assuming no discrimination? Between 1920 and 1970, states varied as to whether 1 or 5% of lawyers were women and 1–10% of trial court judges were women. She hypothesised that as the number of eligible women increases, we might expect the number of women judges to increase.

Cook traced the 12 chances Florence Allen—the first woman on the Ohio Supreme Court and the first woman on any federal appeals court and the only woman on a federal appeals court for 32 years (she sat on the Sixth Circuit)—had to be appointed to the US Supreme Court (1980a). Cook effectively documented Allen's exclusion from the group of insiders most eligible for appointment: close friends of the president, champions of the New Deal (particularly Roosevelt's court-packing plan), and senators. As the social movement that produced suffrage waned and elites turned against unmarried women partnered with other women, such as Florence Allen (Faderman, 2000), homophobia may also have played a role (Organ, 1998, pp. 228, 242). In 1982, Cook compared Florence Allen's 12 unsuccessful attempts to reach the Supreme Court to the process that yielded the first woman Supreme Court justice, Sandra Day O'Connor. Cook set their credentials against other Supreme Court justices and found elite education, politically active and connected families, and comfort if not affluence in both Allen and O'Connor's background, as in nearly all of the justices. Noting that only eight of 101 male justices were unmarried, Cook contrasted Allen's unmarried status (without remarking on her two lengthy partnerships with women) with O'Connor's marriage, three children, and break from work when her children were small, making her life experiences closer to the experience of most American women than Allen's and therefore more acceptable to her appointing authorities. Cook plotted women's groups' first involvement in the process in recommending three women candidates for the Arthur Goldberg vacancy. The first formal project to place women on the federal bench was the National Women's Political Caucus's project which began in 1977. Cook showed

how the American Bar Association's Standing Committee's evaluations of potential women nominees thwarted women's progress and echoed the views of many, such as Chief Justice Burger, that no qualified woman existed. When President Reagan gave the committee O'Connor's name in 1980, the committee had reluctantly accepted the viability of women candidates and had its first woman member, who also became the chair.

In her 1984 article entitled "Women Judges: A Preface to Their History", Cook argued that only when three factors have been achieved will women's numbers rise: an increase in the number of judicial positions to be filled, an increase in the numbers of eligible women, and an increase in the number of gatekeepers positively inclined to give women fair consideration, although she also recognised the importance of the pressure exerted by a strong feminist movement. Cook ultimately rejected the 'trickle up' argument: that women will automatically increase their numbers on the bench as their numbers in the legal profession rise. Instead, she carefully documented the factors that thwart women's proportional representation. A significant finding was that the larger the size of the court, whether they are superior and municipal courts as a whole, federal appellate courts, or state supreme courts, the greater the likelihood of a woman member. She documented the admission of women to the bar, their progress, the number of women Supreme Court clerks and law professors, noting the importance of serving as a clerk or working in a prestigious law firm for being on the fast track for high judicial office. She also documented the interval between a state's admission of women to the bar and appointment of women to the state trial court supreme court (104 years for Iowa, which admitted the first woman to the bar, 110 years for Missouri, which took the longest, the average being 50). Vital gatekeepers, such as the law professors who suggest law clerks to Supreme Court justices, do not recommend women in proportion to their increasing numbers.

Although her earlier findings found women appointed proportionate to their representation in the legal profession, by 1984, Cook found a disparity between the numbers of women judges we might expect based on the number of women lawyers of 50%, and found the transition from non-attorney to attorney judges to have reduced the proportion of women serving. She traced the career paths of women judges. Contrary to her earlier finding that the method of selection did not affect the proportion of women judges, Cook found women more likely to find a place on the bench through appointment rather than election and that having women on appointing panels increases the number of women chosen. Women have the best chance of serving on a state bench in a large state with an elective system, strong party organisations, and weak interest groups, under Democratic Party hegemony. Political scientists will continue to explore whether the type of selection system affects the numbers of women selected (Alozie, 1996; Cook, 1988; Bratton & Spill, 2002).

After Beverly Blair Cook, Elaine Martin is the political scientist with the most sustained body of work on women judges. Like Cook, she used sex as a variable to see if presidents use different criteria for choosing men and women judges. In 1982, Martin explored the disparate impact[3] of using the criterion of being well known by senior judges as the basis for choosing judges. Her survey found that 43% of the women felt that they would not have been considered under the previous

system rather than merit selection because they lacked the political influence and credentials. Carter was looking for women with a profound commitment to 'equal justice under the law' and 90% of the women he appointed had accepted pro bono work or worked for legal aid, and 90% had shown a demonstrable commitment to feminism. If Carter's women judges behaved differently than men once on the bench, it might well be because he carefully chose them from among feminists rather than because of either an essential female difference or from having experienced life as a woman. Martin may not be prepared to second the National Women's Political Caucus's researcher Ness's claim that the American Bar Association (ABA) blatantly discriminated against women and minority men by giving them lower scores when they presented identical credentials, but she did consider a second example of disparate impact: how the ABA's criteria of valuing large firm experience made it nearly impossible for women to pass muster because large firms refused to hire women attorneys. Rather than emphasise women's difference as a claim to their presence on the bench, Martin suggested that if we use objective criteria of merit, women are more deserving than the men Carter appointed. By de-emphasising political connections, Carter's merit commissions let the women candidates' stronger academic credentials emerge. Moreover, Martin suggested that circuit nominating commissions imposed a standard of judicial experience on women but not men candidates because they were skittish about women's abilities. President Reagan placed little priority on diversity but continued to employ a gender double standard. He required women but not men to have had either judicial or prosecutorial experience. Moreover, all of the politically active women appointed by Reagan were active at the national level, in national Republican politics, or presidential or senatorial campaigns (Martin, 1987, p. 140). Martin suggested that women may have had to meet a stronger ideological test than men.[4] She showed the value of using sex as a variable. Comparing men and women provided a basis for rethinking our notions of merit—academic excellence, or knowing a Senator? Is large firm experience perhaps more relevant for the prospective trial judge and judicial experience more relevant for the appellate judge? Interrogating existing standards may expose misogyny by laying bare double standards. Lastly, Martin gave us insight into where a different voice might come from if we find it empirically, and to expect it to be transitory and variable.

According to Martin (2004b), Bush (41)'s[5] record of appointing women improved upon Reagan's and even Carter's, although his interest in appointing women occurred only after the Clarence Thomas hearings, and half of these appointments date from the year he ran unsuccessfully for re-election. Moreover, he mostly elevated women Reagan had appointed, rather than expanded the number of women overall serving on the federal bench. President Bush, therefore, only after the Thomas confirmation, like candidate Reagan before him, perceived an electoral advantage in appointing more women to the federal bench. (Reagan had promised to appoint a woman to the US Supreme Court.) White men were a minority of Clinton's appointments and Clinton's judicial selection team included many women.

Martin's findings were supported and elaborated by other studies. Scherer (2005) showed that Clinton appointed the largest number of women and the largest percentage of women to the bench of any president. Women nominees,

however, were more likely to run into trouble with the Republican-controlled Senate. Although diverse, Clinton's appointees were ideologically moderate and indistinguishable in their votes from Bush (41)'s judges. Clinton's women appointees were more likely than men to be sitting judges and less likely to come from private firms. More women, however, now have experience as prosecutors, particularly in the US Attorney's offices, a traditional pipeline to the bench. Presidents seem to hold women to a higher standard of experience either as a judge or a prosecutor than men. Studies by Citizens for Independent Courts showed that the Senate took five months to take action on Clinton's male appointees, while they took eight months to take action on Clinton's female and minority appointees (Biskupic, 2000).

Williams (2007) examined gender and ambition for judicial office among Texas lawyers. Although she found fewer women in her sample declaring ambition for judicial office, she found women more likely than men to express ambition after controlling for other factors. Jensen and Martinek (2007) examined how women candidates fared in judicial elections, finding women, but especially Republican women, to be more successful than men. Githens's 1995 study as a participant observer on the Maryland judicial nominating commission, however, showed the importance of thinking of gender as a social process even as we simply compare the standards imposed on men versus women. Ambition is a social construction, not an inherent sex trait that boys or girls either have or lack at birth; rather it is nourished in some and discouraged in others—nourished, in fact, through the very social processes such as how judicial nominating commissions treat applicants (Lawless & Fox, 2005). Githens demonstrated that the Maryland judicial nominating commission treated men and women with aspirations for the bench differently. Commissioners perceived women as 'uppity' for seeking to rise above their station. Conversely, commissioners regarded men who applied for judgeships as lacking in ambition since judgeships paid far less than practice in a large firm.

3.2. *Sex differences as inputs and the cause of hypothetical outputs*

Once a sufficient number of women were on the bench to study, research on the barriers to women's full equality in securing judicial office receded and the question of how decisions of women judges differed from those of men came to dominate. In 1981, Cook surveyed the 170 women sitting on state courts, and a comparative sample of men. She hypothesised that women as a group would be more feminist than men on women's rights cases. Yet from the very beginning, she eschewed an essentialist approach. Cook dismissed what she called the biological model "that women will exhibit a different style of decision-making and emphasize different substantive goals compatible with certain intrinsic characteristics of the sex" (1981, p. 216), arguing that such a model—the precursor to the different voice—poses no challenge to the existing order of women's separate spheres. Rejecting both models, Cook embraced a socialisation model and added a feminist political philosophy: because women experience sexism and discrimination, "male authorities do not feel for or act for women's interests, and women authorities largely do" (1981, p. 217), a finding Patricia Yancey Martin *et al.* (2002) would later refer to as the feminist standpoint.

Cook identified judges by sex, party, and ideology, asked them whether they considered themselves feminist or supportive of the women's movement, and then asked them a couple of hypothetical questions (1981). Cook found gender gaps on each measure. She then administered two hypothetical questions and asked judges to assume that the law would support a decision for either party. One is about temporary alimony for a woman custodial parent to acquire an education, the other for a married mother to be able to change her name to her maiden name despite her husband's disapproval. Cook found consensus on the hypothetical case on alimony; but she also established that attitude and feminism but not sex and party predicted judges' behaviour on the second hypothetical case about name change.

As soon as enough women were on the federal bench to compare, Elaine Martin (1987) demonstrated the significant differences among them. Presidents Carter and Reagan both imposed extra requirements on their women appointees that they did not impose on men, albeit different ones. Carter wanted evidence of a commitment to equal justice under law; Reagan wanted either judicial or prosecutorial experience as well as evidence of involvement in Republican politics. The two groups were in closest agreement as to whether there should be a woman on the Supreme Court (100% Carter women judges/85% Reagan women judges). The gap between the two widened in their support for women in public office, and grew widest (95% to 37.5%) in their positive support for the women's movement. Martin showed that not all women judges think alike. By having previously exposed the gendered selection mechanisms, Martin showed why we might expect greater differences between Carter and Reagan women appointees than between Carter and Reagan men appointees.

In the same study, Martin also surveyed women judges attending the 1986 annual meeting of the National Association of Women Judges and compared them to a sample of men judges (1989). She modified Cook's protocol, but asked questions that allowed her to plot the gender ideology of judges and then analysed whether that led to differences in answers on increasing the number of women judges, on women judges' behaviour, on perceptions of gender bias in the courts, and on hypothetical cases that raised gender issues from battered women, to divorce, to abortion. On the important question of whether men's view of women is affected positively by the presence of women judges, men feminists were most strongly in agreement. On the next two questions, on whether women have a unique perspective and the bench does not reflect society without women members, gender, led by women feminists, showed the strongest agreement, followed by women non-feminists, then men feminists, then men non-feminists. Women judges, however, virulently disagreed about the difference gender makes. Women judges, feminists and non-feminists, were more likely than men feminists to agree with statements that women judges behaved differently from men, that they have an ability to bring people together, and that they face special problems in the justice system. Feminism, however, was more important than gender in predicting whether judges agreed with the statement that "judges sometimes treat women attorneys, witnesses or litigants in demeaning, condescending or unprofessional ways".

Martin's study had many methodological limitations. Her sample was not representative, we might question whether her scale revealed meaningful differences,

she did not control for other potentially important variables, and she dealt with self-reported opinions and hypothetical cases rather than actual behaviour. Nevertheless, Martin made several important contributions. First, like Cook, she did not assume that sex is a proxy for feminism but investigated when gender produces attitudinal differences empirically. She did not treat gender as a simple dichotomy, but recognised the presence of feminist men, who may differ little from feminist women, and non-feminist women, who seem to differ less than we might think from feminist women and more than we might expect from non-feminist men. Yet her work took an essentialist turn when she condensed it for publication in a reader on women and politics under the heading the "unique contribution of women judges" (Martin, 1993, p. 178). Martin showed that feminist ideology may well be more important than gender in predicting different votes in hypothetical cases, yet treated feminism as dichotomous. The presentation of the work illustrates a recurring problem: the way feminist ideology transmorphs into sex differences and a gender continuum becomes dichotomous sex differences.

In a 1991 conference paper, Martin criticised legal academics' importation of Gilligan and Ruddick as a way of talking about hypothesised differences from the outset, instead of examining the question empirically. Martin surveyed women state and local court judges sitting on the bench in 1987 regarding their views of their representational role and the difference women make. They overwhelmingly rejected the view Martin labels token, that is the view that because of their high visibility, women judges should be more cautious than men in breaking with tradition. The highest agreement was with the statement that we need more women judges because the bench without women does not reflect the total fabric of society (85%). Fewer, but an overwhelming majority, agreed with the view that "women have certain unique perspectives and life experiences different from men that ought to be represented on the bench" (80%). Fewer still (62%) responded that women judges are probably more sensitive to claimants raising issues of sexual discrimination than are men. The biggest divisions among women, however, were with what she labels voice: that women judges have an ability in the decision-making process to bring people together in a way that men don't. The largest group (40%) disagreed with this statement, 30% agreed and 30% were neutral.

More recently, sociologist Patricia Yancey Martin examined Florida judges and found that "compared with men judges and attorneys, women judges and attorneys were more conscious of gender inequality, observed more gender bias in legal settings, and showed a stronger connection between experiences with gender bias and feminist consciousness" (Martin *et al.*, 2002, p. 669). Drawing on feminist standpoint theory, however, Martin *et al.* argue that feminist consciousness is a political achievement, not an automatic consequence of being a woman or experiencing life as a woman. Women observed more gender bias dynamics, and were more likely than men to agree with a variety of feminist principles ranging from property division post-divorce, to rejecting rape myths and negative stereotypes about domestic violence. The findings held across race. While not making claims directly for outputs, Martin *et al.* argued that the presence of women judges will make the legal system more objective, more legitimate in the eyes of women claimants, and help all judges raise their consciousness on these issues.

3.3. *Decisions as outputs*

The first study of the effects of women judges found no differences between men and women in their sentencing behaviour, even in rape cases, nor evidence that the gender of the judge interacted with the gender of the defendant (Kritzer & Uhlman, 1977; Palmer, 2001). Later analysis of the same data confirmed that although men and women judges did not differ in their overall sentencing behaviour, women judges were twice as likely as men judges to send women to jail (Gruhl *et al.*, 1981). Women judges, more so than men, treated men and women defendants similarly. Illustrative of the complex and often paradoxical way we think about gender, Kritzer and Uhlman had hypothesised that women would fear crime more than men and therefore would be tougher on criminals, particularly rapists. Gruhl *et al.*, however, hypothesised that women would be more lenient. Perhaps the most important finding, however, was buried in a footnote where Gruhl *et al.* noted that in their miniscule sample of seven, from which they were trying to determine whether sex determines sentencing behaviour, "for all three dependent variables there are more differences among the seven women judges than between the men and women judges" (1981, p. 314). Once sex was introduced into the equation as a variable, however, gender became a dichotomous difference.

In 1983, Gottschall compared the voting of Carter appointees on the Court of Appeals over a two-year period to see if they were liberal activists, as critics charged. He found Carter's appointees to be similar to those of other Democratic administrations and different from Republican appointees. In order to look for gender effects, Gottschall only compared white women to white men, displaying the view of gender as a residual variable, that which is not confounded by other factors, rather than understanding gender intersectionally. He found little difference between men and women on rights of accused and prisoners and some differences for race and sex discrimination cases, with the caveat that he analysed only 19 votes cast by women. Another study of federal district judges found male judges to be more liberal and women more likely to defer to government (Walker & Barrow, 1985). It found no significant differences between male and female US District Court judges on issues of women's rights or criminal policy. Women judges, however, were more likely to uphold government regulation and less likely to support personal liberty claims. Allen and Wall's (1987) study showed that four out of five women on four state Supreme Courts were the court's most liberal members.

Sue Davis's study of judges on the Ninth Circuit Court of Appeals (1992–93) was grounded in feminist theory. She acknowledged the critiques of Gilligan as well as the ways in which scholars often misread or misinterpret her work (Kenney, 1995). Recognising that finding a different, female, or feminine voice in one woman jurist hardly proves anything about the category of women, Davis searched for evidence of the different voice by pairing the women judges on the Ninth Circuit with their most similar men—men appointed by the same president, similar in education and background and at a similar location on the liberal–conservative spectrum. Davis's different voice looks more like a feminist voice than does Gilligan's. For Davis, the different voice is one that asks about gender; it considers

the impact of the challenged practice on women. Such a voice recognises a role for the state in protecting members of the community and in valuing connection. Perhaps most controversially, the different voice eschews bright-line legal rules in lieu of pragmatism and contextual reasoning. Davis looked at equal protection and civil rights cases. She found many of the elements of the different voice in the cases she examined, but little evidence of gender differences between paired men and women, let alone a dichotomy. She concluded with agnosticism as to whether Gilligan was wrong altogether, as applied to the judiciary, or whether the sort of women who become federal judges are the sort of women who think like men. Paradoxically, her findings did not lead her to a strong criticism of Gilligan, or to reject the different voice as a way to frame gender and judging. Instead, she leaves us with the possibility that the wrong sort of women serve on the bench (too manly?) or that the male system overpowers the feminist voice.

Davis's study offered the important insight that both men and women used feminist tools of analysis in their reasoning in landmark equal protection cases out of the Ninth Circuit. Moreover, this reasoning looked a lot like other kinds of legal reasoning. What's fair? Who is disadvantaged by this rule? Who is left out of the picture by this abstraction? Whose perspective and labour is valued? Whose is devalued? Which citizens do the police protect, and which do they scorn as provoking and therefore deserving their own beatings? Some of the judges (in one case a man) fail to see the injustice in sex discrimination, but there are men who do see it, and all of the women do. Both men and women judges occasionally struggle to do justice rather than strictly follow rules, and other judges criticise them vigorously in their opinions for results oriented decisions. Davis found that whether one approached sex discrimination law as a feminist matters—it determines outcomes in important cases. Women and some men employed feminist tools of analysis. The feminist mode of reasoning is neither foreign to legal reasoning, nor inherent in women's bodies. Davis took a step forward in empirically showing that while women are likely to apply a feminist analysis of equal protection cases, some, but not all, men do too. In the end, however, she retreated from an anti-essentialist view of gender and questioned whether women judges could give full expression to either their full femininity or feminism, suggesting that only "the right sort of women"—women who accepted the yoke of the law—would be appointed in the first place.

In a subsequent study, Davis *et al.* (1993; see also Songer *et al.*, 1994) expanded the exploration of the different voice from the Ninth Circuit to the entire Court of Appeals and beyond equal treatment cases to cases on criminal procedural and obscenity. Where her matched pairs showed little difference on the Ninth Circuit, Davis *et al.* found women judges on the Court of Appeals as a whole more likely than their male colleagues to support claimants in sex discrimination cases (63–46%), and more likely than their colleagues to support the defendants in search and seizure cases (17.7–10.9%), although they found no significant differences in obscenity cases. The difference narrowed somewhat but persisted when they compared women appointed by Democratic presidents to men in employment discrimination cases, and disappeared between Republican-appointed men and women. Nor did they find differences when they factored the party of the appointing president into her analysis of search and seizure cases.

Davis and colleagues laboured to apply Gilligan whereas one might think her previous study would lead her in the opposite direction. She first interpreted the finding that women seem more likely than their male colleagues to see the harm of sex discrimination as consistent with an ethic of care that gives weight to the harm of community exclusion. Although they cited harsh critics of the Gilligan approach (Epstein, 1988), they were non-committal about what their findings show. The first alternative they considered was that the psychological and legal theories of difference were wrong. Women could support claimants in sex discrimination cases because they have experienced discrimination directly, or have encountered gender-based obstacles in their lives, or have affinity with those who have. Alternatively, perhaps the difference is not evident in a vote? They noted that to the extent they found women speaking in a different voice on the Ninth Circuit, men did too. The third possibility they considered was that law crushes the different voice, and women, as newcomers, cannot withstand law's hostility to an ethic of care. Lastly, women of the generation who are likely to be judges might either have had the ethic of care stamped out of them, or they might have been especially chosen for judicial office because they lacked this supposedly essential gender trait in the first place.

Calling for further study, Davis *et al.* ended by pointing out that until women's different approaches to legal reasoning are welcomed in the study of law, we will not really know whether women have a distinctive impact on the legal system. Implicit in their conclusion was the assumption that women are different, and we just have not been clever enough to uncover that difference empirically; alternatively, that the power of law has suppressed the difference, despite the contradictory evidence that differences were fleeting, a function of partisanship or liberalness, and despite the strong evidence that Davis found in her close textual analysis of the Ninth Circuit that men were asking the woman question and using feminist modes of analysis too. Missed was the opportunity to point out how tricky it is to operationalise Gilligan and marry a gender analysis to an ethic of care.

By 1994, Songer *et al.* equated feminist legal scholarship with the Gilligan position of difference. Gone was the thoughtful asking the woman question of the early Ninth Circuit work. Still they found little evidence of the different voice. Employing a predictive model, they found gender to add nothing to the predictive power in either obscenity cases or in search and seizure cases. As predicted, presidential appointment effects were strong. The gender of judges, however, was strongly related to the probability of a liberal vote in job discrimination cases (38% probability for men, 75% for women). They recognised that women could be more attentive to discrimination generally because of their experiences rather than because they reason in a different voice; but they then returned to the different voice as the dominant frame. They then mused whether law school stamps out the different voice in favour of rights and hierarchies—suggesting that it represses the different voice in everything but discrimination cases.

Rather than seeing law silencing women judges' different voice, perhaps what we see in Davis is political science repressing Davis's more anti-essentialist approach over time. Although she starts with a disfavoured topic—how gender affects judging—she begins with doctrinal analysis, perhaps the discipline's least approved of method.

She moves to a statistical analysis of opinions and at last, to a predictive model. In the process, however, we lose the critical eye and sophistication of feminist theory with which she began; the different voice frame thus becomes more conservative and essentialist. What is striking is that the further she moves down the path of statistical analysis, the farther away we get from any real support of the different voice with the possible exception of sex discrimination cases. Yet Gilligan remains firmly entrenched as the dominant gender frame.

3.4. *Outputs in sex discrimination cases*

"Research on state supreme courts, the US Courts of Appeals, and the US Supreme Court consistently has shown that women judges tend to be the strongest supporters of women's rights claims, regardless of their ideology" (Palmer, 2001, p. 91). Yet even that finding has varied, depending on the time period. In her 2003 essay for the *UC Davis Law Review* reviewing political science studies of whether men and women decide cases differently, legal academic Theresa Beiner is forced to conclude that "the effects of race and gender of judge are inconclusive" (p. 610). In a recent example, Jennifer Segal studied President Clinton's judicial appointees to the district courts and found the traditional (i.e. white male) judges to be more liberal (pro-plaintiff in sex discrimination cases) than non-traditional (women and minority men) appointees. Even if one might concede that as Clinton faced a Republican-dominated Senate, he knew that women nominees faced more intense scrutiny than men, one can hardly conclude, based upon Segal's findings, that Clinton's women appointees spoke in a distinctive feminine or feminist voice.

In addition to casting votes which may or may not diverge from those of colleagues, women judges may influence their male colleagues. When political scientist Nancy Crowe looked for this evidence in sex discrimination cases on the US Court of Appeals between 1981 and 1996, she found no evidence of such an effect (1999). Jennifer Peresie, however, examined how, over a three-year period where the doctrine was relatively stable, the presence of female judges on three-judge federal appellate panels affected collegial outcomes in Title VII cases on sexual harassment and sex discrimination (2005). She found that plaintiffs were twice as likely to prevail when a woman judge was on the bench. The presence of a woman judge increased the probability that a man judge would support the plaintiff. Peresie criticised previous studies for failing to control for individual characteristics other than gender, thereby magnifying the gender effect, and for not controlling for significant doctrinal changes. Peresie found that judges appointed by Democratic presidents were the most pro-plaintiff and that Democratic men and Republican women were similarly pro-plaintiff. Interestingly, Peresie found men and women judges more different from each other on an individual level in sexual harassment cases but the influence of women judges greater in sex discrimination cases. Peresie lacked an adequate theoretical account of these differences. Boyd *et al.* also found that the presence of a woman on a panel hearing a sex discrimination case made it more likely that the panel would result in a pro-plaintiff decision (2007). They believe the effect to be deliberative and to result in men changing their behaviour.

3.5. *Outputs in divorce cases*

Elaine Martin's more recent work examines state supreme courts and rulings in divorce cases (2004a). Martin zeroed in on divorce cases as the place where we might most expect gender rather than feminism to lead to differences in behaviour on the part of men and women judges, and examined the non-unanimous case decisions of the Michigan State Supreme Court over 13 years. She found Democrats to be more liberal than Republicans, African-Americans different from whites on one issue only, discrimination, and men and women to differ from each other but in the opposite direction.

> Men cast 52.3% of their votes as liberals in discrimination cases while women cast only 38.3%. The reason for this result may simply be that during most of the time period under study there was only one Democratic woman justice, who, as a former prosecutor and criminal trial court judges, was somewhat less liberal than her fellow male Democrats in two of the three issue areas (Martin, 2000, p. 1225).

This comment reveals what I find problematic about this line of research. The researcher is drawing on the tools of social science to look for patterned behaviour rather than telling idiosyncratic stories of individual judges and courts and why they decided as they did—either by reading opinions, or by drawing on history, biography, and journalism. But although we are looking at the Michigan Supreme Court over time, we are still explaining variance of a small number of people and a small number of women and minority men. So we assume gender (not feminism) leads to a difference in votes in discrimination cases, and when we do not find it, we explain it away by referring to the particular details of the case itself. The gender assumption remains even though the evidence forcefully not only fails to support it, but contradicts it.

Martin first added Minnesota and Wisconsin to her study, then all state high courts, to examine her hunch that although other studies found few gender differences, divorce cases would provide "the most fertile ground for discovering the impact of judicial gender" (2004a, p. 2). This telling phrasing reveals her belief that, finally, women's true difference from men in the form of their gendered life experiences will be evident in their decision making. Martin labelled what she hopes to find: the representative voice. She found that women judges are more likely than men to support a woman litigant in divorce cases. This difference is more pronounced if there are three women on the court but LESS if there are two—a non-linear relationship Martin cannot explain. Men are more supportive of women litigants when they serve with only one other woman and less likely if they are chosen by merit systems. Women who have more trial court experience are more supportive of women litigants.

As Martin tried to make theoretical sense of these results, the fundamental flaw in these studies emerged: the researcher looked for and either found or failed to find sex differences. A story is produced to suggest why essential differences are masked, or inconsistently found, but the research does not deploy the evidence to help us

decide which story is more persuasive. A common story draws on one reading of Kanter—that women tokens, isolated on the bench, or in their profession, behave just like men. But once women reach critical mass, their true differences can emerge. The evidence that Martin and Cook have gathered on women judges in the United States suggests that the earliest women judges (particularly Republican appointees) may have been the most openly feminist, with the exception of Justice O'Connor. Davis tested for the different voice, failed to find it, and left us with the view that it is masked rather than does not exist. Peresie's theories could not explain why a woman member of a panel influenced sex discrimination cases more than sexual harassment cases. Rather than continuing to repeat the running of sex as a variable to test for the different voice, I think it is time for rethinking our theories of gender and judging where Cook began and Martin *et al.* developed.

4. Seeing gender one judge at a time

4.1. *Men judges' women's rights orientation*

As a judicial behaviouralist who adopted the attitudinal model long before it was identified as such, Cook did not see judges at the highest appellate levels as enmeshed in a discursive structure that constrained their decision making and shaped their arguments (i.e. as bound by law) but rather as able to pick and choose from precedent and interpretive canons to support their policy preferences. Rather than engaging in a textual exegesis of rules, precedents, and legal arguments, Cook mined legal texts for evidence of judicial attitudes and policy orientations. What mattered to her was who judges were and what they thought and believed about everything, not just law and the judicial role:

> In these cases, what is important is how the Justice feels about women—women on welfare, pregnant teachers, women officers, women jurors—and their demands, in relation to how the Justice feels about the other party—industry, grade school, the military establishment, the courts—and its expectations for the female role (Cook, 1978a, pp. 54–5).

Cook plotted each of the justices based upon their votes on women's rights cases and the views they express in their opinions, other writings, and speeches. Her searing critique ended with an aside: "The paternalism of the male Supreme Court justices which shines through these cases may only be ended with their closer association with female justices" (1978, p. 78). Yet Cook's assumption that women judges will necessarily support women's rights claims more strongly than feminist men is complicated by her own later analysis of the jurisprudence of Justice O'Connor. Cook also compared two women judges' views on women's rights: Florence Allen's and Sandra Day O'Connor's. Allen, a suffragist, was part of a vast network of women's groups and saw herself as a representative of women; in contrast, men politicians picked O'Connor once Ronald Reagan had promised a seat for a woman and O'Connor looked ahead to the time when sex identity would lose its significance (Cook, 1982, p. 326).

4.2. *Doctrinal and biographical analyses of Justice O'Connor*

One of the most troubling strands of argument in the field of gender and judging has been the assertion that Justice O'Connor used communitarian, holistic, teleological and contextual reasoning, dubbed the feminine voice, rather than liberal, individualistic, atomistic, non-teleological, abstract and rule-based reasoning (Davis, 1993, p. 136). No one could credibly argue that Justice O'Connor had a distinctly feminist voice, although she did take a feminist position on some issues, particularly relative to her more conservative colleagues, but her gender arguably mattered because she deployed a distinctly 'feminine' style of reasoning. This argument was put most fully by legal academic Suzanna Sherry (1986), but several others advanced it as well (Behuniak-Long, 1992; Sullivan & Goldzwig, 1996). When political scientist Sue Davis put these claims to a rigorous empirical test, however, she found little evidence to support them, finding merely that Justice O'Connor was less conservative than Justice Rehnquist on some issues and showed greater support for equality claims than other conservatives (1993). It was hard to argue that O'Connor's reasoning is distinctly feminine, when her positions were shared by Justices Souter and Kennedy and not Ginsburg. Political scientist Jilda Aliotta (1995) reached the same conclusion.

An ongoing puzzle is why Davis, as well as Martin, and others who recognised the theoretical criticisms of Gilligan and found little empirical support in her research, continued to use Sherry's theories to frame questions about Justice O'Connor and gender and judging and further, why they gave Sherry's arguments pride of place when so many feminist legal academics dismissed her argument as nonsensical. Davis's empirical analysis demolished Sherry's argument; yet she concluded, "O'Connor does not appear to speak 'in a difference voice', but the possibility remains that other women judges do" (1993, p. 139). Justice O'Connor (echoing many of the NAWJ members that Martin surveyed) herself dismissed as absurd the idea that she employed a uniquely or distinctly feminine approach to legal reasoning (O'Connor, 1991, p. 1546). To be sure, O'Connor's jurisprudence eschewed bright-line legal rules and she seemed to revel in her power as the swing justice, questioning advocates about facts of particular cases at oral argument. With only one case, it is impossible to demonstrate a connection between her gender and her style of reasoning. What is astonishing, however, is the determination of observers to find that distinct female essence of judging, rather than ask how her experiences, including gender, have shaped her perspectives, as gender and other life experiences have shaped those of each of the men justices.

Although brief, Cook's analysis of Justice O'Connor contrasted favourably with the analysis of many of her successors. Unlike the overwhelming majority of women judges Cook had surveyed, Justice O'Connor neither self-identified as a feminist nor supported widespread access to abortion. Cook documented O'Connor's experience of sex discrimination and her work as a legislator in passing some sex equality legislation while recognising that her commitment to women's equality was weak. She reminded us that upon President Reagan's assumption of the presidency, right-wing Republicans effectively vetoed women judicial candidates as "too feminist" (Cook, 1988, p. 12)

and noted that Reagan's choice of O'Connor "offered more symbol than substance to other women" (1988, p. 15). Cook's scalogram analysis of the 18 sex equality cases O'Connor had then considered (Cook excludes abortion cases from this analysis) showed five male justices more favourable to sex equality than O'Connor.

Cook completed a fuller and more comprehensive analysis of O'Connor's role in the Burger Court in 1991. Beginning with an analysis of O'Connor's background and her confirmation hearings, she moved into an analysis of her jurisprudence and found that Justice Brennan, not Justice O'Connor, consistently took the lead in favour of gender equality. O'Connor ranked sixth (Cook, 1991, p. 248). Cook concludes:

> O'Connor performed as the woman justice on the Court only in her extrajudicial activities as a speaker and writer. After her first term, when she raised her voice vigorously for a strong constitutional guarantee of gender equality but for weak remedies for gender discrimination, she retired as a spokesperson on women's rights. She never challenged a Court opinion that denied gender equality. The one attitude that could be associated with her personal experience as a mother in American culture was her sensitivity to children, which appeared in criminal, free expression, and church–state cases ... O'Connor's contributions to the Burger Court's jurisprudence were characterized by her political sensibility, driven by her structural principles, and *unmarked by her gender* (Cook, 1991, pp. 272–3, emphasis added).

Cook's choice of words is telling. Gender means feminine or feminist essence. Unlike Cook, I would urge us to see everyone as marked by gender, men and women, but in different ways and with different effects. Even Cook, the most anti-essentialist of the three scholars I examined here more closely, returned to the assumption of difference. O'Connor was a disappointment because she did not speak in a feminist voice, the voice Cook was hoping for when she criticised the all-male Supreme Court's rulings on sex discrimination.

4.3. *Becoming Justice Blackmun*

In writing her judicial biography of Justice Blackmun, legal correspondent for the *New York Times* Linda Greenhouse had early access to the justice's newly released papers (2005). We learn that Justice Blackmun, most known as the author of *Roe v. Wade*, had a daughter who became pregnant out of wedlock, married, lost the baby through miscarriage, and subsequently divorced. All we learned from his notation after Ruth Bader Ginsburg's oral arguments on landmark equal protection cases is that she had worn a red ribbon in her hair. Greenhouse's remarkable book showed how Justice Blackmun came to feminism through the issue of reproductive freedom, and thereby came to diverge from the other Republican-appointed justices, most poignantly, his lifelong friend, Warren Burger. We learned more about gender, women, and feminism from Greenhouse's approach than from Sherry's. First, not only do men have gender, but they have experiences that mark them by gender, as well as positions on women's rights issues. Second, as feminist standpoint theory would lead us to recognise, gender consciousness is acquired, not an automatic

component of biological identity. Nor, as such, is it dichotomous. It varies among men and women and between them in ways that are perhaps patterned but which may be patterned differently across time. Third, we must trace its existence empirically rather than assume it.

4.4. *Each judge influences others, but in unpredictable ways*

In their 1990 *Women and Politics* article, O'Connor and Segal examined how the addition of one justice, Sandra Day O'Connor, to the Court may have moved Justice Rehnquist more toward the centre on sex discrimination cases. Perhaps, too, Justice Ginsburg's arguments led him to join the majority in the Virginia Military Institute case and perhaps even in *Nevada v. Hibbs* (Kenney, 2004). As intriguing as O'Connor and Segal's findings are for thinking about the difference women make in collegial courts, Barbara Palmer's analysis of Justice Ginsburg's effect on her male colleagues (2002) shows the same confounding results that Martin found as the number of women increased on state supreme courts (2004a). Palmer found that although O'Connor and Ginsburg wrote more than their share of decisions in sex discrimination cases and are the spokespeople for the Court on women, some male colleagues have become more supportive of women's rights claims because of Ginsburg's addition; others have become less so, making it difficult to argue for a clear gender effect.

5. Other effects of women on the bench

If significant gender differences exist, they may manifest themselves in other ways than in producing a dichotomous difference in votes cast in cases (Beiner, 2003; Martin, 1989). Women might conduct their trial courtrooms differently from men by refusing to allow well-documented sexist behaviour; they might act differently as administrators: for example, hiring more women law clerks.[6] Men lawyers and men judges might moderate their behaviour, as might women jurors, lawyers, and litigants. In many but not all cases, a woman justice on a state supreme court called for the creation of a state gender bias taskforce (Martin, 1989, p. 79) and women judges were almost always leaders in establishing race bias taskforces (Resnik, 1988).

Martin surveyed the 1989 National Association of Women Judges conference attendees about the impact of women judges. Ninety-eight percent agreed that women judges were role models for women attorneys. Nearly 90% reported making a special effort to encourage other women to run for judicial office. Nearly three-quarters of women agreed that women judges in general work to heighten the sensitivity of other judges to the problem of gender bias although only one third reported that they personally had made a difference in how men judges thought about the gender impact of their decisions. More than half (52%) reported making a difference through substantive decisions. When pressed for specific examples, women judges mentioned sensitising judges to some of their most flagrant sexist practices (47%), being a role model in the sense of making women jurors or litigants feel more comfortable (35%), changing substantive law on domestic violence or divorce (30%),

engaging in equitable hiring behaviour (24%), and participating in their state's gender bias taskforce (15%). Martin's study shows the wide spectrum of women judges' views about the difference gender makes.

A 2003 study of the 15 women chief justices of state supreme courts—an all-time high—examined their state of the judiciary messages for evidence that they placed more emphasis on women's issues than male chief justices (Turner & Breslin, 2003). The authors deserve praise for looking for the significance of gender beyond dichotomous votes on cases and noting that as administrators of their state's judicial systems, chief judges can advance reforms such as those concerning juvenile courts, family courts, gender bias studies, and battered women's programmes. The study uncovered enormous variation among the chief judges, men and women, even on women's issues. While the presence of a woman chief judge positively and significantly impacted the likelihood of mentioning a women's issue, the number of mentions does not increase with an increased number of women on the court. Rather, it had the opposite effect. They found no statistical significance for the claim that women chief justices are more likely to make women's issues a priority.

6. Conclusions

How does gender matter? Does it produce different outcomes in judicial decisions? The scholarly studies I discuss in this paper show that researchers have used sex as a proxy for feminist, that is, more likely to be concerned with children and better at juvenile justice, pro-defendant in sex discrimination cases, pro-choice, pro-woman in divorce, employing communitarian reasoning, inclined to seek mediate solutions, likely to raise women's issues in speeches, and likely to inflict harsh or lenient sentences. Only occasionally has the evidence shown that sex is a proxy for the assumed attribute. We need to examine the strength of the empirical basis for the claim of difference (what was the sample size? How representative of the judiciary as a whole? Did the researchers control for other explanatory variables?). Even when researchers uncovered a difference, it predicted different outcomes only in some cases, while other predictors, such as party or ideology, predicted differences more reliably in others. We need to take great care in how we talk about sex differences. Strangely, findings of no difference never seem to challenge the fundamental assumption of difference, nor deter the search for it.

Women and men do have different life experiences. Some, but not all, women are mothers. Some, but not all, women are in heterosexual marriages where they do the lion's share of caring labour. All experience the world as a woman, subject to the risks of sexual violence, gender devaluation, and exclusion and discrimination. Rather than identify essential sex differences, perhaps we should understand gender as producing tendencies among generational cohorts. When the women who are now senior judges entered the legal profession, they had profound experiences of exclusion. Many, such as Justice Sandra Day O'Connor and Minnesota Supreme Court Justice Rosalie Wahl, did not enter large law firms but instead worked for the government on mental health issues or, as many women did because it was one of the few places where parents could work part-time, worked for public defenders

(Kenney, 2001). We can expect women who serve on the bench in Texas, for example, who have run as Republicans, served as prosecutors, and spent their time with the victims of violent crime, to have very different outlooks and to bring to the bench different experiences than women who have worked for a public defender. The Republican women who President Bush (43) appointed might be as different from earlier Republican women appointed to the bench as they were from Democratic women appointees. Even women of the same age cohort do not necessarily share a feminist consciousness. One need only consider the differences between Justices O'Connor and Ginsburg and between Justices Marshall and Thomas for the point to be clear. We must move from an assumption of essential sex differences to a discussion of gender.

It is time to re-examine the application of Rosabeth Moss Kanter's classic work on gender and organisations, *Men and Women of the Corporation* (1977), to courts. Kanter was profoundly anti-essentialist. Her organisational analysis focused on structural conditions to predict behaviour rather than essential sex differences to explain why tokens may conform to the dominant group. On the other hand, scholars often misapply her findings to claim that once women reach critical mass their 'true' (read dichotomous, uniform, and feminist) differences can emerge. More recent studies have questioned Kanter's assumption that resistance to women's presence in male-dominated institutions would diminish as women moved from minority to parity (MacCorquodale & Jenson, 1993; Yoder, 1991). We should apply these insights to evidence of increasing challenges to women judges. Rosemary Hunter's analysis of women judges in Australia shows that behind the recent numbers of women appointments "lurks an undercurrent of hostility toward women judges, which shows no sign of abating in the near future" (2006, p. 281). According to Hunter, women judges experience what Rosabeth Moss Kanter called heightened attention: their qualifications are disputed, and their colleagues (on and off the bench) show open hostility to them. She notes that women judges' colleagues simply "hold them in contempt for simply being women" (p. 295). The assumption is that men are the natural occupants of such positions, that women obtain them through political manoeuvring, not merit, and that enough women have been appointed. Moreover, evidence from Canada suggests that women judges are far more likely than men to have their objectivity challenged and gender-based conflicts of interest asserted (Backhouse, 2003; Omatsu, 1997). Litigants seem to miss the irony that if the gender of the woman judge poses a conflict in a rape or employment discrimination case, the same goes for the gender of a male judge. We should recognise that a feminist consciousness is a political achievement, not an inevitable result of being female or living life as a woman. So, too, should we understand that the creation of a group of judges, men and women, who bring a gender lens to judging, is an organisational accomplishment and not an automatic result when a certain number of women judges join a court. In fact, the evidence suggests that women may feel less compelled to articulate 'a woman's point of view' the more women serving on a court. The question is not simply in adding more women to the mix, but in creating organisations attentive to gender devaluation.

Gender is a relevant category for social interaction, and the absence or presence of women may change group dynamics; but that does not mean it does so in fixed,

predictable, and static ways. Particularly on collegiate courts, I think there is a strong case to be made for injecting people with different experiences of all sorts rather than for using gender as an automatic proxy for feminist, liberal, or compassionate toward the downtrodden. The gender composition of groups matters in often subtle ways, determining what comments might be intolerable and how issues are framed as well as what kinds of evidence and arguments the group considers. It matters, then, that Lady Brenda Hale is a woman, but perhaps more important is that she is an expert in family law and has championed no-fault divorce as a law commissioner. She is the author of the first text on women and the law (Hale & Atkins, 1984) and brings a sophisticated understanding of gender issues to her analysis.[7]

The work of more than 70 scholars in the Collaborative Research Network on Gender and Judging of the Law and Society Association shows the rich possibilities of a gender analysis. When done well, using sex as a variable can expose discrimination or important sex differences. When done badly, it can assume rather than discover essential sex differences in ways that are not helpful for understanding judicial behaviour. Across many methods, from statistical analysis of judicial opinions, to historical case studies of judicial campaigns to doctrinal analysis of equal protection decisions, a gender analysis, where gender is a social process, has much to offer our understanding of judging.

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Notes

[1] See the special issue of *Politics & Gender on Intersectionality*, 2(3), (2007).

[2] Within political science, those who identify as judicial behaviourists adopt quantitative methods rather than qualitative methods, share the values of social science, and see judges as using legal rules to justify their policy choices rather than determining them (Mather, 1994, p. 77).

[3] In employment discrimination law, disparate impact (known as indirect discrimination in the United Kingdom and European Union) occurs when employers use a sex neutral characteristic, such as a height or weight-lifting requirement or the requirement that one be a veteran. The requirement is formally neutral since some women are tall, some can lift heavy weights, and some are veterans, but fewer women than men can comply with any of these requirements. The burden then shifts to the employer to show that the requirement is necessary for the job. So in this case, fewer women than men may be known to the president (or senator), but is being known the best predictor of who will make a good judge?

[4] Carroll's data show Reagan-appointed women judges to be far less supportive of the women's movement even than other Republican women politicians, while Carter's appointees were well within the range of Democratic women politicians (1985).

[5] George Herbert Walker Bush was the 41st president of the United States from 1989 to 1993. George W. Bush was the 43rd president of the United States, taking office in 2001. To distinguish them, we tend to refer to them as Bush (41) and Bush (43).

[6] Cook drew attention to this issue early on. The existing evidence raises interesting points about sex and feminism. Justice Brennan refused to hire women clerks on the grounds that his secretary (later his wife after he was widowed) would not permit it. Justice O'Connor made it a priority, as did Justice Marshall. Justice Ginsburg, however, does not have a good record. Blackmun hired more women law clerks than all the sitting justices combined, and during his last ten years on the Court, a majority of his clerks were women (Greenhouse, 2005, p. 208).

[7] Erika Rackley's work on Hale (2006), like Linda Greenhouse's work on Blackmun (2005), shows how gender matters in individual cases.

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Wise Latinas, Strategic Minnesotans, and the Feminist Standpoint: The Backlash Against Women Judges

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THOMAS JEFFERSON SCHOOL OF LAW
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WISE LATINAS, STRATEGIC MINNESOTANS, AND THE FEMINIST STANDPOINT: THE BACKLASH AGAINST WOMEN JUDGES

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I. INTRODUCTION

The confirmation furor over then-Judge (now Justice) Sonia Sotomayor's suggestion that, in some cases, a wise Latina with rich life experience might make a better decision than a white man lacking similar experience, reveals many elements of the backlash against women judges. It reminds us why it matters that women and those with a feminist consciousness serve as judges (and senators). And it provides an opportunity to reexamine how life experience and

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emotional intelligence shape judgment. To understand the backlash against women judges, one must understand what it means to say that judging is gendered.[1] The United States Senate, the media, and the public hold men and women judges and judicial nominees to different standards and treat women differently from men, despite the fact that women judges do not, for the most part, decide cases differently from men.

Judges who are wise articulate a feminist consciousness grounded in experience, have a deep passion for equal justice under law, and shape legal decisions for good. The dominant conception of judging itself—emphasizing objectivity and neutrality, valuing reason and censuring empathy, and analogizing to umpiring baseball games—reveals a deeply gendered discourse. Exposing how judging is gendered leads to a more accurate understanding of what judging is and an understanding of why diversity improves it.

Until we better conceptualize judging, we have little chance of breaking free of the current impasse over judicial selection and the role of the courts more generally. To make this argument, I first describe the concept of backlash against women judges, and then I use examples drawn from Justice Sotomayor's confirmation hearings. I next analyze the "wise Latina woman" comment in closer detail and the *Hall v. Hall* decision of the Minnesota Court of Appeals that Judge Sotomayor used to illustrate her point. Finally, I offer some conclusions about the nature of difference and the importance of diversity and commitment to equal justice, and some contributions to the ongoing discussion of how we can better understand judging.

II. BACKLASH

The term "backlash" is most associated with Susan Faludi's bestseller arguing that the 1980s saw an organized backlash against feminism.[2] The term backlash emerged in the aftermath of the

1. *See* Hannah Brenner & Renee Newman Knake, *Gender and the Legal Profession's Pipeline to Power*, Symposium, *Symposium: Gender and the Legal Profession's Pipeline to Power*, 2012 MICH. ST. L. REV. 1419, 1424–26 (2012).

2. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST WOMEN 11 (1991). *Backlash* on first glance reads like a catalogue of sexist episodes, rather than a carefully analyzed pattern. For Faludi, the agents of backlash in the 1980s were the media who created a narrative, a frame, to convince women that they had achieved equality but were miserable as a result. Faludi demonstrated that women were not miserable and that inequality, not equality, caused women's suffering. Importantly,

passage of the 1964 Civil Rights Act.[3] It denotes "a sudden violent movement backwards, as the recoil of waves or the rebound of a falling tree."[4] Professors Jane Mansbridge and Shauna L. Shames define backlash as a politically conservative reaction to social or political change.[5] Social movement scholars often use the term "counter-mobilization" rather than backlash.[6] Opponents counter-mobilize because they see the tide of opinion and policy turning.[7]

The concept of backlash implicitly assumes that the reaction against women's progress is qualitatively different than simple sexism or what the legal community calls "gender bias." Women's progress unleashes a new force that is distinct from the forces that impeded their progress in the first place. Backlash has an important emotional dimension: women's progress can unleash rage.

Faludi denied that women had achieved full equality and argued, "the antifeminist backlash has been set off not by women's achievement of full equality but by the increased possibility that they might win it. It is a preemptive strike that stops women long before they reach the finish line." *Id.*

3. DANIELLE MCGUIRE, AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE (Vintage Books ed. 2011) (2010); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1362–63 (2006).

4. Felice A. Stern, *Backlash*, 40 AM. SPEECH 156 (1965).

5. Jane Mansbridge & Shauna L. Shames, *Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power*, 4 POL. & GENDER 623, 624 (2008); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 389 (2007); *see* SEYMOUR MARTIN LIPSET & EARL RAAB, THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790–1970 (1970).

6. *See* Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 261 (Doug McAdam, John D. McCarthy, & Mayer N. Zald eds., 1996); Post & Siegel, *supra* note 5; David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1631–32 (1996); Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, *in* SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 247 (Mayer N. Zald & John D. McCarthy eds., 1987); Clarence Y. H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107 (1982).

7. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions about Backlash*, 120 YALE L.J. 2028, 2078 n.175 (2011). In *Gender and Justice: Why Women in the Judiciary Really Matter*, I operationalize and apply the concept of backlash to the case of the removal from office of Rose Bird, former Chief Justice of the California Supreme Court. SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 149 (2013).

Mansbridge and Shames assert that the loss of capacity is experienced more intensely than the absence of capacity,[8] since those who hold positions come to view their status as the natural order.[9] Professor Kira Sanbonmatsu shows that as the number of women legislators increases, the opposition to them and their agenda increases as well.[10] Professor Janice D. Yoder, drawing on Professor Blalock and Reskin, labeled this phenomenon "an intrusiveness effect."[11] The number of women in non-traditional fields surges, threatening the majority. The majority responds with hostility[12] to what they fear is "feminization."[13] Professor Cynthia Fuchs Epstein described backlash as follows: "Like white cells surround offending matter, . . . [t]he new entrants may be sabotaged as the majority group, protecting its community, . . . musters its forces to control its culture and boundaries."[14] Such hostility is well documented for women in nontraditional fields: from firefighting to soldiering to academia.[15]

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8. Mansbridge & Shames, *supra* note 5.

9. JOSEPH GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 207 (2d ed. 1986).

10. Kira Sanbonmatsu, *Gender Backlash in American Politics?*, 4 POL. & GENDER 634 (2008). Bratton operationalizes backlash narrowly as support for a policy agenda or opposition to it and separates out whites or men simply letting blacks or women shoulder the burden for legislation, versus increased opposition to sponsored legislation as a result of legislative diversity. Kathleen A. Bratton, *The Effect of Legislative Diversity on Agenda-Setting: Evidence from Six State Legislatures*, 30 AM. POL. RES. 115 (2002). Kathlene, however, found resistance to women legislators in legislative debates and in frequent interruptions. Lyn Kathlene, *Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates*, 88 AM. POL. SCI. REV. 560 (1994). Haider-Markel found LGBT state legislators did introduce more pro-gay legislation, but their presence increased the likelihood that legislators would introduce and pass anti-gay legislation. Donald P. Haider-Markel, *Representation and Backlash: The Positive and Negative Influence of Descriptive Representation*, 32 LEGIS. STUD. Q. 107, 111–12 (2007).

11. Janice D. Yoder, *Rethinking Tokenism: Looking Beyond Numbers*, 5 GENDER & SOC. 178 (1991).

12. *Id.* at 184.

13. Margaret Thornton, *'Otherness' on the Bench: How Merit is Gendered*, 29 SYDNEY L. REV. 391, 411 (2007).

14. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 194 (1981).

15. CYNTHIA COCKBURN, IN THE WAY OF WOMEN: MEN'S RESISTANCE TO SEX EQUALITY IN ORGANIZATIONS (1991); Sally J. Kenney, *New Research on Gendered Political Institutions*, 49 POL. RES. Q. 445 (1996); Janice D. Yoder, *Context Matters: Understanding Tokenism Processes and Their Impact on Women's Work*, 26 PSYCHOL. WOMEN Q. 1 (2002).

In light of the research on backlash, many scholars, Sanbonmatsu[16] among them, have called into question the idea that as women break down barriers, women's changing roles become normalized. Professor Rosabeth Moss Kanter, for example, hypothesized that as more women entered the workplace, women would suffer less heightened attention and visibility and be less likely to be cast in gender-stereotyped roles.[17] She later acknowledged that resistance to women's increased presence could increase rather than decrease as women's numbers went up in the workplace.[18] Women tokens, that is, the lone woman in the group, do not threaten the male ethos of an occupation and therefore the masculinity of its occupants;[19] men co-workers see them as honorary men rather than typical women.

In research on why the progress for women academics has been so slow, Professor Constance Backhouse uses the concept of "the chilly climate" rather than backlash,[20] but the two concepts are similar. Professors Meredith Reid Sarkees and Nancy McGlen,[21] for example, enumerate key features of the chilly climate in academia: derisive comments, hostility of colleagues, denunciation of feminist research, and a pronouncement that women can "write their own tickets" while men have no chance.[22] These phenomena are pervasive

16. Sanbonmatsu, *supra* note 10.

17. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

18. *Id.*

19. *See* COCKBURN, *supra* note 15.

20. Constance Backhouse, *The Chilly Climate for Women Judges: Some Reflections on the Backlash from the Ewanchuk Case*, 15 CAN. J. WOMEN & L. 167, 167–68 (2003). The "chilly climate" is the term for a workplace atmosphere where women are not welcome and where they endure multiple acts of discrimination and devaluation as they go about their work. It is most often used to describe women in academia: as one title puts it, "outsiders in the sacred grove." NADYA AISENBERG & MONA HARRINGTON, WOMEN OF ACADEME: OUTSIDERS IN THE SACRED GROVE (1998).

21. Meredith Reid Sarkees & Nancy E. McGlen, *Misdirected Backlash: The Evolving Nature of Academia and the Status of Women in Political Science*, 32 POL. SCI. & POL. 100 (1999). Beth McMurtrie, *Political Science Is Rife With Gender Bias, Scholars Find*, CHRONICLE OF HIGHER EDUCATION (Aug. 30, 2013) http://chronicle.com/article/Political-Science-Is-Rife-With/141319/; Daniel Maliniak, Ryan M. Powers, & Barbara F. Walter, The Gender Citation Gap, presented at the American Political Science Association General Meeting, (2013).

22. MELISSA HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA 171 (2011). Melissa Harris-Perry analyzes the savage response to feminists on Duke's campus for suggesting there may be a campus culture of condoning rape whether or not its lacrosse players had raped anyone. *Id.*

in law, too. When more than forty-six percent of Attorney General Rob Hulls's appointments to the bench in Victoria, Australia, were women, one senior barrister opined that it was an advantage *not* to have testicles.[23] Thornton concludes that "[a]s the percentage of women appointed creeps toward [fifty] percent and approximates the proportion of women law graduates, complaints about the sacrifice of merit and the evil of affirmative action . . . become more vociferous."[24]

Backlash is not, as Faludi suggests, merely a story we tell about women's progress, but can also be a repertoire of conservative responses that include ideas and practices. To be sure, backlash engenders powerful stories or narratives. For the judiciary, those narratives include the idea that representativeness and diversity are the enemy of merit; that women would ascend to the bench as a matter of course if they were qualified; and that the appointment of women signals special interest politics. Backlash also consists of concrete practices, not simply narratives.

A. Backlash Against Women Judges

Discrimination against women in the judicial selection process takes many forms, one of which is brazen hostility. Some deny women the professional courtesy that nominees and judges routinely enjoy, independent of party, ideology, and ability. In short, women judges and nominees fail to enjoy many elements of positional power—behaviors extended to them because of the office they hold rather than because of respect or admiration for them as individuals.

Women may hold the position but may not be invited into the fraternity. Hunter calls this practice "holding women in contempt for being women,"[25] which includes openly attacking women judges in ways that would be unthinkable for men judges. Through patronizing remarks, forms of address that deny women's professional status, confusing women with each other, interrupting them, and by issuing formal challenges to women's objectivity, women's ability to serve is questioned, challenged, and undermined. Many federal and state

23. Thornton, *supra* note 13, at 398.

24. *Id.* at 399.

25. Rosemary Hunter, *The High Price of Success: The Backlash Against Women Judges in Australia*, *in* CALLING FOR CHANGE: WOMEN, LAW, AND THE LEGAL PROFESSION 282, 281–83 (Elizabeth Sheehy & Sheila McIntyre eds., 2006).

gender bias taskforce reports and empirical studies confirm women judges lack positional power.[26]

Perhaps the best example of brazen hostility was Justice Alito rolling his eyes as Justice Sotomayor read an opinion from the bench.[27] Justice Alito also feels comfortable publicly displaying his contempt for his older colleague, Justice Ginsburg, for Justice Kagan, and even for the President, an African American, during the State of the Union Address. Judges have often disliked each other. They have disagreed profoundly and harbored low assessment of each other's intellectual abilities and integrity. But the unwritten rule is such feelings and assessments are not visible in public, and especially not visible during ceremonial occasions.

If women judges point to gender discrimination, they are savaged. When Madam Justice Bertha Wilson of the Supreme Court of Canada conducted a survey of women federal and provincial judges in Canada, she found that forty-four percent had experienced discrimination on the bench. Male judges were outraged and demanded that Justice Wilson disclose the names of the judges who had reported discrimination, characterizing Justice Wilson as a "man-eating monster."[28] Justice Wilson found the fallout from the survey enormously painful and "an unequivocal and deeply personal experience of gender discrimination."[29] Hunter concludes that the "disciplining of and resistance to women" has the consequence of deterring women from advocating for institutional change and from aspiring to judicial office.[30]

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26. Judith Resnik, *Asking about Gender in Courts*, 21 SIGNS 952, 952–90 (1996).

27. Katie McDonough, *Justice Alito Mocks Female Justices on the Bench*, SALON.COM (June 25, 2013), http://www.salon.com/2013/06/25/justice_alito_mocks_female_justices_while_on_the_bench/; Dana Milbank, *Justice Samuel Alito's Middle-School Antics*, WASH. POST (June 24, 2013), http://articles.washingtonpost.com/2013-06-24/opinions/40162827_1_justices-elena-kagan-high-court.

28. Backhouse, *supra* note 20, at 179–80.

29. *Id.* at 180 (quoting ELLEN ANDERSON, JUDGING BERTHA WILSON: LAW AS LARGE AS LIFE 349 (2001)).

30. Hunter, *supra* note 25, at 296. The response to Justice Wilson's survey is echoed in the move of a group of conservative senators to shut down the gender bias taskforce movement. In 1995, five senators asked the General Accounting Office to investigate the federal funds spent on such taskforces and recommended that Congress not allow any further spending. Although some of these taskforce reports, like the one from the Eighth Circuit, hardly touched on the lack of gender diversity in the judiciary, others called for opening up the judicial selection process and included evidence of sexist treatment toward women judges as well as toward women lawyers

Another indication of backlash is the presumption of incompetence—a gendered double standard.[31] Bosses, co-workers, students, and clients presume men to be competent in their positions until experience proves otherwise. Women are assumed to be imposters, poorly qualified for the positions they hold, or the beneficiaries of unfair advantages (such as affirmative action or "sleeping their way to the top"). Hunter gave examples from Australia[32] that were so striking that the state of Victoria's Attorney General confronted the backlash directly in a speech:

> [W]omen who accept appointment continue to be measured against some sort of paternalistic yardstick, required to jump higher and faster than any male candidate lest they be labeled an undeserving token. It is at this point, Your Honour, that I cannot hide my disappointment in some quarters of the profession who persist in undermining women in senior office, referring to them in patronizing terms or ranking them in some sort of unspoken contest in which, I suspect, they themselves would not fare well.[33]

A recent study of judicial evaluations showed that women judges and minority men judges were consistently rated lower than white men, regardless of their educational credentials or experience on the bench.[34]

Backlash may also include actions by lawyers and litigants that challenge women judges' positional authority. Perhaps the most

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and plaintiffs. The thirteen-year run from 1982 to when opponents shut it down in 1995 was wildly successful in documenting the absence of judicial impartiality in certain areas of case law, most notably domestic violence, but also in the treatment of women (and minority men in the case of the race bias studies). Anticipating the response to Justice Sotomayor, in 1995, opponents effectively framed those pointing at gender bias as lacking impartiality and judicial temperament and engaging in sex discrimination. The shutdown of the gender bias taskforce movement was part of a backlash and a reaction to its success. Those who wanted to challenge gender bias in the courts were on notice that they would not only face opposition, but stiff counterattacks.

31. *See generally* CARMEN GONZALEZ, PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs et al. eds., 2012); MARGARET THORNTON, DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION 208 (1996).

32. Hunter, *supra* note 25, at 282.

33. *Id.* at 283 (quoting Rob Hulls, *Welcome to Chief Justice Warren*, 78 AUSTRALIAN L.J. 79 (2004)).

34. Rebecca D. Gill, Sylvia R. Lazos, & Mallory M. Waters, *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 LAW & SOC'Y. REV 731 (2011).

striking challenge to women judges' authority, and the failure to grant them positional authority, is through motions to recuse; that is, asking judges to remove themselves from the case for bias or the perception of bias and allowing another judge to serve.[35] Historically, men excluded women from the practice of law and service on juries because they were presumed lacking in reason and overly emotional. Women thus have a higher burden than men to show that they have the acumen and legal training to perform such public service. But the association of men with reason and women with emotion makes this demonstration difficult. Women have the dual challenge of showing not only that they are rational, but that they are not excessively emotional. They have to show that they can be objective and disassociate their social location from their judgment. The social location of white, upper-middle class, and largely Protestant men, of course, is never called into question or associated with potential bias. Only those marked as "other" are viewed as imbued with a social location that renders them unable to be objective or open-minded. Non-dominant groups must be excluded, in part, because their entry into the field brings up the question of all judges' social locations in ways that threaten the narrative of impartial judgment.

When reading commentary on confirmation hearings of women, one cannot help but wonder whether the contest is for "Miss America," "Miss Congeniality," or to be one of the nine most important jurists in the country. The media routinely reports on women candidates for elective office by discussing their "husbands, hemlines, and hair," focusing on their gendered attributes of femininity and fulfillment of gender roles rather than policy positions and campaign success.[36] And professional women face a double bind in that they must either present themselves as attractive and feminine,

35. Unfortunately, courts do not keep statistics on motions to recuse so the evidence is anecdotal, but many women judges report challenges to their impartiality. *See* KENNEY, *supra* note 7. *See* FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 173–96 (2009).

36. Farganis and Wedeking find that senators have asked more probing questions of judicial nominees than in the past. *See* Dion Farganis & Justice Wedeking, *No Hints, No Forecasts, No Previews: An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan*, 45 LAW & SOC'Y REV. 525 (2011). Thornton analyzes corporealizing the body of the "other" as a significant mechanism for denying rationality, autonomy, and authority to women. Margaret Thornton, *Authority and Corporeality: The Conundrum for Women in Law*, 6 FEMINIST LEGAL STUD. 147 (1998).

making them appear likeable but less competent, or downplay their femininity, making them appear competent but less likeable.[37] Gender and attractiveness implicate people's willingness to credit women with leadership ability and grant them positional power. In short, gender is a lens through which other information about judges and candidates is filtered and weighed.[38]

B. The Backlash Against Then-Judge Sotomayor

One example of backlash is the profoundly different way the United States Senate treated Sonia Sotomayor when she sat before them for the federal district court or the court of appeals compared to when she was a nominee for the U.S. Supreme Court. The U.S. Senate had confirmed Sonia Sotomayor for district court and then again for the court of appeals when President Obama nominated her to the U.S. Supreme Court.[39] The American Bar Association once again gave her its highest possible rating.[40] Nonetheless, President

37. Lee Sigelman, Carol K. Sigelman, & Christopher A. Fowler, *A Bird of a Different Feather? An Experimental Investigation of Physical Attractiveness and the Electability of Female Candidates*, 50 SOC. PSY. Q. 32 (1987).

38. Likewise, studies of orchestra tryouts and evaluations of identical resumes with the gender of names switched testify to the fact that men and women who express no conscious hostility to women or belief in their inferiority routinely devalue women's attributes, even if the women's credentials are superior or identical to men's. *See* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000). Recent studies of women producers choosing to produce few women playwrights and young women's lack of enthusiasm for Hillary Clinton's campaign suggest that the problem of devaluing women is not restricted to a few sexist men but is ubiquitous. *See* Emily Glassberg Sands, Opening the Curtain on Playwright Gender: An Integrated Economic Analysis of Discrimination in American Theater (Apr. 15, 2009) (unpublished Master's thesis, Princeton University) 67–73, *available at* http://graphics8.nytimes.com/packages/pdf/theater/Openingthecurtain.pdf; Sheri Wilner & Julia Jordan, *Discrimination and the Female Playwright*, 21 GIA READER (2010), http://www.giarts.org/article/discrimination-and-female-playwright; ANNE E. KORNBLUT, NOTES FROM THE CRACKED CEILING: HILLARY CLINTON, SARAH PALIN, AND WHAT IT WILL TAKE FOR A WOMAN TO WIN (2009).

39. Senator Amy Klobuchar asked Judge Sotomayor directly in her confirmation hearings whether either Senate Judiciary Committee that previously confirmed her had asked her about her remarks, *Confirmation Hearing on the Nomination of the Honorable Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 43–46 (2009) (statement of Sen. Klobuchar).

40. AMERICAN BAR ASS'N, RATINGS OF ARTICLE III JUDICIAL NOMINEES, 111TH CONGRESS (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/scfedjud/ratings/ratings111.authcheckdam.pdf.

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Obama's identification of empathy as a quality he sought in judges had triggered a "national media freakout."[41]

After twice confirming her to federal judicial appointments, some Republican Senators voted against then-Judge Sotomayor ostensibly for a myriad of reasons. She lacked judicial temperament because she was perceived as too aggressive in oral argument[42] and was allegedly mean to staff members.[43] She did not believe in the rule of law, as she had stated that appellate judges sometimes made policy. She was not impartial and objective, believing her life's experiences would enhance her judgment. And lastly, she was racist and sexist, having commented that she hoped wise Latinas would make better judgments.

Some argued that the senators who opposed her were actually voting against her for ideological reasons, since she was clearly qualified. Others objected to the way she was "lectured, patronized, and treated as a potential dissident, likely to break free of the tethers of stare decisis and fair play as soon as she was handed her Supreme Court robes."[44]

Justice Sonia Sotomayor observed that she was subjected to a higher standard of scrutiny than men nominees to the U.S. Supreme Court. For example, she was interrogated on personal matters, such as her divorce. She was even asked to name everyone she had dated.[45] She was trashed as "too fat."[46] The double standard of this

41. Dalia Lithwick, *Review: 'My Beloved World' by Sonia Sotomayor*, CHI. SUN-TIMES (Jan. 24, 2013), http://www.suntimes.com/entertainment/books/17562441-421/review-my-beloved-world-by-sonia-sotomayor.html.

42. *See* Carol Jenkins, *Media Justice for Sotomayor*, WOMEN'S MEDIA CENTER (July 10, 2009), http://www.womensmediacenter.com/blog/entry/media-justice-for-sotomayor.

43. *See* Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC (May 4, 2009), http://www.newrepublic.com/article/politics/the-case-against-sotomayor; but also see this trenchant critique: Jamison Foster, *Where Does Sonia Sotomayor Go to Get Her Reputation Back?*, MEDIA MATTERS (May 8, 2009), http://mediamatters.org/research/2009/05/08/where-does-sonia-sotomayor-go-to-get-her-reputa/149989.

44. Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263 (2010).

45. Stephanie Francis Ward, *Female Judicial Candidates Are Held to Different Standards, Sotomayor Tells Students*, A.B.A.J (Mar. 8, 2011), http://www.abajournal.com/news/article/female_judicial_candidates_are_held_to_different_standards_sotomayor_tells_/.

46. "Fat," you say? Compared to Justices Thomas and Scalia? Yes, it is true. Megan Carpentier, *Women Too Stupid to Stay Thin Are Not Smart Enough for*

attention to "hemlines, hair" and, in her case, ex-husbands, is clear when we recall the Republicans' "Pin Point strategy" of focusing the confirmation hearings on Clarence Thomas's background and character rather than his ideology and lack of appellate judicial experience.[47] Thomas, unlike Sotomayor, was not presumed incompetent, although his academic credentials and legal experience were less impressive than hers. Scrutiny into his sexuality, on the other hand, was "a high-tech lynching."[48] No one seemed to worry about his weight.

Thomas and Sotomayor had drawn very different political lessons from their similar life experiences: growing up poor, attending parochial schools, lacking parental attention, depending on a grandparent, and attending an Ivy League University as part of an affirmative action policy ("admitted through a special door,"[49] as Sotomayor described it). While Justice Thomas found himself humiliated by the taint of racial preference, Justice Sotomayor concluded affirmative action rightly created the "conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."[50]

Sotomayor learned to "build bridges instead of walls"[51] while Thomas emerged in "a defensive crouch,"[52] declaring himself to be "an educated fool."[53] Sotomayor also clearly recognized that the

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Supreme Court, JEZEBEL (May 5, 2009), http://jezebel.com/5241128/women-too; and Paul Campos, *Fat Judges Need Not Apply*, THE DAILY BEAST (May 4, 2009), http://www.thedailybeast.com/articles/2009/05/04/fat-judges-need-not-apply.html.

47. TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION (Hyperion 1992); TONI MORRISON, RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 172–96 (1992).

48. *Confirmation Hearing on the Nomination of the Honorable Clarence Thomas, to be an Associate Justice of the Supreme Court of the United States*, 102d Cong. 157 (1991).

49. SONIA SOTOMAYOR, MY BELOVED WORLD 191 (2013).

50. *Id.*; Jason Farago, *Of the People: Sonia Sotomayor's Amazing Rise*, NPR BOOKS (Jan. 14, 2013), http://www.npr.org/2013/01/14/169157494/of-the-people-sonia-sotomayor-s-amazing-rise.

51. SOTOMAYOR, *supra* note 49, at 164.

52. Emily Bazelon, *The Making of a Justice: 'My Beloved World' by Sonia Sotomayor*, N.Y. TIMES, Jan. 20, 2013, at BR11, *available at* http://www.nytimes.com/2013/01/20/books/review/my-beloved-world-by-sonia-sotomayor.html.

53. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 85 (2007).

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summa cum laude degree from Princeton, the prize for the best senior thesis, a position on the *Yale Law Review*, and employment in the New York district attorney's office were not "pats on the back to encourage mediocre students," but earned by her ability and hard work.[54] This comparison of the Court's two minority members should in and of itself dispel the notion that judges from underrepresented groups necessarily think alike.

Just as supporters of Clarence Thomas sought to steer the focus from ideology to background, Republican senators found Justice Alito's description of his background similarly compelling, concluding that his life experiences humanized him, rather than rendered him biased[55] and likely to unreflectively side with his kind. Instead, they argued, his past revealed his feelings for the underdog, a capacity rarely glimpsed in his legal opinions. Looking into Sotomayor's background, however, strangely led to the opposite conclusion that she lacked objectivity.

C. Sotomayor's Response

We learn more about Justice Sotomayor's background and how she believed it shaped her from her "searching and emotionally intimate memoir"[56] of her life up to the time of her first appointment to the federal bench. *My Beloved World* (she draws the title from Puerto Rican poetry[57]) is at times "disarmingly personal," confessing nicotine addiction, the death of her cousin from AIDS, her own responsibility for the dissolution of her marriage, her choice to remain childless, and a penchant for wearing sensible underwear that her mother bought for her.[58] Justice Sotomayor explained that she wrote

54. SOTOMAYOR, *supra* note 49, at 191; Farago, *supra* note 50.

55. Abrams, *supra* note 44, at 273; Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE NOVO (2009). Senator Amy Klobuchar, in the Senate Judiciary hearings, talked about how the modest backgrounds of Justices O'Connor, Marshall, Blackmun, and Ginsburg enhanced their judging. *Confirmation Hearing on the Nomination of the Honorable Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 43–46 (2009) (statement of Sen. Klobuchar).

56. Michiko Kakutani, *The Bronx, the Bench and the Life in Between*, N.Y. TIMES, Jan. 22, 2013, at C1.

57. "Forgive the exile / This sweet frenzy: / I return to my beloved world, / In love with the land where I was born." From *To Puerto Rico (I Return)*, by José Gautier Benitez.; *see* SOTOMAYOR, *supra* note 49, at 313–15.

58. SOTOMAYOR, *supra* note 49, at 92, 221, 232, 283.

the book to inspire others from disadvantaged backgrounds to imagine possibilities.[59] The book, however, functions as a rejoinder to critics. It makes a powerful case why someone with Justice Sotomayor's background, consciousness, and commitment to equal justice under law should serve as a judge. The book is also "a powerful brief in defense of empathy, her long-awaited closing argument in the trial of Mind v. Heart."[60]

Sotomayor prudently distanced herself from the "wise Latina" remarks in her Senate confirmation hearings—hearings one commentator referred to as scripted and stylized as a Kabuki dance, more theater than debate over judging and the nature of the Constitution.[61] Others have lamented the missed opportunity for a wider public debate on judging, rationality, emotions, background, and identity.[62] It seems unlikely that any nominee in living memory of Robert Bork will ever again attempt to have a frank and open debate with the Senate Judiciary Committee about the role of the judiciary.

Justice Ruth Bader Ginsburg—who in 1993 defended the constitutional right to privacy, asserted the need for a strict scrutiny analysis for sex-based classifications under the equal protection clause, and revealed that she found the death penalty to be cruel and unusual punishment during her hearings—observed that the current

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59. This aspect is reminiscent of Chief Justice Rehnquist's account of his time as a law clerk. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 3–20 (Vintage Books ed. 2002) (1987).

60. Lithwick, *supra* note 41. The book does not argue the points directly: "While Sotomayor has written an honest appraisal of her personal life, she withholds anything remotely as politically controversial as her infamous 'wise Latina' comment." Greg Walklin, *Book Review: 'My Beloved World' by Sonia Sotomayor*, LINCOLN JOURNAL STAR (May 26, 2013), http://journalstar.com/entertainment/books/book-review-my-beloved-world-by-sonia-sotomayor/article_b02da824-aa6c-5da9-a380-bd0e2fe90fba.html.

61. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 2 (2009); Richard Brust, *No More Kabuki Confirmations*, A.B.A.J. (Oct. 1, 2009), http://www.abajournal.com/magazine/article/no_more_kabuki_confirmations/. For a comprehensive analysis, *see Supreme Court Nominee Candor*, *supra* note 36, at 525–60.

62. Abrams, *supra* note 44; Carol J. Greenhouse, *Judgment and the Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings*, 8 LAW, CULTURE AND THE HUMAN 409 (Nov. 25, 2010); Nancy Maveety, *Difference in Judicial Discourse*, 6 POL. & GENDER 452, 453 (2010).

Senate would never have confirmed her.[63] Other judges, such as former federal district judge Nancy Gertner, lamented that presidents would no longer consider nominating lawyers who devoted their careers to public interest litigation.[64]

The publication of *My Beloved World* contributes to a discussion of why it is important to have a diverse and representative bench of judges with a demonstrable commitment to equal justice under law. Anthropologist Carol Greenhouse has analyzed the arguments and discourse of the Senate confirmation hearings.[65] Legal scholars Hannah Brenner and Renee Knake have analyzed how the media treats men and women Supreme Court nominees differently.[66] Legal scholar Kathryn Abrams has dissected the Sotomayor confirmation hearings to reveal how concepts of rationality, impartiality, objectivity, and identity affect our understanding of judging.[67] And legal scholar Susan Bandes has deconstructed the concept of empathetic judging. Before returning the backlash against nominee Sotomayor, it is worth exploring why it matters that women and minority men—those with backgrounds as prosecutors, public defenders, and public interest lawyers, and those who have a demonstrated commitment to equal justice under the law—serve as judges.

III. DO WOMEN JUDGE DIFFERENTLY THAN MEN?

Since women began serving in sufficient numbers, social scientists have employed quantitative analysis to discover whether women judges decide cases differently than men, and non-white judges differently than white judges. Some evidence exists that

63. James Joyner, *Ruth Bader Ginsburg: I Couldn't Get Confirmed Today*, OUTSIDE THE BELTWAY (Aug. 31, 2011), http://www.outsidethebeltway.com/ruth-bader-ginsburg-i-couldnt-get-confirmed-today/.

64. NANCY GERTNER, IN DEFENSE OF WOMEN: MEMOIRS OF AN UNREPENTANT ADVOCATE (2011).

65. Greenhouse, *supra* note 62.

66. Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession's Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees*, 84 TEMP. L. REV. 325, 325 (2012).

67. Abrams describes the query of the role of emotions in judgment as "the place where I live." I, too, share an interest in understanding the role of gender and emotions in social movements. Sally J. Kenney, *Mobilizing Emotions to Elect Women: The Symbolic Meaning of Minnesota's First Woman Supreme Court Justice*, 15 MOBILIZATION: AN INT'L J. 135, 135–58 (2010).

women judges are more likely to side with plaintiffs in cases of sex discrimination in employment, and they are likely to persuade their colleagues on appellate panels to join them.[68] Other evidence suggests women might be more likely to grant asylum in immigration cases (although the fact that women come to the immigration bench through social work while men come through law enforcement may explain much of that difference).[69] The fact that the evidence provides little empirical support for the proposition that women as a group decide cases differently than men[70] has not stopped social scientists from continuing to search for evidence that sex as a variable explains outcomes, nor commentators from boldly asserting that such a relationship exists. If some social scientists continue to assert the existence of a sex-based difference regardless of the evidence, we can hardly blame commentators for repeating the observation. The core belief that women will change judging, either by their mere presence or once they achieve "critical mass," is not simply the result of misinformation.

The first political scientist to study women judges, Beverly Blair Cook, quickly abandoned her expectation that women would necessarily make more feminist rulings once she carefully considered Justice O'Connor's opinions and votes.[71] She speculated, as many do who find little empirical support for sex differences, whether a difference would emerge once women served on the bench in greater numbers.[72] The incontrovertible fact that the Fifth Circuit Court of Appeals is one of the most inhospitable to feminist claims while also being the most gender diverse, as well as evidence from state supreme courts,[73] should give pause. Yet nothing seems to slow the

68. Christina Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. OF POL. SCI. 389 (2010).

69. Carrie Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender*, *in* REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 202, 217 (Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag eds., 2009).

70. *See* KENNEY, *supra* note 7.

71. Beverly Blair Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 238–75 (Charles M. Lamb & Stephen C. Halpern eds., SUNY Press. 1991).

72. See the articles in the "Critical Perspectives on Critical Mass" section of POL. & GENDER (2006), especially Drude Dahlerup, *The Story of the Theory of Critical Mass*, 2 POL. & GENDER 511 (2006).

73. Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALBANY L. REV. 1205, 1205–36 (2000); Martin, Elaine and Barry

reassertion of the expectation of difference. In *Gender and Justice: Why Women in the Judiciary Really Matter*, I debunk these claims and make the nonessentialist case for a representative bench that does not rest on women's difference. Most recently, columnist Rekha Basu has asserted this difference in a column for the *Des Moines Register* upon Jane Kelly's ascension to the Eighth Circuit Court of Appeals.[74] Other columnists have commented when women have taken the same position, even if men appointed by Democrats joined them. Sex as a variable seems to always crowd out competing explanations. Former *New York Times* Supreme Court reporter Linda Greenhouse often notes when the women on the Court vote together, but she fails to observe simultaneously that they are often joined by the other Justices appointed by Democratic presidents.[75]

Women judges themselves have spoken on both sides of the issue.[76] Ruth Bader Ginsburg found such claims that women would decide cases differently from men condescending and sexist.[77] More recently, she repeatedly invoked the case of the strip search of a thirteen-year-old girl as a justification for why we need women on the Supreme Court.[78] Minnesota Supreme Court Justice Jeanne Coyne "coyned" the phrase "a wise old woman and a wise old man reach the same conclusions."[79] Justice O'Connor often quotes Coyne's remark in her speeches.[80] Judge Miriam Goldman Cedarbaum sums up this perspective:

Pyle, *Gender and Racial Diversification of State Supreme Courts*, 24 WOMEN & POL. 35 (2002).

74. *See* Rekha Basu, *Courts Need Female Justices' Perspective*, DES MOINES REGISTER (June 25, 2013), http://www.desmoinesregister.com/article/20130625/BASU/306250086/1001/NEWS/Basu-Courts-need-female-justices-perspectives.

75. Linda Greenhouse, *Women's Work*, NEW YORK TIMES OPINIONATOR (Apr. 18, 2012), http://opinionator.blogs.nytimes.com/2012/04/18/womens-work-2/?_r=0.

76. KENNEY, *supra* note 7.

77. Ruth Bader Ginsburg, *Some Thoughts on the 1980s Debate Over Special Versus Equal Treatment for Women*, 4 LAW AND INEQ. 143 (1986).

78. Safford Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

79. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women* 32 S.W. U. L. REV. 189 (2003); David Margolick, *Women's Milestone Majority on the Minnesota Supreme Court*, N.Y. TIMES, Feb. 22, 1991, at B16.

80. Sandra Day O'Connor, *Foreword*, *in* WOMEN & LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE, 175–96 (Barbara Kellerman & Deborah L. Rhode, eds., 2007); Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, PUB. L. 489 (2001); Herma Hill Kay & Geraldine Sparrow, *Workshop on Judging: Does Gender Make a Difference?*, 16 WIS. WOMEN'S L. J. 1 (2001); Claire L'Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle*

> Many women of my generation believed that separateness undermined equality, and we sought integration. I have never referred to myself, for example, as a woman lawyer or a woman judge because I have always believed that those were not categories. That is, people are undoubtedly men and women, but lawyers and judges do not have genders. This is a viewpoint that is now controversial, and is under attack by some feminist theorists who propound the idea that women think differently from men, and that there are gender-based intellectual differences that should be recognized in the work place. Some of these voices are uncomfortably reminiscent of descriptions of the alleged "differences" between men and women that were used in times gone by to disqualify women from professions and preclude them from higher education.[81]

The first woman justice on the Minnesota Supreme Court, Rosalie Wahl, like Justice Ginsburg and Judge Cedarbaum, did not believe sex explained much variation, with one exception. She believed her men colleagues to be incapable of understanding the situation of what then was called "a displaced homemaker."[82] To recognize that women in the aggregate do not decide cases differently than men in the aggregate, and to recognize that not all women see discrimination and some men do, is not to say that certain cases and historical moments do not generate gender chasms and impasses. Many women experienced that divide during the Anita Hill hearings.[83] Justice Ginsburg's example of the thirteen-year-old girl is

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for Equality, 16 WIS. WOMEN'S L. J. 15 (2001); Kathryn Werdegar, *Why a Woman on the Bench?*, 16 WIS. WOMEN'S L.J. 31 (2001); Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507–22 (1990); Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489–503 (1984); Nina Totenberg, *How Women Changed the High Court . . . and Didn't*, NPR SPECIAL SERIES (June 24, 2010), http://www.npr.org/templates/story/story.php?storyId=128079684; Bradley Blackburn, *Justices Ruth Bader Ginsburg and Sandra Day O'Connor on Life and the Supreme Court*, ABC WORLD NEWS (Oct. 26, 2010), http://abcnews.go.com/WN/diane-sawyer-interviews-maria-shriver-sandra-day-oconnor/story?id=11977195.

81. Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B. U. L. REV. 39, 43 (1993).

82. Harriet Lansing, *Rosalie E. Wahl and the Jurisprudence of Inclusivity*, 21 W.M. MITCHELL L. REV. 11 (1995). Many women married, invested their energies in the domestic sphere, caring for home and children, rather than focusing on careers. When they divorced after more than twenty years of marriage, they were not equipped to earn a living. KENNEY, *supra* note 7, at 44.

83. *See* Anita Hill, *What Difference Will Women Judges Make? Looking Once More at the "Woman Question"*, *in* WOMEN & LEADERSHIP: THE STATE OF PLAY AND

another. Justice Wahl identified displaced homemakers. Judge Navanethem Pillay's questioning on the International Criminal Tribunal for Rwanda of Jean-Paul Akayesu's troops' sexual violence as he oversaw the killing of more than 2,000 Tutsis led to prosecutors including charges of mass rape as genocide for the first time.[84] I make the argument in *Gender and Justice* that to recognize the empirical fact that women as a group do not decide cases differently than men as a group is not to deny that judges, particularly women judges with a feminist consciousness, can play an important role in bringing new evidence, arguments, and framings to judicial discourse. Justice Sotomayor, in her wise Latina speech, seemed to find another case where the presence of a wise woman was pivotal in the case of *Hall v. Hall*. The nuances of my argument seem to be unintelligible: either women are essentially different or they make no difference. No room for a middle ground seems to exist.

Reflective legal scholars have also wrestled with this question for some time. Legal scholar Theresa Beiner openly shares her angst as she truly expects women on the bench to change outcomes while recognizing the evidence does not support that conclusion.[85] The expectation that feminist judging is different motivates legal scholar Rosemary Hunter's instigation of the Feminist Judgments Project, now underway in Canada, Ireland, and the United Kingdom.[86] Political scientist Karen O'Connor searched for a common gender consciousness shared by Justices O'Connor and Ginsburg (regarding Justice O'Connor's record more favorably than did Cook). She searched for the impact of women on the bench in their influence on others, rather than looking for the effects of difference in opposite votes in cases.[87] While the evidence showed that Justice O'Connor's

STRATEGIES FOR CHANGE 175–96 (Barbara Kellerman & Deborah L. Rhode, eds., 2007).

84. *When Rape Becomes Genocide*, N.Y. TIMES (Sept. 5, 1998), http://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html; Louise Chappell, Gender & Judging in the First Case at the International Criminal Court: Powerlessness or Precedence for Future Persuasion?, presented at the American Political Science Association Conference, Chicago (Aug. 28–Sept. 1, 2013).

85. Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?* 6 MICH. J. GENDER & L. 113, 147–51 (1999).

86. *See* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn, & Erika Rackley, eds., 2010).

87. Karen O'Connor & Alixandra B. Yanus, *Judging Alone: Reflections on the Importance of Women on the Court*, 6 POL. & GENDER 441 (2010). *See also*

presence on the bench moved her colleagues to more women-friendly outcomes, Justice Ginsburg's presence showed no similar discernible effect. Other scholars have found little evidence of women's difference in hiring more women law clerks, or in their speeches as state chief justices.[88]

Sex as a variable explains little difference in judicial outcomes. Women, as a group, do not decide cases differently than men as a group. We all know that not all women judges are feminist and not all minority men are progressive on civil rights. We do have evidence that gender and feminist consciousness matter. Professor Elaine Martin demonstrated that sometimes women judges diverged from men in hypothetical cases and other times feminists from non-feminists, depending on the issue.[89] Sherrilyn Ifill, President of the NAACP Legal Defense and Education Fund, demonstrated that African Americans as a group are more likely than whites to perceive the racial injustice in shooting a teenager in a suburban neighborhood or police stops for "driving while black."[90] While the evidence that women as a group see the world differently than men is weaker than the evidence for the claim that African Americans see the world differently from whites, we do know that women lawyers, for example, are more likely to perceive gender bias in the courtroom than men. Women are more likely to see gender bias than men, but some men see it and some women do not.

Kenney's analysis of how his daughter's divorce may have influenced Chief Justice Rehnquist in *Nevada v. Hibbs*: Sally J. Kenney, *The Constitutional Status of the* Family and Medical Leave Act (Oct. 1, 2004), *available at* http://tulane.edu/newcom b/upload/family_medical_leave_act.pdf. To understand hofw Justice Blackmun came to feminism through reproductive rights, influenced perhaps by his daughter's unplanned pregnancy, *see* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005).

88. Cynthia L. Cooper, *Women Supreme Court Clerks Striving for 'Commonplace'*, 1 PERSP.: THE Q. MAG. ABA COMM'N ON WOMEN PROF. 17, 18–19, 22 (2008); Robert C. Turner & Beau Breslin, The Impact of Female State Chief Judges on the Administration of State Judiciaries, presented at the American Political Science Association annual meeting, Philadelphia (Aug. 28–31, 2003).

89. Elaine Martin, *Differences in Men and Women Judges: Perspectives on Gender*, 17 J. POL. SCI. 74, 74–85 (1989).

90. Sherrilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH & LEE L. REV. 405 (2000).

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Sociologist Patricia Yancey Martin applies feminist standpoint theory to make sense of this fact.[91] Feminist standpoint theory rests on the fact that men and women have different life experiences that shape how they see the world. Women are more likely to recognize gender discrimination because it disadvantages them, while men have an interest in not seeing it because they mostly benefit from it. Feminist standpoint theory emerged from Marxist theory.[92] The idea was that workers were more likely than the bourgeoisie to see the unfairness in the division of wealth and labor while recognizing that class consciousness did not flow directly from one's experience. One's consciousness was a product of struggle and reflection, not a natural and inevitable result of one's experience. Postmodern feminists seek to disrupt the idea that a necessary or even close relationship between experience and consciousness exists. Other feminists argue one cannot have true feminist consciousness without having the lived experience of a woman.[93] Still others dispute that "women" as a category is coherent, given the wide divergences between the experiences and life chances of women depending on race, class, sexuality, ability, age, and nationality.[94]

Erika Rackley makes an argument from difference while eschewing essentialism.[95] She argues that the conceptual template of a judge—the default judge who is a white man, rational, objective, and fair—distorts our understanding of what judging is. Women, especially when they are feminist or Latinas, can be disparaged as deviating from that norm, generating a backlash, only by leaving intact the assumption that men are simple umpires, that men's social locations do not affect their judgment, that men are always objective and rational, and that the exclusion of women and minority men from the judiciary has no costs. She uses the fairy tale of the little mermaid

91. *See* Patricia Yancey Martin, John R. Reynolds, & Shelley Keith, *Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665 (2002).

92. *See* Nancy C. M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, *in* DISCOVERING REALITY 283 (Sandra Harding & Merrill B. Hintikka eds., 1983); POLITICS AND FEMINIST STANDPOINT THEORIES (Sally J. Kenney & Helen Kinsella eds., 1998).

93. FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn, & Erika Rackley, eds., 2010).

94. *See generally* CAROL SMART, FEMINISM AND THE POWER OF LAW (1989).

95. ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY (2013).

to illustrate her point. Like the little mermaid, women judges must conform to the default judge. Like the little mermaid, they give up their voice. Only by killing the prince—the false standard of judgment—can they survive.

IV. ALL ARE SUSCEPTIBLE TO GENDER BIAS

More recent research from social psychology highlights how implicit bias shapes everyone in a culture because it does not operate at the conscious level, but by the fundamentals of human cognition and categorization.[96] Women devalue themselves and other women. Whether one labels this phenomenon "horizontal oppression,"[97] sees it as flowing from psychic damage,[98] constructs it as a result of tokenism,[99] or recognizes it as a cultural trap where only those members willing to parrot the dominant group's devaluation of others and denounce them have a media platform,[100] having the experience of oppression is no guarantee of group consciousness or solidarity.

The power of implicit bias was driven home painfully to me after reading *My Beloved World*. I had read and been outraged by Jeffrey Rosen's shoddy and misogynistic trashing of Justice Sotomayor in the *New Republic*.[101] I had, however, unknowingly concluded that she was not that likeable. In her memoir, Justice Sotomayor describes her dismay when a colleague in her new law firm described her as "one tough bitch" after overhearing her lawyering on the phone, exhibiting behaviors that she had learned and were normative for criminal prosecutors.[102] I knew that experimental evidence shows repeatedly that subjects see women leaders as

96. BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM, (Eugene Borgida & Susan T. Fiske, eds., 2008); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STANFORD L. REV. 1161–1248 (1995).

97. SUZANNE PHARR, *The Common Elements of Oppression*, *in* HOMOPHOBIA: A WEAPON OF SEXISM 53–64 (1988).

98. Judith Taylor, *Rich Sensitivities: An Analysis of Conflict Among Women in Feminist Memoir*, 46 CAN. REV. SOC. 123, 123–41 (2009); Judith Taylor, *Imperfect Intimacies: The Problem of Women's Sociality in Contemporary North American Feminist Memoir*, 22 GENDER & SOC., 705, 705–27 (2008).

99. KANTER, *supra* note 17.

100. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 114–16, 118 (1992).

101. Rosen, *supra* note 43.

102. SOTOMAYOR, *supra* note 49, at 261.

competent but not likeable for the same traits that earn men labels of competent and likeable. I had experienced people recoiling when I was direct or simply discharged my duties as a leader when men who behaved identically in my position did not garner disapproval. Even so, I had assumed that I probably would not like Sonia Sotomayor.

Her biography convinced me that I both admired and liked her, and made me feel shame when I realized I had unconsciously absorbed some of her critics' vitriol that a hard-driving successful prosecutor, who was divorced and childless, would not be very likeable. I suspect that unconscious racism as well as sexism was also at work, assuming one may have trepidation about Latinas similar to one's fear of "angry black women"[103] and "uppity blacks."[104] I made the same unconscious judgment of Ann Hopkins after reading the *Price Waterhouse* decision and also Chamallas's brilliant critique, only to be shocked by my own implicit bias when I found her eminently likeable and sympathetic after reading Hopkins' autobiography, *Making Partner the Hard Way*. I initially made a similar judgment about Rose Bird.[105] Perhaps social psychologists will help us figure out how to name, interrogate, and unlearn our automatic trepidation toward women leaders.[106]

The point is a simple one: even those with feminist consciousness, knowledge of social psychology, and the experience of discrimination can fall prey to implicit bias. Justice O'Connor assumed that being a woman is enough to generate a different consciousness in her concurring opinion in *J.E.B.*, which struck down gender-based peremptory challenges of jurors. Like those who expect women judges to "get it" in cases about gender, Justice O'Connor declared that "a plethora of studies make clear that" women jurors are more sympathetic to rape victims than men.[107] Unfortunately, the evidence does not support her assertion.[108] As sociologist Hazel Genn

103. HARRIS-PERRY, *supra* note 22, at 86–87.

104. THOMAS, *supra* note 53, at 117–18.

105. KENNEY, *supra* note 7. Bird was the first woman on the California Supreme Court when Governor Brown appointed her to be chief. The voters voted not to retain her in 1986 after two campaigns to unseat her.

106. TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 239–46 (2001).

107. J.E.B. v. Alabama, 511 U.S. 127, 149 (1994).

108. JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 158 (Cambridge: Harvard University Press 2000); J.S. Batchelder, D.D

has found in her examination of British disability claims, women do not necessarily sympathize with other women and, in fact, may be more critical and judge them more harshly than men, particularly when they differ from the women in race, class, and parenting practices.[109]

Does that mean sex does not matter? And that it makes no difference to have women on the bench? In *Gender and Justice*, I make a nonessentialist case for women judges. It matters that women serve on the bench, so that justice is not merely done, but seen to be done; so that women are not excluded from power, and to help normalize women wielding judgment. Women as a group do not necessarily make a difference for other women, but many individual women (and men) do. Individuals matter even if sex as a variable cannot explain differences in outcomes.[110] Paradoxically, everyone will immediately recognize this proposition to be true even though they might also make arguments that contradict it.

For example, it is hard to think of a bigger chasm between two jurists than between Justice Marshall and Justice Thomas in their views about race, class, the equal protection class, the Constitution, and the role of the judiciary (Justice Sotomayor made this observation in her speech[111]). Yet the Justices who served with Justice Marshall testified to the difference he made on the Court and in their own understandings of race and class. Ironically, conservatives know that it makes a huge difference who sits on the Court, which is why Justice Lewis Powell urged conservatives to seek the appointments of

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Koski, & F.R. Byxbe, *Women's Hostility Toward Women in Rape Trials: Testing the Intra-Female Gender Hostility Thesis*, 28 AM. J. CRIM. JUST. 181, 181–200 (2004); SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 11–12 (2009); Cameron McGowan Currie & Aleta M. Pillick, *Sex Discrimination in the Selection and Participation of Female Jurors: A Post-*J.E.B. *Analysis*, 35 JUDGES' J. 2, 2–6, 38–42 (1996); Sandra Benlevy, *Venus and Mars in the Jury Deliberation Room: Exploring the Differences that Exist Among Male and Female Jurors During the Deliberation Process*, 9 S. CAL. REV. L. & WOMEN'S STUD. 445, 469 (2000).

109. Hazel Genn, Decision-Making about Welfare Benefits: Does Gender or Anything Else Make a Consistent Difference?, presented at the Law & Society Association annual meeting, Hawaii (June 3, 2012).

110. As we wrote these remarks, we were saddened by the deaths of Justice Rosalie Wahl and Congresswoman Lindy Boggs—clear examples of how one person can make a huge difference.

111. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002), (publishing her lecture from 2001).

those judges who would be more sympathetic to business.[112] Chief Justice Roberts may describe his role as an umpire, merely calling balls and strikes, but when he is umping, business always wins over labor, employers over plaintiffs.[113] Conservatives recognize that we should not just choose the best-qualified judges based on merit, whatever that means—presumably that they have elite qualifications and relevant experience. If they truly did believe that, this belief would have compelled them to support rather than oppose the elevation of Judge Sotomayor to the U.S. Supreme Court.

The recognition that identity (in this case, sex) is not the same as expertise led the International Criminal Court to require both that the bench be gender-balanced and that member states nominate judges with a knowledge of gender-based violence, given the origins of the Court in the mass rapes and genocide in the former Yugoslavia.[114] The drafters of the Rome Treaty might have recognized that women might be more likely to specialize their legal work in violence against women, but that one could not presume they were an expert merely because they had two X chromosomes. Nor could they presume that no men had this expertise. I simply argue for a clear recognition of this same fact.

V. WISE LATINAS: A CLOSER LOOK

In 2001, then-Judge Sotomayor gave the Judge Mario G. Olmos Memorial Lecture at the University of Berkeley School of Law.[115] Given the furor her remarks caused as part of her judicial confirmation hearings for the U.S. Supreme Court, and the way they

112. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (Anchor Books 2007); CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2008).

113. *See* Bandes, *supra* note 55, at 139–40; "After four years on the Court . . . Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff." Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hardliner*, THE NEW YORKER, May 25, 2009, at 42; Senator Sheldon Whitehouse quoted Toobin for his rejection of the proposition that Chief Justice Roberts acts, in practice, as a neutral umpire. Abrams, *supra* note 44, at 271–72.

114. Louise Chappell, *Gender and Judging at the International Criminal Court*, 6 POL. & GENDER, 484, 484–95 (2010).

115. *Id. See generally* Sotomayor, *supra* note 111.

have been distorted, it is worth looking more closely at what she actually said, the claims she made, and the questions she raised.

A. The Actual Speech

Justice Sotomayor began what she finished with *My Beloved World*, telling the story about her Latina identity and where she came from.[116] She defined "Latina" or "Latino" not as a political identity but an identity rooted in food, family, and struggle. She lamented the low numbers and late entry of women serving on the bench, particularly women of color. She talked about how the long delay in confirming Judge Paez to the Ninth Circuit demonstrates a continuing need for women and Latinos to organize and mobilize to press their case for inclusion. She approved of Judge Cedarbaum's caution of the search for difference based on gender or race as rooted in an assumption of inferiority. But she parted company from Cedarbaum by raising the question of whether one can achieve objectivity and transcend one's personal background. She wondered "whether by ignoring our differences as women or men of color we do a disservice both to the law and society."[117]

Justice Sotomayor cited Professor Steven Carter of Yale Law School for the proposition that people, including judges, whether within or across identity groups, differ in their outlook because they have different experiences. She nodded to Yale Law Professor Judith Resnik, who has written on gender and judging, for the proposition that not all feminists think alike. She said we are still in the formative stages of determining what feminist judging entails. She pointed out Justice Thomas's differences with many in the African American community to reiterate the point that not all members of a minority group think alike. And she turned to professor and now Dean of the Harvard Law School, Martha Minow, for the proposition that neutrality and objectivity is an unobtainable aspiration.

Justice Sotomayor continued, "Not all women or people of color, in all or some circumstances or indeed in any particular case of circumstances but enough people of color in enough cases, will make

116. Justice Sotomayor began by describing how being a "Newyorkrican," a second-generation immigrant from Puerto Rico, is different than being Mexican, for example. *Id.* at 87–88.

117. *Id.* at 91.

a difference in the process of judging."[118] She expected that large numbers of women on the bench will make a difference. She answered Judge Cedarbaum's point that an all-white U.S. Supreme Court decided *Brown* with the fact that those who argued the case were largely African American men and women: Justice Thurgood Marshall and Judge Constance Baker Motley. She made the same observation about Justice Ginsburg as an advocate for women's equality.

Justice Sotomayor mentioned a Minnesota case disputing the granting of an order for protection to a woman seeking a divorce from her husband, who had previously battered her and who was now making verbal threats. She seemed to be suggesting that the women on that court, acting in concert, made the right decision while the men dissented and were in the wrong. It is true that all the women joined the majority and several men judges wrote dissenting opinions that failed to understand facts about domestic violence, misapplied the law, and made mistakes about the facts of the case before them. But several men judges also joined the majority. So the Minnesota Court of Appeals did not split dichotomously on gender lines, even if the women, under the wise leadership of the opinion writer Judge Harriet Lansing (not a Latina), did all join the same opinion. When women are united and men make comments worthy of criticism, it is easy to overlook the men that joined with the women and mischaracterize the split as between men and women. A difference becomes a dichotomy and a chance to reassert an exaggerated claim of gender essentialism.

Justice Sotomayor disagreed explicitly with Judge Cedarbaum, Justice O'Connor, and Justice Coyne. She turned again to Minow, who declared there can never be a universal definition of wise.[119] She then said, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[120] She noted that even the great men of constitutional law made terrible decisions. Not until 1972 did any U.S. Supreme Court strike down as unconstitutional states' laws that discriminated on the basis of sex. She wanted to reiterate that she does not believe those who have not had the experience of others cannot understand that experience.

118. *Id.*

119. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

120. Sotomayor, *supra* note 111, at 92.

"However," she noted, "to understand takes time and effort, something that not all people are willing to give." Some people simply lack the capacity. She continued:

> Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.[121]

Justice Sotomayor then invited the audience to think about the difference having more Latino and Latina judges would make. She invited men and whites to ponder the well-documented empirical findings of gender and race bias taskforces that women and minority men still experience obstacles. She said she aspires to question what she thinks she knows based on her experience and therefore be more than the "sum total of my experiences."[122] She also promised to continue to evaluate whether her opinions, sympathies, and prejudices are appropriate.

Before turning specifically to the Minnesota case, two points are worth making about her remarks, beyond the obvious one of how her "wise Latina" remark has been taken vastly out of context by so many people. First, Justice Sotomayor was tentative in her claims. She cited others and asked questions. Those familiar with the debates about feminist legal theory and judging and difference will see her remarks as much more cautious than many others writing throughout the 1990s about the difference women would make.

Second, she invited everyone to reflect on why a diverse and representative bench matters, without making essentialist claims about all women or minority men, or white men either, for that matter. When she adduced evidence of how experience shapes judgment, she most often spoke from personal experience and then tempered the claim to knowledge from direct experience with her aspirations for impartiality and her promise to always interrogate how her experience might affect her judgment and whether that is appropriate. Her remarks situated her as a participant in an ongoing discussion about the nature of judging and are not the tone of a racist or a sexist. They are the remarks of one who is deeply reflective and

121. *Id.*
122. *Id.* at 93.

has a keen emotional intelligence: in short, a wise Latina woman. Before I explore further her emotional intelligence and insights for judging, I turn in greater detail to the Minnesota case that she drew on as an example.

B. Hall v. Hall

Hall v. Hall is a 1987 Minnesota Court of Appeals decision involving a protection order issued under Minnesota's Domestic Abuse Act.[123] The facts are straightforward. Robert and Patricia Hall were married in 1978. Patricia Hall first petitioned for an order of protection from domestic abuse in 1981. In a sworn statement she said that Robert Hall had held a gun to her head and threatened to kill her; pushed, kicked, shoved, and punched her on numerous occasions; and threatened her by asking whether she would rather be "dead or beat up." The district court granted a protection order, and Robert Hall began participating in a domestic abuse program. At Patricia Hall's request, the protection order was removed in June 1982.

In 1984, Patricia Hall petitioned for dissolution of the marriage. As part of the dissolution proceedings, court services conducted a visitation investigation, and a family court officer recommended that family court services supervise visitation because of Robert Hall's chemical use and aggressive acting-out behavior at times of pick-up and return of the two children, ages two and eight.

Before entry of the final dissolution judgment, Patricia Hall petitioned for a second domestic abuse protection order. In a statement provided under oath on October 2, 1986, Patricia Hall recounted two September 1986 incidents that she said caused her to fear further acts of domestic abuse. The most recent had occurred on September 22. The Halls were involved in an argument about a custody issue and Robert Hall said, "You better stop f——ing with me; if you don't stop f——ing with me you'll end up in a box."[124] Patricia Hall said that Robert Hall "was verbally abusive, swearing and yelling and calling her filthy names."[125] He said, "I'm going to be the son-of-a-bitch that buries your ass."[126] Patricia Hall's sworn statement of the September 2 incident was similar, stating that Robert

123. Hall v. Hall, 408 N.W.2d 626, 628 (Minn. Ct. App. 1987).
124. *Id.* at 628.
125. *Id.*
126. *Id.*

Hall had been verbally abusive and threatened to "hunt her down."[127] Patricia Hall also stated that Robert Hall was a hunter and possessed a gun.

On October 2, 1986, the district court issued an order to show cause and a temporary order for protection under the Domestic Abuse Act. On October 16, a district court referee held a hearing on the petition. Both Patricia Hall and Robert Hall appeared for the hearing; neither was represented by an attorney. The referee administered an oath to both of the Halls and then directed Robert Hall's attention to Patricia Hall's statements in the verified petition. After a discussion about visitation, the referee asked Robert Hall if the things stated in the petition had happened. He initially answered, "No." But when the referee asked, "You weren't verbally abusive to her?" he responded, "I may have. I did swear at her. I called her an asshole. Thought she was being a real bag."[128] The referee admonished him that there were children in the back of the courtroom, and then said, "If you're talking to me the way you have been, I can imagine what your talking to her is like."[129] After additional statements by each of the Halls, the referee said that he believed that Robert Hall had threatened Patricia Hall, and issued an order for protection with a specific finding that based on the petition, affidavit, and statements, the court found there had been acts of domestic abuse.

The order for protection continued Patricia Hall's custody "per the [dissolution] decree," and prohibited Robert Hall from committing any acts of domestic abuse against Patricia Hall; it also excluded Robert Hall from Patricia Hall's residence except for the purpose of exercising visitation. The order also provided that visitation should be supervised by court services and Robert Hall was ordered to participate in a program to prevent domestic abuse offered by the Wilder Foundation.

Robert Hall filed a notice of review requesting review in the district court and denied that he had "ever threatened to kill" Patricia Hall or "harm" her. Instead, he asserted that she had threatened him by saying that she would not abide by the pending final dissolution judgment and not let him see the children "with the frequency" that the judge would order. Each of the Halls submitted additional written

127. *Id.*
128. *Id.*
129. *Id.* at 632.

evidence and argument. A second district court judge, Ramsey County District Court Judge Harold W. Schultz, affirmed the October 16 determination, and Robert Hall filed a notice of review with the Minnesota Court of Appeals.

Following the submission of Robert Hall's brief, a panel of the court of appeals considered and decided the appeal. The determination was circulated to the full court in a written opinion. Three judges requested en banc consideration. Because the court rules provided for en banc consideration upon the request of three judges, the appeal was considered by the full court of fourteen judges—twelve elected judges and two retired district court judges, sitting by appointment. The decision[130] affirmed the district court's order granting the order for protection. The prefatory material, supplied by the editors, indicated that the court was evenly divided. And the law provides that when the court is evenly divided on appeal, the decision of the district court stands. All three women on the court, Judges Harriet Lansing, Sue Sedgwick, and Doris Huspeni, and four men, Judges Foley, Parker, Leslie, and Stone, voted to uphold the order for protection.

A closer analysis of the dissents discloses that two of the dissents were based only on the provision in the order that required supervised visitation, which would entail only a restriction in the scope of the order, not a reversal of the protection order itself. These two partial dissents were, however, designated as full dissents rather than "affirm in part; dissent in part." More puzzling is that these two dissents are based on the majority opinion's conceding that Patricia Hall had not alleged domestic abuse directed at the children. The majority opinion, however, after making that observation, accordingly limits the supervision of visitation, saying, "It is supported on the present record to the extent that it is implemented for the pick-up and return of the children for purposes of visitation." The concluding portion of the opinion again states the limitation of only "including supervised visitation for the purpose of picking up and returning the children." Thus, these two dissenters' purported objection to supervision "during visitation" is a patently phantom objection. Apparently these dissenters, who understood that the primary dissent could not be defended, were willing to manufacture a facially baseless dissent to avoid being counted in the majority.

130. *Hall*, 408 N.W.2d 626.

But the primary dissent by Chief Judge Peter Popovich is equally difficult to comprehend. It is based on the idea that the trial court record "fails to establish a present intention to do harm or inflict fear of harm" that is sufficient to support the issuance of a domestic abuse protection order.[131] Domestic abuse is defined in the statute to include "infliction of fear of imminent physical harm."[132] The statement that Patricia Hall did not testify she was actually fearful for her safety is not accurate. The verified petition that Patricia Hall signed under oath and that stands as testimony specifically says that she feared imminent and present danger because of Robert Hall's threats that he would "hunt her down," that if she did not stop "f——ing with him she would end up in a box," and that he "was going to be the son-of-a-bitch who buries her ass."[133]

In the face of these comments, the primary dissent incredulously states that there was no testimony of specific threats to support the issuance of the protective order. It is difficult to understand how these four dissenting judges could not believe that these threats were sufficiently specific and violent to support Patricia Hall's claim of fear of physical harm. It begins to boggle the mind when it is viewed in the context of the physical abuse five years earlier that included holding a gun to Patricia Hall's head and asking her "would you rather be dead than beat up" and two instances of abuse that required medical attention. Added to the two perplexing dissents on the issue of supervision of visitation by Judges Roger Nierengarten and Daniel Donald Wozniak (that was carved out of the order and no longer operative), a seventh judge, Judge Gary Crippen, wrote a seven-page dissent on how the curtailment of privacy, liberty, and property interests was threatened by the nature of summary proceedings, issues that were not fully raised in the appeal.

In the *Yale Journal of Law and Feminism*, Kathleen McDonald concluded:

> In 1987, an evenly-divided Minnesota court of appeals sitting en banc upheld a restraining order in another case, but not without the howls of the dissenting justices who would have required a showing of more severe abuse before granting protection . . . . Although the legal arguments have become more sophisticated

131. *Id.* at 629.
132. MINN. STAT § 518B.01(2)(a) (1984).
133. *Hall*, 408 N.W.2d at 628.

> since the nineteenth century, the results are often the same: for one reason or another, the battered wife is not protected because the battering husband's interests prevail.[134]

Justice Sonia Sotomayor noted that of the three women judges on that court of appeals, all of them supported the majority opinion. To be sure, four men also supported the majority opinion, but no woman supported the dissent. One can only speculate on what Sotomayor meant by invoking *Hall v. Hall*. The dissenters' fear seems to be that the pendulum has swung too far and batterers do not enjoy sufficient due process. They might also fear that (just as they seem to be biased in favor of the batterer's point of view as men and husbands) Sotomayor or another Latina judge would be similarly blinkered and biased in favor of women or immigrant populations. The response was an expression of fear that judicial machinery would be used for unfair purposes when in fact a few good men and women tried to apply the law as written to protect a woman who had been battered from the high likelihood that her batterer would murder her. They sought to implement the purpose of the law to remedy a problem, heal the system, or make it fairer to women. Rather than making the system biased in favor of women, or victims of domestic violence, Justice Sotomayor may have meant to argue that a person who had been at the receiving end of bias—both as a minority and a woman—could bring a perspective to judgment that would not allow this imperfection in the system to continue and to undermine our highly valued system of justice. The system would be less biased, not biased toward a different group.

As the late Minnesota Supreme Court Justice Rosalie Wahl observed in *Some Reflections on Women and the Judiciary*:

> We also have a right to expect from women judges an intense commitment to fairness, growing out of a personal recognition of the injury of injustice and unfairness. We expect, of course, that women judges will treat men and women fairly; that, in itself, will have profound effects. Our responsibility is even broader than

134. Kathleen A. McDonald, *Battered Wives, Religion, & Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251, 285–86 (1990). In France, most family law judges are now women, and fathers' rights organizations have recently mobilized against them claiming they are biased against men. *See* CeLine Bessiere & Muriel Mille, *The Judge Is (Often) a Woman: Professional Perceptions and Practices of Male and Female Family Court Magistrates*, 55 SOCIOLOGIE DU TRAVAIL 341 (2013).

> gender even-handedness, however. Will we take this sensitivity to fairness and apply it to all who come before us? Will we transform our specific knowledge of the shifting social rules and the limiting assumptions about the individual capabilities, interests, and goals of women into a broad ethic of fairness to all persons whose existences are controlled by such cultural limits? As judges, will we challenge ourselves to question how and why some persons are traditionally considered "bad," incompetent, or unable, and who and what makes some people more likely to be faulted socially, and thus legally, for their actions? The old, the poor, the differently abled, members of racial, ethnic, cultural, and affectional preference minorities, like women, have all suffered from these assumptions. A comprehensive ethic of fairness requires this breadth of vision of what equal treatment might mean. As we face every party who appears before us in our role as judge, whether in person at a trial or on the record in appellate review, such concerns must be in our minds.[135]

The point is not that all women see injustice and no men do. It is that we need a justice system in which an existing unfairness to women can be adequately heard and understood so that the unfairness can be addressed and fairly resolved. Why was Justice Sotomayor put in such a defensive position after saying that perhaps there was a reason to want to include a wise Latina woman as a decision maker, and that a wise Latina woman might have come to another—perhaps a better—decision than the dissenters in *Hall v. Hall*? Are those interested in keeping off the nominee of a Democratic President merely grasping at straws rather than sincerely advancing an argument? Is she being punished for pointing at discrimination, one element of backlash? Is she being assumed to be partial as a member of a non-dominant group? Or, does her presence and voice call into question the neutrality of the judiciary, drawn from a very narrow slice of American society? What we too often miss in the episode are the important insights Sotomayor asks us to consider about the nature of judging. By focusing on whether wise Latinas decide cases differently from others, we miss her important insights about emotions, experience, consciousness, and judging.

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135. Rosalie Wahl, *Some Reflections on Women and the Judiciary*, 4 LAW & INEQ. 153, 156–57 (1986).

VI. WISE JUDGING

One can only speculate as to what was in then-Judge Sotomayor's mind as she made the "wise Latina" remark. Analyzing her remarks in their entirety provides important context—perhaps a better understanding than her comments at her confirmation hearings. What critics have often missed is the choice of the word "wise." As Justice Wahl recognized, all judges must strive to understand the experiences of those before them to do justice. It is called empathy. Justice Sotomayor has said her experience does not produce a knee-jerk reaction to side with her tribe. Rather, her emotions guide her to the social facts of the case that merit closer interrogation. That interrogation requires a close examination of the record as well as a faithful adherence to the law. Senator Amy Klobuchar skillfully steered the attention of the Senate Judiciary Committee to Judge Sotomayor's background as a prosecutor (as Senator Klobuchar's was). In the discussion, it is clear that as a former prosecutor, Judge Sotomayor does not automatically or unreflectively side with prosecutors, but instead, brings that knowledge and experience to the bench.[136] Justice Coyne did not say smart men or women reach the same decision—nor did she say men and women will always see situations the same way. Nor did she say all women see things that all men miss. Rather, she chose the word "wise," as did Justice Sotomayor.

The word "wise" suggests that judging consists of at least two separate processes. One is that wisdom entails acting on the best knowledge and evidence on the nature of domestic violence. Feminist legal theorists and social scientists have long understood the partiality of the "reasonable man" standard in the law. What might make the average woman afraid may be different from the average man. Moreover, a woman who has been beaten might be more reasonably fearful of threats than one who has never been beaten. We know that women are most at risk of being killed by their batterers when they escape the abusive relationship. Some feminist scholars

136. *Confirmation Hearing on the Nomination of the Honorable Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 43–46 (2009).

have even argued for not just a reasonable woman standard but a reasonable victim standard.[137]

The second part of wisdom is emotional intelligence. *My Beloved World* provides substantial evidence that Justice Sotomayor possesses a keen self-knowledge. Justice Sotomayor's childhood taught her to "listen carefully and observe until I figured things out."[138] The conflicts between her parents over her father's alcoholism and her desire to continue her weekly sleepovers with her beloved Abuelita[139] taught her intense self-reliance in confronting a diagnosis of diabetes at age seven: "It then dawned on me: If I needed to have these shots every day for the rest of my life, the only way I'd survive was to do it myself."[140] Later, she notes, "I've spent my whole life learning how to do things that were hard for me."[141] Emily Bazelon describes it as "a textbook description of grit."[142] Laura Shaine Cunningham concludes: "Sonia emerges as sensitive to the needs of many others."[143]

Emotionality is often denigrated as leading weak women to use emotion rather than reason. Sotomayor dispassionately recognized her shortcomings and found mentors to help her, whether it was asking the smartest student in her class at Catholic school how to study, or asking her Princeton professor how to write a term paper. A woman partner in her law firm taught her how to write better briefs. *My Beloved World* "underscores just how well Justice Sotomayor mastered the art of narrative."[144]

The irony of Sotomayor being dismissed as too emotional, and therefore too feminine and partial, is that she had to learn to be more emotional, both as a high-school debater, a prosecutor, and as an intimate friend and daughter. She retreated to voracious reading in the library to mourn her father's death. This quality developed in

137. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, 315–20 (3d ed. 2012).

138. SOTOMAYOR, *supra* note 49, at 48.

139. Laura Shaine Cunningham, '*My Beloved World,' by Sonia Sotomayor*, SAN FRANCISCO CHRONICLE (Feb. 22, 2013), http://www.sfgate.com/books/article/My-Beloved-World-by-Sonia-Sotomayor-4301509.php.

140. SOTOMAYOR, *supra* note 49, at 4.

141. *Id.* at 288.

142. Bazelon, *supra* note 52.

143. Cunningham, *supra* note 139.

144. Kakutani, *supra* note 56.

childhood, where she was "a keen observer and listener. I picked up on clues. I figured things out logically, and I enjoyed puzzles."[145] She later observed, "The truth is that since childhood I had cultivated an existential independence. It came from perceiving the adults around me as unreliable, and without it I felt I wouldn't have survived. I cared deeply for everyone in my family, but in the end I depended on myself."[146] Her emotional intelligence did not flow naturally or easily from her experience of being a woman.

Justice Sotomayor's memoir reveals not just grit, intelligence, and determination, but emotional intelligence, despite having been raised by a mother who was icy and distant, if passionately committed to her daughter's educational success (and proper wedding). She described how Warren Murray, the Bureau Chief in the Manhattan district attorney's office, taught her to use emotion so that jurors felt the moral responsibility to convict.[147] Friends have taught her how to sing and dance and dress with flair. Whether learning to ask openly for love or for help managing her diabetes, she has learned how to acquire the skills and attributes to be a better person, a better lawyer, a better judge. She recognized that "when she's hard at work, she sometimes misses social cues" and learned to have more empathy.[148] Perhaps she can have a positive influence on Justices Alito and Scalia?

Like Bazelon, I value Sotomayor for her transgression of gender norms as much as her adherence to them. Unlike the mock juror who voted against her because he did not like "brassy Jewish [sic] women," I am glad Justice Sotomayor fires aggressive questions from the bench. I agree with Jason Farago:

> [H]er memoir should remind us that hard work on its own isn't enough to take any of us to the top, and building a country that offers equal opportunity for all is the work of generations. At least there's one justice on the Supreme Court who understands that intimately.[149]

In a culture that reviles ambition in women, Justice Sotomayor was afraid to voice her ambitions for judicial office perhaps more

145. SOTOMAYOR, *supra* note 49, at 80.
146. *Id.* at 223.
147. *Id.* at 245.
148. Bazelon, *supra* note 52.
149. Farago, *supra* note 50.

because it might be seen as above her station as a working-class Latina. She had ambitions for the bench early on, if undeclared, and she was "nominated for a district court judgeship in her thirties, making her among the youngest federal judges in the country."[150] She learned from her mother that "a surplus of effort could overcome a deficit of confidence."[151] I believe that we would all be wise to be collectively grateful for Sotomayor's determination and perseverance to pursue her ambition and to encourage Latinos and Latinas to do the same, even though her speeches to those groups were turned against her.

My Beloved World reveals not the tribalism of knee-jerk identity politics but Sotomayor's deep ability to think for herself while surrounded by a crowd that might think differently, whether on how to be a good wife or what being a Puerto Rican student activist means. As a judge, she does not revel in Olympian detachment but is the people's judge, throwing out the first pitch in Yankee Stadium and appearing on Sesame Street.[152] A backlash against Justice Sotomayor occurred not simply because she pointed at discrimination in the dissenting opinions of *Hall v. Hall*, but because her remarks called into question the conception of judging as umpiring where a small number of people of similar backgrounds can affect the lives of those very different from them. By trying to explain how her background matters for judgment, Justice Sotomayor called into question what some have called "the noble lie." I agree with Abrams, that the judges who are dangerous on the bench are those who think of themselves as umpires or those who have never questioned whether their gender or life experiences leads them to identify with one party before them and to revile another.[153]

Justice Sotomayor has said that her emotions guide her to which facts to pay attention to—and to which items to bring her considerable intellect to bear upon. In the 1990s, feminist legal theorists invoked Susan Glaspell's play, *A Jury of Her Peers*, to think about the difference women would make as judges. In the play, a

150. Jeff Welty, *Book Review: My Beloved World*, NC CRIM. L. UNC SCHOOL OF GOV. BLOG (May 6, 2013), http://nccriminallaw.sog.unc.edu/?p=4245.

151. SOTOMAYOR, *supra* note 49, at 115.

152. Farago, *supra* note 50.

153. Abrams, *supra* note 44, at 270–71.

man is found strangled and his wife pleads ignorance.[154] The women who accompany the men investigating find a dreary house with a terrible stove. They discover a canary strangled in her sewing box and decide simultaneously without conferring to hide that piece of evidence from the men who treat them with contempt and seek to develop a story to explain why a woman might kill her husband. My interpretation of the play is that women bring similar capacities of reason and detection, but that they happen to be looking in different places than the men. They hide the dead canary because they know the men will reach the same conclusion—that she killed her husband. The women empathize with the woman who used to sing beautifully in church as the strangled canary, trapped in a loveless marriage, and, as her peers, unlike the men, judge her to be blameless.

VII. CONCLUSION

What are the wider implications of the backlash against women judges? As legal scholar Constance Backhouse wrote:

> Women judges are surely some of the most privileged and powerful individuals in Canada. Unlike most females working today, they have "no more ceilings through which to push." They "hold and deploy the power of the state." However, a closer inspection "inside the robes" shows that gender "trumps" even judging.[155] If women this powerful cannot escape the effects of misogyny and discrimination, then no woman can. The very message is simply shocking.[156]

A gender analysis reveals the scaffolding that judges, lawyers, voters, and so many others use to evaluate and make judgments on elected and appointed leaders. Just as feminists in the 1970s identified a set of behaviors that they argued constituted a pattern of sexual harassment,[157] so should scholars explore further whether the phenomena I have identified constitute a backlash against women judges. If we want women to progress, we need to understand the complex role of gender in shaping outcomes. And doing so means we must recognize that women "do" gender in different ways and are

154. SUSAN GLASPELL, HER AMERICA: "A JURY OF HER PEERS" AND OTHER STORIES (Patricia L. Bryan & Martha C. Carpentier eds., 2010).

155. Resnik, *supra* note 26, at 971–72.

156. Backhouse, *supra* note 20, at 189.

157. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1695–1701 (1998).

vulnerable in different degrees to gender-based attacks, based on their individual characteristics as well as the political context.

Analyzing Justice Sotomayor's "wise Latina" remarks with a deeper understanding of *Hall v. Hall* puts in sharp relief the backlash against her nomination. Her remarks not only suggested that, at least in one case disputing an order for protection, some judges were biased against women and profoundly ignorant of the risks to their lives women face when leaving their batterers. Their misunderstanding about the relevance of the absence of threats to the children could also be interpreted as saying that women's safety is not important if the children's safety is not at issue. Sotomayor is right in that we need more people on the bench who are sensitive to gender bias and understand the plight of battered women. Wise Latinas, but not all Latinas, fall into that category. Whether Judge Harriet Lansing or Justice Sotomayor, they help ensure that justice is done and is seen to be done.

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Heather Roberts

Review Essay:Why (Re)Write Judgments?

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Review Essay: Why (Re)Write Judgments?

Australian Feminist Judgments: Righting and Rewriting Law by Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds) (2014) Hart Publishing, 382 pp ISBN 9781849465212

Heather Roberts[*] and Laura Sweeney[†]

Abstract

Australian Feminist Judgments is a collection of fictional judgments for real Australian cases that have been rewritten by Australian scholars from the perspective of a feminist judge. Each judgment is introduced by a commentary, written by a different scholar, explaining the legal and historical context of the original decision and the choices made by the feminist judge. This review essay locates the collection within more general debates surrounding judgment writing, particularly leading Australian extra-judicial commentary on how and why judgments are written. Against this larger plane, we consider a number of the key issues raised by the collection about judgment writing, including the significance of recounting the facts of a case, the uses of formalist judicial method and the capacity of judgments to effect change. Drawing on a number of examples from the collection, this review essay contends that *Australian Feminist Judgments* makes a valuable contribution not only to contemporary feminist debates, but also to issues going to the heart of judicial practices and judgment.

I Introduction

December 2011 to January 2012 was an exciting period for theorising about Australian judicial decision-making. In December 2011, the Australian Research Council ('ARC') announced that the Australian Feminist Judgments Project had been awarded a Discovery Grant. The project, of which *Australian Feminist Judgments*[1] is but one key component, was devised to 'investigate relationships between feminist theory and practice in Australian judicial decision-making'.[2]

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[1] Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014).

[2] Research Data Australia, *Australian Feminist Judgments Project: Jurisprudence as Praxis* <https://researchdata.ands.org.au/australian-feminist-judgments-jurisprudence-praxis/535833>.

Inspired by the 2007 *Women's Court of Canada* ('*WCC*'),[3] and the 2010 United Kingdom (UK) project *Feminist Judgments* ('*UKFJ*'),[4] the objective of *Australian Feminist Judgments* is to demonstrate that a judgment in a real case could be feminist, 'authentic' and 'legally plausible'.[5] To achieve this objective, most — but not all — of the feminist 'judges' have written their judgments applying the 'same constraints'[6] as the original decision-maker, that is, the original facts as found by the lower courts and the academic critique the parties could have drawn on at the time.[7]

Like its UK predecessor, *Australian Feminist Judgments* adopts Hunter's seven-point checklist of 'feminist judging'.[8] Importantly, 'identifying as a woman' is not on this list,[9] and so, for the first time in the feminist judgment-writing genre, one of the feminist 'judges' in the Australian collection is male.[10] This aspect of the collection alone ensures that it provides a distinctive lens through which to examine preconceptions regarding the connections between feminism, gender and judging.[11] According to Hunter, the key attributes of feminist judging include traditional feminist concerns such as 'ask the woman question', 'include women' and 'challenge gender bias', as well as requiring judges to be 'open and accountable about [their] choices' and to reason from context to 'contextualise and particularise' their reasoning.[12] The resulting fictional judgments in *Australian Feminist Judgments* encompass decisions from

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3 Special Issue: Rewriting Equality (2006) 18(1) *Canadian Journal of Women and the Law* contains the 'Women's Court of Canada' decisions.

4 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

5 Heather Douglas et al, 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1.

6 Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010), 13. See also Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18(1) *Canadian Journal of Women and the Law* 1, 6.

7 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 13. The *Australian Feminist Judgments* contributors not following these 'same constraints' are Irene Watson (Chapter 3); Heron Loban (Chapter 11); and Nicole Watson (Chapter 27).

8 Douglas et al, 'Introduction', above n 5, 8; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010), 35.

9 Although indicating a 'tentative' view that a 'feminist judge' must be a woman, this question is left open in Rosemary Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15(1–2) *International Journal of the Legal Profession* 7, 8. As the *Australian Feminist Judgments* editors note, the project's interest is in feminist judging methods (not the attributes of feminist judges): Douglas et al, 'Introduction', above n 5, 2.

10 Jonathan Crowe, 'Judgment: *U v U*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 365.

11 The fact that approximately half of the original decisions were by female judges, including one all-female bench (*Goode v Goode*), allows *Australian Feminist Judgments* readers to explore further components of the feminism, gender and judging question: that is, that women judges speak in the 'same' voice; that all women judges are feminists; or that all feminists speak in the 'same' voice. Unfortunately, the editors do not explicitly explore these unique contributions of their collection, although they discuss the gender and judging question in Douglas et al, 'Introduction', above n 5, 4–6. See further Heather Roberts, 'Book Review: *Australian Feminist Judgments*' (2015) 35(3) *Legal Studies* 558.

12 Douglas et al, 'Introduction', above n 5, 8.

courts throughout the judicial hierarchy,[13] and on a broad variety of legal topics, such as family law and discrimination law, as well as areas less traditionally associated with 'feminist' concern, including environmental law and constitutional law.[14] Each judgment is introduced by a commentary, written by a different scholar, which typically explains the legal and historical context of the original decision and highlights some of the choices made by the feminist judge. As the commentators and editors explain, some feminist 'judges' provide dissenting decisions, while others reach the same conclusion as the original judge.[15] These approaches challenge perceptions that feminist judgments will necessarily result in different, and radical, outcomes.

In the UK, less than a month after the ARC announced the Australian Feminist Judgment Project's funding, Justice Heydon presented his famous speech 'Judicial Independence: The Enemy Within'.[16] Heydon's 'enemy' is the threat to judicial independence posed by judges themselves: 'excessively dominant' judicial personalities, exerting influence on their colleagues to conform to joint reasons; the judicial 'herd' willing to bow to majority opinion.[17] For Heydon, the independent judgment-writing process is essential to guarantee judicial independence, as the only way for judges to ensure true application of the law and fidelity to the judicial oath.[18] Heydon's speech set off a flurry of responses from current and former judges,[19] particularly on the topic of collective judgment writing. More broadly, however, these debates enlivened familiar questions: why, and how, should judges write judgments?

This review essay submits that *Australian Feminist Judgments* should be read as part of this broader conversation about judgment writing in Australia. In doing so, it seeks to demonstrate *Australian Feminist Judgments*' value both to those readers predisposed to feminist theory, and to readers to whom the 'F word' in the book's title might not ordinarily appeal. In addition to making valuable contributions to contemporary feminist debates, *Australian Feminist Judgments* presents readers with an opportunity to engage with issues of the style, methods and importance of written reasons for judgment. Part II of this review essay considers these questions. Part III concludes with a discussion of how the collection engages with debates regarding one of the key elements of judgment writing beyond the text: the influence of judges' backgrounds, personalities and identities on judgment writing.

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13 On the novelty, and, significance of this editorial choice, see further, Roberts, above n 11, 56–1.

14 Margaret Thornton, 'The Development of Feminist Jurisprudence' (1998) 9(2) *Legal Education Review* 171, 183.

15 Heather Douglas et al, 'Reflections on Rewriting the Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 19, 21.

16 The speech was later published as J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 (April) *Law Quarterly Review* 205.

17 Ibid 215–6.

18 Ibid.

19 See, eg, Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) *Sydney Law Review* 189; Justice P A Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (Speech delivered at the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014) <http://www.jca.asn.au/wp-content/uploads/2013/11/P01_14_02_28_1-Justice-P-A-Keane.pdf>; Justice Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554; Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37(2) *Australian Bar Review* 102.

II *Australian Feminist Judgments* and the Conversation about Judgment Writing

The style, methods and importance of judgment writing are recurring themes in the extra-judicial writings of Australian judges, featuring most famously in Sir Frank Kitto's 1973 paper 'Why Write Judgments?', later published in 1992 in the *Australian Law Journal*.[20] The following section considers the ways in which two themes of *Australian Feminist Judgments*' rewritten judgments — feminist fact-telling and feminist formalism — contribute to this broader conversation about judgment writing in Australia.

Style of a Judgment: Fact-telling

Fact-telling is an integral component of written judgments and Australian judges have recognised its difficulty and significance to the outcome of disputes and to the legal system's 'professional credibility'.[21] Judges have also reflected on the diversity of judicial approaches to how facts are interpreted and told.[22] For example, Heydon observed in his 'Enemy Within' paper that

> individual perceptions of the material facts can differ subtly but crucially. So can perceptions of the *real* issues, the *relevant* authorities, and the *significant* arguments. More fundamentally … attempts to state ideas in particular sets of words can alter the ideas as the words change.[23]

Heydon's comments were made in the context of judgment-writing practices by multi-member appellate benches. It is, perhaps, unlikely that Heydon also had feminist legal theories in mind. However, his comments resonate strongly with *Australian Feminist Judgments*' emphasis on the importance of language and material facts in written judgments.[24] Two of the seven attributes of Hunter's 'feminist judging' checklist correspond directly to the fact-finding and fact-telling process: reasoning from context to 'contextualise and particularise'; and 'include women' and women's experiences in the judgments' narratives and reasoning.[25] Although illustrated to varying degrees across the collection, the rewritten decision of *R v Webster*[26] demonstrates strikingly the difference these methods make.

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[20] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66(12) *Australian Law Journal* 787. See also Michael Kirby, 'On the Writing of Judgments' (1990) 64(11) *Australian Law Journal* 691; Sir Harry Gibbs, 'Judgment Writing' (1993) 67(7) *Australian Law Journal* 494; Sir Anthony Mason, 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 33; Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (speech delivered at the Sir Harry Gibbs Law Dinner, Emmanuel College, University of Queensland, 18 May 2012); Gaegler, above n 19.

[21] Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73(10) *Australian Law Journal* 743, 746.

[22] See, eg, Justice Roslyn Atkinson, 'Judgment Writing' (Speech delivered at the Australian Institute of Judicial Administration Conference, Brisbane, 13 September 2002) 4.

[23] Heydon, above n 16, 220–1 (emphasis in original).

[24] Douglas et al, 'Reflections', above n 15, 28–30.

[25] Douglas et al, 'Introduction', above n 5, 8.

[26] (Unreported, Supreme Court of New South Wales, Wood J, 24 October 1990).

In *R v Webster*, Wood J sentenced Matthew Webster to 14 years' imprisonment for the murder of 14-year-old Leigh Leigh. Feminist 'judges' van Rijswik and Townsley do not change this sentence. However, the perspective and narrative differences between the original and the feminist judgment are profound, and carefully outlined in Duncanson's excellent commentary.[27] For example, as Duncanson notes, Woods J's original judgment detaches agency from Leigh's assailants by referring to 'the tragic killing of Leigh Leigh', and explaining that prior to her death sexual intercourse '[took] place with a fifteen year old person'.[28] This narration of events is consistent with Woods J's attribution of responsibility to the parents for their lack of supervision.[29] By contrast, the feminist 'judge' addresses Webster directly, stating, 'You [Webster] murdered Leigh at a sixteenth birthday party'.[30] Then, regarding the sexual assault, the feminist judge observes that '[Leigh's] vulnerability was firstly taken advantage of *by* [another, unidentified] fifteen year-old youth'.[31] In the feminist retelling of the facts, liability is clearly and directly sited with the perpetrators.

By contextualising and particularising the crimes against Leigh, and the roles of her attackers, the feminist judgment underlines the difference that feminist reasoning can make to how legal 'truths' are perceived. In addition, the feminist judgment in *R v Webster* begins to overcome one of the key criticisms levelled at the deployment of personal narrative in third-wave feminism: that '[n]arrative collections do not translate easily into political strategies or legal theories'.[32] At the same time, this judgment and others in the collection adopting feminist fact-telling[33] raise important considerations outside the feminist context about the way judges do and should tell facts, and more generally the implications of fact-telling outside courts.

Judicial Methods: Formalism as Feminist Method

The alternative approaches to fact-telling by the feminist judges highlight the distinctiveness, particularly in form and tone, of some feminist judgments compared to the original decisions. By contrast, other feminist judgments in the collection use what the editors term 'formal legal methods' and 'black letter' approaches to rewrite the decisions.

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27 Kirsty Duncanson, 'Truth in Sentencing: The Narration of Judgment' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 309, 314–15.

28 Ibid 313–14.

29 Ibid 312–13.

30 Ibid 316.

31 Ibid 317 (emphasis added).

32 Bridget J Crawford, 'Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure' (2007) 14(1) *Michigan Journal of Gender & Law* 99, 126.

33 See also, eg, in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014): Heron Loban, 'Judgment: *ACCC v Keshow* [2005] FCA 558' (ch 11); Kate Fitz-Gibbon, Danielle Tyson and Jude McCulloch, 'Judgment: *R v Middendorp* [2010] VSC 202' (ch 20); Penny Crofts and Isabella Alexander, 'Judgment: *Taikato v R* [1996] HCA 28' (ch 15); Elena Marchetti and Janet Ransley, 'Judgment: *R v Morgan* [2010] VSCA 15' (ch 21).

Much judicial (and academic) energy has been expended on defining the attributes of 'formal legal methods'.[34] Included in this discussion are debates regarding the boundaries of a variety of '-isms'[35] (particularly, legalism, literalism, and competing virtues of 'progressivism'), and whether particular judges can be held up as true and consistent exemplars of particular approaches.[36] In Australian extra-judicial writings, such debates peaked particularly strongly in response to the Mason Court era, with labels of 'traditionalist' and 'legalist' set against 'activist' and 'progressivist'; each label used differently by commentators, as a term of either praise or critique.[37] Broadly speaking, however, in these debates, 'form' (for example, the language of statutes, the fabled 'criterion of liability') is contrasted with 'substance' (for example, the practical operation of legal rules, read in light of contemporary circumstances and policy considerations).[38] This broad demarcation is consistent with the definitional approach taken by the editors, who emphasise that the feminist-formalism chapters are marked out by methods encompassing strict approaches to statutory interpretation, close adherence to precedent and/or the exercise of 'judicial restraint'.[39]

Australian Feminist Judgments' three discrimination law judgments provide perhaps the best illustration of this feminist-formalist approach.[40] In *New South Wales v Amery*, for example, feminist judge Gaze changes the case's outcome to find in favour of 13 female casual high school teachers who had alleged sex discrimination on the basis that they performed the same work as the permanent staff, but received up to 20% less pay.[41] Gaze's judgment uses none of the narrative techniques of *R v Webster* to evoke the plight of the casual workers in the narrative. Rather, she draws closely on established precedent, legislative intention and the distinction between errors of law and errors of fact to apply discrimination law to protect the female workers.

Through judgments such as that written by Gaze, *Australian Feminist Judgments* demands that readers question their own understanding of, and assumptions about, formalist legal reasoning. For example, Sir Anthony Mason has suggested that the

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34 See, eg, Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554; Justice Michael Kirby, *Judicial Activism* (The Hamlyn Lectures, 2003) (Sweet & Maxwell, 2004); Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13.

35 On '-isms', and the see Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 290.

36 See, eg, on the question whether Sir Owen Dixon applied a legalist approach consistently in his contract law jurisprudence: John Gava, 'When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence' (2011) 33 *Sydney Law Review* 157.

37 See further Coper, above n 34, 554.

38 See further Martin Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 166, 170–2.

39 Douglas et al, 'Reflections', above n 15, 32.

40 See in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014): Anita Stuhmcke, 'Judgment: *JM v QFG and GK* [1998] QCA 228 (ch 24); Jennifer Nielsen, 'Judgment: *McLeod v Power* [2003] FMCA 2' (ch 25); Beth Gaze, 'Judgment: *The State of New South Wales v Amery* [2006] HCA 14' (ch 26).

41 See further Margaret Thornton, 'The Indirection of Sex Discrimination: *State of New South Wales v Amery*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 420.

virtues that underpin legal formalism are 'continuity, objectivity and absence of controversy'.[42] He also explained that 'in its most extreme form', legal formalism requires 'a complete separation of law from politics and policy'.[43] Feminist judge Gaze's decision in *New South Wales v Amery* illustrates, however, that use of feminist-formalist methods can confound these expectations about formalism. On the one hand, Gaze's feminist judgment reflected a marked departure from established judicial approaches to discrimination law, and for this reason may have invited controversy had it been delivered in the 'real' legal sphere. On the other hand, the use of formalist methods *for feminist objectives* necessarily challenges the perception that formalism is antithetical to achieving legal and social reform. More broadly, the emphasis on the use of formalist methods indicates that feminist judges are not necessarily radical in form — the 'bra burners' of the bench — 'pushing the boundaries'[44] of accepted legal reasoning. Given the tendency of the judicial appointments process to favour homogeneity,[45] this is good news for those seeking greater feminist appointments to the bench.

The Importance of Judgments and their Capacity to Effect Change

Collections of rewritten judgments naturally invite questions about the importance of judgments in the legal realm and beyond. Judges such as Sir Frank Kitto locate the importance of judgments within the administration of the legal system.[46] However, Chief Justice Doyle has questioned the significance of judgment writing even within the legal sphere, suggesting that 'the efficiency and fairness' of judicial hearings and the manner in which judges conduct themselves are the true 'essentials of justice'.[47] By contrast, the worldwide feminist judgment-writing projects reflect a broader vision for why judgments matter. As the *UKFJ* editors explained, had the feminist judgments in their collection been delivered in place of the originals, they would have had the capacity to alter the outcomes between parties, legal doctrine and discourse, and broader policy and socio-economic outcomes.[48] This sentiment is echoed in the *Australian Feminist Judgments* editors' focus on the law reform capacity of the rewritten judgments.[49] This broader, reformist vision for judgments is also supported by the work of scholars such as Barak-Erez, now a judge on the Israeli Supreme Court, who has highlighted the normative consequences of judicial decisions as institutional histories justifying the legitimacy of the State and the courts as an institution of the State.[50]

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42 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 156.

43 Ibid.

44 Douglas et al, 'Reflections', above n 15, 34.

45 See, eg, Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 69; Kate Malleson, 'White, Male and Middle Class — Is a Diverse Judiciary a Pipe Dream?' (Paper presented at Mansfield College, Oxford, 1 June 2012) 1.

46 Kitto, above n 20, 788, 790.

47 Chief Justice John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73(10) *Australian Law Journal* 737, 737.

48 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 27–8.

49 Douglas et al, 'Introduction', above n 5, 17.

50 See, eg, Daphne Barak-Erez, 'Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court' (2001) 16(1) *Canadian Journal of Law and Society* 93.

At the same time, the Australian editors' decision to permit some contributors to work outside the 'same constraints' as the original decisions forces readers to interrogate the limits of the judgment form and, more broadly, the limits of judgments to effect law reform. For example, in *Australian Feminist Judgments*' first 'judgment', Watson elects not to rewrite a judgment in *Kartinyeri*,[51] because in her view a judgment '*would not prise open places for Nunga women*' unless it was 'done from "another space", outside Australian common law and the sovereignty of the Australian state'.[52] Instead, her essay argues powerfully that Anglo-Australian judgment writing cannot accommodate these women's voices, even if feminist reasoning were applied, because of the linguistic, procedural and substantive conventions of judgments. In this way, the non-conformist feminist 'judgments' ensure that readers are constantly questioning the potential significance of judgments and the limits on their capacity to effect change.

III *Australian Feminist Judgments'* Contribution to Debates about Who Judges Are and Why It Matters

The Indigenous contributions also engage directly in conversations about the relevance and influence of aspects of a judges' personal identities to the judgments they produce. Watson's essay on *Kartinyeri*, for example, self-consciously and overtly draws on her identity as an Indigenous Nunga woman to inform her critique.[53] Loban's judgment in *ACCC v Keshow* incorporates an Indigenous judge sitting alongside another Federal Court Judge, which emphasises the links between judges' identities and the judgments they produce.[54]

The proposition that aspects of personal identity matter in judgment writing is, in one sense, a manifestation of one of the most explicit aims of *Australian Feminist Judgments* as a whole: to explore what reasoning might have been adopted if 'a feminist judge'[55] had heard the case. Significantly, however, apart from the Indigenous contributions, the editors observe that the feminist 'judges' instead typically 'avoid explicit acknowledgement of background factors'[56] and how they influence their judging.

Australian judges (except perhaps Michael Kirby[57]) have tended to be similarly circumspect in both their judgments and extra-judicial commentaries about the intersections between their own identities, backgrounds and values and the form and substance of judgment writing. The surge in the publication of

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51 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Kartinyeri*').

52 Irene Watson, 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 46, 53 (emphasis added).

53 Ibid 46.

54 Loban, above n 33, 180.

55 Douglas et al, 'Introduction', above n 5, 1 fn 2, 5–6. The editors acknowledge the debates surrounding gender and judging, and more particularly the question whether women judges would decide in a 'different voice' questions necessarily raising issues of identity and judging.

56 Douglas et al, 'Reflections', above n 15, 25.

57 See, eg, Justice Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239.

judicial biographies in Australia has in part attempted to relocate legal reasoning as an aspect of, and informed by, the broader life experiences of judges. Of these biographies, the most detailed assessment of the mechanics of judgment writing, and the interiority of the 'moment of decision',[58] is A J Brown's *Michael Kirby: Paradoxes and Principles*,[59] which takes readers inside Kirby J's chambers during the writing of key decisions.[60] In Australia, however, book-length judicial biographies remain rare, and few biographers have had access to such a range of personal documents.[61] In some circumstances, biographical and autobiographical reflections at swearing-in ceremonies can also provide insights into judges' life experiences and their judicial philosophy, but the brevity of the form ensures that these remain fleeting glimpses.[62]

In *Australian Feminist Judgments*, insights into the feminist judges' life experiences are derived primarily from the interviews conducted with the feminist judges and the commentaries accompanying the judgments. In the interviews, for example, the editors note that

> the writers [of the feminist judgments] agreed that their background and experiences had influenced their judgment. For example, many of the judgment-writers said that it was their scholarship in an area of law and feminist jurisprudence which largely informed their approach. … In a few cases, the judgment-writer commented on personal connections to the facts of the case.[63]

The absence of further autobiographical reflections by the Australian feminist judges contrasts with the approach taken in the *WCC*, where the feminist judges each introduce their judgments with an 'author's note'.[64] Unfortunately, the *Australian Feminist Judgments* editors did not explain their decision to depart from the *WCC* model. However, the editors of the *UKFJ* made the same decision, on the basis of time constraints and the fact that '[j]udgments in the real world do not come accompanied by exegeses'.[65] The *Australian Feminist Judgments* editors may well have been influenced by similar considerations; however, we suggest that

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58 Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18(1) *Australian Bar Review* 4.

59 A J Brown, *Michael Kirby: Paradoxes and Principles* (The Federation Press, 2011).

60 Ibid 390–1 on *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices*'); 395–6 on *Thomas v Mowbray* (2007) 233 CLR 307, 442–3 [386]–[387].

61 For insights from Sir Owen Dixon's diaries into his judgment writing, see Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2003) 78–80, 262–3, 320 fn 53.

62 See further Heather Roberts, '"Swearing Mary": The Significance of the Speeches Made at Mary Gaudron's Swearing-in as a Justice of the High Court of Australia' (2012) 34(3) *Sydney Law Review* 493; Heather Roberts, 'Telling a History of Australian Women Judges through Courts' Ceremonial Archives' (2014) 40(1) *Australian Feminist Law Journal* 147.

63 Douglas et al, 'Reflections', above n 15, 25. One of the editors has published additional commentary on these interviews, and interviews conducted with sitting and retired judges self-identifying as feminists, in Rosemary Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-making' (2015) *Current Legal Problems* (forthcoming) <http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001.full>.

64 See, eg, Pothier's explanation of the 'very personal relevance' of her case, because of the disability she shared with the applicant: Dianne Pothier, '*Eaton v Brant County Board of Education*' (2006) 18(1) *Canadian Journal of Women & the Law* 121, 121.

65 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 3, 26–7.

individual authorial notes could have further developed the aims of the project in a number of ways.[66] For example, the inclusion of biographical insights into the feminist judgments would have provided readers with opportunities to re-engage with questions of how the 'law' is made; to be confronted with the diversity of feminist choices available to the 'judge'; and to 'hear' women's voices not only in the written judgment, but also during the judging process. Importantly, as the project has obvious potential for application in the classroom,[67] 'authors' notes' would also have provided valuable instruction for future 'judges' on the complexities and challenges of writing judgments.

IV Conclusion

This review essay submits that while questions of identity and judging present opportunities for further extension, *Australian Feminist Judgments* ably and engagingly achieves its stated objective: to 'highlight [the] possibilities, limits and implications of a feminist approach to judging' by rewriting existing decisions as 'feminist judgments'.[68] In particular, the editors' innovations from the pre-existing models of feminist judgments — by extending the range of judgments to lower courts, and by provocatively allowing Indigenous contributors to stretch the boundaries of the original judgments' form and content — ensures that *Australian Feminist Judgments* provides rich material through which to consider feminist judging's nature, purpose and impact. In doing so, it also demonstrates how debates surrounding the 'possibilities, limits and implications' of judging more generally are enriched by critical evaluations of imagined feminist judgments.

66 Douglas et al, 'Introduction', above n 5, 8.
67 Ibid 15–17.
68 Research Data Australia, above n 2.

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What a difference difference makes: gendered harms and judicial diversity

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ABSTRACT *Taking the UK Ministry of Justice's ongoing quest to ensure a more diverse judiciary as its starting point and backdrop, this paper establishes the House of Lords' decision in* Secretary of State for the Home Department v. K (FC); Fornah (FC) v. Secretary of State for the Home Department [2006] *as a lens through which to explore the 'difference' of the woman judge and, in particular, the developing jurisprudence of Baroness Hale—the first (and only) female law lord in the UK. It argues that Baroness Hale's candid recognition and articulation of the gendered nature of the experiences and violence in Fornah's story reveals not only the difference difference (in whatever form) might make to understandings of the judge, judging and justice but also the importance of recognising the transformative potential of judicial diversity to create a space in which difference is celebrated and valued on its own terms, a place where difference can truly make a difference.*

Introduction

> My Lords ... the answer in each case is so blindingly obvious that it must be a mystery to some that either of them had to reach this house. (Baroness Hale in *Secretary of State for the Home Department v. K (FC)*; *Fornah (FC) v. Secretary of State for the Home Department* [2006] 83)

Since her elevation to the House of Lords in January 2004, it has become increasingly apparent that while she is far from "trouble with a capital H" (Hardcastle, 2004) Baroness Hale is nevertheless "just a bit different" from her exclusively male colleagues (Hale, 2004a). Indeed, the combination of her pioneering achievement, her candid exposure of the inheresnt sexism in her profession (Verkaik, 2003), and her willingness to talk about "clothes, cooking and childcare" (Hale, 2002) which secured her place as one of the "Women We Loved in 2003" (Addley, 2003) continues to confirm her status as not only one of the most interesting feminists alive today (Anon, 2005) but also "one of our more thoughtful" law lords (Anon, 2004).

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The decision in *Secretary of State for the Home Department v. K (FC); Fornah (FC) v. Secretary of State for the Home Department* is a case in point.[1] Baroness Hale's explicit recognition of gender-related and gender-specific persecution—her difference, if you like—haunts the unanimous ruling. Put another way, gendered difference is both the method and the subject of the appeal. This is not unproblematic. While the world may have "woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted" (Baroness Hale, *Fornah* [2006] 86), in the context of adjudication the mere suggestion of difference—particularly in relation to the woman judge—remains contentious. The existence or otherwise of a 'different' judicial voice (however so articulated) is, more often than not, rejected as a "dangerous myth" (O'Connor, 1991, p. 1553) that threatens to lure the unwary toward the quagmire of essentialism while, at the same time, going to the heart of Herculean understandings of the judge and judging. So viewed, the woman judge is a threat to the aesthetic norm; her presence on the bench is an inescapable irritant, simultaneously confirming and disrupting its established masculinity. As a result, while calls—in both the UK and beyond—for judicial diversity grounded in the importance of equal opportunities or democratic legitimacy abound (Thomas, 2005), arguments located in difference (whatever that might mean) have largely fallen silent.

And yet, perhaps the irritant potential of the woman judge is no bad thing. In fact some might ask—what's so great about Herculean understandings of the judge and judging anyway? Maybe the detached, disembodied, impassive judicial superhero has had his day; the aesthetic image of the Herculean judge is increasingly understood as not only unattainable but also undesirable (Rackley, 2006a). If so, then the presence of difference on the bench provides us with an opportunity to reassess both what it is we want from our judges and what it means to judge. Put another way, it is because the woman judge is 'different' that we both look for and—more importantly—*find* difference (Rackley, 2006b). So viewed, difference brings into sharp relief not only the extent to which prevailing images of the judge are enmeshed in notions of sameness and uniformity but also attributes of the judge and judging currently hidden beneath his superhero's clothes.

However this is not to suggest that all—or indeed any—women judges speak with a 'different voice' akin to the elusive (and currently derided) voice of the idealised, Gilligan-inspired lawyer and judge (although there may be similarities in tone).[2] Nor is it to fetishise Baroness Hale's difference *as a woman* over other aspects of her identity—for example, her academic background, her time as a law commissioner, her judicial training—or other personal characteristics—her feminist credentials (Hale, 2007), her experiences as a mother and grandmother and so on. Rather my point is this. Properly understood, the promise of judicial difference (however defined) lies in its ability to render contingent particular but dominant forms of judicial reasoning—that is the incorporation of difference on the bench exposes the extent to which the privileging of particular knowledges, the flattening of difference and the suppression of polytonality both affect and effect women, judging, and the delivery of justice. In so doing, judicial difference acts as a catalyst for disruption; impacting upon the legal monotony, destabilising its taken-for-granted assumptions and uncovering

alternative ways of seeing, understanding, and judging and the possibility of true judicial diversity.

Taking the UK Ministry of Justice's ongoing quest to ensure a more diverse judiciary as its starting point and backdrop, this paper utilises the House of Lords' decision in *Fornah*—described by one commentator as a decision bearing "all the hallmarks of Britain's first woman law lord" (Anon, 2006)—as a lens through which to explore the 'difference' of the woman judge and, in particular, the developing jurisprudence of Baroness Hale—the first (and only) female law lord in the UK. To this end *Fornah* is illustrative rather than definitive. The paper argues that Baroness Hale's candid recognition and articulation of the gendered nature of the experiences and violence in Fornah's story reveals not only the difference difference (in whatever form) might make to the understandings of the judge, judging and justice but also the importance of recognising the transformative potential of judicial diversity to create a space in which difference is celebrated and valued on its own terms, a place in which difference can truly make a difference.

Appointing difference

Ever since John Griffith identified the judiciary in England and Wales as a largely homogenous group, possessing "a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions" (Griffith, 1997, p. 7), the class, age, education, sex, race and, more recently, sexuality of the judiciary have been subject to vigorous scrutiny.[3] While the judiciary in England and Wales is more diverse than it has ever been with almost twice as many women and people from ethnic minority groups working in, and being appointed to, it than there were ten years ago, current figures suggest we are in danger of having what Brenda Hale has described as a "pale male judiciary" for some time yet (2005b, p. 281). Although just over 25% of the judiciary as a whole is female, women make up less than 11% of full-time judges. Moreover, just 11 women sit in the High Court and above alongside 98 men; put another way just over 91% of the senior judiciary is male.[4] Following the retirement of Elizabeth Butler-Sloss as President of the Family Division, none of the Heads of Division are (or have been) female. Judges from a non-white ethnic minority background fare even worse. Linda Dobbs' hope that her appointment to the High Court in 2004 "would be the first of many" has not yet been realised (BBC News, 2004). Non-white ethnic minority groups remain significantly underrepresented in both the senior judiciary and the judiciary as a whole, comprising just 1.8% and 4% respectively.[5] Clearly, as the previous Lord Chancellor, Lord Falconer, observed there is "still more to do if we are to achieve a judiciary that better reflects the society it serves" (DCA Press Notice, 2006).

Unsurprisingly then judicial diversity—or lack thereof—has, for a number of years, been fairly consistently high on the UK's political agenda.[6]

> Achieving judicial diversity is a priority because it makes a real and positive difference to the administration of justice. We need to harness the talent and ability of all those who would make good judges, so that we can be sure that

> the best are being appointed whatever their background. The public needs to have confidence in judges who more closely reflect the diversity of the nation, and who have a real understanding of the problems faced by most people. (DCA Press Notice, 2005)

True to his word, the Falconer-era brought with it a number of key changes (as part of the Labour Government's wider programme of constitutional reform) designed to encourage and meet the needs of a more diverse judiciary. These included allowing for a reduction in the time spent as advocate before qualifying for judicial appointment, opportunities for job sharing, career breaks, a mentoring scheme and, most significantly, legislative provisions establishing an independent Judicial Appointments Commission responsible for nominating candidates for appointment by (or on the recommendation of) the Lord Chancellor.[7]

And yet, one might well ask: what is all the fuss about? *Why* should we want a more representative judiciary? Is it simply that there *ought* to be more women judges, just as there ought to be more women in Parliament or managing directors of FTSE 100 companies (Equal Opportunities Commission, 2006), not to mention more male nurses and primary school teachers (a kind of numerical aestheticism)? Or, alternatively, maybe the formal adherence to principles of fairness and equal opportunities is a mechanism to ensure the judiciary's survival? Perhaps judicial diversity is necessary in order to maintain public confidence in, and to ensure the legitimacy of, the judiciary as a whole? The difficulty is, however, that none of these proffered rationales draw on any advantage in the woman judge *per se*. But should they? Surely the *woman* judge has something to offer beyond simply evening up the numbers at the table? How, if at all, might her presence make a difference?

Enter Baroness Hale: the first—and so far only—lady law lord. Unsurprisingly perhaps, she believes "the case for increasing diversity on the Bench, not only in gender and ethnicity, is not just a fashionable and self-interested prejudice. It is overwhelming" (Hale, 2003). Importantly, her motivation is transformative rather than simply curative. A more diverse judiciary, she suggests, will not only meet the demands of democratic legitimacy and equal opportunities—increasing public confidence through a shrewd use of human resources which addresses the disadvantages of the current judiciary—but also, through the incorporation of a variety of perspectives, will make a difference to the decisions made:

> I would like to think that a wider experience of the world is helpful: knowing a little about bearing and bringing up children must make some difference ... [although] there have been some wonderful family judges who have never changed a nappy or cooked a fish finger in their lives. (Hale, 2001a, p. 501)

Nevertheless, crucially although Baroness Hale believes women lawyers and judges have "moved on" from an understandable reluctance to "acknowledge or claim the right to be different" (Hale, 2002, p. 12), her relationship with 'difference' remains somewhat prickly. Answering the question why we should want more women judges, she suggests that her academic career, her reforming inclinations and her

"tendency to go native" are "at least as influential" in relation to her jurisprudence as her gender (Hale, 2001a, p. 500).

> We should not expect women judges to 'make a difference' in the sense that they are likely to make different decisions from men ... We are all lawyers first and men or women second ... But if it were as simple as that, why should having more women on the bench be expected to increase public confidence in its decision? Window dressing is important, as every retailer knows, but isn't it necessary also to improve the products on sale? The difference is more subtle. (Hale, 2003)

Her support for a more diverse judiciary is not, therefore, grounded in an understanding that women judges speak in a 'different voice' or that men and women 'judge' differently: "the great majority of judgments I have written or spoken [Hale contends] could just as easily have been written or spoken by a man" (Hale, 2003). Rather it lies in an understanding that the perspectives and experiences of women judges *as women* necessarily inform their judgments and that "the experience of leading those lives should be just as much part of the background and experience which shapes the law as the experience of leading men's lives has been for centuries" (Hale, 2003). Lady Justice Arden has made a similar point.

> The point I am making is that men and women often bring different perspectives to bear on a problem ... It is that potential for different perspectives that men and women often have that in my view has the potential to enrich judicial decision-making. I am not saying that other under-represented groups do not have different perspectives too, but women are by far the largest group under-represented in the judiciary. (Arden, 2008)

Put another way, Baroness Hale and Lady Justice Arden's understanding of the importance of difference is grounded in the recognition that who the judge *is* matters. As Sandra Berns has noted, it matters both in terms of "the kind of story ultimately told, and for the way that story reaches the law and the law reaches that story" (1990, p. 8).

This is deeply subversive. It explodes a paradox underlying current discourses on adjudication where on the one hand women judges are viewed as desirable in order to broaden the range of perspectives on the bench, thus making the judiciary more representative, while on the other judges are *supposed* to be without perspective (even if we no longer *really* believe this to be true), thus suggesting there is little need for a representative judiciary. As traditional understandings of the judge and judging—a fairy tale of one "almost superhuman in wisdom, in propriety, in decorum and in humanity" (Gall, 1996) able to apply the law in a neutral and detached way—lie in ruin, the presence of difference on the bench challenges us to reconsider our adjudicative expectations; to confront our Herculean demons in order to let go of the superhero and embrace the [(wo)man] judge (Rackley, 2002). So understood, difference—found in the distinctiveness of perspective and experience—is not an end in itself but rather a route to engendering diverse perspectives on adjudication, justice and law. Put simply, as Baroness Hale suggests, there *is* more to difference than simply

window dressing; its strategic subtlety not only masks its true irritant potential but also the extent to which it can really 'make a difference'. In revealing previously unimagined adjudicative alternatives, it throws a spotlight onto the ordinary or normal, reorientating our focus away from difference itself and onto that which difference is different to; it moves the spotlight away from the prefix to its subject, from the *woman* judge to the woman *judge* and, in so doing, allows for and, more importantly, increases the possibility that one day judicial diversity might render this, and all other, descriptive prefixes superfluous.

Judging gender

Zainab Esther Fornah grew up in Freetown, the capital of Sierra Leone. Her childhood was a happy one:

> I had a nice life with my brothers and my mother and father . . . The only difficult thing I had to face was that my aunts used to come from the village to see my father and tell him it was time for me to join the secret society. That meant it was time for me to be cut, to be circumcised. (Walter, 2006)

Female Genital Mutilation (FGM)[8] is performed on the overwhelming majority of girls in Sierra Leone.[9] It typically takes the form of Type II FGM (commonly known as 'excision') which involves the excision of the prepuce and clitoris together with partial and total excision of the labia minora (WHO, 2000). It is often performed in very crude conditions by older women—members of secret societies—and causes excruciating pain as well as serious short- and long-term ill-effects including excessive bleeding, infection, urine retention, increased risk of fistula, sexual dysfunction, complications in pregnancy and childbirth, psychological damage and death. Although FGM is performed worldwide,[10] including (despite legislation prohibiting it) the UK,[11] in Sierra Leone the practice of FGM is particularly intractable:[12]

> [I]t is a rite of passage from childhood to full womanhood, symbolised by admission of the initiate to these secret societies. Even the lower class of Sierra Leonean society regard uninitiated indigenous woman as an abomination fit only for the worst sort of sexual exploitation. Because of its totemic significance the practice is welcomed by some women and accepted by almost all. In society as a whole the practice is generally accepted where it is not approved, and the authorities do little to curb or eliminate it. (*Fornah* [2006] 6).

Zainab Fornah is, therefore, somewhat unusual, her intact state the result of her father's rejection of what he understood as an 'evil' practice. In a newspaper interview she described how her father protected her from it: he "would give them excuses, and say that he would bring me one day . . . but he didn't want me to go . . . and said I didn't have to do it" (Walter, 2006). But then the war came. Zainab was just 12 when, like many girls and young women in Sierra Leone at that time, she was abducted and repeatedly raped by rebel soldiers. By the time the war was over and she returned to Freetown, her family had been killed. The abuse she had suffered during the war

meant that it was impossible for her to remain in Freetown: "Everyone knew I had been taken to the bush, and they shouted and pointed at me in the streets" (Walter, 2006). And yet, she was scared to return to her father's village as this meant she would have to join the 'secret society'—to be cut. With the help of an uncle from America she flew to England where she claimed asylum.[13]

Article 1A (2) of the 1951 Geneva Convention Relating to the Status of Refugees defines a refugee for the purposes of the Convention as any person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .[14]

It was common ground in *Fornah* that FGM "constitutes treatment which would amount to persecution within the meaning of the Convention and that if [Fornah] was . . . a member of a particular social group the persecution of her would be for reasons of her membership of that group" ([2006] 25). This is unsurprising. Asylum claims based on fear of FGM have been recognised worldwide.[15] FGM has also been condemned as unconscionable, cruel, degrading, and discriminatory in numerous national and international instruments, declarations, resolutions, pronouncements, guidelines and recommendations (Fordham & Cassels, 2007).

> On this basis, we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice. (UNHCR memorandum, Female Genital Mutilation, 10 May 1994, in Fordham & Cassels, 2007, p. 347)

What was at issue then was whether Zainab Fornah's well-founded fear of persecution was "for reasons of . . . membership of a particular group"—the most problematic of the five Convention grounds. Put another way was she, according to the Convention, a member of a particular social group—however defined? Opinions on this varied greatly. The Secretary of State, while granting her limited leave to enter the UK, rejected her claim to asylum on the grounds that "girls who were at risk of being subjected to FGM" did not constitute a social group for the purposes of the Convention.[16] This was subsequently overturned by an Adjudicator who found that "young, single Sierra Leonean women, who are clearly at considerable risk of enforced [FGM]" could in fact be seen as a social group for the purposes of the Convention. On appeal to the Immigration Appeals Tribunal it was held that neither "young, single Sierra Leonean women" nor the more specific "young Sierra Leonean women who [had] not undergone female genital mutilation" could (on the reasoning of the House of Lords in *Islam v. Secretary of State for the Home Department;*

R v. Immigration Appeal Tribunal, Ex p Shah [1999]) be properly regarded as a particular social group under the Convention. While in no way condoning or justifying the practice of FGM, this decision was supported by the Secretary of State and confirmed by a majority in the Court of Appeal.

Fornah appealed.[17] The House of Lords unanimously held that she qualified for protection under the Convention as a "member of a particular social group"—variously defined as either "all women in Sierra Leone" (Lord Bingham and Baroness Hale: 31 and 114, respectively) or somewhat more narrowly as "uninitiated or intact indigenous females women in Sierra Leone" (Lords Hope, Rodger and Brown: 58, 80 and 119, respectively). In so doing, the law lords "convincingly dispel the myth that FGM is simply a custom performed by women on women, and provide a powerful recognition that the practice constitutes a blatant breach of human rights in male-dominated societies" (Cragg, 2006): "[p]atriarchal societies have often recruited women to be the instruments of the continued subjection of their sex" (Baroness Hale, *Fornah* [2006] 93). Moreover, despite its linguistic similarity to male circumcision

> [t]he contrast ... is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. FGM may ensure a young woman's acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority. (Lord Bingham, 31)

Put simply, the law lords in *Fornah* recognise and, importantly, articulate, the multilayered gendered harm of FGM, as a form of gender-specific persecution. Their identification of it as a "very cruel expression of male dominance" and "extreme expression of the discrimination to which all women in Sierra Leone are subject" effectively establishes gender as an identifying characteristic of a particular social group for the purposes of the Convention (Lord Bingham, 31).

But what of Baroness Hale? To what extent, if any, did having a Lady amid the Lords make a difference to the Lords' unanimous decision in *Fornah*? Or, put another way, what difference, if any, did difference make?

Recognising harm

Like other human rights instruments of its time, the Refugee Convention reflects the concerns and conceptions of persecution and harm of the immediate post-Second World War period. Significantly, gender (or indeed sex) is not listed alongside "race, religion, nationality, membership of a particular social group and political opinion" as a reason for persecution which automatically gives rise to a claim for refugee status under the Convention. Traditionally, this has meant that women (and others) have found it difficult to utilise the protection of the Convention: "the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals have gone unrecognised" (UNHCR, 2002, p. 5; Crawley, 2001). Moreover, limited understanding or acknowledgement of the specific ways in which women are persecuted—honour

killings, Sati, domestic violence, rape, FGM and so on—has, critics suggest, enabled governments to "hide behind narrow definitions to avoid their responsibility for crimes against women" (Kennedy, 2005, col. 856).

However more recently, in both academic commentary and international debate, it has not only been accepted that gender-specific and/or related harms fall within the remit of the Convention (usually through the use of the 'particular social group' provision) but that "the text, object, and purpose of the Refugee Convention *require* a gender-inclusive and gender-sensitive interpretation" (Baroness Hale, *Fornah* [2006] 84). This is not least because states who are party to the International Covenant on Civil and Political Rights and the Convention of the Elimination of All Forms of Discrimination against Women as well as the Refugee Convention are now obliged to interpret the latter in line with the commitment to gender equality contained therein. Coupled with the groundbreaking decisions of the House of Lords in *Islam* and *Shah* [1999] (allowing the asylum claims of women who, having been forced by their husbands to leave their homes in Pakistan, feared that if they returned they would be falsely accused of adultery and persecuted for sexual immorality, the penalty for which might be death by stoning or flogging) and the Court of Appeal in *P and M v. Secretary of State for the Home Department* [2004] (accepting a claim for asylum by a young Kenyan Kikuyu woman who feared her father would force her to undergo FGM) it seemed the time for undervaluing or ignoring gender-specific persecution had past. Sadly, the decision of the majority of the Court of Appeal in *Fornah* [2005]—a decision which "made all the right noises about how awful FGM is" before taking "sanctuary in a mean and narrow interpretation of the law"—bucked this trend (Kennedy, 2005, col. 856).

In dismissing Fornah's appeal, Auld and Chadwick LLJ concluded "female genital mutilation of young, single and uncircumcised Sierra Leonean women" did not constitute persecution "for reasons of" their membership of a "particular social group" on a number of "technocratic" (Kennedy, 2005, col. 856) grounds including the fact that

> the practice [of FGM], however repulsive to most societies outside Sierra Leone, is ... clearly accepted and regarded by the majority of the population of that country, both men and women, as traditional and part of the cultural life of its society as a whole. (Auld LJ, *Fornah* [2005] 44)

As a result, far from ostracising them, FGM leads to "full acceptance by Sierra Leonean society of those young women ... into adulthood". Thus, while FGM clearly constitutes persecution for the purposes of article 3 of the ECHR, it is not, at least in the circumstances in which it was practised in Sierra Leone, discriminatory as required by the Convention (44). In so arguing, the majority of the Court of Appeal appears seduced by the arguments of the cultural relativists. Reluctant to follow through their recognition of FGM as a "repulsive" practice on the grounds that it is part of the "tradition" and "cultural life" of Sierra Leonean society (44), they come dangerously close to resorting to what Martha Nussbaum describes as the "worst option of all" when seeking to balance respect for cultures and human rights:

> To say that a practice endorsed by tradition is bad is to risk erring by imposing one's own way on others who surely have their own ideas of what is right and good. To say that a practice is alright wherever local tradition endorses it as right and good is to risk erring by withholding critical judgment where real evil and real oppression are surely present. To avoid the whole issue because the matter of proper judgment is so fiendish difficult is tempting, but perhaps the worst option of all. (Nussbaum, 1995).[18]

However the responses of Auld and Chadwick LLJ to Fornah's position are interesting for another reason. Referring to the Court of Appeal's "appalling" decision in a debate on FGM in the legislative body of the House of Lords, Helena Kennedy argues

> If anything, [*Fornah*] argues for more women judges in our courts. It is cases like these which highlight problems of gender issues still continuing in our courtroom because the men involved do not realise that their own mindset is often what determines their approach to law. (Kennedy, 2005, col. 856)[19]

Really? Certainly, the majority of the Court of Appeal in *Fornah*, while recognising FGM as a gendered harm fails to fully understand or locate this harm within the gendered context in which it takes place. Their focus on the practices and traditions of the community belies an individualistic understanding of the practice of FGM which is incompatible with the broader, group focused conception of harm or persecution required by the Convention. In so doing, as the dissent of Arden LJ acknowledges, they fail to recognise that "the effect of FGM is to identify a social group" and to mark out those who are not part of that group for persecution:

> the mere fact that Sierra Leonean society accepts FGM does not mean that the prospectively adult women in that society cannot constitute a particular social group for the purposes of the refugee convention. (*Fornah* [2005] 63)

And yet, while there is clearly a difference in approach and the ultimate decision between the male and female members of the Court of Appeal [the conventions of legal writing, whereby Lord *and* Lady Justice becomes simply 'LJ', obliterating the "stigmata" of Lady Justice Arden's sex (Berns, 1999, p. 203)], it is not immediately apparent that this necessarily points to, as Kennedy suggests, the need for more *female* judges per se, rather than, say, judges who are more attuned to the limitation of their own experiences and common sense (Graycar, 1995). We should be wary of the temptations of gender essentialism, of any claim to a 'female', or indeed 'male', judicial voice (Kennedy, 2005, col. 856; Hale, 2001a, p. 501). After all, as Arden LJ states: "If you had a woman judge a case and a man judge a case you would be likely to have the same conclusion on the case" (Smith-Spark, 2004). Although, presumably, the Court of Appeal's decision in *Fornah* is the exception that proves the rule?

Interestingly in light of Kennedy's claim, and somewhat unusually, *Fornah* met with two female judges as it progressed through the courts: Lady Justice Arden in the Court of Appeal and Baroness Hale in the House of Lords. Given the poor

representation of women in the UK judiciary (especially at senior levels), this is no mean feat. It is not often that we are able to compare the decision-making of two senior *female* judges in the same case (and, of course, it is impossible to do so in the House of Lords). As a result, it is tempting to compare and contrast similarities in, say, outcome (they both found for Fornah) and differences in, say, their definitions of the particular social group to which she belongs. To comment on the fact that while Arden LJ would have limited it to "*prospectively* adult women, that is those women who have not yet undergone FGM" (*Fornah* [2005] 61), Baroness Hale favoured the broader group of all "Sierra Leonean women belonging to those ethnic groups where FGM is practised" ([2006] 114). Or, alternatively, to contrast Baroness Hale's explicit articulation of the gendered harm expressed through the practice of FGM with the measured more limited narrative of Arden LJ's lone dissent in the hope of reaching some, inevitably vague conclusions, as to their 'difference' (if any and however defined) both to each other and their male colleagues.

However, while such a comparison is perhaps interesting, it is ultimately, at best, a distraction and, at worst, a theoretical dead end. We must be careful not to become bewitched by their difference. It is because Arden LJ and Baroness Hale are women that we both look for and, more importantly, *find* difference. However, getting our attention in this way is not without its pitfalls. In embracing Baroness Hale and Arden LJ as *women* judges or even as (women) judges we risk looking for and then endowing their judgment and decision-making with feminine traits instead of closely scrutinising what they are really doing. Put another way, in our hunt for difference (in whatever form) we risk overlooking and stifling the potential impact of difference on judicial diversity.

So understood, that Arden LJ (perhaps unusually) comes to a different *conclusion* to her male colleagues is relatively unimportant (Belleau & Johnson, 2004). Judicial difference, Arden suggests, is found as much (if not more) in the process rather than the end of judgment (2008). Thus, while her lone dissent gets our attention, its persuasive success lies not in its manifestation as, or articulation of, difference *per se* but rather in its effects; that is in the ability of her narrative (as with all dissenting judgments) to challenge the majority's story and weaken its hold on our collective imagination. Put another way, her 'difference' lies in the fact that she hears and tells a different story (rather than simply the fact that it has a different ending) and, more specifically, in the potential of her counter-narrative to open up new avenues for exploration and alternative understandings of the judge and judging.

After all, if visibility (in the sense of different endings) were to be a necessary requirement of difference where would this leave Baroness Hale? True, in many ways her opinion in *Fornah* displays some, by now, familiar characteristics. Most notably, her deliberate recognition—and, importantly, articulation—of the particular "gender-related and gender specific persecution" raised by the case ([2006] 83). Gender not only tops and tails her opinion but runs throughout. Consider, for example, her easy identification of FGM as a gendered harm at its outset, its purposeful gender(ed)-focus evidenced in her lengthy and detailed description of what FGM involves and her strategic juxtaposition in her conclusion of the everyday reality faced

by many women worldwide and the gender-biased nature of the protection offered by the Convention:

> [The resolution of this case] is by no means purely of academic interest to these women or to the many others in the world who flee similar fears. They are just as worthy of the full protection of the Refugee Convention as are the men who flee persecution because of their dissident political views. (115)

Contrast this with Lord Rodger's slightly less comfortable acceptance of the "gender-specific" nature of the harm (74). Here gender is isolated securely in double-quotes, less it taint his subsequent remarks and coupled with an immediate clarification—"being a woman" the "causa sine qua non" of being a victim in such cases—the archaic Latinate legal term, presumably, a linguistic antidote or response to the new fangled idioms required by the recognition of so-called gender-issues (74).

However, semantic pedantries acknowledged and put aside, what is more interesting about the House of Lords' decision in *Fornah* is the *similarity* between Baroness Hale's and the other law lords' opinions. Consider, for example, Lord Bingham's rejection of the emphasis put by the majority of the Court of Appeal on the fact that FGM is carried out by women: "Most vicious rituals are in fact perpetuated by those who were themselves subject to the ritual as initiates and see no reason why others should not share the experience" (31) with Baroness Hale's assertion that "it cannot make any difference that [FGM] is practised by women upon women and girls. Those who have already been persecuted are often expected to perpetuate the persecution of others, as any reader of *Tom Brown's Schooldays* knows" (110). And Lord Hope's description of the "initiation ritual" as a "process of sexual separation" and the interrelationship between sexual discrimination and patriarchy (53–4) with Baroness Hale's blunt listing of the purposes of FGM as "to lessen the woman's sexual desire, maintain her chastity and virginity before marriage and her fidelity within it, and possibly to increase male sexual pleasure" ... which, she suggests, have been "translated into power social purposes" (93).

So viewed, her opinion isn't all that different. What difference there is is perhaps more a matter of style than substance—of discursive narrative compared to restrained legal reasoning (as traditionally understood)—and as such is maybe as much, if not more, reflective of Baroness Hale's background as an academic and law commissioner than her gender. Furthermore, while clearly her typically contextualised, gender-aware approach infused the law lords' opinions (compare, for example, Lord Bingham's gender-infused, context laden opinion with the narrowly legalistic judgments of Auld or Chadwick LLJ), no less than three of her four colleagues were more persuaded by Arden LJ's dissenting formulation of the definition of the relevant social group for the purposes of the Convention than by Baroness Hale's broader approach (Lords Hope, Rodger and Brown: 56, 74, 119 respectively).

That said, the unanimous decision of the House of Lords nevertheless clearly has (or, just as importantly, is seen to have) Baroness Hale's fingerprints all over it: "Although all five judges agreed ... few would doubt that Lady Hale has brought to the highest court in the land a bracing new approach to women's rights" (Anon,

2006; Tsang, 2006). Moreover, in stark contrast to the apocalyptic fears voiced on her appointment, the influence and impact of her "unique perspective" (Lord Hoffmann, *R v. G* [2008] 36) on the jurisprudence of the House of Lords has been seen as a good thing:

> [Lady Hale's] success should encourage the Lord Chancellor's slow progress in widening the gene pool of judges by looking for candidates—women and men, and in particular those from minorities—who can offer the right combination of intellectual excellence and diverse experience to the court that shapes English law. (Anon, 2006)

This insight is not particularly novel. It is something female judges have known for a while. Bertha Wilson made a similar point back in 1990 in her lecture exploring whether women judges "will really make a difference":

> women view the world and what goes on in it from a different perspective from men ... [and that] women judges, by bringing that perspective to bear on the cases they hear, ... play a major role in introducing judicial neutrality and impartiality into the justice system. (Wilson, 1990, p. 515)

Likewise, Beverley McLachlin more recently put it bluntly thus: "we need more women on our Benches ... because we need the perspectives that women can bring to judging" (in Hale, 2005a, p. 1); a view which is echoed in Baroness Hale's albeit slightly more tentative claim on her appointment to the House of Lords that "[b]eing a woman doesn't necessarily make a difference when you're making judgments but we are different and it's that more than anything else that will make a difference" (Brenda Hale in Pears, 2004).[20]

Whichever way you put it, the message is clear: the incorporation of difference on the bench subtly changes and, ultimately, improves the judicial product (Hale, 2004b). As the decision in *Fornah* shows, a truly diverse judiciary is not simply apposite (on the grounds of, say, equal opportunities or democratic legitimacy) but rather essential if we are to realise the best we possibly can in terms of justice, judgments and judging. However difference alone is not enough. What we need is more *diversity*. Put another way, while the presence of difference on the bench gets (for whatever reason) our attention, it is in fact only the beginning of the story. Where difference might take us? Now that's the start of a whole new adventure.

Toward an understanding of judicial diversity: concluding remarks

In its consultation paper *Increasing Diversity in the Judiciary* the Department for Constitutional Affairs (now the Ministry of Justice) defines diversity as: "The presence among a group of individuals of a wide variety of backgrounds, cultures, opinions, styles, perspectives, values and beliefs" (DCA, 2004b, p. 57). According to this definition judicial diversity simply requires the presence of a miscellaneous—albeit strategic—assortment of difference or dissimilarity on the bench appointed on 'merit', without regard to 'irrelevant' factors such as age, disability, gender, ethnicity, marital status, political affiliation, religion or belief, sexual orientation, gender

identity (p. 8). While it remains to be seen how this, at best, somewhat optimistic and, at worst deliberately naïve belief in the reciprocity of merit and diversity plays out (p. 8), it is clear that this pragmatic understanding of diversity is significantly flawed (Rackley, 2007, p. 86).

Put simply, diversity is not about letting people in but about letting go. It challenges the complacency and normative superiority of the status quo: "majority groups are not entitled to retain more cultural status and recognition than others; they must therefore let go of some of their privilege, however painful such a letting go may feel" (Cooper, 2004, p. 35). So understood, the politics of diversity require more than simply tolerating of the presence of varied perspectives and distinctive backgrounds within a given group—"toleration implies disapproval or dislike. We do not tolerate things we like or endorse" (Weeks, 1993, p. 206). Rather, diversity compels us to create a space in which difference is celebrated and valued on its own terms (Cooper, 2004, p. 7). In so doing, diversity demands we "look away from that which stands out as different in order to be able to evaluate the mainstream, the common and the 'normal'" (Cooper, 2004, p. 7); to look not at the unusual but instead at the mundane or taken for granted and, in so doing, to embrace difference not as "intrinsic in the 'different' person, but rather the product of comparison" (Minow, 1989–90, p. 3).

Thus, properly understood, judicial diversity is not simply about ensuring that a strategic assortment of individuals of varying ages, sex, race, class, culture, and so on live 'happily ever after'—a strategic evening up of the numbers on the bench to ensure a kind of numerical aestheticism. Nor is it about securing the resigned acceptance by the status quo of the inclusion of difference as a political necessity—a strategy for survival, albeit with the tacit assurance that nothing will really change. Rather, diversity requires the usual to be transformed by the remarkable and the extraordinary to become the norm. It is as much about looking at that which difference is different to—the everyday or mundane—as it is about looking for difference itself.

So understood, judicial diversity is a process or means to an end, rather than an end in itself. Put another way, once difference is understood as "not merely 'out there' but [as] created through the ways we [or the judiciary] works" (Archer, 2004, p. 470) a focus on that which is different—both in the sense of *being* aesthetically atypical and *doing* judging differently—reveals the contingency of traditional accounts of legal reasoning and the possibility of alternative and diverse adjudicative voices, which are not necessarily (but may be) feminine and/or feminist in intonation. Put simply, difference provides us with an opportunity to test our assumptions about the judge and judging—to consider not only what is different to the judicial norm but the norm itself.

Perhaps, then, Sandra Berns is right—maybe the whole idea of difference and, in particular, "of a different voice is part of the problem" that threatens to "seduce" us away from what is really going on and what is really important in the context of judicial diversity (1998, p. 13). Maybe, like the sun, we should not—if we wish to avoid disorientating blindness—look directly at or for difference but rather explore its impact on those that it is different to. Put simply, instead of looking for the difference or otherwise of Arden LJ and Baroness Hale, our attention should rather be focused

on norm—on Lord Justices Auld and Chadwick together with Lords Bingham, Hope, Rodger and Brown—and the impact the presence of difference has on them. To ask the question: do *male* judges make a difference? This might make for an interesting comparison. For example, while the majority of the Court of Appeal remain bound by their grid-like reasoning—the lure of "the aesthetic of bright-line rules, absolutist approaches, and categorical definitions" (Schlag, 2002, p. 1051), where law is predictable, stable, certain, solid, boundaried, coherent, and determinate—the law lords embrace the strategic importance of context and strategic detachment in decision-making. Following, one assumes, the lead of Baroness Hale toward the 'obvious' conclusion (indeed, how could they not?), Lords Bingham, Hope, Rodger and Brown utilise the seductive unbounded energy of law "on a mission" (Schlag, 2002, p. 1072) in order to make some small part of Fornah's story their own. In so doing, they let her experiences penetrate them fully, recognising that true detachment and effective judging is grounded in connection and contextualised engagement (Albom, 1997, p. 103).

So viewed, judicial diversity ultimately subverts that which it is said to reinforce; it utilises the presence of difference on the bench as a means of exploring aspects of judging often overlooked in conventional accounts of adjudication (rather than confining its potential as an end in itself). It requires us to let go of difference and embrace diversity; put simply, to consider where difference might take us and, in so doing, begin to re-imagine what it is we want from our judiciary and what it means to be a judge. If this means that there will be more decisions from the House of Lords like *Fornah*—where the transformative potential of difference captures our imagination—this may be no bad thing.

Notes

[1] Hereinafter *Fornah* [2006]. This paper concentrates exclusively on the facts and decision in relation to Zainab Fornah. *Fornah* was joined, on appeal to the House of Lords, with the case of *K* involving an Iranian national who had fled Iran following the arrest of her husband and having been raped and insulted by the Revolutionary Guards there. Her asylum claim—grounded in a fear of persecution as a member of a particular social group (her husband's family)—as well as issues of causation was successful, on appeal, to the House of Lords. For a discussion of the facts and decision in relation to K's appeal and Baroness Hale's criticism of the process of dividing families into "primary" and "secondary" members as "inherently sexist" see further, Chaudhry (2007).

[2] The extent to which women judges speak in a 'different voice'—although perhaps intuitively attractive—remains hotly disputed among both legal academics and professionals: see, e.g. Freenan (2007), Malleson (2003), Kay and Sparrow (2001), Sisk *et al.* (1998), Davis (1992–93), Martin (1993) and Belleau and Johnson (2005).

[3] See generally, Schultz and Shaw (2003), Moran (2006), Freenan (2007), Nicolson (2005), Darbyshire (2007) and Thomas (2005) in the UK; Thornton (1996) in Australia; Kay and Brockman (2000) in Canada; and Kruse (2001) in the US.

[4] Figures taken from the Judiciary of England and Wales website as at 1 April 2008, available at: http://www.judiciary.gov.uk/keyfacts/statistics/diversity_stats_annual/2007.htm (accessed 10 July 2008).

[5] *Ibid.* See further, Abbas (2005). There are no government figures available in relation to other indicators of diversity, for example, age, sexuality, educational background, disability or religion,

however see further Sutton Trust Briefing Note (2005) on the educational background of the senior judiciary, DCA (2005a) on disability, and Moran (2006) on sexuality.

[6] On 9 May 2007 the responsibilities of the Department for Constitutional Affairs (DCA) transferred to the new Ministry of Justice and Jack Straw was appointed Lord Chancellor and Secretary of State for Justice. In a speech at the Lord Mayor's annual judges dinner in July 2007 he confirmed the new department's continuing commitment to securing a more diverse judiciary (Straw, 2007). See in particular DCA (2003, 2004a, 2004b, 2004a, 2005b) and further http://www.dca.gov.uk/judges/diversity.htm (accessed 10 July 2008).

[7] Section 64 of the Constitutional Reform Act 2005 establishes that the JAC "must have regard to the need to encourage diversity in the range of persons available for selection for appointments" (although cf. Dyer, 2008). On the Judicial Appointments Commission see further http://www.judicialappointments.gov.uk/ (accessed 10 July 2008).

[8] In this paper I use the term 'Female Genital Mutilation' (FGM) in line with the House of Lords, however I recognise (with Baroness Hale) that increasingly the practice is being referred to internationally as 'Female Genital Cutting' (*Fornah* [2006] 90). On the issues raised by FGM more generally see further Nussbaum (1999, pp. 118–29), FORWARD (2002), The Female Genital Cutting Education and Networking Project, available at: http://www.fgmnetwork.org/index.php (accessed 26 September 2007); the Debate on 'Female Genital Mutilation' in the House of Lords on 8 December 2005 (HL Hansard, vol. 676, col. 844–68); Atoki (1995) and Bibbings (1995).

[9] Estimates put incidences of FGM in Sierra Leone at between 80 and 90%. It is practised (for social/cultural, as opposed to religious, purposes) by all ethnic groups except Krios who are located primarily in the western region and in Freetown (US Department of State, 2001).

[10] The World Health Organisation estimates that between 100 million and 140 million girls and women have undergone some form of FGM and that about three million more do so each year (WHO, 2006, p. 2).

[11] Some estimates suggest that there are 3,000–4,000 new cases in the UK per year (www.ipu.org). Under the Female Genital Mutilation Act 2003 (which replaced the Prohibition of Female Circumcision Act 1985) it is an offence to "excise, infibulate or otherwise mutilate the whole or any part of a girl's labia majora, labia minora or clitoris" (s1(1)) [unless it is a surgical operation necessary for the 'girl's' (which includes 'woman') (s6(1)) physical or mental health, or related to labour or child birth (s1(2))] and also to aid, abet, counsel or procure a person to do the relevant act outside the UK (s3). As of 2005, there have been no prosecutions under this Act (Lord Bassam, HL Hansard, vol. 676, col. 866–8, 8 December 2005).

[12] No law prohibits FGM in Sierra Leone and efforts by NGOs to eradicate it are actively resisted by the women's secret societies (Bowers, 2007; IRIN, 2005). Following the House of Lords' decision in *Fornah*, Zainab Fornah was criticised by Septimus Kaikai, Sierra Leone's information minister, in a interview for the BBC for what he described as a "deliberate and conscious and premeditated attempt by individuals to malign and besmear the reputation, integrity and character of a government and its people" (BBC News, 2006).

[13] Although the practical importance of Fornah's case was mitigated slightly by the Secretary of State's recognition that article 3 of the ECHR prevented her return to Sierra Leone, the case was not moot. The case was acknowledged as important not only in relation to the stronger protections Zainab Fornah will enjoy as a refugee but also in relation to the subsequent use of UK jurisprudence in relation to the convention's reach (*Fornah* [2006] 1; Chaudhry, 2007).

[14] As amended by the 1967 Protocol.

[15] See, e.g. *Yale v. Secretary of State for the Home Department* [2000]; *P and M v. Secretary of State for the Home Department* [2004] (England and Wales); *In re Kassindja* [1996]; *Abankwah v. Immigration and Naturalization Service* [1999]; *Mohammed v. Gonzales* [2005] (US); *RRT N97/19046* [1997]; *GZ 220.268/0-XI/33/00* [2002] (Austria); *Re B(PV)* [1994]; *Khandra Hassan Farah* [1994] (Canada).

[16] As discussed by Auld LJ in *Fornah v. Secretary of State for the Home Department* [2005] 5–7 (herein after *Fornah* [2005]).

[17] Remarkably the appeal permission grounds had to be drafted pro bono after the Legal Services Commission deemed the appeal unarguable (Tsang, 2006).

[18] See further Nussbaum (1999), Okin (1998), Harris-Short (2003), Gunning (1991–92).

[19] Rights of Women (2007) make a similar point. Welcoming the decision of the House of Lords they go on to argue: "decisions like these show the importance of having a judiciary and legal system that is representative of society as a whole and that there needs to be much more done to ensure that more women, and Black and Minority Ethnic (BME) women in particular, reach senior positions in the legal profession and judiciary" (p. 6).

[20] This view is by no means unanimous among all women judges (see, for example, O'Connor, 1991; Anon, 2000).

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Can *feminist* judges make a difference?

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ABSTRACT *Many of the expectations and aspirations about the 'difference' that women judges would make have proved unrealistic, given the inevitable diversity and often conservatism of women appointed as judges. On the other hand, we might reasonably expect feminist judges to 'make a difference'. This essay focuses on feminist judges, and seeks to identify what it is that we might reasonably expect of them. This in turn requires consideration of who counts as a feminist judge, what might be included in a feminist approach to judging, and what institutional norms inherent within the judicial role might constrain the adoption of a feminist approach. The essay concludes that feminist judges both can and ought to make a difference across a wide range of judicial activities.*

> The idea of women on the bench may have gained acceptance ... but the proper role for female jurists once they get there is still a work in progress. (L'Heureux-Dubé, 2001, p. 30)

Introduction

This paper is the first product of what is intended to be a larger project on feminism and power. One of the objectives of liberal feminism has been to get women into positions of power, but it has not developed any theory of what women should do when they get there. At least part of the reason for this has been the assumption that women would make a difference simply by *being* there. According to this view, if the problem was women's (illegitimate) exclusion from public institutions, then they had merely to be included in order to transform those institutions. Once women visibly occupied powerful positions for which they were equipped and qualified, they would demonstrate by their very presence that the previous exclusion of women was indeed illegitimate, and would also ensure that women's perspectives and experiences were brought into the decision-making processes undertaken by those institutions.[1]

These assumptions about the difference that women in power would make, however, now appear at best naïve and at worst essentialist. Why did we think that

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women would transform institutions without simultaneously—or alternatively—being transformed by them (see Menkel-Meadow, 1986)? Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo?[2] Why did we assume that women appointed to these positions would have the capacity to represent the whole, diverse range of women's perspectives and experiences? And why did we imagine that individual women would want potentially to risk their newly-acquired status by taking a stand on behalf of other women, when it would be much safer for them to keep their heads down and attempt to gain some legitimacy amongst their sceptical peers and jealous subordinates? After all, women have not exactly been welcomed into the halls of power with open arms, and invited to rearrange the furniture.

Consequently, it seems more useful at this juncture to ask about *feminism* and power, rather than *women* and power. Feminists do have a political agenda (leaving aside, for the moment, exactly what that might be). Feminism might be seen as a kind of voluntary community of belief, like religious congregations and political parties (Cotterrell, 2006, p. 72). Such communities are based on shared beliefs or values and stress solidarity and interdependence; participation is "conscious and considered" (Cotterrell, 2006, pp. 69, 72). To identify as a feminist necessarily involves assuming a commitment to other women. It might legitimately be expected, therefore, that feminists in positions of power will exercise their power in a feminist way. But *is* that a legitimate expectation in all institutional contexts? Is it easier, for example, to follow a consciously pro-woman political agenda as a politician or union official than as a judge? And if it is a legitimate expectation, what precisely might a feminist deployment of power look like? This essay seeks to provide the beginnings of an answer to these questions.

Who is a feminist judge?

It is not my intention in this essay to engage in a purely descriptive discussion of feminist judging. To the extent that the essay does describe a feminist approach to judging, it is an approach that may (and I hope will) be adopted by any judge. My concern, however, is also to make a normative claim about what might reasonably be *expected* of a feminist judge. Consequently, it is necessary to identify the judges who may be the subject of these expectations. In other words, while any judge *may* engage in feminist judging, it would only be reasonable for feminists to *expect* feminist judging of feminist judges. So it is necessary to identify which judges fall within this category.

Two issues arise in this context. First: is it necessary for a feminist judge to be a woman, and secondly: is it necessary for a feminist judge to identify as a feminist? My tentative answer to the first question is yes (I take the experience of being gendered female to be a crucial element of feminism), but I am also aware that there is much scope for disagreement on this point, and insufficient space in this essay to argue it fully. For now, therefore, I will not offer a conclusive answer, but will move to the second and more important question about identification.

I do maintain that a feminist judge must identify her- (or him-) self as a feminist. Some women judges specifically and emphatically insist that they are not feminists, often by reference to the social construction or caricature of feminism as something negative, wrongheaded and/or dangerous.[3] I would argue that one cannot be a feminist while accepting and perpetuating this negative characterisation of feminism. Feminists, if we can agree on little else, do tend to value feminism.

What, then, of judges who refuse to declare a position or remain equivocal, but whose judgments and actions evince feminist sympathies? Some women judges in particular have been identified as feminists by (some) other feminists, without themselves embracing the label. There seem to be two issues here. First, referring back to the understanding of feminism as a voluntary community of belief which gives rise to legitimate expectations about how its members will behave, it seems that if we are going to hold *expectations* about the judicial behaviour of feminist judges, then the element of voluntariness must be respected. If participation in the feminist community includes the assumption of certain commitments, then such participation must indeed be "conscious and considered".

Secondly, however, there is the issue of judges who do not identify as feminists, but to whom we may wish to refer as exemplars of 'feminist judging'. Perhaps the most obvious example in this category is Justice Bertha Wilson of the Supreme Court of Canada, who "demonstrate[d] an understanding and engagement with feminism" (McGlynn, 2003, p. 308) in speeches such as the famous "Will Women Judges Really Make a Difference?" (Wilson, 1990), in judgments such as *Lavallee*[4] and *Morgentaler*,[5] and in the report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (1993), which she chaired; but who, according to her biographer, rejected the label of 'feminist' (Anderson, 2001, pp. xiv, 135–6, 197; see also McGlynn, 2003, p. 308; Rackley, 2007, p. 80). As noted above, however, feminist judging is not necessarily the exclusive province of feminist judges. While we may only *expect* a consistently feminist approach of feminist judges, this does not mean that other judges may not also make decisions, give speeches or engage in projects that are recognisably feminist at least some of the time. Referring to someone as an exemplar is not the same as imposing expectations upon them. So there is no necessary contradiction between excluding someone from the category of 'feminist judge' for normative purposes, yet referring to one or more of their judgments or speeches as examples of feminist judicial practice for descriptive purposes.

Further, in the specific case of Justice Wilson, her rejection of feminism must be understood in the particular legal and social context of her time. She came from a generation before the women's movement, having entered law school in 1954 and begun work as a lawyer in 1959. This may have affected her subsequent attitude towards feminism, both substantively and strategically. According to Backhouse, women lawyers of this generation typically denied their experiences of discrimination (see also Hunter, 2002) and "cautiously adopted strategies of responding to male exclusion and hostility with politeness and persistence" (Backhouse, 2007, p. 10). By contrast, Backhouse notes that the substantial increase in women entering law schools in Canada from 1970 "brought a certain 'safety in numbers' and many of the women who became lawyers after 1970 recognized that they had the luxury of identifying

with feminism because they were able to offer each other protection and support" (Backhouse, 2007, p. 4). Thus, we should remain aware of the fact that the rejection of feminism has had different generational meanings. Although the generation of women judges still on the bench who pre-dated the women's movement is now shrinking, we should also be sensitive to other contexts in which it may be difficult for a judge to identify as a feminist, while nevertheless (at least sometimes) behaving as one. My definition of who counts as a feminist judge for normative purposes is thus, necessarily, temporally and culturally specific.

It follows from the identification requirement that there are likely to be relatively few feminist judges (and also that those judges are quite likely to be women[6]). Nevertheless, the category of feminist judges is not an empty one, even at the highest levels of the judiciary. Once again, however, I wish to stress that it is not my contention that feminist judging is the exclusive province of feminist judges as defined here. Empirically, it can also be done by men and by women who do not identify as feminists. Indeed, another Canadian Supreme Court judge, Justice Claire L'Heureux-Dubé, has argued that 'making a difference' should not only be seen as the responsibility of women judges (L'Heureux-Dubé, 1997a, p. 7). Rather, everyone in a position of power should take responsibility for understanding different perspectives and reflecting them in law, and all judges should "develop an increased sensitivity ... to the diverse human experiences which are presented to courts on a daily basis" (L'Heureux-Dubé, 1997a, p. 9). Normatively, however, I would argue that we can only *expect* feminist judges to engage in feminist judging. Before turning to the question of whether this is a reasonable expectation in all aspects of the judicial role, I deal with a further definitional issue: what constitutes feminist judging?

What should a feminist judge do?

The question of what constitutes feminist judging has received considerable attention in previous literature, and that literature yields an array of suggestions as to how a feminist judge may or ought to approach her role. Many of these suggestions are procedural—that is, they set out ways to go about judging as a feminist, rather than dictating any specific substantive results. But feminism does have substantive goals, in particular the achievement of equality and justice for women, in the legal system and in society. These substantive goals may also translate into expectations of feminist judges.

Asking the woman question

In a well-known article, US feminist legal theorist Katharine T. Bartlett identified one of the key feminist legal methods as 'asking the woman question', that is, examining and highlighting "the gender implications of rules and practices which might otherwise appear to be neutral or objective" (Bartlett, 1990, p. 837). Judith Resnik, for example, notes a consistent finding of US court gender bias task forces, that while most male judges reported that gender had little or no effect on the process or outcome of most cases, "significantly higher percentages of women judges (whether at trial or appellate level, in administrative tribunals or in courts) report occasions

in which they deem gender to be relevant" (Resnik, 1996, p. 963). Bartlett also argues that 'asking the woman question' can (and should) lead to asking questions about other forms of exclusion (on the basis of race, religion, sexuality, etc.) that may be operating in the particular case (Bartlett, 1990, p. 848).

Including women

Having identified the relevance of gender, the feminist judge should then judge inclusively. This has two aspects. First, as Christine Boyle has argued, she should not make decisions that protect male interests masquerading as human interests, but should try to take into account women's as well as men's interests (Boyle, 1985, pp. 101–2). In doing so, she demonstrates that the male perspective is not a neutral norm against which other narratives can be evaluated, but represents only a partial view of reality (L'Heureux-Dubé, 1997a, p. 3; C. Young, 2004, p. 235).

Secondly, Justice L'Heureux-Dubé has identified the hope that women judges will be "more willing and able to hear and understand the stories of women litigants" (L'Heureux-Dubé, 1997a, p. 3). While this will not be true of all women judges, it does suggest that a feminist judge should listen carefully and respectfully to stories of women's lives, and should also tell those stories in her decisions (Graycar, 1995, p. 281), thereby putting gendered (and racialised, and other previously excluded) experience into legal discourse (see, e.g. Rush, 1993, p. 609; Kobayashi, 1998, p. 203; Rackley, 2006, p. 176). While she sat on the Canadian Supreme Court, for example, Justice L'Heureux-Dubé explained that "I recognize that women's diverse experiences have been sadly lacking in many areas of law and I have continually emphasized the necessity of incorporating them in our judicial decisions" (1997a, p. 6).

The feminist judge's ability to hear and understand the stories told by women litigants may be based partly on her own gendered experience, which enables her to respond sympathetically when other women speak of similar experiences. However, a judge's personal experience alone cannot possibly encompass the diversity of experiences that women litigants bring to court. Consequently, Christine Boyle has argued that the feminist judge "would need to continue to talk with other women to learn how they experience the world", and also to refer to research on women's experience, in order to gain a broader understanding (Boyle, 1985, pp. 102–3). For instance, Elizabeth Sheehy notes that Justice L'Heureux-Dubé "consistently attempted to enrich her knowledge of the experience of the 'other' by reading and integrating material" from sources such as women's organisations and reports of government bodies, "in order to craft sounder legal doctrine" (Sheehy, 2004b, p. 12).

Challenging gender bias

A third major element of feminist judging identified in the literature is the process of intervening to challenge hegemonic discourses of sexism, racism and heteronormativity. This may involve questioning the current legal construction of 'woman', rejecting 'stock stories' about women's reactions and behaviour, not relying on stereotypical or gender-biased assumptions about sexual difference or behaviour,[7] challenging myths

and stereotypes about women, and critiquing previous judgments or the decisions of 'brother' judges that adopt such myths and stereotypes (L'Heureux-Dubé, 1997a, pp. 5–6; Boivin, 2003, pp. 88–94; Backhouse, 2003, p. 192). In addition to attempting to identify and overcome gender bias in legal principles and doctrines (L'Heureux-Dubé, 1997a, p. 3), this process extends to confronting sexism and gender bias in the legal profession.

Contextualisation, particularity and attention

Fourthly, a feminist judge may engage in what Bartlett describes as "feminist practical reasoning", that is, reasoning from context, focusing on the reality of women's lived experience in each situation, and producing a decision that is individualised rather than abstract (Bartlett, 1990, pp. 849–50). Other feminist legal scholars have also emphasised the importance of contextualisation (Sherry, 1986, pp. 604–9; Gilbert, 2003, p. 2; Boivin, 2003, pp. 75–6), avoiding abstraction (Boyle, 1985, pp. 103–4), and focusing on the realities of people's lives rather than on narrow doctrinal issues (Westergren, 2004, p. 691; Rush, 1993, p. 623). Contextualisation may include considering the specific situation of the parties, the circumstances in which particular legislation was enacted, and/or the broader social context within and upon which the legal rules in question operate. In order to understand this social context, it may be necessary to refer to social science research literature and policy reports—so-called 'social framework evidence' (see, e.g. Boyd, 2004, pp. 169–70, 175–6, 178; C. Young, 2004, pp. 234–5; Sheehy & Boyle, 2004, p. 249; Sullivan, 2004, pp. 63–7; Sparks, 2004, p. 381).

In relation to individualised decision making, Helen O'Sullivan has produced what she refers to as a 'particularity model' of judging, which involves the judge taking into account (in a criminal trial) the particular circumstances of the accused, the accuser and the case, "*really looking*" at the parties before her, treating both the accused and the accuser as people with reason, emotion and vulnerabilities, and as worthy of equal respect and dignity, and avoiding categorisation and the rigid application of universal rules, but rather rendering a 'fresh judgment' in every case (O'Sullivan, 2007, ch. 6, pp. 9–35; see also Murdoch, 1970, p. 91; Derrida, 1990, p. 961). Similarly, Patricia Cain has offered the following feminist recasting of Judge Learned Hand's advice to judges:

> When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. But listen in such a way as to make it part of your experience. Find some small part of your own self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then, should you judge. (Cain, 1988, p. 1955)

The 'particularity model' has resonances with Carol Gilligan's (1982) 'ethic of care'—the notion that women speak in a different moral voice, specifically one that is relational, connected, caring, nurturing, responsible and just, rather than abstract, distanced, calculating, disengaged and legalistic (see, e.g. Sherry, 1986, p. 580;

Resnik, 1988). The 'ethic of care' has proved problematic, however, as both a hypothesis and an aspiration. Clearly, not all women judges do speak in such a 'different' moral voice (nor do all male judges conform to its masculine opposite). Neither is it clear that we should want all feminist judges to speak in this 'different' voice. Not only does the 'ethic of care' represent a somewhat stereotypical view of femininity that we might wish to contest (see, e.g. DuBois *et al.*, 1985, pp. 73–5), but alternative feminist visions have argued for the virtues of detached attention rather than care and connection. As explained by Helen O'Sullivan:

> [Simone] Weil describes 'attention' in this way:
>
> > Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding in our minds, within reach of this thought, but on a lower level and not in contact with it, the diverse knowledge we have acquired which we are forced to make use of. (Weil, 1977, p. 49)
>
> Weil regards "paying attention" as a widening of focus resulting from detachment, which involves "[s]tepping back from the immediate objects of concern which tend to cause a distortion of moral perception" (Van Marle, 2004). Detachment leads to a reliable perception of the individual. (O'Sullivan, 2007, ch. 6, p. 16)[8]

Although elements of the 'ethic of care' remain valuable (such as taking responsibility for one's decisions, and the ability to think relationally), a combination of feminist practical reasoning, the particularity model and detached attention in Weil's sense appear to represent a preferable feminist approach to judging.

Remedying injustices, improving women's lives, promoting substantive equality

Much of the US empirical research on women judges has sought to determine whether women judges adopt a 'representative role'; that is, to what extent do they adopt a 'woman's viewpoint' on 'women's issues' (matters directly impacting on women as a group) (Allen & Wall, 1993, p. 158)? Allen and Wall's survey, for example, found that women judges who identified as feminist were twice as likely as all other respondents to advance 'pro-woman' positions in response to hypothetical cases involving women's issues (Allen & Wall, 1993, p. 158; see also Martin, 1989, pp. 78–81). But they also found in a study of actual voting patterns that the majority of women judges adopted a representative role across a range of cases involving women's issues—sex discrimination, sexual abuse, medical malpractice, property settlements, and child–parent relations (Allen & Wall, 1993, p. 161). Similarly, Martin and Pyle found that judicial gender had the greatest impact on pro-wife decisions in divorce cases (Martin & Pyle, 2000, p. 1231; see also Davis *et al.*, 1993; Martin, 1993; Westergren, 2004).

Arguably, feminist judges should attempt to identify and remedy injustices of any kind, attempt to achieve concrete improvements in women's lives, and provide a vision of a better world in which justice for women would prevail (Backhouse, 2003, p. 192;

Boivin, 2003, pp. 75–6, 97; Lakeman, 2004, p. 48). Arguably, too, feminist judges should promote a substantive view of equality—one which seeks to accommodate women's differences, to take account of historic and systemic disadvantages, and to revise norms and standards to incorporate women's positions and experiences (Gaudron, 1997; Gilbert, 2003, p. 2).

It would be too simplistic, however, to expect that feminist judges should always adopt a 'representative role' or take a 'pro-woman' stance. In some cases, what constitutes a 'pro-woman' decision or a feminist outcome may be considerably less than obvious. Is it 'pro-woman', for example, to protect a vulnerable young woman from potential harm, or to allow her the autonomy to make her own (possibly harmful) decisions? What 'representative role' should a feminist judge adopt in a case concerning the validity of a rule banning the wearing of headscarves by women in employment or education? What would be the 'pro-woman' position in a case in which a mother and grandmother were contesting custody of a child? Is it 'pro-woman' to increase the wages paid to child care workers, when this will benefit some women (child care workers) at the expense of others (women who may now be unable to afford child care and thus have their employment options curtailed)?

Making feminist choices

In cases where there may be no clear or single feminist answer, we are compelled to revert once again to procedural guidance. One element of such guidance might be to be wary of judging other women simply because they have made different choices from the ones the feminist judge might have made in their position.[9] Another would be for the feminist judge to think carefully about the consequences of her or his judicial choices. As Sonia Lawrence has observed, exercising power "is a complicated task that risks implicating feminists in various forms of oppression and subordination" (Lawrence, 2004, p. 588). A decision may not only exclude some women, but contribute to a worsening of their situation or cause them material harm (Lawrence, 2004, p. 594). Whatever choices are made, therefore, the feminist judge must be open about the priorities she sets and the tradeoffs she makes, and be prepared to justify her choices and to be accountable for the balance she strikes in each case (Lawrence, 2004, p. 597). A third element of procedural guidance would be to remain up-to-date with feminist legal literature, and to draw upon discussions of difficult issues in that literature and the resolutions proposed therein.

Full-time feminism

Is it reasonable to expect feminist judges *always* to deliver feminist judgments? On the Australian High Court, for example, Justice Mary Gaudron tended to be feminist on civil law issues, but pro-defendant on criminal law issues, including those that might adversely affect women and children. I would argue, however, that a judge who identifies as a feminist cannot be selectively feminist. Neither can her feminism be confined to cases involving 'women's issues', since there is no clear dividing line between cases involving 'women's issues' and those that do not. Justice Wendy Baker has observed

that equality issues present themselves in court every day in all manner of proceedings: tort, contract, tax, administrative law, labour law, crime, evidence, civil procedure and family law (Baker, 1996, p. 208). Moreover, feminist legal theory has developed analyses of just about every area of law, including contracts, commercial law, corporate law, constitutional law, evidence and civil procedure, as well as the more obvious areas of tort, criminal law, family law, medical law, labour law, equity and trusts, and human rights. This is another reason for feminist judges to maintain familiarity with feminist legal literature. Arguably, they have a responsibility to do so, and to make use of it to consider whether and if so how a feminist analysis may be undertaken in every case coming before them. Sheila McIntyre has noted, for example, that Justice L'Heureux-Dubé considered judging to be a scholarly activity—an intellectual challenge and a learning process requiring her to read widely and to constantly expand and update her jurisprudential resources (McIntyre, 2004, p. 314).

Supporting other women

A final aspect of feminist judging is the provision of support and encouragement to other women lawyers and judges. As suggested above, this does not mean always agreeing with each other, but it does mean adopting a general stance of solidarity and mutual assistance, and thinking carefully about where and how disagreements, when they arise, are expressed.

Is feminist judging permissible?

Turning now to the key question for this paper, the judicial oath sworn by English judges is "to do right to all manner of people, according to the laws and usages of the realm, without fear or favour, affection or ill will" (Hale, 2005, p. 286). This expresses the judicial norms of fairness, decision-making according to law, independence and impartiality—which incorporates both impartiality as between litigants and impartiality as between arguments (Wilson, 1990; Hale, 2001, p. 498).

In reflecting on the second element of this formulation (decision-making according to law), Lord Bingham of Cornhill has suggested that judicial decisions must be "legally motivated" (Bingham, 2005, p. 70). Decisions are precluded which are motivated

> not by legal but by extraneous considerations, as by the prejudice or predilection of the judge, or worse, by any personal agenda of the judge, whether conservative, liberal, feminist, libertarian or whatever. (Bingham, 2005, p. 70)

On this view, a decision motivated by feminist considerations would be impermissible. But what of the case of mixed motives? As Brenda Hale has argued:

> [T]he business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the law, to the problem under discussion and to ideas of what makes a just result. (Hale, 2007, pp. 2–3)

Hale also goes on to point out that "an important project of feminist jurisprudence has been to explode the myth of the disinterested, disengaged, and distant judge" (Hale, 2007, p. 3). Fairness, decision-making according to law, independence and impartiality do not—indeed cannot—require the judge to become a blank slate upon which the evidence and arguments in each case are written afresh. At a recent discussion in London on feminism and judging, one of the participants observed that suggesting that one's gender is likely to affect one's experience and hence one's judgments is seen as highly divisive and somehow 'letting the side down'.[10] But such a view is only tenable within a system which takes (privileged, white) male perspectives to be universal and neutral.

A more pluralist and realist perspective might accept that a judge's religious and political beliefs, including feminism, are likely to inflect his or her decision-making, but should not intrude to the extent that the judge allows him- or herself to prejudge the issue or to be biased against particular parties or particular arguments. This is consistent with Justice Wendy Baker's argument that "Feminism in a judge is not [*automatically*] evidence of judicial partiality, nor a threat to judicial independence" (Baker, 1996, p. 199). But it also accepts that feminism in a judge will (or at least ought to) be trumped by the need for fairness, decision-making according to law, impartiality and independence should a conflict arise. In other words, a feminist approach or a feminist agenda must always be subordinated to judicial norms. But this allows considerably more scope for feminism than one might expect, especially when one recalls that judging is not just about making decisions.

When I discussed this project with a feminist trial judge, who spends her working life presiding over a fairly unalloyed diet of rape, sexual assault and child sexual abuse cases, she observed that feminist judging makes her "bloody tired". This reminded me that her practice as a feminist judge includes at least the following:

(a) listening to endless stories of the physical and emotional abuse visited upon other women and children;
(b) attempting to provide a trial process that minimises the trauma for the victims, against the constant efforts of defence counsel to push the boundaries of aggressive defence;
(c) feeling responsible for the outcomes of these cases and attempting to deliver some kind of justice to the victims of abuse in a legal system heavily weighted against them;
(d) reaching and delivering sentencing decisions;
(e) constantly having to defend her legitimacy as a feminist judge in the face of challenges, official complaints, sniping and disrespect from non-feminist colleagues (both male and female) and other detractors inside and outside the legal profession; and
(f) the extensive extra-curricular activities she undertakes (in her case, working for legal and procedural reforms relating to the reception of children's evidence).

While I have undoubtedly missed some other things that make her tired, it is notable that this list does not include decision-making (in the sense of determining the outcome of the case) at all.

I would argue, indeed, that previous analyses of the potential 'difference' that women judges might make have been either too optimistic (ascribing to women judges an unfettered capacity to change the law and the legal system), too pessimistic (asserting that law and the legal system are completely impervious to women's voices), or otherwise too dogmatic (contending that feminism is incompatible with being a judge), because they have adopted too generalised an understanding of judging. In order to arrive at a more nuanced and defensible assessment of the relationship between judging and feminism, it is necessary to develop a more detailed description of the practice of judging, and then to determine at each point whether a feminist approach would be consistent with judicial norms of fairness, decision-making according to law, impartiality and independence.

There appear to be four major aspects of judging which I will consider separately below—the court process, the outcome of the case, the reasons given for a decision, and extra-curricular activities. I acknowledge at the outset that this is a description of the practice of judging in common law systems, and that judging may involve different activities, or the same activities may be done differently, in civil law systems.

The court process

As noted above, part of the role of a feminist trial judge is to listen to stories of abuse visited upon other women and children, and to attempt to provide a trial process that minimises trauma for the victims of abuse, against the constant efforts of defence counsel to push the boundaries of aggressive defence. Managing the first instance trial or hearing process is a little-explored aspect of (feminist) judging (see Martin, 1989, p. 75; Hale, 2007, p. 22).

In terms of contextualisation and particularity, I have argued elsewhere that judges should not, in civil cases involving violent relationships, simply accept any terms of settlement between the parties that are handed up, but should scrutinise the terms of proposed settlements to ensure that the agreement protects the safety of the survivor of violence and any children involved (Hunter, 2007, p. 169). This approach involves paying attention to the context of the proceedings and the realities of the situation, rather than succumbing to abstraction and universal rules (the notion that settlement is automatically preferable to adjudication, and that if the parties have agreed, the court should remain neutral as to the terms of settlement).

Further, the precepts of particularity and attention would require the feminist judge to treat all parties, including victims/complainants/vulnerable witnesses, with equal dignity and respect. This would include offering litigants compassion and concern, engaging with the lives and the pain of the people appearing before her (Resnik, 1988, pp. 1922–3), and taking active steps to minimise their trauma in the courtroom. It would include the close supervision of cross-examination (Schultz, 2001, p. 64), making decisions about the admission or exclusion of evidence, and implementing available protections for vulnerable witnesses, in order to ensure that witnesses are not humiliated, patronised or bullied, and are given a fair opportunity to give their best evidence (Hale, 2007, p. 24). I once saw a very good example of this in a family law case in which the unrepresented father, who was

alleged to have subjected the mother to serious violence, was set to cross-examine her directly. The mother was clearly terrified of the father, but the (feminist) judge arranged things so that she (the judge) acted as a physical intermediary between the two parties, enabling the father to ask his questions without confronting the mother, and the mother to answer without collapsing in fear. (All this while the mother's own barrister appeared to have no clue as to the point of the judge's efforts.) A feminist judge concerned to accord equal dignity and respect to all litigants would also make certain that they understood what was happening in court.

The imperatives to challenge gender bias and improve women's lives would mean that a feminist judge would not minimise the gravity or the effects of domestic violence. It has also been argued that judges in domestic violence restraining order proceedings ought to express their support and sympathy for the victims of domestic violence, while impressing upon perpetrators the unacceptability of violence, and the seriousness of breaching the orders being made (Ptacek, 1999, pp. 106–9). This, too, could fall within the feminist approach of promoting substantive equality.

The 'right' approach to take in such cases, however, may not always be clear. In the context of domestic violence, some feminist lawyers and sympathetic judges have taken the position that victims of abuse should, as far as possible, be spared the stress and trauma of speaking in open court about their experiences. Yet other research suggests that while some women welcome the opportunity to remain silent, others are very keen to tell their stories and to have them publicly heard and affirmed (Hunter, 2005; see also Schultz, 2001, p. 63). Should a feminist judge therefore minimise speaking requirements/opportunities, or ascertain in each case whether a survivor of violence wishes to speak or would prefer not to do so? The elements of feminist judging outlined above might suggest that an approach that gives women the opportunity to tell their stories and have them heard and understood, to be represented in legal discourse, to be considered as unique individuals, and to receive a 'fresh judgment' in each case—i.e. one that recognises women's diversity—would be preferable to one that generalised about victims of violence as a group, or exhibited paternalism. This would also be consistent with the feminist literature and research evidence rather than relying only on limited personal experience. In any event, the feminist judge would need to reflect on the possible consequences of her choice, and be able to justify it as a feminist position.

Do any of these suggestions constitute unreasonable expectations of a feminist judge? Scrutinising proposed settlements to ensure that violence is not perpetuated involves no partiality or unfairness to either party, and does not raise any issues in relation to legal decision-making or judicial independence.

It is also difficult to see how impartiality and fairness would be compromised if all litigants are treated with equal dignity and respect. Taking steps to minimise complainants' trauma, attempting to make them feel comfortable, and protecting vulnerable witnesses do not limit the defendant's ability to put his case, and can only be conducive to the effective administration of justice. This may not be how impartiality has traditionally been interpreted (Resnik, 1988, pp. 1922–3), but impartiality simply means lack of partiality for one side or another; it does not have to mean indifference or disengagement. Likewise, no issue of judicial independence is raised. In relation to

the judge's decisions whether to exclude certain evidence, the judge must apply the rules of evidence, but those rules often confer a discretion, or the weighing of factors such as 'probative value' and 'prejudicial effect', which may in turn be exercised, or interpreted, in a way that challenges gender bias and takes into account the context of the case and the particularity of each party. In sum the feminist approach of contextualisation, particularity and attention appears to offer an entirely acceptable, and considerably more attractive model of judging, albeit a much more demanding one for the judge. As Brenda Hale has argued:

> In criminal trials, properly protecting the prosecution witnesses while allowing the defence properly to deploy its case is a hugely demanding task. It is so much easier to sit back and let defence counsel rip. It is also much safer: appellate courts do not usually have the opportunity to criticise trial judges for failing to protect vulnerable witnesses properly; but they have plenty of opportunities to criticise trial judges for 'descending into the arena' and intervening too much. Enabling all the witnesses, on either side, to give their best evidence is a much more radical idea than you might think. ... But the process of enabling witnesses to give their best evidence, of listening carefully to the stories being told even if alien to one's own experience, can only enhance the fairness of the trial. A feminist trial should be a fairer trial. (Hale, 2007, p. 24)

Similarly, challenging gender bias in attitudes towards domestic violence is inherently an approach that enhances fairness and impartiality rather than undermining them. But the concern to improve women's lives and promote substantive equality in the court process is not so clear-cut. At first blush, this may appear to be the opposite of impartiality. In fact, however, it is simply the opposite of *neutrality*, in a situation in which neutrality is not called for. Parliament has enacted laws designed to protect victims of domestic violence and to reduce its incidence. Once a decision has been made, on the basis of admissible evidence, that violence has occurred, or that there is a legally significant risk of its occurrence, then emphasising the gravity of that finding, expressing concern and support towards the victim, and reinforcing the unacceptability of violence to the perpetrator, is entirely in line with legislative policy. It is premised on decision-making according to law, and does not compromise fairness, impartiality, or judicial independence.

Finally, the example given makes it clear that there is nothing inherent in the process of making feminist choices about how the trial or hearing should be run that would take that process outside the bounds of permissible judicial action. Thus, it appears that feminist judges can adopt the full range of feminist approaches towards the court process without contravening judicial propriety. Consequently, it would be reasonable to expect feminist judges to act consistently *as* feminists at this level.

The result of the case

A feminist judge may make decisions that challenge gender- and other forms of entrenched bias. One such example might be Canadian Judge Corinne Sparks's

decision in *RDS*,[11] in which she acquitted a Black defendant charged with obstructing police—a different decision from the one that might ordinarily have been made, and one that refused to perpetuate "the spiral of racialized injustice" (Kobayashi, 1998, p. 208). Another might be Australian magistrate Pat O'Shane's decision to dismiss charges of malicious damage against a group of women who had defaced a billboard which depicted a man sawing a semi-clad woman in half. In doing so, she stated that "The crime in this situation is the erection of those billboards depicting violence towards women". This decision provoked conservative outrage about O'Shane's cavalier disregard for property interests, but it also generated a great deal of public and private support, and a sense that she had empowered people to stand up against violence towards women (O'Shane, 1994, pp. 4–6).

The precepts of contextualisation, particularity and attention would result in sentencing decisions in criminal cases that reflected the interests of the community, the defendant and the victim, rather than accepting formulaic submissions.

A feminist judge would also be concerned to make decisions that remedied injustices, improved women's lives, and promoted substantive equality. As well as dealing with the substantive issues in dispute, this would include ensuring that the level of damages awarded appropriately reflected the nature of the harm suffered—a particular issue for women in sex discrimination, sexual harassment and abuse, medical negligence, and criminal compensation cases.

An interesting case study in this regard is provided by Eliane Junqueira, who has observed that Brazilian women judges are generally seen and see themselves as being tougher than their male colleagues on women seeking maintenance in divorce cases. They see this tough approach as helping women to break free from economic dependency on their husbands and to "better develop and fulfil their potential as human beings". They also see this stance as being most in tune with the constitutional principle of the equality of men and women, which does not permit any presupposition that women are less self-sufficient than men. They may be sympathetic to the actual labour market position of some women (for example those who are older or have few qualifications), and so might grant temporary maintenance until they are able to find their own feet. But they also express antipathy towards women who appear not to want to work and to remain dependent on their husbands (Junqueira, 2003, p. 448).

Yet while women's economic independence from men is a key feminist aspiration, this approach involves a fairly rigid insistence upon formal equality, with only limited regard for context, and a somewhat punitive, 'maternalistic' exercise of power to discipline divorced women and force them to behave in an approved feminist fashion. Insisting that divorced women acquire economic self-sufficiency may be an example of false gender neutrality that in fact serves men's interests (i.e. they are not required to pay maintenance to wives who may have sacrificed much of their income-earning potential to the marriage). It is also an example of adversely judging women who make different choices, rather than respecting the diversity of women's experience. By contrast, a more inclusive, contextualised and particularised approach would be more likely to achieve substantive equality between women and men in the post-divorce context. Clearly, one of the perils of a substantive equality analysis is that in

taking into account the undesirable social realities of women's lives, there is a risk of reinforcing them (Mossman, 2004, p. 309). But from the position of a judge dealing with individual cases (as opposed to a policy-maker), the consequences of refusing to take account of social realities and insisting upon formal equality are likely to be more disadvantageous for women litigants than the consequences of pursuing a substantive equality approach.

How far are these kinds of feminist results possible within the boundaries of the judicial role, in particular the need for decision-making according to law? The answer depends on the situation. If the case directly raises issues of equality and discrimination—as many cases do in countries that have adopted constitutional or legislative human rights instruments—then a decision that promotes substantive equality is likely to be "consistent with the fundamental principles of the law" (Hale, 2007, pp. 26–7), and as such, is hardly objectionable (Hale, 2005, p. 286).

Secondly, if the feminist judge is exercising a discretion—as in the cases of the award of maintenance to a divorced wife, the dismissal of charges, the amount of damages to be awarded for non-economic loss, or sentencing in a criminal case—there is likely to be some scope for feminist decision-making. Discretion is not, of course, entirely unconstrained. It must be exercised within the bounds of any statutory or common law criteria to be taken into account, and more generally within the bounds of fairness, impartiality and judicial independence. It must also be exercised by reference to the arguments and evidence presented by the parties. As Justice Wendy Baker has observed:

> judicial sensitivity and training cannot compensate for a failure by counsel to properly analyse, plead or prove matters concerning gender or racial equality or cultural diversity arising in a lawsuit. Judges cannot substitute 'judicial notice' for evidence or compensate, to any significant extent, for a failure by counsel to identify the issues and present the appropriate facts and law. (Baker, 1996, p. 206–7)

Nevertheless, discretionary decision-making is an area in which a feminist philosophy may come into play. In this respect, the feminist judge is in no different position from the judge who exercises discretion in accordance with his or her predisposition towards liberalism, conservatism, the Christian faith, defendants, the state, institutions, or individuals. The same may be said for the interpretation of ambiguous statutory language and divergent precedents, and other instances of legal indeterminacy.

In relation to shaping legal doctrine in a way that is informed by a feminist analysis, judges who are members of the highest court in the relevant court hierarchy clearly have more room to manoeuvre than those at lower levels.[12] But it must be acknowledged that a lower or intermediate level judge faced with clear legislative provisions and/or clear precedent may have very little opportunity for feminist decision-making (unless, of course, the relevant precedent is itself the product of feminist decision-making by a higher court). Likewise, a trial judge may actively supervise the court proceedings, make evidential rulings, and emphasise certain issues in her summing up, but the decision is ultimately made by the jury. This is another reason why the feminist trial judge referred to earlier finds her job tiring:

while she feels responsible for the outcomes of her cases—for trying to deliver some kind of justice to victims of abuse—ultimately she cannot make up for deficiencies in the prosecution case, change the law, or prevent the jury from acquitting defendants she believes to be guilty. The best she can do is to make her conduct of the proceedings and her directions to the jury as appeal-proof as possible.

Reasons for decision

The fact that judges, particularly in lower level courts, are bound to follow existing rules and precedents, which may leave little scope for creativity or difference in their decisions, has led some authors to question whether women judges simply become assimilated into the masculine legal culture (Davis, 1993, p. 171; Graycar, 1995, pp. 268–9). But even if the outcome of a case is constrained, this does not mean that the feminist judge is compelled, in Berns's terms, to "become one with the law she speaks" (Berns, 1999, p. 53). Arguably, in cases other than those where the decision is made by a jury, there always remains scope for a judge to deploy a feminist analysis in her reasons for decision. Even if the law is clear and compels a decision one way or another, the reasons given for arriving at that decision may still evince a feminist approach.

Reasons for decision may be both implicit (referred to consciously or otherwise in the process of fact-finding) and explicit (the contents of the published judgment). On appellate courts, there is also the issue of the influence (or lack thereof) of the feminist judge on the reasoning of her judicial colleagues. Each of these points is considered in turn.

(i) Fact finding and assessments of credibility. A great deal of what judges do at lower levels of the court hierarchy is fact-finding. There has been very little discussion of this topic in the literature to date (see, e.g. Hale, 2001, p. 500, 2007, pp. 22–3), however it was raised at the conversation about feminism and judging referred to earlier. At that event, one of the participants noted that in chairing tribunals dealing with cases of equal pay and sex discrimination, her own experiences of discrimination and inequitable pay arrangements tend to make her more open-minded to the evidence of complainants, and she also encourages her fellow tribunal members to be similarly open-minded (see also Omatsu, 2005, p. 75). Likewise, another participant observed that judges do rely on their own experiences in the fact-finding process, which in the case of a woman judge includes understanding what it is like to be the only woman working in a male-dominated environment—something of which male judges have no experience. As a result, in her view, the under-representation of women on a tribunal that deals with discrimination and harassment cases limits the quality of its decisions. A third participant said that when hearing evidence, she understands where women are coming from, thereby providing access to justice for those women where it was not previously available. These are all examples of judging inclusively.

Similarly the Chief Justice of New Zealand, Dame Sian Elias, observed at a recent conference that her life experience as a woman has made her sensitive to

humiliation and conscious of the importance of human dignity.[13] And Maryka Omatsu notes that:

> To the extent that gender, class, race or ethnicity affect one's behaviour on the stand, direct experience will also help judges to interpret a witness's demeanour, for instance to assess credibility. (Omatsu, 2005, pp. 75–6)

While experience as a woman is something that women judges as a whole rather than specifically feminist judges may bring to the bench, as noted earlier, a feminist judge would understand women's experience to be socially constructed, hence her willingness both to acknowledge her own experiences of discrimination and gender bias, and to connect those experiences to those of other women (compare Hunter, 2002). As suggested earlier, too, in order to judge inclusively, a feminist judge would not simply rely on her own experience in fact-finding and assessing the plausibility of litigants' stories, but would also refer to research and to interactions with other women in order to understand the diversity of women's experiences—for example the range of sometimes contradictory reactions experienced by victims of sexual assault and domestic violence.

Fact finding and assessing witness credibility may also involve challenging gender bias—for example consciously rejecting 'stock stories' about women's reactions and behaviour. At the feminism and judging event, for instance, two of the participants suggested that a feminist approach to fact-finding would include trying not to rely on stereotypical or gender-biased assumptions about sexual difference or behaviour.

Reg Graycar has argued that:

> we need to pay careful attention to what judges know about the world, how they know the things they do, and how the things they know translate into their activity as judges. (Graycar, 1995, p. 267)

If judicial knowledge is singular, derived from homogeneous (masculine) sources, and rarely reflected upon, then it will be difficult to achieve fairness towards all litigants. It is notable that all three judges at the conversation on feminism and judging characterised the process of judging from (gendered) experience as one of *providing justice* to women litigants. That is, their ability to comprehend what women were talking about produced overall fairness rather than partiality for one side. By contrast, a system in which all or most judges were men was implied to be *unfair* because it denied women the possibility of an empathetic hearing. Similarly, an approach to fact-finding that eschewed sexist (or other kinds of) assumptions and stereotyping arguably would perfect rather than violate judicial norms of fairness and impartiality.

(ii) Written judgments. There is, by now, quite a catalogue of exemplary feminist judgments available, and a developing literature analysing them—especially those penned by appellate judges at the highest level. These judgments 'ask the woman question', incorporate women's lives (and social science research evidence and feminist legal scholarship) into legal discourse, and challenge gender bias, myths and stereotypes. Examples include Justice Claire L'Heureux-Dubé's decisions on tax deductibility of childcare;[14] spousal support following divorce;[15] the admissibility of sexual history evidence[16] and counselling records,[17] and the issue of consent,[18] in

rape cases; and judicial bias[19] (see also L'Heureux-Dubé, 1997a, pp. 5–6; Sheehy, 2004a). In the latter case, she and Justice Beverley McLachlin held that the reasonable person in Canada is an informed and thinking member of society who subscribes to the principles of the Charter, including equality, and is aware of historical discrimination against minorities. Significantly, in French, this person was rendered as "la personne raisonnable".[20]

The judgments of Brenda Hale in the UK's High Court (Family Division), Court of Appeal and House of Lords, have been similarly wide-ranging, including decisions on child contact and the impact of family violence in family law,[21] evidence in sexual assault cases,[22] and medical negligence affecting women's reproductive choices. In the wrongful conception case of *Parkinson v. St James and Seacroft University Hospital NHS Trust*,[23] the Court of Appeal, composed of Hale and two male judges, reached a unanimous decision on the outcome, but in their judgments told the story of the case in quite different ways. In Rackley's words, Hale gave an "extraordinarily vivid account of pregnancy, childbirth and parenthood" (2006, p. 175) which shed new light on 'wrongful pregnancy' cases, and she also put forward an understanding of the invasion of the woman's autonomy in such cases as not merely something physical (which would therefore end at the child's birth), but as involving the imposition of an unwanted caring relationship (which thus continued throughout the child's dependency) (Rackley, 2006, p. 176).

Feminist judges such as Claire L'Heureux-Dubé and Mary Gaudron have also developed a significant jurisprudence of equality.[24] Both understood equality in substantive rather than formal terms. For Gaudron, equality involved "the recognition of genuine difference and, where it exists, differential treatment adapted to that difference" (Gaudron, 1997). Similarly, L'Heureux-Dubé's equality framework involved "a contextualized approach ... that emphasized the social history and vulnerability of disadvantaged groups", with a greater focus on the effects of discriminatory practices than on the black-letter search for a ground of discrimination recognised in existing Charter jurisprudence (Gilbert, 2003, p. 2; see also M. Young, 2004, p. 289).

The question then arises as to whether feminist judging in this sense violates judicial norms of fairness, impartiality, or decision-making according to law. The observation of fairness and impartiality requires that the arguments of both sides in the adversarial contest are given equally careful attention. If, in the course of a feminist judgment, the arguments with which the judge disagreed were ignored or summarily dismissed, this could create an appearance of partiality. But so long as a feminist judgment acknowledged and gave plausible reasons for rejecting opposing arguments, then no problem of unfairness or partiality would arise. Indeed, to the extent that such a judgment paid careful attention to arguments on behalf of women that were dealt with cursorily in other judgments, it would represent a fairer approach. In relation to decision-making according to law, whatever other sources the feminist judge may rely upon or refer to, ultimately, a judgment must be crafted from admissible evidence, social facts that might be the subject of judicial notice, and legal doctrine. The exemplary judgments discussed above certainly conform to these strictures.

(iii) Influence. Contrary to what I have just argued, Sandra Berns contends that a feminist judgment is an oxymoron. In her view, the conventions governing judicial

texts require the eradication of judicial difference (Berns, 1999, p. 204), and thus judgments will be most successful when judicial particularity is completely expunged. Judgments must be written as if it is "the law that has spoken" rather than the individual judge (Berns, 1999, p. 205). To the extent that judicial particularity remains, the authority of the judgment is diminished. Thus, for a judge to self-consciously speak with a different voice constitutes an abrogation of responsibility, a failure to justify the decision and to persuade the interpretive community in the most compelling way possible (Berns, 1999, p. 205): "whatever justification is proffered is incomplete, a failed attempt" (Berns, 1999, p. 206).

> To the extent that she speaks with a 'different voice', universality collapses into particularity. Judgment ceases to be a plausible continuation of an authoritative legal narrative and becomes a break with tradition. As rhetoric it may serve to challenge long standing traditions and in that way have persuasive force, but within law, as the continuation of an ongoing legal story, it is likely to be a failure. (Berns, 1999, p. 206)

I think that this argument is overstated, and that law is not nearly as monolithic and closed as Berns makes out. But even if one were to accept the argument as it stands, it does not negate the *possibility* of feminist judgment. Rather, it goes to the persuasiveness or influence of feminist judgments, which is a different matter.

Some of the exemplary feminist judgments identified above—and many others—have been dissenting opinions. At appellate level, a feminist judge who takes a different view of the case from other members of the court can always dissent. Claire L'Heureux-Dubé, for example, has been described as one of the Canadian Supreme Court's "great dissenters" (Gilbert, 2003, p. 27), and she herself argued for the value of dissenting opinions (L'Heureux-Dubé, 2000a). While a dissenting judgment does not change the law, it does put previously excluded experiences into legal discourse, educate students, lawyers and judicial colleagues about those experiences, demonstrate a different way of thinking about the issues in the case, provide an opportunity for judges to debate and analyse the merits of alternative approaches to those issues, and potentially lay the groundwork for future legal development (see also L'Heureux-Dubé, 2000a, pp. 496, 508, 511–2; Sparks, 2004, p. 382; Hale, 2007, pp. 21–2). Further, a dissenting judgment can not only preserve the judge's personal integrity, but also strengthen judicial independence (L'Heureux-Dubé, 2000a, p. 513).

L'Heureux-Dubé saw the authority of a dissenting opinion as being conferred by the quality of its reasoning (2000a, p. 514), while in Rackley's words, "the persuasive success of a dissenting narrative lies in its ability to challenge the majority's story and weaken its hold on our collective imagination" (Rackley, 2006, p. 181). In two cases decided by the US Supreme Court in 2007, in which majorities of the court upheld limitations on women's hard-won rights to abortion[25] and pay equity,[26] Justice Ruth Bader Ginsburg underlined the strength and power of her feminist objections by reading her dissenting judgments from the bench. As one journalist noted: "To read a dissent aloud is an act of theatre that justices use to convey their view that the majority is not only mistaken, but profoundly wrong" (Greenhouse, 2007).

In other cases, feminist appellate judges may be able to persuade their judicial colleagues to their point of view, and to join them in their reasons for decision and/or in the ultimate result of the appeal. For example, Justice Bertha Wilson managed to persuade other members of the Canadian Supreme Court to join her in the *Lavallee* decision, upholding the admissibility of expert evidence to explain the thought-processes and dispel myths about battered women who kill their abusers.[27] In the Rwandan genocide case, *Prosecutor v. Akayesu*, Justice Pillay wrote for the International Criminal Tribunal for Rwanda in finding that rape and sexual violence can be forms of genocide.[28] According to Rackley, Pillay's empathetic connection with the victims who gave evidence in the case "changed the course of women's jurisprudence in the international institutions", shaped the tribunal's understanding of rape as both an individual and a group injury, and "allowed her fellow tribunal members and others to see the bigger picture" (Rackley, 2007, p. 90). Brenda Hale's exhortation in *Re D* about the need to consider the impact of domestic violence in child contact cases was taken up by the Court of Appeal in *Re L*.[29]

Feminist judges' persuasion of their colleagues may occur behind the scenes as well as in the authorship of leading judgments. For instance, the US Ninth Circuit Court of Appeals coined the "reasonable woman standard" in employment discrimination cases in a decision written by a male judge; but, according to Hon. Mary Schroeder, this would never have occurred if the court had been all male (Schroeder, 2002, p. 255). In Elaine Martin's survey of members of the US National Association of Women Judges, 77% of respondents agreed that women judges had an influence on how their judicial colleagues perceived cases involving women's issues; 51% agreed that their presence on the bench had made a difference in the number of judicial decisions by themselves and others that promoted gender fairness in the substantive law; 48% agreed that their presence on the bench had made a difference in male judges' sensitivity to the existence and consequences of gender-based discrimination; and 47% said that they made efforts to change traditional, stereotyped attitudes towards women among male judges and attorneys (Martin, 1993, pp. 170–1). Likewise, Justice Rosalie Abella, in paying tribute to Justice Claire L'Heureux-Dubé, noted that she had "consistently introduced the woman's voice to the judicial conversation" (Abella, 2004, p. 40).

At lower levels of the court hierarchy, where, as discussed above, a single judge may be bound by doctrine and precedent to reach a particular result, her judgment may nevertheless suggest the possibility of a different approach, point out injustices wrought by the current rules and/or call for legislative intervention to change those rules. As Brenda Hale notes, "The task of judging frequently requires a judge to uphold a law in the wisdom or justice of which [she] does not believe" (Hale, 2007, p. 17). Judges have "no right to opt in and out of particular cases in accordance with our conscientious objections to particular laws" (Hale, 2007, p. 17). But, short of resigning, a judge may indicate her dissent from the rule, while nevertheless being bound to apply it in the case before her. This form of 'dissent' may also influence the legislature, or the thinking of appellate court judges.

Once more, these aspects of feminist judging do not violate norms of judicial behaviour. A dissenting opinion cannot compromise fairness, impartiality or

independence (indeed, as argued by L'Heureux-Dubé, it may enhance the latter), and will only have credibility to the extent that it presents legally acceptable alternative reasoning in the case at hand. When a feminist judge persuades other judges to adopt her view, they are presumably persuaded by the cogency of her construction of the case and the legal plausibility of her argument, rather than by any form of judicial impropriety. And when a single judge expresses her disagreement with the law that she is bound to apply, she nevertheless applies it, so that her decision is one made according to existing law.

Extra-judicial activities

Empirically, feminist judges appear to engage in a wide range of extra-curricular activities. These include law reform projects, participation in women judges' organisations, giving speeches and writing articles, and generally practising feminism in their professional lives. Unlike their day jobs, however, extra-curricular activities are clearly optional. While feminist judges may, and often will, become involved in a range of activities, they cannot reasonably be *expected* to do so. But if and when they do, they can, once more, reasonably be expected to practise their feminism consistently. That is, in the course their extra-curricular activities, feminist judges ought to (and in fact do) ask the woman question, challenge gender bias, seek to make improvements in women's lives, promote substantive equality, and support and encourage other women judges and lawyers. They encounter fewer institutional constraints in doing so than they do in relation to the task of judging, although some constraints do remain.

(i) Law reform. Feminist judges may become involved in particular law reform projects on an ad hoc basis or may be appointed to generalist law reform bodies. As argued above, whatever the matters under consideration, it would be reasonable to expect a feminist judge involved in law reform consistently to act and think as a feminist, to draw upon relevant feminist legal literature, and to exercise feminist choices in contexts where there may be scope for disagreement between feminists as to the best approach to be taken.

Brenda Hale has argued that law reformers by necessity must develop a reform 'agenda'—a point of view about what the law should be (Hale, 2007, pp. 5–6). Thus, she states that "in the Law Commission, I never had any qualms about describing myself as a feminist" (Hale, 2007, p. 13). On the other hand, a feminist judge may be challenged on the basis that her law reform commitments demonstrate unacceptable bias in favour of one group or another, and/or insufficient respect for and deference to the current law which she is bound to apply in her day-to-day judicial role. The implication here is that she cannot be trusted to judge independently, impartially and according to law. Yet unless there is actual proof of bias or persistent legal errors in her judgments, such accusations carry little weight.

Moreover, like appellate courts, law reform bodies are generally collegial, which means that the feminist law reformer may be outvoted, write a dissenting report,[30] persuade her colleagues to agree with her position, join with other colleagues who take a similar approach, or listen to other arguments and be persuaded by them.

As on an appellate court, force of reasoning is the key criterion, regardless of the source of the agreed position.[31]

(ii) Women judges' organisations. Women judges' organisations tend not to be explicitly feminist organisations,[32] and many of their members may not identify as feminists. However, they do espouse some feminist goals, and provide both an avenue for feminist judges to pursue their commitments, and a source of social and professional support and solidarity (see Martin, 1989, p. 76). The general aims of women judges' organisations tend to be threefold: to provide mutual support, encouragement and collaboration amongst women judges; to promote the appointment of women to the judiciary; and to promote women's equality, awareness of 'women's issues' in law, and justice for women litigants.[33] The US National Association of Women Judges (NAWJ), for example, provided the impetus for the creation of State and federal task forces to investigate gender bias in the courts, and has supported and assisted women running for State judicial office (Kessler, 1983; Martin, 1993, p. 168). Elaine Martin's research suggests that members of women judges' organisations are more likely than other women judges to adopt a 'representative role' both collectively and individually (Martin, 1993, p. 170), while other research has pointed to the importance in activating individual feminist projects of a supportive network of like-minded women who share feminist views (Martin, 1993, pp. 167–8; Rackley, 2006, p. 167).

One important feature of women judges' organisations, as Judith Resnik has noted, is that they provide a means by which women judges can collectively speak out about issues which it might be difficult for them to address as individuals (Resnik, 1988, p. 1931). This refers not only to the power and persuasiveness of a collective as opposed to an individual voice, but also to the fact that personal attacks resulting from feminist activity are obviated when the activity is undertaken by an organisation rather than being attributable to any individual. Further, the organisation can perform a legitimating role, suggesting that particular views and concerns are not wildly radical, judicially inappropriate, or held by a minority of one, but are in fact widely shared. It is difficult to see how any of the activities of women judges' associations in challenging gender bias, exposing injustices, promoting substantive equality and supporting other women could be described as in any way compromising judicial independence or creating a perception of partiality. Neither does membership of a women's organisation *per se* indicate partiality, other than towards the concept of women's equality.

(iii) Speeches and articles. Feminist judges are often invited to speak at women lawyer functions and to women law students, and they also give speeches and addresses at conferences, law schools and to the legal profession, which may then be published as journal articles. Several themes tend to be prominent in feminist judicial speeches: critiques of the current judicial appointment process and advocacy for the appointment of more women judges (e.g. Branson, 1997; Matthews, 1998; Gaudron, 1999, 2002; Hale, 2001; and see also Cruikshank, 2003, pp. 127–36); discrimination against women in the legal profession, including their own experiences of sexist/gender-biased/discriminatory treatment (e.g. Branson, 1997; Gaudron, 1999, 2003; see also Cruikshank, 2003, pp. 127–36; Batrouney, 2005); the

pioneering role of 'first women' in the legal profession (see, e.g. Batrouney, 2005); and social and legal injustices towards women (e.g. O'Shane, 1994; Gaudron, 1999; see also Cruikshank, 2003, pp. 127–36; Batrouney, 2005). In other words, in their speeches, feminist judges challenge gender bias, expose injustices, promote substantive equality (see especially L'Heureux-Dubé, 1997b, 1999, 2000b, 2002; Hale, 2001; and see also Cruikshank, 2003, pp. 127–36); discrimination against women in the legal profession, including their own experiences of sexist/gender-biased/discriminatory treatment (e.g. Branson, 1997; Gaudron, 1999, 2003; see also Cruikshank, 2003, pp. 127–36; Batrouney, 2005); the pioneering role of 'first women' in the legal profession (see, e.g. Batrouney, 2005); and social and legal injustices towards women (e.g. O'Shane, 1994; Gaudron, 1999; see also Cruikshank, 2003, pp. 127–36; Batrouney, 2005). In other words, in their speeches, feminist judges challenge gender bias, expose injustices, promote substantive equality (see especially L'Heureux-Dubé, 1997b, 1999, 2000c), and support other women. These occasions can also provide the opportunity for a judge to identify herself as a feminist (see, e.g. Thornton, 1996, p. 208; Gaudron, 1999; Hale, 2007), and/or to highlight the importance of feminist legal theory in exposing and analysing women's inequality before the law, and in informing their thinking and practice (e.g. O'Shane, 1994, p. 12; Gaudron, 1997).

Daphne Gilbert observes that Justice Claire L'Heureux-Dubé made similar arguments in her speeches and articles and in her legal judgments, but was more tempered in her judgments while speaking with more passionate conviction outside the court (Gilbert, 2003, p. 3). Speeches and articles do provide greater freedom in this respect, but they are not entirely free of constraint. Firstly, judges cannot express views on issues that might come before them in individual cases, as this would raise the possibility of apprehended bias. Notably, however, this renders the themes of feminist judicial speeches identified above relatively safe. Processes of judicial appointment, promotion of women, legal professional practices, personal experiences and the experiences of other women lawyers and judges, and historical topics are unlikely to be raised in individual cases coming before the courts. Injustices towards women may potentially be raised, but any problems of apprehended bias may be avoided by speaking in very general terms,[34] or by repeating views that the judge has already expressed judicially (e.g. L'Heureux-Dubé, 1997a, pp. 5–6; Gilbert, 2003, p. 3; Hale, 2007).

Secondly, the content of her speeches may expose the feminist judge to the same kinds of objections and accusations as noted above in relation to law reform activities—perhaps more so than in that context. For example after her speech on "Will Women Judges Really Make a Difference?", Bertha Wilson faced a chorus of criticism that she was "a feminist judge who had violated her own judicial oath of impartiality and was accordingly incapacitated from the execution of her judicial duties" (Rackley, 2007, p. 79). Similarly, an Australian judge's description of herself as a feminist at her swearing-in was greeted with "considerable consternation and comment" (Thornton, 1996, p. 208). Once again, however, despite the hysteria that extra-curial feminist pronouncements may attract, they are no more disqualifying than sexist, racist or homophobic jokes delivered by male judges as part of the more

traditional after-legal-dinner repertoire, or, for example, than expressed judicial commitments to Christianity or individual rights. If bias is alleged, then its existence must be proved in the context of individual cases.

(iv) Other activities. Feminist judges can play an important role in mentoring, supporting and encouraging other women judges and lawyers (see, e.g. Sparks, 2004, p. 382). Specific forms of support might include practising affirmative action in the appointment of clerks/associates/research staff; encouraging women to apply for silk and for judicial appointments, and to re-apply if they are initially rejected;[35] publicly standing up to senior male bullies in the profession (e.g. Gaudron, 2002); and directly confronting apparently discriminatory practices. For example, Mary Gaudron relates that she tackled a particular State Solicitor General as to why he never had women juniors in the constitutional cases in which he appeared before the Australian High Court. He said that he did not know any good women barristers, whereupon she supplied him with a list, after which women did begin to appear alongside him in the court (Gaudron, 1999, p. 119).

Another day-to-day activity of the feminist judge can be drawing her male colleagues' attention to the fact that women have different perspectives and experiences which have previously been excluded from the law, and challenging their unconscious (or overt) gender bias. Judith Resnik notes that to hear their female colleagues speaking about their own experiences of subordination can be both disconcerting and enlightening for male judges and lawyers. They may come to realise that "If women judges do not escape the effects of being women, then no one can" (Resnik, 1996, pp. 971–2). Thus, for instance, the US task force reports which documented women judges' experiences of discrimination provided "male judges with a new awareness of women's oppression" (Resnik, 1996, p. 972). In addition, rather than behaving as 'one of the boys'—trying to emulate men as far as possible—the feminist judge can remind her colleagues that law does include the feminine, and in doing so, compel them to think twice about sexist language, assumptions and behaviour.[36]

Conclusion

I have argued in this essay that while it is unrealistic to make generalisations or to impose demands upon women judges as a whole, *feminist* judges both can and ought to make a difference. They *can* do so because there is an identifiable body of feminist judicial theory and praxis upon which they can draw (*contra* Solimine & Wheatley, 1995, p. 907), and further, because adopting a feminist approach and applying a feminist philosophy has been shown to be entirely permissible within the bounds of judicial propriety—that is, while observing the judicial norms of fairness, impartiality, independence, and decision-making according to law—in relation to many if not all aspects of judging. They *ought to* do so (at least in their judicial role, and ideally in their extra-curricular activities as well) because self-identification as a feminist involves a commitment to a community of belief, and thus gives rise to legitimate expectations on the part of other community members that that commitment will be put consistently into practice.

One final objection remains to be disposed of. It might be thought that my normative argument places an intolerable burden on feminist judges (and therefore would tend to discourage judges from identifying as feminists). Not only do feminist judges often face challenges, complaints, sniping and disrespect from non-feminist colleagues and other detractors inside and outside the legal profession when they act as feminists,[37] but now they will also face challenges, demands and criticism from feminist commentators when they do not act as feminists, or do so insufficiently.

Feminist expectations, however, need not (indeed *ought* not) be expressed in a way that would exacerbate feminist judges' experiences of being perpetually under scrutiny and potential attack. Feminist judges might reasonably expect that discussion and debate among feminists about feminist positions and approaches would be more considered and respectful, and more in the way of an ongoing dialogue, than the personalised attacks of anti-feminists. Moreover, they might also reasonably expect encouragement and support from other feminists in the face of such attacks, whether privately or, where possible, in the form of public statements or demonstrations of support and solidarity. As Cotterrell notes, communities of belief give rise to obligations of *mutual* support (2006, p. 72)—not unilateral expectations, but a concerted effort to put beliefs into practice, from wherever one might sit.

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Notes

[1] For a good, recent account of liberal feminist theory, see Munro (2007, pp. 14–23).

[2] Similarly, in relation to the appointment of Black judges, Justice Corinne Sparks has noted that "Having black skin does not necessarily mean that one will embrace racial consciousness. It does not mean that the person will be sensitive to racial issues or claim racial identity" (Sparks, 2004, p. 383).

[3] See, e.g. Junqueira (2003, p. 445), discussing the case of a woman judge who had a "horror" of feminist language.

[4] *R v. Lavallee* [1990] 1 SCR 852: Wilson J authored the majority opinion which allowed the admission of expert evidence on battered woman syndrome in support of a woman who had killed her partner after suffering prolonged abuse.

[5] *R v. Morgentaler* [1988] 1 SCR 30: in her concurring judgment, Wilson J held that Criminal Code provisions limiting access to abortions violated women's rights to life, liberty and security of the person contrary to s.7 of the Canadian Charter of Rights and Freedoms.

[6] For this reason, I refer throughout this essay to the feminist judge as 'she', although with the invitation that the feminine be read as incorporating the masculine.

[7] A point made by one of the participants in a conversation about 'Feminism and Judging', University of Westminster, 1 May 2007.

[8] Along similar lines, Hester Lessard refers to Justice L'Heureux-Dubé's advocacy of "an open minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case" (Lessard, 2004, p. 136).

[9] Conversation on 'Feminism and Judging', as above n. 7.

[10] *Ibid.*

[11] See *R v. RDS* [1997] 3 SCR 484.

[12] Though see Hale (2007). She adopts Cass Sunstein's identification of four different approaches to judging in the US Supreme Court (p. 4), and professes herself to be a 'minimalist' (p. 24). Minimalists "may be either conservative or liberal, willing to nudge the law in one direction or another. But they prefer nudges to earthquakes. They refuse to promote a broad agenda. Their distinguishing feature is that they believe in narrow, incremental decisions, not broad rulings that the nation may later have cause to regret. By their very nature, minimalists are not too sure that they are right" (p. 5).

[13] Society of Legal Scholars Annual Conference, Durham University, 11 September 2007.

[14] *Symes v. Canada* [1993] 4 SCR 695. For a discussion of this and the following cases, see Boivin (2003).

[15] *Moge v. Moge* [1992] 3 SCR 813.

[16] *R v. Seaboyer* [1991] 2 SCR 577.

[17] *R v. Osolin* [1993] 4 SCR 595; *R v. Carosella* [1997] 1 SCR 80.

[18] *R v. Ewanchuk* [1999] 1 SCR 330.

[19] *R v. RDS* [1997] 3 SCR 484.

[20] *Ibid.*, as discussed in Boivin (2003, p. 99).

[21] *Re D* [1993] 2 FLR 1.

[22] *R v. J* [2005] 1 All ER 1.

[23] *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

[24] For Gaudron, see *Australian Iron & Steel v. Banovic* [1989] 168 CLR 165; *Street v. Queensland Bar Association* [1989] 168 CLR 461; Gaudron (1997); Gaudron (1999, pp. 117–8); and Tate (2006). For L'Heureux-Dubé, see *Egan v. Canada* [1995] 2 SCR 513; *Gosselin v. Quebec (Attorney-General)* [2002] 4 SCR 429; Gilbert (2003); Sheehy (2004b, p. 25); Sheehy and Boyle (2004, pp. 270, 275); M. Young (2004); and McIntyre (2004, p. 314).

[25] *Gonzales v. Carhart* [2007] 127 SCt 1610 (concerning the Constitutional validity of a legislative ban on so-called 'partial birth' abortions).

[26] *Ledbetter v. Goodyear Tire & Rubber Co.* [2007] 127 SCt 2162 (concerning the question of whether the applicant's pay discrimination claim was time-barred, even though she only became aware of the discrimination long after it had commenced).

[27] *R v. Lavallee* [1990] 1 SCR 852.

[28] *The Prosecutor v. Jean-Paul Akayesu* [1998] Case No. ICTR-96-4-T.

[29] *Re D (Contact: Reasons for Refusal)* [1998] 1 FCR 147; *Re L (A Child) (Contact: Domestic Violence)* [2000] 4 All ER 609.

[30] See, e.g. the 'Minority View with Regard to Certain Aspects of the Equality Act' in Australian Law Reform Commission (1994, ch. 16).

[31] Unlike courts, however, law reform bodies do not have the last word, but rely on their recommendations being accepted by politicians. This may introduce another kind of institutional constraint on the pursuit of a feminist agenda, which is beyond the scope of this essay to explore.

[32] The best known women judges' organisations are the US National Association of Women Judges (NAWJ, established 1979), and its extension, the International Association of Women Judges (IAWJ, formed in 1991): see http://www.iawj.org. The UK Association of Women Judges was founded more recently in 2003.

[33] See, e.g. United Kingdom Association of Women Judges, 'Response to DCA Consultation Paper 11/03', 6 November 2003, Annex 1, accessed at http://www.dca.gov.uk/consult/supremecourt/responses/sc160.pdf; and International Association of Women Judges at http://www.iawj.org/what/what.asp.

[34] For example the following from Mary Gaudron: "Confidence in the law is shaken every time a judge makes a statement that implies women or members of some minority group in our society are less deserving of the law's protection than others ... Regrettably, judges and lawyers have provided sufficient evidence of their insensitivity to the situation of women for many women to believe that the courts and establishment lawyers simply do not serve the interests of women and, thus, to that extent do not serve the interests of justice" (Gaudron, 1999, pp. 119–20).

[35] Conversation on 'Feminism and Judging', as above n. 7.

[36] *Ibid.*

[37] Perhaps the best-known example is the extraordinary reaction to Justice L'Heureux-Dubé's judgment in the *Ewanchuk* case (*R v. Ewanchuk* [1999] 1 SCR 330), which included an official complaint and a wholly unprecedented personal attack in the press by the judge whose decision she had criticised (see, e.g. Backhouse, 2003, pp. 172–5; McIntyre, 2004); but this is far from being the only example (see, e.g. Hunter, 2004, 2006).

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Feminist judgments as teaching resources

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Abstract

This paper discusses feminist judgments as a specific vehicle for teaching students to think critically about law. The analysis of appellate judgments forms a central plank of Anglo-Commonwealth and US jurisprudence and legal education. While academic scholarship generally offers various forms of commentary on decided cases, feminist judgment-writing projects have recently embarked on a new form of critical scholarship. Rather than critiquing judgments from a feminist perspective in academic essays, the participants in these projects have set out instead to write alternative judgments, as if they had been one of the judges sitting on the court at the time. After introducing the UK Feminist Judgments Project and describing what is 'different' about the judgments it has produced, the paper explains some of the ways in which these judgments have been used in UK law schools to teach critical thinking. The paper finally speculates on the potential production and application of feminist judgments or their equivalents beyond the common law context.

Key words

Critical thinking; feminist legal theory; Feminist Judgments Project; judicial decision-making; legal education; Women's Court of Canada

Resumen

Este artículo analiza las sentencias feministas como un vehículo específico para enseñar a los estudiantes a analizar el derecho desde un punto de vista crítico. El análisis de las sentencias de apelación constituye un elemento central de la jurisprudencia y la enseñanza del derecho en los países angloamericanos y de la Commonwealth. Mientras la comunidad académica ofrece generalmente diversas formas de comentario de casos resueltos, los proyectos de literatura judicial feminista se han embarcado recientemente en un nuevo sistema de crítica académica. En lugar de redactar ensayos académicos criticando las sentencias judiciales desde una perspectiva feminista, los participantes de estos proyectos se han propuesto redactar sentencias alternativas, como si hubieran sido uno de los

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jueces del tribunal en cuestión. Después de presentar el Proyecto de Sentencias Feministas del Reino Unido y describir las “diferencias” que presentan las sentencias que ha producido, el artículo explica algunas de las formas en que se han utilizado estas sentencias en las facultades de derecho del Reino Unido para enseñar pensamiento crítico. Finalmente, el artículo especula sobre la producción y aplicación potencial de resoluciones judiciales feministas o sus equivalentes más allá del contexto del derecho consuetudinario.

Palabras clave

Pensamiento crítico; teoría feminista del derecho; Proyecto de Sentencias Feministas; toma de decisiones judicial; enseñanza del derecho; Tribunal de Mujeres de Canadá.

Table of contents

1. Introduction

This paper discusses feminist judgments as a specific vehicle for teaching students to think critically about law.[1] The analysis of appellate judgments forms a central plank of Anglo-Commonwealth and US jurisprudence and legal education. The traditions of common law development, constitutional and statutory interpretation, individual judgments and lengthy reasons for decision provide fruitful sources for close study, argument and critique. While academic scholarship generally offers various forms of commentary on decided cases (individual or synthetic, analytical or critical, descriptive or normative), feminist judgment-writing projects have recently embarked on a new form of critical scholarship. Rather than critiquing judgments from a feminist perspective in academic essays, the participants in these projects have set out instead to write alternative judgments, as if they had been one of the judges sitting on the court at the time. This involves putting feminist theory into practice in judgment form, under conditions of constraint such as using only the law and materials available at the time of the original judgment, responding to arguments put by the opposing parties, and observing judicial norms of fairness, impartiality, and respect for precedent.[2] The aim is to show that, even at the time of the original decision, the case could have been reasoned and/or decided differently.

In the following discussion, I first introduce the UK Feminist Judgments Project and describe what is 'different' about the judgments it has produced, before going on to explain some of the ways in which these judgments have been used in law schools to teach critical thinking. I finally speculate on the potential production and application of feminist judgments outside the common law context.

Of course feminist judgments need not be imagined. There are many actual feminist appellate judgments issued by judges such as Lady Hale on the UK Supreme Court, Madame Justice Claire L'Heureux-Dubé on the Canadian Supreme Court, Justice Ruth Bader Ginsburg in the US Supreme Court and Justice Mary Gaudron on the High Court of Australia, to name only a few. Judgments identifiable as feminist may also be authored by male judges.[3] What the feminist judgment-writing projects offer, however, is a concentrated collection of feminist judgments which announce their own strategies and critical objectives and which aim to be accessible, and which may thus be drawn upon readily by legal educators and students in teaching and learning.

2. The UK Feminist Judgments Project

The idea of writing imagined feminist judgments was first conceived by a group of Canadian feminist academics, lawyers and activists who were particularly concerned with the development of the Canadian Supreme Court's jurisprudence on s.15 – the equality clause – of the Canadian Charter of Rights and Freedoms. As members of the Women's Legal Education and Action Fund (LEAF), they had been involved in a number of interventions in s.15 cases, in which LEAF had submitted briefs urging the Court to implement a more robust conception of substantive equality. Although the Court had initially been responsive to their arguments, over time those

[1] The paper assumes that students *should* be taught to think critically about law. Some of the possible reasons for doing so are discussed briefly towards the end of the paper. It does not, however, assume that legal education is currently *not* critical, nor that feminist judgments *must* form part of a critical legal education. It simply offers feminist judgments as a new and potentially helpful approach to teaching critical thinking in law.

[2] For discussion of the effect of these constraints and the limits they impose on the critical project of feminist judgment-writing, see Majury (2006, p. 6); Hunter *et al.* (2010b, pp. 5-6, 13-15); and Hunter (2010).

[3] The question of what counts as a feminist judgment and how feminist judgments may be identified is a contentious one which, while falling outside the scope of this paper, has been discussed at length elsewhere (see, e.g. Sheehy 2004; Hunter 2008; Baines 2009, 2012). See also the section on 'What's Different About Feminist Judgments?' below.

arguments appeared to be having less and less impact, and they were searching for new ways to capture the Court's attention. In Majury's words:

> Women's equality is painfully far from being a reality—too many women live in poverty, unable to feed and house themselves and their children adequately; lesbians are merely tolerated, mostly regarded as a deviant lifestyle, sometimes targeted for hate and violence; women with disabilities are still denied basic access to transportation, employment, and autonomy; racialized women are stigmatized and marginalized, and, in the post 9/11 political climate, some are perceived as potential terrorists; Aboriginal women are disappearing—raped, murdered, and discarded. The issues are urgent; there is much equality work to be done. But, politicians and Supreme Court of Canada judges alike seem to think that women have largely attained equality and that other issues (balanced budgets and national security) should take priority over equality. We are losing equality ground; we are in danger of losing our equality footing. (Majury 2006, p. 1)

It was in this context that they hit upon the idea of rewriting s.15 cases in order to demonstrate to the Court how it could be done. They dubbed themselves the Women's Court of Canada (WCC), and set about 'reviewing' Supreme Court decisions on s.15. The first six decisions of the WCC were published in the *Canadian Journal of Women and the Law* in March 2008 (see http://womenscourt.ca/). One of the activities of the WCC from early on was to introduce law students to their judgments and encourage students to consider the reasoning they had employed and to compare and contrast the judgments of the WCC with the decisions of the Supreme Court. The WCC launch event included a one-day symposium incorporating student workshops at the University of Toronto, and the WCC subsequently went 'on the road' to speak to students at the Universities of Victoria and Saskatchewan in Western Canada (see http://womenscourt.ca/media). Members of the WCC have subsequently published an article on the pedagogical use of WCC judgments (Koshan *et al.* 2010).

While the WCC focused on a distinct body of jurisprudence, the UK Feminist Judgments Project, launched in late 2007, took a broader approach to its subject-matter, issuing a general invitation to feminist legal academics to write alternative feminist judgments in any area of English law. Participants were both self-selected and selected their own judgments to rewrite, inevitably choosing cases in which they perceived a particular gender issue to arise, and/or an injustice that they wished to remedy. The result was the production of 23 alternative judgments across a wide range of areas – family law, criminal law, public law, contract, property law, banking law, equality and human rights law. In a handful of cases the judgment-writer imagined an appeal to a higher court and wrote a fictional appeal judgment. However, the majority were written as additional judgments in the original case decided by the Court of Appeal, House of Lords or Privy Council. Interestingly, not all of these were dissenting judgments. Several were concurrences, in which the feminist judgment-writer agreed with the result in the case, but did so for different reasons. The judgments have been published in a book: Hunter, McGlynn and Rackley (eds), *Feminist Judgments: From Theory to Practice* (2010a). In the book, each judgment is accompanied by a commentary, which explains for the benefit of the non-specialist reader the facts and the issues in the original case, how it was originally decided, and what the feminist judgment does differently. The book also contains an introduction to the Project and two theoretical chapters on the practice of feminist judging and the judgment-writing process.

3. What's different about feminist judgments?

The feminist judgments differ from their originals in a variety of ways, both substantive and methodological. Substantively, the judgments implicitly draw upon various aspects of feminist legal theory, particularly feminist critiques of liberal legalism. So, for example, several of the judgments view the subjects of law as

relational and interdependent rather than as atomised, self-interested and competitive individuals (see, e.g., Nedelsky 1989, 1990; Fineman 2004), and seek to implement an 'ethic of care' rather than the more traditional, masculine 'hierarchy of rights' (see, e.g., Gilligan 1982; Tronto 1993; West 1997; Sevenhuijsen 1998; Held 2005). Similarly, some reject the liberal dichotomy which sees subjects either as autonomous agents or as vulnerable victims in need of protection, and assert the possibility of occupying positions of both autonomy and vulnerability, victim and agent, at the same time – a common feature of women's lives (see, e.g. Scales 1986; Hunter 2007; Fineman 2008). Others tackle the public/private distinction, and challenge the state's refusal to limit the power of those who control the private sphere from engaging in abuse, exploitation and exclusion (see, e.g. Olsen 1984; O'Donovan 1985; Okin 1989; Fineman and Mykitiuk 1994; Thornton 1995; Boyd 1997). Others rethink problems of 'clashing rights' (see, e.g. Kingdom 1992; McColgan 2000) and bring a different perspective to bear on these dilemmas which often involves showing how differing rights and interests which were assumed to be incompatible can actually be mutually accommodated. And some, like the Women's Court of Canada, advocate a more substantive interpretation of 'equality', while others continue to appreciate the value of formal equality arguments in circumstances where even this basic standard of equal treatment is lacking.

Another group of judgments draw upon Foucauldian critiques of medical or bio-power (see, e.g. Foucault 1970, 2007; Miller and Rose 1986; Smart 1989; O'Donovan 1993; Rose 2006) to question the privileging of 'expert' medical or welfare opinions, and the associated devaluation of the knowledge and experience of parents and carers, or the need for women to produce 'expert' medical or psychiatric evidence to prove they have been harmed. The judgments also evidence the feminist theoretical concern with intersectionality – i.e. the need to acknowledge that women do not all share the same essential life experience, but that gender intersects with class, race, ethnicity, religion, sexuality and so on in different ways (see, e.g. Crenshaw 1989, 1991; Grabham *et al.* 2008; Lutz, Herrera Vivar and Supik 2011). Thus, the judgments deal with the specific positions and experiences of older women, lesbians, and Muslim women in particular cultural contexts.

Methodologically, the feminist judgments consistently use a set of techniques which are fairly distinctive, and which have also been identified in other literature on feminist judging (see, e.g. Resnik 1988; Bartlett 1990; Rush 1993; Sheehy 2004; Hunter 2008, 2010; Koshan *et al.* 2010).[4] First is the technique of telling the story differently, i.e. recounting the facts of the case in a different way from the original judgments in order to give voice to those (often women) who have been silenced or sidelined. Second is the use of contextual materials – social science, historical, and policy literature – to place the facts and the legal issues in a broader context. For example the feminist judgments variously include reference to research evidence on rape trials, domestic violence, lesbian motherhood, post-separation parenting, ageing, sado-masochistic sexual preferences, and the dynamics of commercial relationships. In addition, the judgments incorporate what I have identified as 'feminist common knowledge', i.e. information about the world that feminists consider to be so well known that it does not require proof.[5] So, for example, the feminist judgments draw on common knowledge about caring, marriage, parenthood, pregnancy, homophobia, and the intricacies of negotiating ethnic minority cultural and religious identities within contemporary British society. The

[4] Though it should be stressed that there is no fixed 'programme' for feminist judging, and that a feminist approach to judging might not differ greatly from any other critically aware judicial approach (see Hunter 2010, p. 43).

[5] For a fuller discussion of 'feminist common knowledge', and how it relates to the doctrine of judicial notice, see Hunter (2010, pp. 38-39; 2012). See also Graycar (1995) on the sources of judicial knowledge.

use of social science research evidence and feminist common knowledge in turn enables the judge to engage in what Katherine Bartlett (1990) calls 'feminist practical reasoning', i.e. reasoning from context rather than in the abstract, leading to more particularised – and arguably therefore more just – results. Such reasoning can be used to highlight the shortcomings of the current law, to show why a particular rule is inappropriate or inapplicable to the given facts, and/or to incorporate previously excluded experiences and perspectives into the stock of legal knowledge, which then become available to future judges, lawyers and litigants.

4. Feminist judgments as teaching resources

It quickly became obvious to those who participated in the project, and those who read the book, that the feminist judgments made excellent teaching resources. They did so in three respects. First, they demonstrated how feminist theoretical ideas could be implemented in legal practice. For students who were curious as to how this could be done, or who were sceptical as to whether it could be done, they provided practical illustrations. Some students who expected that judgments written from a feminist perspective would be biased or incoherent were forced to rethink their preconceptions. For example in the case of *Wilkinson v Kitzinger* (2006), a lesbian couple who had been married in Canada sought to have their marriage recognised *as a marriage* in England, whereas English law recognised it only as a civil partnership. They argued that this refusal violated their rights under Articles 8, 12 and 14 of the European Convention on Human Rights (ECHR). The English judge dismissed their application and advanced a vehement defence of the value of 'traditional' heterosexual marriage, the protection of which was said to justify interference with the applicants' rights to non-discrimination under Article 14 ECHR. The feminist judgment (one of the fictional appeals) meticulously examines the legal precedents on the ECHR, exposes flaws in the judge's reasoning on Articles 12 and 14, and finds in favour of the applicants (Harding 2010). Students comparing the two judgments found that it was the *feminist* judgment that appeared neutral, dispassionate, 'legal' and 'objective', while the original judgment was more emotional, partial and overdetermined.

In addition, the feminist judgments collectively demonstrate that feminism is not monolithic – that there may be a variety of feminist views on a particular issue, and that it is not possible simply to 'read off' 'the' feminist outcome from the facts. There is one acknowledged feminist judge on the UK Supreme Court (formerly the House of Lords) – Lady Hale. Some of the imagined feminist judgments rewrote her decisions, illustrating a different feminist perspective on issues such as the scope of the defence of provocation, the relative importance of biological versus social motherhood, or whether schoolgirls should be allowed their choice to wear strict Islamic dress.

Secondly, the feminist judgments can be used to provoke critical thinking about judicial decision-making by exposing the contingency of the decisions made. Results that appeared inevitable are shown not to be so (see also Koshan *et al.* 2010, pp. 137, 139). As Majury states in the Canadian context:

> The WCC decision enabled the students to see concretely that the decision really could have been written and decided very differently... While the students may already have understood this in the abstract, it seemed that reading the rewritten judgment helped them to see and understand that potential at a deeper and more meaningful level. It became a possibility rather than just an idea. (Koshan *et al.* 2010, pp. 136-137)

The judgments can also be used to highlight the techniques of persuasion judges employ, and the choices judges make in constructing the 'facts' of the case, hence demonstrating that the 'facts' represented by the court are indeed selected and constructed rather than transparently reflecting an external reality (see also Koshan *et al.* 2010, pp. 130, 138, 142). Following on from this, the judgments provoke

reflection on the important relationship between the story told about the facts and the outcome of the case.

Thirdly, the feminist judgments can be used to provoke critical thinking about the particular decision made by the court and to illustrate different possibilities for the development of legal doctrine in the relevant subject areas. The judgments suggest new directions for the development of the common law in relation to property, contracts, criminal liability and defences, child welfare and the application of international law by domestic courts, among others. They also offer alternative interpretations of legislative provisions in human rights law, criminal law, evidence law and employment protection law. In some instances, too, they illustrate the limits of the law and its inability to provide a remedy. In the case of *James v Eastleigh Borough Council*, the feminist judge reluctantly concludes that an interpretation of the concept of discrimination in the Sex Discrimination Act 1975 which she might have preferred is simply not open for a judge to make (McColgan 2010). And the incapacity of judicial review proceedings to regulate potential future conflicts, as opposed to adjudicating retrospectively on past events, is clearly identified in the feminist judgment in *R v Portsmouth Hospitals NHS Trust, ex parte Glass* (Bridgeman 2010).

The feminist judgments are now being used for teaching purposes in a number of English law schools (and internationally), in 'gender and law'-type courses (focusing on feminist approaches to judging) (see also Koshan *et al.* 2010, pp. 132-136); in introduction to law, jurisprudence and statutory interpretation courses (focusing on critical analysis of judicial decision-making); and in doctrinal courses such as family law, criminal law, civil liberties, law and commercial relationships, and healthcare ethics (focusing on how particular cases might have been decided differently, and more generally on alternative possibilities for doctrinal development) (see also Koshan *et al.* 2010, pp. 129-132, 136-137). In some of these courses, students are required to draft their own feminist judgment as part of the assessment, or have the option of doing so.

Two of the participants in the project successfully applied to the UK Centre for Legal Education for a grant to develop a set of teaching materials based on the Feminist Judgments Project. The grant enabled them to hold two workshops at which academics who were using the judgments in teaching, or were interested in doing so, could discuss with each other and share ideas about how they were using the judgments, how they had designed their classes, and their experiences of teaching with the judgments. Subsequently, some of those who attended the workshops wrote up their teaching materials, and these are now publicly available on the Feminist Judgments website at http://www.feministjudgments.org.uk. The following discussion draws upon and presents (in edited form) these teaching materials.

Two of the sets of materials use the feminist judgments as a vehicle for critical analysis of judgment-writing and judicial reasoning.

4.1. Lois Bibbings, University of Bristol

- **Module:** Legal Methods
- **Aims:** To enable critical discussion of legal methods, including the construction of legal argument, the use of precedent and, in particular, techniques of judging.
- **Reading:** Court of Appeal judgment in *R v Stone and Dobinson* (1977); feminist judgment in *R v Stone and Dobinson* (Bibbings 2010);[6] theoretical material on precedent and judging.

[6] *R v Stone and Dobinson* concerns criminal liability for omissions. The court upheld manslaughter convictions for both defendants, on the basis that they had assumed a duty to care for the first defendant's seriously ill sister, and had breached that duty, resulting in her death. The feminist

- **Questions/Exercise:** The focus of the class should be on the discussion and analysis of the two versions of the judgment in *R v Stone and Dobinson*. Attention should be directed first to the 'real' case: how it is argued, how it uses precedent, how convincing its reasoning and decision are and why? An analysis of the alternative judgment should follow, along similar lines and then a comparative discussion can be introduced. Amongst other things, students should be encouraged to think how precedent and the techniques of judging are used in each case, which they think is the most lawyerly/legalistic and which is the most convincing decision and why. Students could also be asked to reflect upon the nature of legal reasoning and judging, taking into account different accounts of what is, might or should be involved (e.g. objectivity, rationality, logic, craft, creativity, emotion, politics, standpoint, empathy).

4.2. Anna Grear, University of West of England

- **Module:** Critical and Legal Reasoning
- **Aims:** Understanding how judges reason (reasoning from statutory rules; reasoning from cases; the nature and legitimacy of judicial adjudication).
- **Reading**: *Donoghue v Stevenson* (1932); Court of Appeal decision in *Porter v Commissioner for Police for the Metropolis* (1999); feminist judgment in *Porter v Commissioner for Police for the Metropolis* (Grear 2010).[7]
- **Exercise:** Having engaged in an analysis of *Donoghue v Stevenson*, including an interrogation of the various strategies deployed by the judges to reach the outcome they preferred, the students were set the task of writing an alternative judgment in the case of *Porter*. Given the paucity of time, the students were set the task of constructing an analytical map of their judgment, and also providing one, in-depth, precise paragraph from the judgment in relation to any one of their own selected precedents. The students really enjoyed the exercise. I also gave them the feminist judgment as an example of how it is possible to start from any given position and still produce a judgment conforming to the canons of legal practice. This, in and of itself, emphasised, in a very practical way, the way in which law cannot, even by deploying its own limited and highly specialised version of reasoning, close out multiple perspectives.

Two other sets of materials focus on feminism and the application of feminist theory to legal decision-making, while also thinking about techniques of judging. It is notable that the second of these (by Fitzpatrick and Hunter) uses an actual rather than imagined feminist judgment – an opinion delivered by Lady Hale when she was a member of the Court of Appeal, which is contrasted with the judgment of one of her male colleagues in the same case.

4.3. Joanne Conaghan, University of Kent

- **Module:** Critical Introduction to Law

judgment revisits the facts of the case, acknowledging the difficulties experienced by the defendants who themselves suffered from significant disabilities and their unsuccessful attempts to get help for the deceased, and attributing blame not to the defendants but to the wider community and the state for their failures to care for the family as a whole.

[7] In *Porter v Commissioner for Police for the Metropolis*, a woman with two young children staged a peaceful sit-in at a ultility company's offices in protest at their alleged failure to connect the electricity supply to her new flat. She was forcibly ejected by the police, and unsuccessfully sued them for assault, battery, wrongful arrest, false imprisonment and malicious prosecution. The lawfulness of the police's actions turned on the ability of the utility company to treat her as a trespasser on its premises. The Court of Appeal held that it had power to do so. The feminist judgment disagrees, categorising the premises not as 'private' but as 'quasi-public', giving members of the public a right to enter so long as their behaviour is not unreasonable.

- **Aims:** understand feminism as a critical 'mode of analysis or *way of seeing*'; consider the application of that *way of seeing* to a particular case; analyse how the feminist judgment operates, and its similarities and differences from the original judgments; critically assess the feminist claim to produce 'fairer trials'.
- **Reading:** Privy Council decision in *Attorney-General for Jersey v Holley* (2005); feminist judgment in *Attorney-General for Jersey v Holley* (Edwards 2010).[8]
- **Questions:** ***Privy Council decision***: What was the legal issue which *Holley* seeks to resolve? What are the facts? How do you know? Consider the majority and minority judgments: (a) What arguments do they put forward? (b) What techniques of statutory interpretation do they deploy? (c) Does story telling/narrative play a role in any of the judgments? What is the relevance of justice to decision-making in *Holley*? ***Feminist judgment:*** In what sense is this a 'feminist' judgement? Does it work? Does the inclusion of gender considerations lead to more just judicial reasoning? Is the author's advocacy of a flexible standard for judging self-control consistent with her view that male jealousy and hubris should always be ruled out as a ground for provocation? Does it matter?

4.4. Ben Fitzpatrick and Caroline Hunter, University of York

- **Module:** Foundational Issues in Law
- **Aims:** Provide a general introduction to feminist legal theories and the different feminist approaches to law; Provide a brief introduction to the gendered nature of legal decision making through examination of the statistics on female judges and the reaction to the appointment of Brenda Hale to the House of Lords; Ask students to consider whether there is a distinctive female or feminist voice in judging.
- **Reading:** The judgments of Brooke LJ and Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* (2001)[9] (judges' names removed). Suggested further reading includes articles on feminist legal theory, women judges, feminist judging, and commentary on the case.
- **Exercise:** The students are asked to read the judgments with the following questions in mind: Which is by a female and which by a male judge? How would you characterise their differences? This is then used to provoke a discussion on the nature of the 'voice' of the judge. We have now run this exercise twice and in general the students could tell the difference. Interestingly most preferred what they perceive as the 'neutral' voice of Brooke LJ's judgment.

The final set of materials addresses all three issues: the nature of judgment-writing, the application of feminist legal theory and different ways in which legal doctrine could have developed. The author presents a generic teaching plan for introducing feminist judgments in the classroom, which she suggests could be

[8] *Attorney-General for Jersey v Holley* concerned the legal test for the availability of the defence of provocation. While a majority of the Privy Council held that the provocation must be such that it could cause an ordinary person to lose self control, the feminist judgment prefers the alternative formulation, that the provocation could make a person with the defendant's characteristics (including any physical or mental conditions) lose self-control, on the basis that this formulation is necessary in order to do justice to battered women who kill their abusers.

[9] The issue in *Parkinson v St James and Seacroft University Hospital NHS Trust* was whether a mother could recover damages for the birth of a disabled child following a negligently-performed sterilisation operation. The Court of Appeal unanimously held that damages were recoverable for the extra costs of bringing up a child with a significant disability, where that was foreseeably a result of the surgeon's negligence. However, Brooke LJ and Hale LJ gave different reasons for arriving at this conclusion, with Hale LJ emphasising in particular the invasion of bodily integrity involved and the effects of pregnancy, child birth and caring responsibilities on women.

applied to a range of possible modules including Public Law, Legal Method, Law and Gender, Human Rights, Legal Theory or a Project-based course.

4.5. Harriet Samuels, University of Westminster

- **Aims:** Understand and experience the process of judgment-writing; Develop an understanding of the historical, social, and economic context of judgments; Understand and apply feminist method.
- **Reading:** First instance, Court of Appeal and House of Lords decisions in *Roberts v Hopwood* (1925); feminist judgment in *Roberts v Hopwood* (Samuels 2010) and accompanying commentary (Palmer 2010);[10] *Short v Poole Corporation* (1926), or any two contemporaneous cases that raise relevant issues. (Samuels also includes a reading list for the teacher, covering women and the law, feminist methods, judicial decision-making, judicial politics, women judges, and feminist judging.)
- **Exercise:** Introduce the first case; Consider the case in its historical, social, economic and political context as appropriate; Study feminist method and feminist judgment-writing; Re-write another case using feminist method.
    - Class 1. Discuss thinking critically, feminist method, historical context; assign case reading and questions to prepare.
    - Class 2. Discuss the case: facts, arguments, legal issues, majority and dissenting judgments, judicial preferences/partiality/values; discuss the feminist judgment: how does it apply feminist method? Compare and contrast the majority and feminist judgments.
    - Class 3. Prepare students to write a feminist/alternative judgment in the second case: summarise facts, summarise arguments, conclusions, reasons, reasons for rejecting the other side's arguments; reflection on values, gender issues, wider context.
    - Judgments may be written in next class or in students' own time.

It can be seen that these teaching materials mostly seek to engage students in discussion, debate and practical exercises, although the feminist judgments can clearly also be incorporated into lectures – for example on the Feminist Judgments website Conaghan provides powerpoint slides for a lecture on feminist judging and the case of *Attorney-General for Jersey v Holley* (2005) to precede the seminar exercise set out above. The materials are also evidently focused on *critical* thinking about law, emphasising various ways in which law may be questioned rather than taken for granted, evaluated rather than simply learnt, and considering how a critical, feminist approach may be brought to bear, while also being concerned to take a critical, questioning approach to the feminist project itself. As Réaume notes in relation to her experience of teaching a seminar dedicated to a sustained analysis of the WCC judgments and their originals:

> While the students appreciated the different approach that the WCC brought to the cases, they did not passively go along with the new approach. Having opened up what made a WCC decision different, the students often noticed gaps or flaws in the reasoning of both courts. This sometimes led to reflection on how the gaps could be filled, on how the argument *really* should go. (Koshan *et al.* 2010, p. 139)

Although judgments embodying other critical approaches are less readily available, the feminist judgments and related teaching materials could also clearly be used to

[10] In *Roberts v Hopwood*, the district auditor disallowed Poplar Borough Council's decision to pay a higher minimum wage to its employees than had been agreed through official trade union negotiations, and to pay the same wage to women and men, on the grounds that the proposed pay was excessive, unreasonable, amounted to gratuities rather than wages, and failed to take into account the interests of the ratepayers. The Council sought judicial review of the auditor's decision, but the decision was upheld by the House of Lords. The feminist judgment draws on contemporary material to demonstrate that equal pay for women should not have been considered unreasonable.

illustrate ways in which other critical approaches (such as critical legal studies, critical race theory or decolonising jurisprudence) could be incorporated into judgments, and/or to encourage students to write alternative judgments employing these approaches.

In their article on the use of WCC judgments in teaching, Koshan *et al.* (2010) connect their project firmly with 'outsider pedagogy', i.e. the conscious inclusion of the experiences and perspectives of 'outsider' groups within (legal) education in order both to remedy past exclusions and to challenge the claims to neutrality and objectivity of traditionally accepted and authoritative ways of seeing and understanding the world. For example, they argue that "Including feminist perspectives in legal education...seeks to ensure that women's voices have 'space...credibility, and perhaps even power'" (Koshan *et al.* 2010, p. 124, quoting Bakht *et al.* 2007, p. 674). They further argue that it is necessary for law students to be exposed to multiple social realities and to become aware of "multidimensional sources and forms of, as well as solutions to, inequality", in order to "properly serve their clients and be strong social citizens" (Koshan *et al.* 2010, p. 125; see also pp. 138, 143-144). While it has not been the purpose of this paper to advocate specific motivations for encouraging law students to engage in critical thinking – or any particular kind of critical thinking – I would suggest that there is no *necessary* connection between motivations and methods. While some teachers will use the feminist judgments as part of a political project of feminist, critical or 'outsider' pedagogy, the judgments may also be used by those who are concerned to teach students to interrogate the nature of legal reasoning and the development of legal doctrine, but may not share these broader political goals.

5. Further applications?

Although the feminist judgments have proved to be very useful critical teaching resources in a common law context, one question that obviously arises is whether this model is applicable in other legal systems. The idea of encouraging students to scrutinise court decisions and to write alternative judgments as a way of operationalising critical perspectives on law and of thinking critically about legal doctrine and judicial decision-making presupposes some degree of indeterminacy and judicial choice in the reasoning and outcomes of cases, and some elaboration of the reasons for decision. It is not difficult to see such possibilities, for example, in relation to the European Court of Human Rights or the International Criminal Court, as well as ad hoc post-conflict tribunals (see, e.g. the feminist judgment of the International Criminal Tribunal for Rwanda on the definition of rape in *Prosecutor v Jean-Paul Akayesu* (1998)). In Constitutional Courts, too, there would always seem to be room for interpretation. It should be noted that the possibility of delivering individual judgments is not a necessary prerequisite. Even where the court speaks with one voice, and there is no scope for concurring or dissenting judgments, the singular decision of the court may still be open to rewriting.

It is acknowledged that in some contexts, court decisions may not be the object of study because they make no material contribution to the development of the law. Here, the emphasis is solely on legislation, possibly incorporating preparatory materials as well. Although the idea of alternative judgments would have little critical purchase in this situation, it may be possible, by analogy, to think about alternative legislative provisions, or alternative processes for producing new legislation. The task may indeed be challenging, but critical thinking about law is by definition a challenging exercise. Fundamentally, the feminist judgment-writing projects have been animated by a perceived gap between law and justice (a gap which, according to Derrida (1990), always exists). Wherever such a gap is perceived, an alternative has already begun to be imagined.

6. Acknowledgements

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POLITICS

Lecture: ‘A Latina Judge’s Voice’

MAY 14, 2009

The following is the text of the Judge Mario G. Olmos Memorial Lecture in 2001, delivered at the University of California, Berkeley, School of Law, by appeals court judge Sonia Sotomayor. It was published in the Spring 2002 issue of Berkeley La Raza Law Journal, a symposium issue entitled "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation," and it is reproduced here with permission from the journal.

"A Latina Judge's Voice"

By Sonia Sotomayor

Judge Reynoso, thank you for that lovely introduction. I am humbled to be speaking behind a man who has contributed so much to the Hispanic community. I am also grateful to have such kind words said about me.

I am delighted to be here. It is nice to escape my hometown for just a little bit. It is also nice to say hello to old friends who are in the audience, to rekindle contact with old acquaintances and to make new friends among those of you in the audience. It is particularly heart warming to me to be attending a conference to which I was invited by a Latina law school friend, Rachel Moran, who is now an accomplished and widely respected legal scholar. I warn Latinos in this room: Latinas are making a lot of progress in the old-boy network.

I am also deeply honored to have been asked to deliver the annual Judge Mario G. Olmos lecture. I am joining a remarkable group of prior speakers who have given

this lecture. I hope what I speak about today continues to promote the legacy of that man whose commitment to public service and abiding dedication to promoting equality and justice for all people inspired this memorial lecture and the conference that will follow. I thank Judge Olmos' widow Mary Louise's family, her son and the judge's many friends for hosting me. And for the privilege you have bestowed on me in honoring the memory of a very special person. If I and the many people of this conference can accomplish a fraction of what Judge Olmos did in his short but extraordinary life we and our respective communities will be infinitely better.

I intend tonight to touch upon the themes that this conference will be discussing this weekend and to talk to you about my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench.

Who am I? I am a "Newyorkrican." For those of you on the West Coast who do not know what that term means: I am a born and bred New Yorker of Puerto Rican-born parents who came to the states during World War II.

Like many other immigrants to this great land, my parents came because of poverty and to attempt to find and secure a better life for themselves and the family that they hoped to have. They largely succeeded. For that, my brother and I are very grateful. The story of that success is what made me and what makes me the Latina that I am. The Latina side of my identity was forged and closely nurtured by my family through our shared experiences and traditions.

For me, a very special part of my being Latina is the mucho platos de arroz, gandules y pernil - rice, beans and pork - that I have eaten at countless family holidays and special events. My Latina identity also includes, because of my particularly adventurous taste buds, morcilla, -- pig intestines, patitas de cerdo con garbanzo -- pigs' feet with beans, and la lengua y orejas de cuchifrito, pigs' tongue and ears. I bet the Mexican-Americans in this room are thinking that Puerto Ricans have unusual food tastes. Some of us, like me, do. Part of my Latina identity is the sound of merengue at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of Saturday afternoon at the movies with my aunt and cousins watching Cantinflas, who is not Puerto Rican, but who was an icon Spanish comedian on par with Abbot and Costello of my generation. My Latina soul

was nourished as I visited and played at my grandmother's house with my cousins and extended family. They were my friends as I grew up. Being a Latina child was watching the adults playing dominos on Saturday night and us kids playing loteria, bingo, with my grandmother calling out the numbers which we marked on our cards with chick peas.

Now, does any one of these things make me a Latina? Obviously not because each of our Carribean and Latin American communities has their own unique food and different traditions at the holidays. I only learned about tacos in college from my Mexican-American roommate. Being a Latina in America also does not mean speaking Spanish. I happen to speak it fairly well. But my brother, only three years younger, like too many of us educated here, barely speaks it. Most of us born and bred here, speak it very poorly.

If I had pursued my career in my undergraduate history major, I would likely provide you with a very academic description of what being a Latino or Latina means. For example, I could define Latinos as those peoples and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. You can tell that I have been very well educated. That antiseptic description however, does not really explain the appeal of morcilla - pig's intestine - to an American born child. It does not provide an adequate explanation of why individuals like us, many of whom are born in this completely different American culture, still identify so strongly with those communities in which our parents were born and raised.

America has a deeply confused image of itself that is in perpetual tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race and color-blind way that ignore these very differences that in other contexts we laud. That tension between "the melting pot and the salad bowl" -- a recently popular metaphor used to described New York's diversity - is being hotly debated today in national discussions about affirmative action. Many of us struggle with this tension and attempt to maintain and promote our cultural and ethnic identities in a society that is often ambivalent about how to deal with its differences. In this time of great debate we

must remember that it is not political struggles that create a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love being a Puertorriqueña and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for Latinos or Latinas, and although that struggle did not and does not create a Latina identity, it does inspire how I live my life.

I was born in the year 1954. That year was the fateful year in which Brown v. Board of Education was decided. When I was eight, in 1961, the first Latino, the wonderful Judge Reynaldo Garza, was appointed to the federal bench, an event we are celebrating at this conference. When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. There was then only one Afro-American Supreme Court Justice and then and now no Latino or Latina justices on our highest court. Now in the last twenty plus years of my professional life, I have seen a quantum leap in the representation of women and Latinos in the legal profession and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices to the Supreme Court and two female justices to the New York Court of Appeals, the highest court of my home state. One of those judges is the Chief Judge and the other is a Puerto Riqueña, like I am. As of today, women sit on the highest courts of almost all of the states and of the territories, including Puerto Rico. One Supreme Court, that of Minnesota, had a majority of women justices for a period of time.

As of September 1, 2001, the federal judiciary consisting of Supreme, Circuit and District Court Judges was about 22% women. In 1992, nearly ten years ago, when I was first appointed a District Court Judge, the percentage of women in the total federal judiciary was only 13%. Now, the growth of Latino representation is somewhat less favorable. As of today we have, as I noted earlier, no Supreme Court justices, and we have only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge. So changes are happening, although in some

areas, very slowly. These figures and appointments are heartwarming. Nevertheless, much still remains to happen.

Let us not forget that between the appointments of Justice Sandra Day O'Connor in 1981 and Justice Ginsburg in 1992, eleven years passed. Similarly, between Justice Kaye's initial appointment as an Associate Judge to the New York Court of Appeals in 1983, and Justice Ciparick's appointment in 1993, ten years elapsed. Almost nine years later, we are waiting for a third appointment of a woman to both the Supreme Court and the New York Court of Appeals and of a second minority, male or female, preferably Hispanic, to the Supreme Court. In 1992 when I joined the bench, there were still two out of 13 circuit courts and about 53 out of 92 district courts in which no women sat. At the beginning of September of 2001, there are women sitting in all 13 circuit courts. The First, Fifth, Eighth and Federal Circuits each have only one female judge, however, out of a combined total number of 48 judges. There are still nearly 37 district courts with no women judges at all. For women of color the statistics are more sobering. As of September 20, 1998, of the then 195 circuit court judges only two were African-American women and two Hispanic women. Of the 641 district court judges only twelve were African-American women and eleven Hispanic women. African-American women comprise only 1.56% of the federal judiciary and Hispanic-American women comprise only 1%. No African-American, male or female, sits today on the Fourth or Federal circuits. And no Hispanics, male or female, sit on the Fourth, Sixth, Seventh, Eighth, District of Columbia or Federal Circuits.

Sort of shocking, isn't it? This is the year 2002. We have a long way to go. Unfortunately, there are some very deep storm warnings we must keep in mind. In at least the last five years the majority of nominated judges the Senate delayed more than one year before confirming or never confirming were women or minorities. I need not remind this audience that Judge Paez of your home Circuit, the Ninth Circuit, has had the dubious distinction of having had his confirmation delayed the longest in Senate history. These figures demonstrate that there is a real and continuing need for Latino and Latina organizations and community groups throughout the country to exist and to continue their efforts of promoting women and men of all colors in their pursuit for equality in the judicial system.

This weekend's conference, illustrated by its name, is bound to examine issues that I hope will identify the efforts and solutions that will assist our communities. The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go but instead to discuss with you what it all will mean to have more women and people of color on the bench. The statistics I have been talking about provide a base from which to discuss a question which one of my former colleagues on the Southern District bench, Judge Miriam Cederbaum, raised when speaking about women on the federal bench. Her question was: What do the history and statistics mean? In her speech, Judge Cederbaum expressed her belief that the number of women and by direct inference people of color on the bench, was still statistically insignificant and that therefore we could not draw valid scientific conclusions from the acts of so few people over such a short period of time. Yet, we do have women and people of color in more significant numbers on the bench and no one can or should ignore pondering what that will mean or not mean in the development of the law. Now, I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. On one of the panels tomorrow, you will hear the Latino perspective in this debate.

For those of you interested in the gender perspective on this issue, I commend to you a wonderful compilation of articles published on the subject in Vol. 77 of the Judicature, the Journal of the American Judicature Society of November-December 1993. It is on Westlaw/Lexis and I assume the students and academics in this room can find it.

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While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address. I accept the thesis of a law school classmate, Professor Steven Carter of Yale Law School, in his affirmative action book that in any group of human beings there is a diversity of opinion because there is both a diversity of experiences and of thought. Thus, as noted by another Yale Law School Professor -- I did graduate from there and I am not really biased except that they seem to be doing a lot of writing in that area - Professor Judith Resnik says that there is not a single voice of feminism, not a feminist approach but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not and perhaps will never aspire to be as solidified as the established legal doctrines of judging can sometimes appear to be.

That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives - no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some

circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.

In our private conversations, Judge Cedarbaum has pointed out to me that seminal decisions in race and sex discrimination cases have come from Supreme Courts composed exclusively of white males. I agree that this is significant but I also choose to emphasize that the people who argued those cases before the Supreme Court which changed the legal landscape ultimately were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Connie Baker Motley, the first black woman appointed to the federal bench, and others of the NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the Court that equality of work required equality in terms and conditions of employment.

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown.

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with

suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering. We, I mean all of us in this room, must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend once again my deepest gratitude to all of you for listening and letting me share my reflections on being a Latina voice on the bench. Thank you.

A Latina Judge's Voice

Hon. Sonia Sotomayor†

Judge Reynoso, thank you for that lovely introduction. I am humbled to be speaking behind a man who has contributed so much to the Hispanic community. I am also grateful to have such kind words said about me.

I am delighted to be here. It is nice to escape my hometown for just a little bit. It is also nice to say hello to old friends who are in the audience, to rekindle contact with old acquaintances and to make new friends among those of you in the audience. It is particularly heart warming to me to be attending a conference to which I was invited by a Latina law school friend, Rachel Moran, who is now an accomplished and widely respected legal scholar. I warn Latinos in this room: Latinas are making a lot of progress in the old-boy network.

I am also deeply honored to have been asked to deliver the annual Judge Mario G. Olmos lecture. I am joining a remarkable group of prior speakers who have given this lecture. I hope what I speak about today continues to promote the legacy of that man whose commitment to public service and abiding dedication to promoting equality and justice for all people inspired this memorial lecture and the conference that will follow. I thank Judge Olmos' widow Mary Louise's family, her son and the judge's many friends for hosting me. And for the privilege you have bestowed on me in honoring the memory of a very special person. If I and the many people of this conference can accomplish a fraction of what Judge Olmos did in his short but extraordinary life we and our respective communities will be infinitely better.

I intend tonight to touch upon the themes that this conference will be discussing this weekend and to talk to you about my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench.

Who am I? I am a "Newyorkrican." For those of you on the West Coast who do not know what that term means: I am a born and bred New Yorker of Puerto Rican-born parents who came to the states during World War II.

Like many other immigrants to this great land, my parents came because of poverty and to attempt to find and secure a better life for themselves and the family that they hoped to have. They largely succeeded. For that, my brother and I are very grateful. The story of that success is what made me and what makes me the Latina that I am. The Latina side of my identity was forged and closely nurtured by my family through our shared experiences and traditions.

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† Judge Sotamayor grew up in a South Bronx housing project and graduated from Princeton University and Yale Law School. She was a former prosecutor in the office of the District Attorney in Manhattan and an associate and then partner in the New York law firm of Pavia & Harcourt. She was also a member of the Puerto Rico Legal Defense and Education Fund. Nominated to the Second Circuit in 1997, she became the first Latina nominated to sit on a federal appellate court.

For me, a very special part of my being Latina is the *mucho platos de arroz, gandoles y pernir* – rice, beans and pork – that I have eaten at countless family holidays and special events. My Latina identity also includes, because of my particularly adventurous taste buds, *morcilla*, -- pig intestines, *patitas de cerdo con garbanzo* -- pigs' feet with beans, and *la lengua y orejas de cuchifrito*, pigs' tongue and ears. I bet the Mexican-Americans in this room are thinking that Puerto Ricans have unusual food tastes. Some of us, like me, do. Part of my Latina identity is the sound of *merengue* at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of Saturday afternoon at the movies with my aunt and cousins watching *Cantinflas*, who is not Puerto Rican, but who was an icon Spanish comedian on par with Abbot and Costello of my generation. My Latina soul was nourished as I visited and played at my grandmother's house with my cousins and extended family. They were my friends as I grew up. Being a Latina child was watching the adults playing dominos on Saturday night and us kids playing *lotería*, bingo, with my grandmother calling out the numbers which we marked on our cards with chick peas.

Now, does any one of these things make me a Latina? Obviously not because each of our Carribean and Latin American communities has their own unique food and different traditions at the holidays. I only learned about tacos in college from my Mexican-American roommate. Being a Latina in America also does not mean speaking Spanish. I happen to speak it fairly well. But my brother, only three years younger, like too many of us educated here, barely speaks it. Most of us born and bred here, speak it very poorly.

If I had pursued my career in my undergraduate history major, I would likely provide you with a very academic description of what being a Latino or Latina means. For example, I could define Latinos as those peoples and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. You can tell that I have been very well educated. That antiseptic description however, does not really explain the appeal of *morcilla* – pig's intestine – to an American born child. It does not provide an adequate explanation of why individuals like us, many of whom are born in this completely different American culture, still identify so strongly with those communities in which our parents were born and raised.

America has a deeply confused image of itself that is in perpetual tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race and color-blind way that ignore these very differences that in other contexts we laud. That tension between "the melting pot and the salad bowl" -- a recently popular metaphor used to described New York's diversity – is being hotly debated today in national discussions about affirmative action. Many of us struggle with this tension and attempt to maintain and promote our cultural and ethnic identities in a society that is often ambivalent about how to deal with its differences. In this time of great debate we must remember that it is not political struggles that create a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love being a Puerto

Riqueña and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for Latinos or Latinas, and although that struggle did not and does not create a Latina identity, it does inspire how I live my life.

I was born in the year 1954. That year was the fateful year in which *Brown v. Board of Education* was decided. When I was eight, in 1961, the first Latino, the wonderful Judge Reynaldo Garza, was appointed to the federal bench, an event we are celebrating at this conference. When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. There was then only one Afro-American Supreme Court Justice and then and now no Latino or Latina justices on our highest court. Now in the last twenty plus years of my professional life, I have seen a quantum leap in the representation of women and Latinos in the legal profession and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices to the Supreme Court and two female justices to the New York Court of Appeals, the highest court of my home state. One of those judges is the Chief Judge and the other is a Puerto Riqueña, like I am. As of today, women sit on the highest courts of almost all of the states and of the territories, including Puerto Rico. One Supreme Court, that of Minnesota, had a majority of women justices for a period of time.

As of September 1, 2001, the federal judiciary consisting of Supreme, Circuit and District Court Judges was about 22% women. In 1992, nearly ten years ago, when I was first appointed a District Court Judge, the percentage of women in the total federal judiciary was only 13%. Now, the growth of Latino representation is somewhat less favorable. As of today we have, as I noted earlier, no Supreme Court justices, and we have only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge. So changes are happening, although in some areas, very slowly. These figures and appointments are heartwarming. Nevertheless, much still remains to happen.

Let us not forget that between the appointments of Justice Sandra Day O'Connor in 1981 and Justice Ginsburg in 1992, eleven years passed. Similarly, between Justice Kaye's initial appointment as an Associate Judge to the New York Court of Appeals in 1983, and Justice Ciparick's appointment in 1993, ten years elapsed. Almost nine years later, we are waiting for a third appointment of a woman to both the Supreme Court and the New York Court of Appeals and of a second minority, male or female, preferably Hispanic, to the Supreme Court. In 1992 when I joined the bench, there were still two out of 13 circuit courts and about 53 out of 92 district courts in which no women sat. At the beginning of September of 2001, there are women sitting in all 13 circuit courts. The First, Fifth, Eighth and Federal Circuits each have only one female judge, however, out of a combined total number of 48 judges. There are still nearly 37 district courts with no women judges at all. For women of color the statistics are more sobering. As of September 20, 1998, of the then 195 circuit court judges only two were African-American women and two Hispanic women. Of the 641 district court judges only twelve were African-American women and eleven Hispanic women. African-American women

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Courts composed exclusively of white males. I agree that this is significant but I also choose to emphasize that the people who argued those cases before the Supreme Court which changed the legal landscape ultimately were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Connie Baker Motley, the first black woman appointed to the federal bench, and others of the NAACP argued *Brown v. Board of Education.* Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the Court that equality of work required equality in terms and conditions of employment.

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Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown.*

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

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race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering. We, I mean all of us in this room, must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend once again my deepest gratitude to all of you for listening and letting me share my reflections on being a Latina voice on the bench. Thank you.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UTAH *v.* STRIEFF

CERTIORARI TO THE SUPREME COURT OF UTAH

No. 14–1373. Argued February 22, 2016—Decided June 20, 2016

Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

Held: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown* v. *Illinois*, 422 U. S. 590. In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Pp. 4–10.

(a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." *Segura* v. *United States*, 468 U. S. 796, 804. But to ensure that those deterrence benefits are not outweighed by

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the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson* v. *Michigan*, 547 U. S. 586, 593. Pp. 4–5.

(b) As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, pre-existing, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest. Pp. 5–10.

(1) Three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590, lead to this conclusion. The first, "temporal proximity" between the initially unlawful stop and the search, *id.,* at 603, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, "the presence of intervening circumstances, *id.*, at 603–604, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, "the purpose and flagrancy of the official misconduct," *id.*, at 604, also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. Pp. 6–9.

(2) Strieff's counterarguments are unpersuasive. First, neither Officer Fackrell's purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell's purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by *Brown*'s "purpose and flagrancy" factor. Pp. 9–10.

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2015 UT 2, 357 P. 3d 532, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Parts I, II, and III. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. App. 15. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the

evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'" App. to Pet. for Cert. 102 (quoting *United States* v. *Simpson*, 439 F. 3d 490, 496 (CA8 2006). Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed. 2012 UT App 245, 286 P. 3d 317.

The Utah Supreme Court reversed. 2015 UT 2, 357 P. 3d 532. It held that the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. *Id.*, at 536. Because Officer Fackrell's discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed. *Ibid.*

We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant. 576 U. S. ___ (2015). Compare, *e.g., United States* v. *Green*, 111 F. 3d 515, 522–523 (CA7 1997) (holding that discovery of the warrant is a dispositive intervening circumstance where police misconduct was not flagrant), with, *e.g., State* v. *Moralez*, 297 Kan. 397, 415, 300 P. 3d 1090, 1102 (2013) (assigning little significance to the discovery of the warrant). We now reverse.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 625 (1999). In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations. See, *e.g., Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961).

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" *Segura* v. *United States*, 468 U. S. 796, 804 (1984). But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." *Ibid.*

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray* v. *United States*, 487 U. S. 533, 537 (1988). Second, the inevitable

discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See *Nix* v. *Williams*, 467 U. S. 431, 443–444 (1984). Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, *supra,* at 593.

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. The Utah Supreme Court declined to apply the attenuation doctrine because it read our precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search." 357 P. 3d, at 544. In this Court, Strieff has not defended this argument, and we disagree with it, as well. The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. And the logic of our prior attenuation cases is not limited to independent acts by the defendant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590 (1975), guide our analysis. First, we look to the "temporal

proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. *Id.,* at 603. Second, we consider "the presence of intervening circumstances." *Id.,* at 603–604. Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." *Id.,* at 604. In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

1

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless "substantial time" elapses between an unlawful act and when the evidence is obtained. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*). Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. See App. 18–19. As the Court explained in *Brown*, such a short time interval counsels in favor of suppression; there, we found that the confession should be suppressed, relying in part on the "less than two hours" that separated the unconstitutional arrest and the confession. 422 U. S., at 604.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. In *Segura*, 468 U. S. 796, the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence. There, agents had probable cause to believe that apartment occupants were deal-

ing cocaine. *Id.,* at 799–800. They sought a warrant. In the meantime, they entered the apartment, arrested an occupant, and discovered evidence of drug activity during a limited search for security reasons. *Id.,* at 800–801. The next evening, the Magistrate Judge issued the search warrant. *Ibid.* This Court deemed the evidence admissible notwithstanding the illegal search because the information supporting the warrant was "wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry." *Id.,* at 814.

Segura, of course, applied the independent source doctrine because the unlawful entry "did not contribute in any way to discovery of the evidence seized under the warrant." *Id.,* at 815. But the *Segura* Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." *Ibid.* That principle applies here.

In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *United States* v. *Leon*, 468 U. S. 897, 920, n. 21 (1984) (internal quotation marks omitted). Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety. See *Arizona* v. *Gant*, 556 U. S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

Finally, the third factor, "the purpose and flagrancy of the official misconduct," *Brown, supra,* at 604, also strongly

favors the State. The exclusionary rule exists to deter police misconduct. *Davis* v. *United States*, 564 U. S. 229, 236–237 (2011). The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." App. 17. Nothing prevented him from approaching Strieff simply to ask. See *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. *Rodriguez* v. *United States*, 575 U. S. ___, ___ (2015) (slip op., at 7). And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest. See *Gant, supra,* at 339.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected

drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

2

We find Strieff's counterarguments unpersuasive.

First, he argues that the attenuation doctrine should not apply because the officer's stop was purposeful and flagrant. He asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition "in the hope that something would turn up." *Taylor* v. *Alabama*, 457 U. S. 687, 691 (1982).

Strieff argues, moreover, that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere

absence of proper cause for the seizure. See, *e.g., Kaupp*, 538 U. S., at 628, 633 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause). Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. See 42 U. S. C. §1983; *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690 (1978); see also *Segura*, 468 U. S., at 812. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

* * *

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

I

Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain "drug activity." App. 16–19.

As the State of Utah concedes, this stop was illegal. App. 24. The Fourth Amendment protects people from "unreasonable searches and seizures." An officer breaches

that protection when he detains a pedestrian to check his license without any evidence that the person is engaged in a crime. *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968). The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. *Rodriguez* v. *United States*, 575 U. S. ___, ___–___ (2015) (slip op., at 6–7). In his search for lawbreaking, the officer in this case himself broke the law.

The officer learned that Strieff had a "small traffic warrant." App. 19. Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff's pockets.

Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer's misbehavior. The methamphetamine, he reasoned, was the product of the officer's illegal stop. Admitting it would tell officers that unlawfully discovering even a "small traffic warrant" would give them license to search for evidence of unrelated offenses. The Utah Supreme Court unanimously agreed with Strieff. A majority of this Court now reverses.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. See *Weeks* v. *United States*, 232 U. S. 383, 392 (1914). When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. *Terry*, 392 U. S., at 12; *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). For example, if an officer breaks into a home and finds a forged check lying around, that check

may not be used to prosecute the homeowner for bank fraud. We would describe the check as "'fruit of the poisonous tree.'" *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality." *Ibid.*

This "exclusionary rule" removes an incentive for officers to search us without proper justification. *Terry*, 392 U. S., at 12. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.,* at 13. When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement polices, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone* v. *Powell*, 428 U. S. 465, 492 (1976). But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks*, 232 U. S., at 394.

Applying the exclusionary rule, the Utah Supreme Court correctly decided that Strieff's drugs must be excluded because the officer exploited his illegal stop to discover them. The officer found the drugs only after learning of Strieff's traffic violation; and he learned of Strieff's traffic violation only because he unlawfully stopped Strieff to check his driver's license.

The court also correctly rejected the State's argument that the officer's discovery of a traffic warrant unspoiled the poisonous fruit. The State analogizes finding the warrant to one of our earlier decisions, *Wong Sun* v. *United States*. There, an officer illegally arrested a person who, days later, voluntarily returned to the station to confess to committing a crime. 371 U. S., at 491. Even though the person would not have confessed "but for the illegal actions of the police," *id.,* at 488, we noted that the

police did not exploit their illegal arrest to obtain the confession, *id.,* at 491. Because the confession was obtained by "means sufficiently distinguishable" from the constitutional violation, we held that it could be admitted into evidence. *Id.,* at 488, 491. The State contends that the search incident to the warrant-arrest here is similarly distinguishable from the illegal stop.

But *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown* v. *Illinois*, 422 U. S. 590, 603–604 (1975).

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." See Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014 (2015) (Systems Survey) (Table 5a), online at https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (all Internet materials as last visited June 16, 2016); Inst. for Law and Policy Planning, Salt Lake County Criminal Justice System Assessment 6.7 (2004), online at

http://www.slco.org/cjac/resources/SaltLakeCJSAfinal.pdf. The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited. App. 17.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." *Brown*, 422 U. S., at 605. Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

A

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. *Ante,* at 7. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

To explain its reasoning, the Court relies on *Segura* v. *United States*, 468 U. S. 796 (1984). There, federal agents applied for a warrant to search an apartment but illegally entered the apartment to secure it before the judge issued the warrant. *Id.,* at 800–801. After receiving the warrant, the agents then searched the apartment for drugs. *Id.,* at 801. The question before us was what to do with the evidence the agents then discovered. We declined to suppress it because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant." *Id.,* at 815.

According to the majority, *Segura* involves facts "similar" to this case and "suggest[s]" that a valid warrant will clean up whatever illegal conduct uncovered it. *Ante,* at 6–7. It is difficult to understand this interpretation. In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. *Segura* would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence. 468 U. S., at 814.

The majority likewise misses the point when it calls the warrant check here a "'negligibly burdensome precautio[n]'" taken for the officer's "safety." *Ante,* at 8 (quoting *Rodriguez*, 575 U. S., at ___ (slip op., at 7)). Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in *Rodriguez*, an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway "ensur[es] that vehicles on the road are operated safely and responsibly." *Id.*, at ___ (slip op., at 6). We allow such checks during legal traffic stops because the legitimacy of a person's driver's license has a "close connection to roadway safety." *Id.,* at ___ (slip op., at 7). A warrant check of a pedestrian on a sidewalk, "by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" *Ibid.* (quoting *Indianapolis* v. *Edmond*, 531 U. S. 32, 40–41 (2000)). Surely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.

The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made "good-

faith mistakes." *Ante,* at 8. Never mind that the officer's sole purpose was to fish for evidence. The majority casts his unconstitutional actions as "negligent" and therefore incapable of being deterred by the exclusionary rule. *Ibid.*

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. *Stone*, 428 U. S., at 492. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior." *United States* v. *Johnson*, 457 U. S. 537, 561 (1982).

B

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." *Ante*, at 8–9. Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. See, *e.g.,* Brennan Center for Justice, Criminal Justice Debt 23 (2010), online at https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant. See, *e.g.,* Human Rights Watch, Profiting from Probation 1, 51 (2014), online at https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. See Systems Sur-

vey (Table 5a). Even these sources may not track the "staggering" numbers of warrants, "'drawers and drawers'" full, that many cities issue for traffic violations and ordinance infractions. Dept. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 47, 55 (2015) (Ferguson Report), online at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The county in this case has had a "backlog" of such warrants. See *supra,* at 4. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. Ferguson Report, at 6, 55.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." Dept. of Justice, Civil Rights Div., Investigation of the New Orleans Police Department 29 (2011), online at https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf. In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." Ferguson Report, at 49, 57. In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. Dept. of Justice, Civil Rights Div., Investigation of the Newark Police Department 8, 19, n. 15 (2014), online at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would

have been considered unsupported by articulated reasonable suspicion." *Id.,* at 9, n. 7.

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. *Ante,* at 8. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." *Ligon* v. *New York*, 925 F. Supp. 2d 478, 537–538 (SDNY), stay granted on other grounds, 736 F. 3d 118 (CA2 2013). The Utah Supreme Court described as "'routine procedure' or 'common practice'" the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160. In the related context of traffic stops, one widely followed police manual instructs officers looking for drugs to "run at least a warrants check on all drivers you stop. Statistically, narcotics offenders are . . . more likely to fail to appear on simple citations, such as traffic or trespass violations, leading to the issuance of bench warrants. Discovery of an outstanding warrant gives you cause for an immediate custodial arrest and search of the suspect." C. Remsberg, Tactics for Criminal Patrol 205–206 (1995); C. Epp et al., Pulled Over 23, 33–36 (2014).

The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional

experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren* v. *United States*, 517 U. S. 806, 813 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U. S., at 21, but it may factor in your ethnicity, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 886–887 (1975), where you live, *Adams* v. *Williams*, 407 U. S. 143, 147 (1972), what you were wearing, *United States* v. *Sokolow*, 490 U. S. 1, 4–5 (1989), and how you behaved, *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. *Devenpeck* v. *Alford*, 543 U. S. 146, 154–155 (2004); *Heien* v. *North Carolina*, 574 U. S. ___ (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. See *Florida* v. *Bostick*, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." *Terry*, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This

involves more than just a pat down. As onlookers pass by, the officer may "'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'" *Id.,* at 17, n. 13.

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." *Atwater* v. *Lago Vista*, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. ___, ___–___ (2012) (slip op., at 2–3); *Maryland* v. *King*, 569 U. S. ___, ___ (2013) (slip op., at 28). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future. A. Goffman, On the Run 196 (2014).

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 8, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this

manner. See M. Gottschalk, Caught 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.,* W. E. B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, The Miner's Canary 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

* * *

I dissent.

SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. See *ante,* at 4; *Davis* v. *United States*, 564 U. S. 229, 237 (2011). The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment's requirements. See *James* v. *Illinois*, 493 U. S. 307, 319 (1990). But suppression of evidence also "exacts a heavy toll": Its consequence in many cases is to release a criminal without just punishment. *Davis,* 564

U. S., at 237. Our decisions have thus endeavored to strike a sound balance between those two competing considerations—rejecting the "reflexive" impulse to exclude evidence every time an officer runs afoul of the Fourth Amendment, *id.,* at 238, but insisting on suppression when it will lead to "appreciable deterrence" of police misconduct, *Herring* v. *United States*, 555 U. S. 135, 141 (2009).

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the "attenuation doctrine," *ante,* at 5—our effort to "mark the point" at which the discovery of evidence "become[s] so attenuated" from the police misconduct that the deterrent benefit of exclusion drops below its cost. *United States* v. *Leon*, 468 U. S. 897, 911 (1984). Since *Brown* v. *Illinois*, 422 U. S. 590, 604–605 (1975), three factors have guided that analysis. First, the closer the "temporal proximity" between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression. *Id.,* at 603. Second, the more "purpose[ful]" or "flagran[t]" the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. *Id.,* at 604. And third, the presence (or absence) of "intervening circumstances" makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations. *Id.,* at 603–604. Here, as shown below, each of those considerations points toward suppression: Nothing in Fackrell's discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule's deterrent benefits.

Start where the majority does: The temporal proximity

factor, it forthrightly admits, "favors suppressing the evidence." *Ante,* at 6. After all, Fackrell's discovery of drugs came just minutes after the unconstitutional stop. And in prior decisions, this Court has made clear that only the lapse of "substantial time" between the two could favor admission. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*); see, *e.g., Brown*, 422 U. S., at 604 (suppressing a confession when "less than two hours" separated it from an unlawful arrest). So the State, by all accounts, takes strike one.

Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent "mistakes." *Ante,* at 8. But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—*i.e.,* to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." App. 17–18. And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house." *Id.,* at 17. Plug in Fackrell's and Strieff's names, substitute "stop" for "arrest" and "reasonable suspicion" for "probable cause," and this Court's decision in *Brown* perfectly describes this case:

> "[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation . . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when

> [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up." 422 U. S., at 592, 605 (some internal punctuation altered; footnote, citation, and paragraph break omitted).

In *Brown*, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

Finally, consider whether any intervening circumstance "br[oke] the causal chain" between the stop and the evidence. *Ante,* at 6. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. See *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 658–659 (2008) (explaining that a party cannot "establish[] proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury); Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L. J. 1077, 1099 (2011) (Fourth Amendment attenuation analysis "looks to whether the constitutional violation was the proximate cause of the discovery of the evidence"). And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. See W. Keeton, D. Dobbs, B. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 312 (5th ed. 1984). For rather than breaking the causal chain, predictable effects (*e.g.,* X leads naturally to Y leads naturally to Z) are its very links.

And Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the "normal" practice of South Salt Lake City police. App. 18; see also *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160 (describing a warrant check as "routine

procedure" and "common practice" in Salt Lake City). In other words, the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. See generally *ante,* at 7–8 (SOTOMAYOR, J., dissenting). To take just a few examples: The State of California has 2.5 million outstanding arrest warrants (a number corresponding to about 9% of its adult population); Pennsylvania (with a population of about 12.8 million) contributes 1.4 million more; and New York City (population 8.4 million) adds another 1.2 million. See Reply Brief 8; Associated Press, Pa. Database, NBC News (Apr. 8, 2007), online at http://goo.gl/3Yq3Nd (as last visited June 17, 2016); N. Y. Times, Oct. 8, 2015, p. A24.[1] So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.[2] Strike

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[1] What is more, outstanding arrest warrants are not distributed evenly across the population. To the contrary, they are concentrated in cities, towns, and neighborhoods where stops are most likely to occur—and so the odds of any given stop revealing a warrant are even higher than the above numbers indicate. One study found, for example, that Cincinnati, Ohio had over 100,000 outstanding warrants with only 300,000 residents. See Helland & Tabarrok, The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping, 47 J. Law & Econ. 93, 98 (2004). And as JUSTICE SOTOMAYOR notes, 16,000 of the 21,000 people residing in the town of Ferguson, Missouri have outstanding warrants. See *ante,* at 8.

[2] The majority relies on *Segura* v. *United States*, 468 U. S. 796 (1984), to reach the opposite conclusion, see *ante,* at 6–7, but that decision lacks any relevance to this case. The Court there held that the Fourth Amendment violation at issue "did not contribute in any way" to the police's subsequent procurement of a warrant and discovery of contraband. 468 U. S., at 815. So the Court had no occasion to consider the

three.

The majority's misapplication of *Brown*'s three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

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question here: What happens when an unconstitutional act in fact leads to a warrant which then leads to evidence?

SUPREME COURT OF THE UNITED STATES

Nos. 05–380 and 05–1382

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

05–380 *v.*

LEROY CARHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

05–1382 *v.*

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 18, 2007]

JUSTICE KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U. S. C. §1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in *Stenberg* v. *Carhart*, 530 U. S. 914 (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances

to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

In No. 05–380 *(Carhart)* respondents are LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, doctors who perform second-trimester abortions. These doctors filed their complaint against the Attorney General of the United States in the United States District Court for the District of Nebraska. They challenged the constitutionality of the Act and sought a permanent injunction against its enforcement. *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805 (2004). In 2004, after a 2-week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. *Id.,* at 1048. The Court of Appeals for the Eighth Circuit affirmed. 413 F. 3d 791 (2005). We granted certiorari. 546 U. S. 1169 (2006).

In No. 05–1382 *(Planned Parenthood)* respondents are Planned Parenthood Federation of America, Inc., Planned Parenthood Golden Gate, and the City and County of San Francisco. The Planned Parenthood entities sought to enjoin enforcement of the Act in a suit filed in the United States District Court for the Northern District of California. *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957 (2004). The City and County of San Francisco intervened as a plaintiff. In 2004, the District Court held a trial spanning a period just short of three weeks, and it, too, enjoined the Attorney General from enforcing the Act. *Id.,* at 1035. The Court of Appeals for the Ninth Circuit affirmed. 435 F. 3d 1163 (2006). We granted certiorari. 547 U. S. ___ (2006).

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures. In addition to the two courts involved in the instant cases the District Court for the Southern District of New York also considered the constitutionality of the Act. *Nat. Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436 (2004). It found the Act unconstitutional, *id.,* at 493, and the Court of Appeals for the Second Circuit affirmed, *Nat. Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (2006). The three District Courts relied on similar medical evidence; indeed, much of the evidence submitted to the *Carhart* court previously had been submitted to the other two courts. 331 F. Supp. 2d, at 809–810. We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. *Planned Parenthood*, 320 F. Supp. 2d, at 960, and n. 4; App. in No. 05–1382, pp. 45–48. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU–486), to terminate the pregnancy. *Nat. Abortion Federation, supra,* at 464, n. 20. The Act does not regulate these procedures.

Of the remaining abortions that take place each year,

most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D&E" is the usual abortion method in this trimester. *Planned Parenthood*, 320 F. Supp. 2d, at 960–961. Although individual techniques for performing D&E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. *Nat. Abortion Federation, supra*, at 465; App. in No. 05–1382, at 61. The steps taken to cause dilation differ by physician and gestational age of the fetus. See, *e.g., Carhart*, 331 F. Supp. 2d, at 852, 856, 859, 862–865, 868, 870, 873–874, 876–877, 880, 883, 886. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. *Nat. Abortion Federation, supra*, at 464–465; *Planned Parenthood, supra*, at 961.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and

out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. See, *e.g., Nat. Abortion Federation, supra*, at 465; *Planned Parenthood, supra*, at 962.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. *Carhart, supra*, at 907–912; *Nat. Abortion Federation, supra*, at 474–475.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D&E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), 1 Appellant's App. in No. 04–3379 (CA8), p. 109 (hereinafter Dilation and Extraction). The medical community has not reached unanimity on the appropriate name for this D&E variation. It has been referred to as "intact D&E," "dilation and extraction" (D&X), and "intact D&X." *Nat. Abortion Federation, supra*, at 440, n. 2; see also F. Cunningham et al., Williams Obstetrics 243 (22d ed. 2005) (identifying the procedure as D&X); Danforth's Obstetrics and Gynecology 567 (J. Scott, R. Gibbs, B. Karlan, & A. Haney eds. 9th ed. 2003) (identifying the procedure as intact D&X); M. Paul, E. Lichtenberg, L.

Borgatta, D. Grimes, & P. Stubblefield, A Clinician's Guide to Medical and Surgical Abortion 136 (1999) (identifying the procedure as intact D&E). For discussion purposes this D&E variation will be referred to as intact D&E. The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D&Es are performed in this manner.

Intact D&E, like regular D&E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. *Carhart, supra*, at 856, 870, 873; *Planned Parenthood, supra*, at 965. Doctors who attempt at the outset to perform intact D&E may dilate for two full days or use up to 25 osmotic dilators. See, *e.g.,* Dilation and Extraction 110; *Carhart, supra*, at 865, 868, 876, 886.

In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

> "If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible." App. in No. 05–1382, at 74.

Rotating the fetus as it is being pulled decreases the odds of dismemberment. *Carhart, supra*, at 868–869; App. in No. 05–380, pp. 40–41; 5 Appellant's App. in No. 04–3379 (CA8), p. 1469. A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level—sometimes using both his hand and a forceps—to

exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." *Carhart*, 331 F. Supp. 2d, at 886–887.

Intact D&E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110–111. In the usual intact D&E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. See, *e.g., ibid.;* App. in No. 05–380, at 577; App. in No. 05–1382, at 74, 282. Haskell explained the next step as follows:

> "'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> "'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> "'[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> "'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.'" H. R. Rep. No. 108–58, p. 3 (2003).

This is an abortion doctor's clinical description. Here is another description from a nurse who witnessed the same method performed on a 26½-week fetus and who testified

before the Senate Judiciary Committee:

> "'Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus. . . .
>
> "'The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> "'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. . . .
>
> "'He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.'" *Ibid.*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. *Planned Parenthood*, 320 F. Supp. 2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05–380, at 41; see also *Carhart, supra,* at 866–867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. *Carhart, supra*, at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. *Id.,* at 864, 878; see also *Planned Parenthood, supra*, at 965.

Some doctors performing an intact D&E attempt to

remove the fetus without collapsing the skull. See *Carhart, supra*, at 866, 869. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because "the objective of [his] procedure is to perform an abortion," not a birth. App. in No. 05–1382, at 408–409. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to collapse the skull" and kill the fetus before it is born. *Id.,* at 409; see also *Carhart, supra*, at 862, 878. Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is dead before it is removed. For the staff to have to deal with a fetus that has "some viability to it, some movement of limbs," according to this doctor, "[is] always a difficult situation." App. in No. 05–380, at 94; see *Carhart, supra*, at 858.

D&E and intact D&E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D&E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions. *Nat. Abortion Federation*, 330 F. Supp. 2d, at 467; *Planned Parenthood, supra*, at 962–963.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on "'partial birth abortion'" proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. 530 U. S., at 995–996, and nn. 12–13 (THOMAS, J., dissenting); see also H. R. Rep. No. 108–58, at 4–5. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here. H. R. Rep. No. 108–58, at 12–14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U. S. C. §1531(a) (2000 ed., Supp. IV).

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge," §2(7), 117 Stat. 1202, notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 768, ¶(7) (Congressional Findings), but that Congress was "not bound to accept the same factual findings," *ibid.,* ¶(8). Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.,* at 767, ¶(1).

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. See 530 U. S., at 921–922 (quoting Neb. Rev. Stat. Ann. §§28–328(1), 28–326(9) (Supp. 1999)). The operative provisions of the Act provide in relevant part:

"(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

"(b) As used in this section—

"(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

"(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

. . . . .

> "(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> "(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.
>
> "(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section." 18 U. S. C. §1531 (2000 ed., Supp. IV).

The Act also includes a provision authorizing civil actions that is not of relevance here. §1531(c).

C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. 331 F. Supp. 2d, at 1004–1030. Second, the District Court found the Act deficient because it covered not merely intact D&E but also certain other D&Es. *Id.,* at 1030–1037.

The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. 413 F. 3d, at 803–804. The court began its analysis with what it saw as the appropriate question—"whether 'substantial medical authority' supports the medical necessity of the banned proce-

dure." *Id.,* at 796 (quoting *Stenberg*, 530 U. S., at 938). This was the proper framework, according to the Court of Appeals, because "when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." 413 F. 3d, at 796. The court rejected the Attorney General's attempt to demonstrate changed evidentiary circumstances since *Stenberg* and considered itself bound by *Stenberg*'s conclusion that a health exception was required. 413 F. 3d, at 803 (explaining "[t]he record in [the] case and the record in *Stenberg* [were] similar in all significant respects"). It invalidated the Act. *Ibid.*

D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2) [was] unconstitutionally vague; and (3) require[d] a health exception as set forth by . . . *Stenberg*." 320 F. Supp. 2d, at 1034–1035.

The Court of Appeals for the Ninth Circuit agreed. Like the Court of Appeals for the Eighth Circuit, it concluded the absence of a health exception rendered the Act unconstitutional. The court interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." 435 F. 3d, at 1173. Even after applying a deferential standard of review to Congress' factual findings, the Court of Appeals determined "substantial disagreement exists in the medical community regarding whether" the procedures prohibited by the Act are ever necessary to preserve a woman's health. *Id.*, at 1175–1176.

The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a

second-trimester abortion. The court found the textual differences between the Act and the Nebraska statute struck down in *Stenberg* insufficient to distinguish D&E and intact D&E. 435 F. 3d, at 1178–1180. As a result, according to the Court of Appeals, the Act imposed an undue burden because it prohibited D&E. *Id.*, at 1180–1181.

Finally, the Court of Appeals found the Act void for vagueness. *Id.,* at 1181. Abortion doctors testified they were uncertain which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. *Id.,* at 1181–1184. Resting on its understanding of the remedial framework established by this Court in *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–330 (2006), the Court of Appeals held the Act was unconstitutional on its face and should be permanently enjoined. 435 F. 3d, at 1184–1191.

II

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), did not find support from all those who join the instant opinion. See *id.,* at 979–1002 (SCALIA, J., joined by THOMAS, J., *inter alios,* concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

Casey involved a challenge to *Roe* v. *Wade*, 410 U. S. 113 (1973). The opinion contains this summary:

> "It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of

> the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." 505 U. S., at 846 (opinion of the Court).

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

To implement its holding, *Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U. S., at 875–876, 878 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life. See *id.,* at 881–883 (joint opinion) (overruling *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986) and *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983)).

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U. S., at 879 (plurality opinion). It also may not impose upon this right an undue burden,

which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.,* at 878. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.,* at 877. *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates and proscribes, with exceptions or qualifications to be discussed, performing the intact D&E procedure.

Respondents agree the Act encompasses intact D&E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D&Es. Because D&E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D&E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." §1531(a) (2000 ed., Supp. IV). It defines the unlawful abortion in explicit terms. §1531(b)(1).

First, the person performing the abortion must "vaginally delive[r] a living fetus." §1531(b)(1)(A). The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. See, *e.g., Planned Parenthood*, 320 F. Supp. 2d, at 971–972. We do not understand this point to be contested by the parties.

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." §1531(b)(1)(A) (2000 ed., Supp. IV). The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks'"—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply. Brief for Petitioner in No. 05–380, p. 46.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." §1531(b)(1)(B) (2000 ed., Supp. IV). For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark. This is because the Act proscribes killing "the partially delivered" fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark. *Ibid.*

Fourth, the Act contains scienter requirements concern-

ing all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks. §1531(b)(1)(A). If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind. See generally 1 W. LaFave, Substantive Criminal Law §5.1 (2d ed. 2003) (hereinafter LaFave); 1 C. Torcia, Wharton's Criminal Law §27 (15th ed. 1993).

B

Respondents contend the language described above is indeterminate, and they thus argue the Act is unconstitutionally vague on its face. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983); *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 525 (1994). The Act satisfies both requirements.

The Act provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972). Indeed, it sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Posters 'N' Things, supra*, at 525–526. Unlike the statutory language in *Stenberg* that prohibited the delivery of a "'substantial portion'" of the fetus—where a doc-

tor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. *Stenberg*, 530 U. S., at 922 (quoting Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999)). Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. *Posters 'N' Things, supra*, at 526; see also *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*"). The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. §1531(b)(1)(A) (2000 ed., Supp. IV). Because a doctor performing a D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as "a trap for those who act in good faith." *Colautti, supra*, at 395 (internal quotation marks omitted).

Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. *Kolender, supra*, at 357. Just as the Act's anatomical landmarks provide doctors with objective standards, they also "establish minimal guidelines to govern law enforcement." *Smith* v. *Goguen*, 415 U. S. 566, 574 (1974). The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. It cannot be said that the Act "vests virtually complete discretion in the hands of [law enforcement] to determine whether the [doctor] has satisfied [its provisions]." *Kolender, supra*, at 358 (invalidating a statute regulating loitering). Respondents' arguments

concerning arbitrary enforcement, furthermore, are somewhat speculative. This is a preenforcement challenge, where "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 503 (1982). The Act is not vague.

C

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.

1

The Act prohibits a doctor from intentionally performing an intact D&E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure. First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. See 18 U. S. C. §1531(b)(1)(A) (2000 ed., Supp. IV). Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery. See §1531(b)(1)(B). The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D&E after intending to undertake both steps at the outset.

The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not

have the requisite intent to incur criminal liability. A doctor performing a standard D&E procedure can often "tak[e] about 10–15 'passes' through the uterus to remove the entire fetus." *Planned Parenthood*, 320 F. Supp. 2d, at 962. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery. §1531(b)(1) (2000 ed., Supp. IV).

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.'" 530 U. S., at 922 (quoting Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999)). The Court concluded that this statute encompassed D&E because "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U. S., at 939. The Court also rejected the limiting interpretation urged by Nebraska's Attorney General that the statute's reference to a "procedure" that "'kill[s] the unborn child'" was to a distinct procedure, not to the abortion procedure as a whole. *Id.,* at 943.

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," §1531(b)(1)(A) (2000 ed., Supp. IV), instead of "'delivering . . . a living unborn child, or a substantial portion thereof,'" 530 U. S., at 938 (quoting Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999)). The Act's language, unlike the statute in *Stenberg*, expresses the usual meaning of "deliver" when used in connection with "fetus," namely, ex-

traction of an entire fetus rather than removal of fetal pieces. See Stedman's Medical Dictionary 470 (27th ed. 2000) (defining deliver as "[t]o assist a woman in childbirth" and "[t]o extract from an enclosed place, as the fetus from the womb, an object or foreign body"); see also I. Dox, B. Melloni, G. Eisner, & J. Melloni, The HarperCollins Illustrated Medical Dictionary 160 (4th ed. 2001); Merriam Webster's Collegiate Dictionary 306 (10th ed. 1997). The Act thus displaces the interpretation of "delivering" dictated by the Nebraska statute's reference to a "substantial portion" of the fetus. *Stenberg, supra*, at 944 (indicating that the Nebraska "statute itself specifies that it applies *both* to delivering 'an intact unborn child' *or* 'a substantial portion thereof'"). In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. See, *e.g.,* 2A N. Singer, Sutherland on Statutes and Statutory Construction §47:28 (rev. 6th ed. 2000). Here, unlike in *Stenberg*, the language does not require a departure from the ordinary meaning. D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*. §1531(b)(1)(A) (2000 ed., Supp. IV). The Court in *Stenberg* interpreted "'substantial portion'" of the fetus to include an arm or a leg. 530 U. S., at 939. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." §1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face

criminal sanctions. *Id.,* at 938–939.

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. Compare 18 U. S. C. §1531(b)(1) (2000 ed., Supp. IV) with Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus. See *Stenberg*, 530 U. S., at 943–944. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." §1531(b)(1)(B). This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.

The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D&E procedure. "'[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895)). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic "'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Stenberg, supra*, at 977 (KENNEDY, J., dissenting) (quoting *Thornburgh*, 476 U. S., at 829 (O'Connor, J., dissenting)). *Casey* put this novel statutory approach to rest. *Stenberg, supra*, at 977 (KENNEDY, J., dissenting). *Stenberg* need not be interpreted to have revived it. We read that decision instead to stand for the uncontroversial proposition that the canon of constitutional avoidance does not apply

if a statute is not "genuinely susceptible to two constructions." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998); see also *Clark* v. *Martinez*, 543 U. S. 371, 385 (2005). In *Stenberg* the Court found the statute covered D&E. 530 U. S., at 938–945. Here, by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms.

2

Contrary arguments by the respondents are unavailing. Respondents look to situations that might arise during D&E, situations not examined in *Stenberg*. They contend—relying on the testimony of numerous abortion doctors—that D&E may result in the delivery of a living fetus beyond the Act's anatomical landmarks in a significant fraction of cases. This is so, respondents say, because doctors cannot predict the amount the cervix will dilate before the abortion procedure. It might dilate to a degree that the fetus will be removed largely intact. To complete the abortion, doctors will commit an overt act that kills the partially delivered fetus. Respondents thus posit that any D&E has the potential to violate the Act, and that a physician will not know beforehand whether the abortion will proceed in a prohibited manner. Brief for Respondent Planned Parenthood et al. in No. 05–1382, p. 38.

This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D&E. If a doctor's intent at the outset is to perform a D&E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present. 18 U. S. C. §1531(b)(1)(A) (2000 ed., Supp. IV). When a doctor in that situation completes an abortion by performing an intact D&E, the doctor does not violate the

Act. It is true that intent to cause a result may sometimes be inferred if a person "knows that that result is practically certain to follow from his conduct." 1 LaFave §5.2(a), at 341. Yet abortion doctors intending at the outset to perform a standard D&E procedure will not know that a prohibited abortion "is practically certain to follow from" their conduct. *Ibid.* A fetus is only delivered largely intact in a small fraction of the overall number of D&E abortions. *Planned Parenthood*, 320 F. Supp. 2d, at 965.

The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance. Doctors, for example, may remove the fetus in a manner that will increase the chances of an intact delivery. See, *e.g.,* App. in No. 05–1382, at 74, 452. And intact D&E is usually described as involving some manner of serial dilation. See, *e.g.,* Dilation and Extraction 110. Doctors who do not seek to obtain this serial dilation perform an intact D&E on far fewer occasions. See, *e.g., Carhart*, 331 F. Supp. 2d, at 857–858 ("In order for intact removal to occur on a regular basis, Dr. Fitzhugh would have to dilate his patients with a second round of laminaria"). This evidence belies any claim that a standard D&E cannot be performed without intending or foreseeing an intact D&E.

Many doctors who testified on behalf of respondents, and who objected to the Act, do not perform an intact D&E by accident. On the contrary, they begin every D&E abortion with the objective of removing the fetus as intact as possible. See, *e.g., id.,* at 869 ("Since Dr. Chasen believes that the intact D & E is safer than the dismemberment D & E, Dr. Chasen's goal is to perform an intact D & E every time"); see also *id.,* at 873, 886. This does not prove, as respondents suggest, that every D&E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D&E that would involve delivery of a living

fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points. Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face on these grounds.

IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U. S., at 878 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings (14)(N), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p.

769. The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

> "Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." Congressional Findings (14)(J), *ibid.*

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington* v. *Glucksberg*, 521 U. S. 702, 731 (1997); see also *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U. S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." 505 U. S., at 873 (plurality opinion); see also *id.,* at 871. The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.,* at 874. This was not an idle assertion. The three premises of *Casey* must coexist. See *id.,* at 846 (opinion of the Court). The third premise, that the State, from the

inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings (14)(L), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769, and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." Congressional Findings (14)(G), *ibid.* The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U. S., at 732–735, and n. 23.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey,*

supra, at 852–853 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e.g., Nat. Abortion Federation*, 330 F. Supp. 2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D&E and intact D&E] procedures entail in clear and precise terms"); see also *id.,* at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey, supra*, at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the

regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings (14)(K), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769. There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D&E and intact D&E was overbroad and then to say it is irrational to ban only intact D&E because that does not proscribe both procedures. In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U. S., at 878 (plurality opinion).

B

The Act's furtherance of legitimate government inter-

ests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'" *Ayotte*, 546 U. S., at 327–328 (quoting *Casey, supra*, at 879 (plurality opinion)). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." *Ayotte, supra*, at 328; see also *Casey, supra*, at 880 (opinion of the Court). In *Ayotte* the parties agreed a health exception to the challenged parental-involvement statute was necessary "to avert serious and often irreversible damage to [a pregnant minor's] health." 546 U. S., at 328. Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D&E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. See 530 U. S., at 932. Abortion doctors testified, for example, that intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D&E was safer for women with certain medical conditions or women with fetuses that had certain anomalies. See, *e.g., Carhart*, 331 F. Supp. 2d, at 923–929; *Nat. Abortion Federation, supra*,

at 470–474; *Planned Parenthood*, 320 F. Supp. 2d, at 982–983.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D&E always to be a safe alternative. See, *e.g., Carhart, supra*, at 930–940; *Nat. Abortion Federation*, 330 F. Supp. 2d, at 470–474; *Planned Parenthood*, 320 F. Supp. 2d, at 983.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. See, *e.g., id.,* at 1033 ("[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E"); see also *Nat. Abortion Federation, supra*, at 482. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. The District Court for the District of Nebraska concluded "the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women." *Carhart, supra*, at 1017. The District Court for the Northern District of California reached a similar conclusion. *Planned Parenthood, supra*, at 1002 (finding intact D&E was "under certain circumstances . . . significantly safer than D & E by disarticulation"). The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D&E. It found the Attorney General's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [intact D&E] has safety advantages over other second-trimester abortion procedures." *Nat. Abortion Federation*, 330 F. Supp. 2d, at 479. In addition it did "not believe that many of [the plaintiffs'] purported reasons for why [intact D&E] is medically necessary [were] credible; rather [it found them to be] theo-

retical or false." *Id.,* at 480. The court nonetheless invalidated the Act because it determined "a significant body of medical opinion . . . holds that D & E has safety advantages over induction and that [intact D&E] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Ibid.*

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See *Kansas* v. *Hendricks*, 521 U. S. 346, 360, n. 3 (1997); *Jones* v. *United States*, 463 U. S. 354, 364–365, n. 13, 370 (1983); *Lambert* v. *Yellowley*, 272 U. S. 581, 597 (1926); *Collins* v. *Texas*, 223 U. S. 288, 297–298 (1912); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30–31 (1905); see also *Stenberg, supra*, at 969–972 (KENNEDY, J., dissenting); *Marshall* v. *United States*, 414 U. S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad").

This traditional rule is consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U. S., at 884 (joint opinion). The opinion stated "the doctor-patient relation here is entitled to the same solicitude it receives in other con-

texts." *Ibid.;* see also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 518–519 (1989) (plurality opinion) (criticizing *Roe*'s trimester framework because, *inter alia,* it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" (internal quotation marks omitted)); *Mazurek* v. *Armstrong*, 520 U. S. 968, 973 (1997) *(per curiam)* (upholding a restriction on the performance of abortions to licensed physicians despite the respondents' contention "all health evidence contradicts the claim that there is any health basis for the law" (internal quotation marks omitted)).

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. See *Hendricks, supra*, at 360, n. 3. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E. One District Court found D&E to have extremely low rates of medical complications. *Planned Parenthood, supra*, at 1000. Another indicated D&E was "generally the safest method of abortion during the second trimester." *Carhart*, 331 F. Supp. 2d, at 1031; see also *Nat. Abortion Federation, supra*, at 467–468 (explaining that "[e]xperts testifying for both sides" agreed D&E was safe). In addition the Act's prohibition only applies to the delivery of "a living fetus." 18 U. S. C. §1531(b)(1)(A) (2000 ed., Supp. IV). If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform

the procedure.

The instant cases, then, are different from *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 77–79 (1976), in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in *Danforth* to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Id.,* at 79. Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Brief for Petitioner in No. 05–380, at 23. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See *Crowell* v. *Benson*, 285 U. S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. See *Nat. Abortion Federation*, 330 F. Supp. 2d, at 482, 488–491. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. Congressional Findings (14)(B), in notes following 18 U. S. C.

§1531 (2000 ed., Supp. IV), p. 769. The testimony in the District Courts, however, demonstrated intact D&E is taught at medical schools. *Nat. Abortion Federation, supra*, at 490; *Planned Parenthood*, 320 F. Supp. 2d, at 1029. Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. Congressional Findings (1), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 767. The evidence presented in the District Courts contradicts that conclusion. See, *e.g., Carhart, supra*, at 1012–1015; *Nat. Abortion Federation, supra*, at 488–489; *Planned Parenthood, supra*, at 1025–1026. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" Brief for Respondents in No. 05–380, p. 19 (quoting 530 U. S., at 938); see also Brief for Respondent Planned Parenthood et al. in No. 05–1382, at 12 (same). As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. *Carhart*, 413 F. 3d, at 796; *Planned Parenthood*, 435 F. 3d, at 1173; see also *Nat. Abortion Federation*, 437 F. 3d, at 296 (Walker, C. J., concurring) (explaining the standard under *Stenberg* "is a virtually insurmountable evidentiary hurdle").

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of

risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

V

The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. Tr. of Oral Arg. in No. 05–380, pp. 21–23. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose "a heavy burden" upon the parties maintaining the suit. *Rust* v. *Sullivan*, 500 U. S. 173, 183 (1991). What that burden consists of in the specific context of abortion statutes has been a subject of some question. Compare *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they

must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)), with *Casey*, 505 U. S., at 895 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid). See also *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174 (1996). We need not resolve that debate.

As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases. *Casey, supra*, at 895 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (internal quotation marks omitted). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000).

The Act is open to a proper as-applied challenge in a discrete case. Cf. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 411–412 (2006) *(per curiam)*. No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception. 18 U. S. C. §1531(a) (2000 ed., Supp. IV).

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 05–380 and 05–1382

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER
05–380 *v.*
LEROY CARHART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER
05–1382 *v.*
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 18, 2007]

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 844 (1992), the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt." There was, the Court said, an "imperative" need to dispel doubt as to "the meaning and reach" of the Court's 7-to-2 judgment, rendered nearly two decades earlier in *Roe* v. *Wade*, 410 U. S. 113 (1973). 505 U. S., at 845. Responsive to that need, the Court endeavored to provide secure guidance to "[s]tate and federal courts as well as legislatures throughout the Union," by defining "the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion proce-

dures." *Ibid.*

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe*'s essential holding. 505 U. S., at 845–846. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.*, at 846. Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman's life *or health*." *Ibid.* (emphasis added). Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child." *Ibid.* (emphasis added).

In reaffirming *Roe*, the *Casey* Court described the centrality of "the decision whether to bear . . . a child," *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972), to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of . . . her place in society." 505 U. S., at 851–852. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman." *Id.,* at 846.

Seven years ago, in *Stenberg* v. *Carhart*, 530 U. S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion."[1]

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[1] The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. See *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 964 (ND Cal. 2004), aff'd, 435 F. 3d 1163 (CA9 2006). The medical community refers to the procedure as either dilation & extraction (D&X) or intact dilation and evacuation (intact D&E). See, *e.g.*, *ante*, at 5; *Stenberg* v. *Carhart*, 530 U. S. 914, 927 (2000).

With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. *Stenberg*, 530 U. S., at 930; cf. *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 327 (2006).

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U. S., at 869 (plurality opinion). See also *id.*, at 852 (majority opinion).[2] "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibili-

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[2]*Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851–852 (1992), described more precisely than did *Roe* v. *Wade*, 410 U. S. 113 (1973), the impact of abortion restrictions on women's liberty. *Roe*'s focus was in considerable measure on "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment." *Id.*, at 165.

ties that precluded full and independent legal status under the Constitution." *Id.*, at 896–897 (quoting *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961)). Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U. S., at 897. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.*, at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, *e.g.*, Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1002–1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. See, *e.g.*, *Ayotte*, 546 U. S., at 327–328 ("[O]ur precedents hold . . . that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the [woman]." (quoting *Casey*, 505 U. S., at 879 (plurality opinion))); *Stenberg*, 530 U. S., at 930 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."). See also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 768–769 (1986) (invalidating a *post*-viability abortion regulation for "fail[ure] to require that [a pregnant woman's] health be

the physician's paramount consideration").

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 79 (1976) (holding unconstitutional a ban on a method of abortion that "force[d] a woman . . . to terminate her pregnancy by methods more dangerous to her health"). See also *Stenberg*, 530 U. S., at 931 ("[Our cases] make clear that a risk to . . . women's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely."). Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here—intact dilation and evacuation (D&E).[3]

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[3] Dilation and evacuation (D&E) is the most frequently used abortion procedure during the second trimester of pregnancy; intact D&E is a variant of the D&E procedure. See *ante*, at 4, 6; *Stenberg*, 530 U. S., at 924, 927; *Planned Parenthood*, 320 F. Supp. 2d, at 966. Second-trimester abortions (*i.e.*, midpregnancy, previability abortions) are, however, relatively uncommon. Between 85 and 90 percent of all abortions performed in the United States take place during the first three months of pregnancy. See *ante*, at 3. See also *Stenberg*, 530 U. S., at 923–927; *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436, 464 (SDNY 2004), aff'd *sub nom. National Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (CA2 2006); *Planned Parenthood*, 320 F. Supp. 2d, at 960, and n. 4.

Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. See Finer, Frohwirth, Dauphinee, Singh, & Moore, Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States, 74 Contraception 334, 341–343 (2006). See also Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107 Obstetrics & Gynecology 128, 133 (Jan. 2006) (concluding that women who have second-trimester abortions typically discover relatively late that they

In *Stenberg*, we expressly held that a statute banning intact D&E was unconstitutional in part because it lacked a health exception. 530 U. S., at 930, 937. We noted that there existed a "division of medical opinion" about the relative safety of intact D&E, *id.*, at 937, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required, *id.*, at 938. We explained:

> "The word 'necessary' in *Casey*'s phrase 'necessary, in appropriate medical judgment, for the preservation of the life or health of the [pregnant woman],' cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion . . . ." *Id.*, at 937 (citation omitted).

Thus, we reasoned, division in medical opinion "at most means uncertainty, a factor that signals the presence of

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are pregnant). Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester. See, *e.g.*, Finer, *supra*, at 344; F. Cunningham et al., Williams Obstetrics 242, 290, 328–329, (22d ed. 2005); cf. Schechtman, Gray, Baty, & Rothman, Decision-Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies, 99 Obstetrics & Gynecology 216, 220–221 (Feb. 2002) (nearly all women carrying fetuses with the most serious central nervous system anomalies chose to abort their pregnancies).

risk, not its absence." *Ibid.* "[A] statute that altogether forbids [intact D&E] . . . . consequently must contain a health exception." *Id.*, at 938. See also *id.*, at 948 (O'Connor, J., concurring) ("Th[e] lack of a health exception necessarily renders the statute unconstitutional.").

B

In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women's health. See 18 U. S. C. §1531(a) (2000 ed., Supp. IV).[4] The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. *Ante*, at 35–36. See *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436, 482 (SDNY 2004) ("Congress did not . . . carefully consider the evidence before arriving at its findings."), aff'd *sub nom. National Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (CA2 2006). See also *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 1019 (ND Cal. 2004) ("[N]one of the six physicians who testified before Congress had ever performed an intact D&E. Several did not provide abortion services at all; and one was not even an obgyn. . . . [T]he oral testimony before Congress was not only unbalanced, but intentionally polemic."), aff'd, 435 F. 3d 1163 (CA9 2006); *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1011 (Neb. 2004) ("Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical

[4] The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*, 530 U. S. 914. See, *e.g.*, 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) ("Why are we here? We are here because the Supreme Court defended the indefensible. . . . We have responded to the Supreme Court."). See also 148 Cong. Rec. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has "no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot").

abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures."), aff'd, 413 F. 3d 791 (CA8 2005).

Many of the Act's recitations are incorrect. See *ante*, at 35–36. For example, Congress determined that no medical schools provide instruction on intact D&E. §2(14)(B), 117 Stat. 1204, notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769, ¶(14)(B) (Congressional Findings). But in fact, numerous leading medical schools teach the procedure. See *Planned Parenthood*, 320 F. Supp. 2d, at 1029; *National Abortion Federation*, 330 F. Supp. 2d, at 479. See also Brief for ACOG as *Amicus Curiae* 18 ("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of Pittsburgh, University of Pennsylvania, University of Rochester, and University of Chicago.").

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. Congressional Findings (1), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 767. But the evidence "very clearly demonstrate[d] the opposite." *Planned Parenthood*, 320 F. Supp. 2d, at 1025. See also *Carhart*, 331 F. Supp. 2d, at 1008–1009 ("[T]here was no evident consensus in the record that Congress compiled. There was, however, a substantial body of medical opinion presented to Congress in opposition. If anything . . . the congressional record establishes that there was a 'consensus' in favor of the banned procedure."); *National Abortion Federation*, 330 F. Supp. 2d, at 488 ("The congressional record itself undermines [Congress'] finding" that there is a medical consensus that intact D&E "is never medically necessary and should be prohibited." (internal quotation marks omitted)).

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Congressional

Findings (14)(B), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769. But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods. See *National Abortion Federation*, 330 F. Supp. 2d, at 490. See also *Planned Parenthood*, 320 F. Supp. 2d, at 1021 ("Congress in its findings . . . chose to disregard the statements by ACOG and other medical organizations."). No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings." *Id.,* at 1024.

C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es." *Planned Parenthood*, 320 F. Supp. 2d, at 1014; cf. *National Abortion Federation*, 330 F. Supp. 2d, at 482 (District Court "heard more evidence during its trial than Congress heard over the span of eight years.").

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D&E is safer than alternative procedures and necessary to protect women's health. *Carhart*, 331 F. Supp. 2d, at 1024–1027; see *Planned Parenthood*, 320 F. Supp. 2d, at 1001 ("[A]ll of the doctors who actually perform intact D&Es concluded that in their opinion and clinical judgment, intact D&Es remain the

safest option for certain individual women under certain individual health circumstances, and are significantly safer for these women than other abortion techniques, and are thus medically necessary."); cf. *ante*, at 31 ("Respondents presented evidence that intact D&E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*.").

According to the expert testimony plaintiffs introduced, the safety advantages of intact D&E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems. See *Carhart*, 331 F. Supp. 2d, at 924–929, 1026–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 472–473; *Planned Parenthood*, 320 F. Supp. 2d, at 992–994, 1001. Further, plaintiffs' experts testified that intact D&E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus. See *Carhart*, 331 F. Supp. 2d, at 924, 1026–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 473–474; *Planned Parenthood*, 320 F. Supp. 2d, at 992–994, 1001. See also *Stenberg*, 530 U. S., at 929; Brief for ACOG as *Amicus Curiae* 2, 13–16.

Intact D&E, plaintiffs' experts explained, provides safety benefits over D&E by dismemberment for several reasons: *First*, intact D&E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D&E. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1025; *National Abortion Federation*, 330 F. Supp. 2d, at 471; *Planned Parenthood*, 320 F. Supp. 2d, at 982, 1001. *Second*, removing the fetus intact, instead of dismembering it *in utero*, decreases the likelihood that fetal tissue will be retained

in the uterus, a condition that can cause infection, hemorrhage, and infertility. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1025–1026; *National Abortion Federation*, 330 F. Supp. 2d, at 472; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. *Third*, intact D&E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1026; *National Abortion Federation*, 330 F. Supp. 2d, at 471; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. *Fourth*, intact D&E takes less operating time than D&E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1026; *National Abortion Federation*, 330 F. Supp. 2d, at 472; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. See also *Stenberg*, 530 U. S., at 928–929, 932; Brief for ACOG as *Amicus Curiae* 2, 11–13.

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. See *Carhart*, 331 F. Supp. 2d, at 1008–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 482, 488–491; *Planned Parenthood*, 320 F. Supp. 2d, at 1032. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure." *Id.,* at 1033 (quoting *Stenberg*, 530 U. S., at 932); accord *Carhart*, 331 F. Supp. 2d, at 1008–1009, 1017–1018; *National Abortion Federation*, 330 F. Supp. 2d, at 480–482;[5] cf. *Stenberg*, 530

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[5] Even the District Court for the Southern District of New York, which was more skeptical of the health benefits of intact D&E, see *ante*, at 32, recognized: "[T]he Government's own experts disagreed with almost all of Congress's factual findings"; a "significant body of medical opinion" holds that intact D&E has safety advantages over nonintact D&E; "[p]rofessional medical associations have also expressed their

U. S., at 932 ("[T]he record shows that significant medical authority supports the proposition that in some circumstances, [intact D&E] would be the safest procedure.").

The District Courts' findings merit this Court's respect. See, *e.g.*, Fed. Rule Civ. Proc. 52(a); *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991). Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive "when . . . medical uncertainty persists." *Ante*, at 33. This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty, see *supra*, at 4–5; it gives short shrift to the records before us, carefully canvassed by the District Courts. Those records indicate that "the majority of highly-qualified experts on the subject believe intact D&E to be the safest, most appropriate procedure under certain circumstances." *Planned Parenthood*, 320 F. Supp. 2d, at 1034. See *supra*, at 9–10.

The Court acknowledges some of this evidence, *ante*, at 31, but insists that, because some witnesses disagreed with the ACOG and other experts' assessment of risk, the Act can stand. *Ante*, at 32–33, 37. In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D&E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D&E

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view that [intact D&E] may be the safest procedure for some women"; and "[t]he evidence indicates that the same disagreement among experts found by the Supreme Court in *Stenberg* existed throughout the time that Congress was considering the legislation, despite Congress's findings to the contrary." *National Abortion Federation*, 330 F. Supp. 2d, at 480–482.

procedure, and many performed abortions only on rare occasions. See *Planned Parenthood*, 320 F. Supp. 2d, at 980; *Carhart*, 331 F. Supp. 2d, at 1025; cf. *National Abortion Federation*, 330 F. Supp. 2d, at 462–464. Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D&E] would be the safest procedure." *Stenberg*, 530 U. S., at 932.[6]

II

A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E *sans* any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [*Casey*'s] conclusion"—*i.e.*, the Government's "legitimate and substantial interest in preserving and promoting fetal

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[6]The majority contends that "[i]f the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Ante*, at 34–35. But a "significant body of medical opinion believes that inducing fetal death by injection is almost always inappropriate to the preservation of the health of women undergoing abortion because it poses tangible risk and provides no benefit to the woman." *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1028 (Neb. 2004) (internal quotation marks omitted), aff'd, 413 F. 3d 791 (CA8 2005). In some circumstances, injections are "absolutely [medically] contraindicated." 331 F. Supp. 2d, at 1027. See also *id.*, at 907–912; *National Abortion Federation*, 330 F. Supp. 2d, at 474–475; *Planned Parenthood*, 320 F. Supp. 2d, at 995–997. The Court also identifies medical induction of labor as an alternative. See *ante*, at 9. That procedure, however, requires a hospital stay, *ibid.*, rendering it inaccessible to patients who lack financial resources, and it too is considered less safe for many women, and impermissible for others. See *Carhart*, 331 F. Supp. 2d, at 940–949, 1017; *National Abortion Federation*, 330 F. Supp. 2d, at 468–470; *Planned Parenthood*, 320 F. Supp. 2d, at 961, n. 5, 992–994, 1000–1002.

life." *Ante*, at 14. See also *ante*, at 15 ("[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."). But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. See *Stenberg*, 530 U. S., at 930. And surely the statute was not designed to protect the lives or health of pregnant women. *Id.*, at 951 (GINSBURG, J., concurring); cf. *Casey*, 505 U. S., at 846 (recognizing along with the State's legitimate interest in the life of the fetus, its "legitimate interes[t] . . . in protecting the *health of the woman*" (emphasis added)). In short, the Court upholds a law that, while doing nothing to "preserv[e] . . . fetal life," *ante*, at 14, bars a woman from choosing intact D&E although her doctor "reasonably believes [that procedure] will best protect [her]." *Stenberg*, 530 U. S., at 946 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D&E procedure. See *ante*, at 34. But why not, one might ask. Nonintact D&E could equally be characterized as "brutal," *ante,* at 26, involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs, *ante,* at 4, 6. "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg*, 530 U. S., at 946–947 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. *Ante,* at 28. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, *ante,* at 5, 34–35, or a fetus delivered through medical induction or cesarean, *ante,* at 9. Yet, the avail-

ability of those procedures—along with D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality. *Ante,* at 34–35. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. See *supra*, at 13, and n. 6; cf. *ante*, at 5, 31–32.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. See *ante*, at 28 ("Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."). Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, *e.g.*, *Casey*, 505 U. S., at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); *Lawrence* v. *Texas*, 539 U. S. 558, 571 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey*, 505 U. S., at 850)).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." *Ante*, at 29.[7] Because of women's

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[7] The Court is surely correct that, for most women, abortion is a painfully difficult decision. See *ante*, at 28. But "neither the weight of the

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scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post-Abortion Syndrome? N. Y. Times Magazine, Jan. 21, 2007, p. 40. See also, *e.g.*, American Psychological Association, APA Briefing Paper on the Impact of Abortion (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women"); Schmiege & Russo, Depression and Unwanted First Pregnancy: Longitudinal Cohort Study, 331 British Medical J. 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, Termination of Pregnancy and Psychiatric Morbidity, 167 British J. of Psychiatry 243, 247–248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stodland, The Myth of the Abortion Trauma Syndrome, 268 JAMA 2078, 2079 (1992) ("Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, Council Policy Manual: (N)(I)(3), Public Interest (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth, 19 J. Anxiety Disorders 137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that "no causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., Psychiatric Admissions of Low-Income Women following Abortion and Childbirth, 168 Canadian Medical Assn. J. 1253, 1255–1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research, 168 Canadian Medical Assn. J. 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D&E procedure. *Ante*, at 28–29.[8] The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Casey*, 505 U. S., at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."). Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[9]

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[8] Notwithstanding the "bond of love" women often have with their children, see *ante*, at 28, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey*, 505 U. S., at 891 ("[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michielutte, & Parsons, The Prevalence of Domestic Violence Among Women Seeking Abortion, 91 Obstetrics & Gynecology 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, Rape-Related Pregnancy; Estimates and Descriptive Characteristics from a National Sample of Women, 175 Am. J. Obstetrics & Gynecology 320 (Aug. 1996).

[9] Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, *e.g.*, World Health Organization, Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000, pp. 3, 16 (4th ed. 2004) ("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide; unsafe abortion represents 13% of all "maternal" deaths); Henshaw, Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R. Gold, C. Richards, & L. Finer, Abortion in Women's Lives 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated . . . 17% of all officially reported pregnancy-related deaths"; "[d]eaths from abortion declined dramatically after legalization").

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, *e.g.*, *Muller* v. *Oregon*, 208 U. S. 412, 422–423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal funct[ion]"); *Bradwell* v. *State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) ("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 paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States* v. *Virginia*, 518 U. S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano* v. *Goldfarb*, 430 U. S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," *ante*, at 29, this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society." *Casey*, 505 U. S., at 852. See also *id.*, at 877 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra*, at 3–4.

B

In cases on a "woman's liberty to determine whether to

[continue] her pregnancy," this Court has identified viability as a critical consideration. See *Casey*, 505 U. S., at 869–870 (plurality opinion). "[T]here is no line [more workable] than viability," the Court explained in *Casey*, for viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*, at 870.

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Ante*, at 17. Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. See *ante*, at 28 (quoting Congressional Findings (14)(G), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769).

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." See *supra*, at 15; cf. *ante*, at 16 (noting that "[i]n this litigation" the Attorney General "does not dispute that the Act would impose an undue burden if it covered standard D&E"). The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." *Ante*, at 14, 24, 25, 31, 33. A fetus is described as an "unborn child," and as a "baby," *ante,* at 3, 8; second-trimester,

previability abortions are referred to as "late-term," *ante,* at 26; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," *ante,* at 3, 37. Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act, *ante*, at 28, 37. And, most troubling, *Casey*'s principles, confirming the continuing vitality of "the essential holding of *Roe,*" are merely "assume[d]" for the moment, *ante*, at 15, 31, rather than "retained" or "reaffirmed," *Casey*, 505 U. S., at 846.

III

A

The Court further confuses our jurisprudence when it declares that "facial attacks" are not permissible in "these circumstances," *i.e.*, where medical uncertainty exists. *Ante*, at 37; see *ibid*. ("In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."). This holding is perplexing given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face. *Stenberg*, 530 U. S., at 930; see *id*., at 937 (in facial challenge, law held unconstitutional because "significant body of medical opinion believes [the] procedure may bring with it greater safety for *some patients*" (emphasis added)). See also *Sabri* v. *United States*, 541 U. S. 600, 609–610 (2004) (identifying abortion as one setting in which we have recognized the validity of facial challenges); Fallon, Making Sense of Overbreadth, 100 Yale L. J. 853, 859, n. 29 (1991) ("[V]irtually all of the abortion cases reaching the Supreme Court since *Roe* v. *Wade*, 410 U. S. 113 (1973), have involved facial attacks on state statutes, and the Court, whether accepting or rejecting the challenges on the merits, has typically accepted this framing of the question

presented."). Accord Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1356 (2000); Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 271–276 (1994).

Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D&E would be unconstitutional "in a large fraction of relevant cases." *Ante*, at 38 (citing *Casey*, 505 U. S., at 895). But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* "all women," nor "all pregnant women," nor even all women "seeking abortions." 505 U. S., at 895. Rather, a provision restricting access to abortion, "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction," *ibid.* Thus the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D&E because other procedures would place their health at risk.[10] Cf. *Stenberg*, 530 U. S., at 934 (accepting the "relative rarity" of medically indicated intact D&Es as true but not "highly relevant"—for "the health exception question is whether protecting women's health requires an exception for those infrequent occasions"); *Ayotte*, 546 U. S., at 328 (facial challenge entertained where "[i]n some very small percentage of cases . . . women . . . need immediate abortions to avert serious, and often irreversible damage to their health"). It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of

[10] There is, in short, no fraction because the numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the "large fraction" test.

second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

B

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case." *Ante*, at 38; see *ante,* at 37 ("The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained."). But the Court offers no clue on what a "proper" lawsuit might look like. See *ante*, at 37–38. Nor does the Court explain why the injunctions ordered by the District Courts should not remain in place, trimmed only to exclude instances in which another procedure would safeguard a woman's health at least equally well. Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D&E. A woman "suffer[ing] from medical complications," *ante*, at 38, needs access to the medical procedure at once and cannot wait for the judicial process to unfold. See *Ayotte*, 546 U. S., at 328.

The Court appears, then, to contemplate another lawsuit by the initiators of the instant actions. In such a second round, the Court suggests, the challengers could succeed upon demonstrating that "in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Ante*, at 37. One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D&E prohibition.

The Court envisions that in an as-applied challenge,

"the nature of the medical risk can be better quantified and balanced." *Ibid.* But it should not escape notice that the record already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D&E would better protect the health of women with particular conditions. See *supra*, at 10–11. Record evidence also documents that medical exigencies, unpredictable in advance, may indicate to a well-trained doctor that intact D&E is the safest procedure. See *ibid.* In light of this evidence, our unanimous decision just one year ago in *Ayotte* counsels against reversal. See 546 U. S., at 331 (remanding for reconsideration of the remedy for the absence of a health exception, suggesting that an injunction prohibiting unconstitutional applications might suffice).

The Court's allowance only of an "as-applied challenge in a discrete case," *ante*, at 38—jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve-out exceptions through piecemeal litigation for "discrete and well-defined instances," *ante*, at 37, women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are "the proper manner to protect the health of the woman." Cf. *ibid.*

IV

As the Court wrote in *Casey*, "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to

the rule of law." 505 U. S., at 865. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*, at 854. See also *id.*, at 867 ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

Though today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. See *supra*, at 7, n. 4. Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings. See *supra*, at 7–9. A decision so at odds with our jurisprudence should not have staying power.

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. See *supra*, at 3, n. 2; *supra,* at 7, n. 4. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Stenberg*, 530 U. S., at 952 (GINSBURG, J., concurring) (quoting *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 881 (CA7 1999) (Posner, C. J., dissenting)).

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

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Women Judges and Constitutional Courts: Why Not Nine Women?

Beverley Baines

We should take Justice Ruth Bader Ginsburg's question "Why not nine women?" seriously. Justice Ginsburg has served on the United States Supreme Court since 1992 and her proposal is for an all-women Court. Western democracies do not appear poised to adopt her proposal; nor have they endorsed the prevailing proposals for parity by feminist scholars Erika Rackley and Sally Kenney or for feminist judges by Rosemary Hunter and Beatriz Kohen. To explain why these proposals had some initial successes but are now stagnating, I frame them as deploying a "strategy of containment", a strategy defined by Jamie R. Abrams to explain the loss of efficacy of feminist domestic violence reform. Situating Justice Ginsburg's proposal as "moving beyond the strategy of containment", I draw on women's judgments in Australian, Canadian, German, Indian, Indonesian, Israeli, South African, British and American constitutional cases about or with significance for women's equality. Whether writing as the only, often the first, woman on a national "constitutional" court, or deciding cases where more than one woman justice wrote a judgment, the richness of their adjudicative diversity demonstrates that women can comprehensively perform the tasks of adjudicating constitutional cases. Far from posing a threat to democracy or the rule of law, the legacy of women jurists' voices illustrates how they promote constitutional justice for women and men.

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WOMEN JUDGES AND CONSTITUTIONAL COURTS: WHY NOT NINE WOMEN?

Beverley Baines

in Helen Irving ed., *Constitutions and Gender* (Edward Elgar Research Handbook, forthcoming 2017)

1 WHY NOT NINE WOMEN?

Ruth Bader Ginsburg posed the question 'Why not nine women?' in conversation with Sandra Day O'Connor at the *Women's Conference* in 2010 (Wilson 2010). Three decades earlier, United States President Ronald Reagan had appointed Justice O'Connor as the first woman justice on the Supreme Court of the United States (USSC); eleven years later, President Bill Clinton appointed Justice Ginsburg as the second woman on the Court. When Justice Ginsburg 'suggested that nine would be a nice number for female justices' (Hirshman 2015: 289), her meaning was clear. By 'nine' she referred to all the members of the USSC. In other words, Justice Ginsburg proposed a Court composed entirely of women. Not only is her proposal radical for the USSC, it is also controversial for national constitutional courts worldwide. My objective in this chapter is to take it seriously.

From the perspective of the USSC the radical feature of Justice Ginsburg's proposal is self-evident. Men monopolised the USSC from its origin in 1789 until 1981. Male presidents appointed male justices – 101 of them and no women – for two centuries (Kenney 2013: 1). Moreover, not only did Justice O'Connor sit alone from 1981 until the appointment of Justice Ginsburg in 1992, but also Justice Ginsburg sat alone for over three years after Justice O'Connor retired in 2006. Currently three women sit on the nine-seat USSC: Justice Ginsburg and (President Barack Obama's two appointees) Justice Sonia Sotomayor, appointed in 2009, and Justice Elena Kagan, in 2010. Put differently no president ever appointed women to half, let alone all, of the seats on the USSC. Under these circumstances Justice Ginsburg's proposal is radical, the more so because hers is the voice not of a scholar but rather of an experienced jurist.

Also her proposal is controversial when applied to constitutional courts worldwide; that is, to any court that makes final decisions about constitutional matters irrespective of

whether it is labelled high, supreme or constitutional. Compare it with those of her female counterparts on other Anglo-American supreme courts. For instance, both Chief Justice Beverley McLachlin of the Supreme Court of Canada (SCC) and Lady Brenda Hale, Deputy President of the Supreme Court of the United Kingdom have advocated gender parity for their respective courts. Assuming gender parity means that 50 per cent of judges must be women, few countries have actually achieved it for their highest judicial bodies. Examples include Rwanda from 2008 to 2012, and in 2015: Bulgaria, Latvia, Luxembourg, Romania, Slovakia, Montenegro, the former Yugoslav Republic of Macedonia and Serbia. What is striking about these examples, however, is the absence of any major western democracies. This lacuna makes calls for gender parity challenging; more importantly it illustrates just how controversial Justice Ginsburg's proposal really is, the more so because no country has ever appointed only women to any national constitutional court.

Obviously an entirety of women judges on a constitutional court could eliminate judicial patriarchy. However, western democracies do not appear poised to adopt this approach anytime soon. Nor have any western governments endorsed the prevailing proposals – parity and feminism – that served well to initiate change but now are stagnating in their efforts to end judicial patriarchy. Part 2 of this chapter sets out these proposals which include some men while excluding some women. I frame them as deploying a 'strategy of containment', a strategy defined by Jamie R. Abrams to explain the loss of efficacy of feminist domestic violence law reforms (Abrams 2016: 103-4). Part 3 situates Justice Ginsburg's proposal for all-women constitutional courts as 'moving beyond the strategy of containment', a process Abrams suggested would make feminist domestic violence law reform more efficacious (Abrams 2016: 105). Parts 4 and 5 support this explanation with examples of constitutional decisions by women judges. Part 6 concludes that the prevailing proposals could also move beyond containment were they to acknowledge all-women constitutional courts. This acknowledgment 'might paradoxically preserve and ensure – not threaten' (ibid) their goal of ending judicial patriarchy. That is, were it to make the prevailing proposals more efficacious, Justice Ginsburg's proposal would serve a function that is not self-evident. Thus there is more than one reason to take all-women constitutional courts seriously.

2 PREVAILING PROPOSALS: PARITY AND FEMINISM

After initial successes in western democracies, the efforts of the prevailing proposals – parity and feminism – to end judicial patriarchy have plateaued or even regressed. This Part suggests that their proponents should consider Jamie R. Abrams's analysis of the American domestic violence law reform movement which emerged in the 1960s and 1970s (Abrams 2016: 105) with the aim to end gendered violence and had some success but has since become less efficacious (Abrams 2016: 103, 104). Abrams attributed this loss of efficacy to the 'strategy of containment' the movement deploys. She defined this strategy as acknowledging male victims, minimising or dismissing female perpetrators and 'preserving the dominant framing of domestic violence as a gendered issue' (Abrams 2016: 104). Without analogising all women judges to female perpetrators, I maintain that the prevailing proposals to eliminate judicial patriarchy deploy a similar strategy of containment when they include some male judges, exclude some women judges and preserve the gendered stereotypes that underlie judicial patriarchy. Before explaining how they deploy this strategy, first I set out the prevailing proposals.

Specifically I begin with the valuable insights offered by each of four feminist scholars, two of whom relied on gender theory to advocate gender parity and two, on feminist theory to call for feminist judges. The gender theorists adopted distinctive approaches to justify gender parity of judicial appointments. United Kingdom scholar Erika Rackley relied on gender differences conceptualised as diversity, while American scholar Sally Kenney focused on gender sameness and discrimination. Similarly, the feminist theorists who called for feminist judges also differed. Both defined feminism as a commitment to women but they did not agree about how to identify this perspective. Rosemary Hunter required a 'feminist judge' to self-identify as feminist in addition to rendering feminist judgments (Hunter 2008: 9) whereas Beatriz Kohen argued that the label 'feminist judge' should apply to judges who rendered feminist judgments even though they refused to self-identify as feminist (Kohen 2013: 423). Their differences notwithstanding, these four feminist scholars offer the most recent, comprehensively justified proposals for ending judicial patriarchy. Their proposals also, as I intend to

explain, deploy the strategy of containment that Abrams attributed to the feminist domestic violence law reform movement.

2.1 Erika Rackley

Erika Rackley called for more diversity among the senior judiciary in England and Wales. She acknowledged that diversity includes an array of identity characteristics although she chose to focus her study on women judges (Rackley 2013: 2). After distinguishing 'women' as a gender (or social process) category from 'female' as a sex (or biological) category, she argued that gender – '*the experience* of being a woman' – has an impact on judicial decision-making (Rackley 2013: 3, emphasis in original). However, she qualified her argument for the significance of gender differences. She did not contend all women have the same experiences or speak with a single unified voice. Nor did she portray gender as all-defining; rather, she limited its reach simply to being *one* of the factors that influence judicial decision-making (Rackley 2013: 5, emphasis in original). In other words, she rejected false universalism and gender imperialism, maintaining she had thereby avoided ' "the favourite feminist sin": gender essentialism' (Rackley 2013: 144). With these qualifications, she easily achieved her preliminary objective which was to render 'deeply implausible' the claim gender *never* influences judicial decision-making (Rackley 2013: 5).

To illustrate how women's experiences (that is, their gender) impacted on judicial decision-making, Rackley analysed Lady Hale's decisions about heterosexual pre-nuptial agreements, sexual abuse of a minor female, refugee status and female genital mutilation and medical liability in wrongful birth cases. These and other decisions not only sustained her argument for the significance of gender differences but also for the importance to judicial decision-making of judicial diversity. Diversity, and more specifically gender diversity, should be valued because it legitimates the authority of the judiciary and promotes equity and social justice among candidates for the bench. In addition, gender diversity improves the substance of judicial decisions and thereby contributes to, rather than opposing, appointments based on merit (Rackley 2013: 195). As with difference, in other words, Rackley folded merit into her argument for gender diversity on the bench. But

gender diversity is self-evidently inconsistent with entirety which probably explains why Rackley proposed gender parity (Rackley 2013: 101).

2.2 **Sally Kenney**

Sally Kenney also opted for gender parity without considering an entirety of women (Kenney 2013: 174). However, she did not base her call for gender parity on arguments for women's difference. She offered three reasons for rejecting difference arguments. First, scholarship inconsistently whipsaws between identifying the distinctive perspectives of women judges and criticising those who do not articulate them (Kenney 2013: 4). Second, highlighting women's differences is risky, even dangerous because it often leads 'to women's marginalization and exclusion' (Kenney 2013: 9). Third, virtually all claims about women's differences reduce to claims about sex (Kenney 2013: 19, Williams 2015: 253). Aligning difference with sex, which she treated as a category with a fixed meaning attached to bodies (Kenney 2013: 16), enabled Kenney to reject difference arguments as essentialist (Kenney 2013: 17). Since her objective was to offer a non-essentialist argument for more women judges, she invoked gender which, like Rackley, she theorised as a social process (Kenney 2013: 17).

Kenney applied gender analysis to a series of case studies of women judges in several different American jurisdictions, Britain and the European Union (Kenney 2013: 19-21). Her research revealed the importance of women's citizenship and equal representation (Kenney 2013: 21). To illustrate further how citizenship and representation contribute to the legitimacy of democratic participation (Williams 2015: 253), she compared the inclusion of women on juries with their exclusion from judicial benches (Kenney 2013: 163). The harm of exclusion was not that women might have produced different outcomes but rather that it was discriminatory (Kenney 2013: 177). Discrimination is wrong because it denies women's citizenship (Kenney 2013: 21); in other words, it denies sameness (Kenney 2013: 13-14). Kenney invited critics to re-evaluate sameness arguments, explaining that 'the more women judges look and behave like men, the more radical their presence on the bench can be because it normalizes women's authority and power' (Kenney 2013: 9). Moreover, Kenney's argument about sameness and

discrimination, like Rackley's study of difference and diversity, implicitly mandated comparison, hence obviating Justice Ginsburg's proposal for an entirety of women. Comparison, in short, justified gender parity. Thus Kenney and Rackley proposed, albeit distinctively, that western democracies should adopt gender parity to end judicial patriarchy.

2.3 **Rosemary Hunter**

While gender parity's supporters called for more women judges, Rosemary Hunter focused on identifying judges who are feminist. She relied on two major criteria. One involved feminist judging. Drawing on existing research, she compiled a list of eight characteristics feminist judging should exhibit (Hunter 2008: 10-15). They were: 'asking the woman question' (Bartlett 1990: 837); including women (Boyle 1985: 101-2; Graycar 1995: 281); challenging gender bias (Boivin 2003: 88-94; Backhouse 2003: 192); contextualisation and particularity (Bartlett 1990: 849-50; O'Sullivan 2007: 9-35); remedying injustices, improving women's lives, promoting substantive equality (Allen and Wall 1993: 158; Backhouse 2003: 192); making feminist choices (Lawrence 2004: 588); full-time feminism (Baker 1996: 208) and supporting other women (Hunter 2008: 15). Over time Hunter varied two of these characteristics; promoting substantive equality became a free-standing characteristic (Hunter 2010: 35; Hunter 2013: 401) while making feminist choices became being open about making difficult choices between competing interests (Hunter 2013: 401). She added a new characteristic, drawing on feminist legal scholarship to inform decisions (Hunter 2010: 35; Hunter 2013: 401), and she abandoned two of her original requirements, namely full-time feminism and supporting other women (Hunter 2010: 35; Hunter 2013: 401). Hunter intended these eight characteristics to serve as a 'checklist' to distinguish feminist from other judging (Douglas, Bartlett, Luker and Hunter 2014b: 8).

Hunter's second criterion was more controversial; she required judges to self-identify as feminist (Hunter 2008: 9). She referred to retired Canadian Supreme Court Justice Claire L'Heureux-Dubé (Hunter 2008), British Supreme Court Justice Lady Brenda Hale (Hunter 2010) and Australian Court of Appeal Justice Marcia Neave (Hunter 2013) as feminist judges, even though the first two did not identify as feminist until late or relatively

late in their respective judicial careers. Since time usually resolves such temporal disjunctions, Hunter concentrated on two other issues raised by self-identification. One concerned judges who exhibit the characteristics of feminist judging but refuse to identify as feminists. Hunter maintained that failing to self-identify was sufficient to exclude them from the category of 'feminist judge' (Hunter 2008: 9). She argued that only the voluntariness of self-identification justified imposing expectations of consistent feminist judging (Hunter 2008: 9). The other issue concerned men. Hunter declined to provide a 'conclusive' answer to the question 'is it necessary for a feminist judge to be a woman' (Hunter 2008: 8). Her uncertainty about men notwithstanding, Hunter never resiled from requiring judges to self-identify as feminist.

2.4 **Beatriz Kohen**

Beatriz Kohen's theory about feminist judges differed from Hunter's in three important respects. First she dealt with Hunter's second issue – must feminist judges be female? – conclusively but implicitly by interviewing male and female judges whom she 'expected to be sympathetic to the feminist cause' (Kohen 2013: 422). Next she confronted Hunter's first issue – must judges identify as feminist? – when she found all but one of these judges 'very reluctant to label themselves feminists' (ibid). Kohen did not immediately follow Hunter's injunction to exclude them simply because she would not be able to impose expectations of feminist judging on them. Instead she explored the reasons for their reluctance to identify as feminist which included being stereotyped as specialists in 'women's cases'; having their impartiality impugned; having to choose among too many categories and identity dimensions of feminism and experiencing feminism's stigmatisation in Argentina where the culture juxtaposes feminism to 'machismo', discrediting it as 'a means to substitute one form of oppression for another' (Kohen 2013: 430). Understanding their reasons, Kohen opted to impose expectations not on feminist judges, as Hunter proposed, but rather on feminist legal scholars and activists to demystify feminism and bridge the gap with judges.

The third important difference was that Kohen decided to avoid the expression 'feminist judge' when she found all of the judges were willing to describe themselves as

'working from a gender perspective, with a commitment to advance women's rights and equality between men and women' (Kohen 2013: 423). This description, which 'showed a clear identification with feminist goals and methodologies' (Kohen 2013: 432), is consistent with many of the characteristics of feminist judging that Hunter had compiled. However, Kohen did not confine her analysis to findings about feminist judging; she also argued that this description served as a 'proxy' for 'feminist judge' (ibid). In other words, unlike Hunter, Kohen collapsed the categories of 'feminist judging' and 'feminist judge'. That Kohen did not retain Hunter's emphasis on distinguishing 'feminist judge' from 'feminist judging' (Hunter 2008: 9) is, therefore, the most significant difference between their two feminist theories about feminist judges.

Notwithstanding their differences the prevailing proposals deploy the strategy Abrams defined as 'containment'. Not only do they accept some male judges; they also exclude some women judges. Most importantly, they sustain this exclusion by applying stereotypes that alter the gender of the excluded women judges. It is relatively easy to recognise the women judges whom the feminist proposals exclude. These women either do not identify as feminist judges (Hunter) or they do not render feminist judgments (Kohen). Hunter and Kohen refrain from labelling them. However, their silence leaves a void which the dominant discourse fills by stereotyping them as anti-feminist, masculinist and/or patriarchal judges. Traditionally these stereotypes are gendered male. Thus the excluded women judges' gender is altered from female to male.

It is more difficult but not impossible to identify the women judges whom the parity proposals exclude. They would materialise only in the unlikely event that more than 50 per cent of a bench consists of women judges. Neither Rackley nor Kenney addressed this possibility. Were it to occur however, it would preclude compliance with the tenets of parity unless the surplus women were either dismissed or deemed male judges. Since dismissal on the ground of gender would infringe human rights laws, deeming them male judges would at least be consistent with the law. But it would alter their gender just as stereotypically as the exclusion of women judges from the feminist proposals altered theirs. Thus the prevailing proposals deploy strategies of containment that conform to Abram's definition. They accept some male judges and exclude some women judges while,

in Abram's words, 'preserving the dominant framing of [judicial patriarchy] as a gendered issue' (Abrams 2016: 104). The next Part situates Justice Ginsburg's proposal for all-women constitutional courts not as one deploying the strategy of containment but rather as moving beyond containment.

3 JUSTICE GINSBURG'S PROPOSAL: ALL-WOMEN CONSTITUTIONAL COURTS

At first glance Justice Ginsburg's proposal for nine 'women' or 'female justices' on the USSC appears to deploy a containment strategy. No men, either as the other half of parity or as male judges who are feminist. How could this not be containment? I offer two responses.

The first is that Justice Ginsburg's proposal is not consistent with Abrams' definition of the strategy of containment. According to Abrams, this definition includes three characteristics, the first two of which required the inclusion of some men and the exclusion of some women (Abrams 2016: 107). Justice Ginsburg's proposal did not comply with either requirement because she included no men and excluded no women. Nor was her proposal consistent with Abrams' third characteristic, 'preserving the dominant framing … as a gendered issue' (Abrams 2016: 104). An all-women constitutional court makes no reference to men. Nor does it invoke gender. In other words, the dominant framing cannot impose gendered stereotypes on a bench composed entirely of women. Since it evinced none of the characteristics required by Abrams' definition, Justice Ginsburg's proposal did not deploy the strategy of containment.

My second response is more speculative. As a self-identified and internationally recognised feminist, undoubtedly Justice Ginsburg was aware of the critique of essentialism that feminists invariably attach to discourse about 'women' and 'female' (Conaghan 2000: 366). Yet she used these terms. I suggest she used them to avoid the binaries traditionally embedded in discourse about sex (man, woman), gender (male, female) and feminism (dominant, subordinate). Woman, women and female are not binaries. Was she envisioning a future, including a constitutional future, in which binaries do not persist? For instance, what if the future is genderless?: not gender neutral which retains gender, but genderless. Pressured by trans rights activists and allies, some American and Canadian jurisdictions are considering abolishing or have already abolished

sex/gender on various identity documents including driver's licences, health cards, passports and birth certificates (Neuman Wipfler 2016: 433-9). A genderless world would obviate any need to rely on the strategy of containment; it would call for 'moving beyond the strategy of containment' (Abrams 2016: 105).

Of course all-women constitutional courts are not the only possibility in a genderless world. Governments in a genderless world could appoint all-male benches. However, a genderless world would not be a de-contextualised world. An all-male bench would restore judicial patriarchy. In other words, it would re-institutionalise historical gender and gendered stereotypes. Thus it would dash any notion of moving beyond the strategy of containment.

Patriarchy's all-male benches aside, all-women constitutional courts will not just happen unless women can do and be seen to do the job. Performance and context are pivotal to the success of Justice Ginsburg's proposal. What follows are illustrations of women who did and are doing the jobs of constitutional court justices. I intend the breadth of their locations to compensate for the fact that they are illustrations. Others will have to provide the national and international analytical rigour that is missing. Ruth Cowan's study of women on the South African Constitutional Court exemplifies how national research might proceed while Josephine Dawuni models a study of the substantive contributions of African women judges on international courts (Dawuni, iCourts, 2016). The remainder of this Part illustrates women judges' contributions in general, while Parts 4 and 5 delve more specifically into a selection of women's decisions. My objective is to support Justice Ginsburg's proposal for all-women constitutional courts.

Who are some of the first women to serve as justices, including chief justices, on constitutional courts around the world? Naming matters. Unlike politicians, the existence and names of women justices are seldom household words, not even in their own countries; and their jurisprudence may be difficult to locate or may require translation.[1] Although democratic judicial review dates at least back to the 1803 decision of the United States Supreme Court in *Marbury v Madison*, the appointment of women to national constitutional courts is much more recent. The origins of such appointments remain obscure but likely among the first, if not the first, were: Erna Scheffler appointed in 1951 to the German Federal Constitutional Court, Helga Pedersen appointed in 1964 to the Danish

Supreme Court, Sri Widoyati Wiratmo Soekito appointed in 1968 to the Indonesian Supreme Court, Ruth Annie Jiagge appointed in 1969 to the Ghanaian Court of Appeal (at the time the highest court) and Cecelia Muñoz Palma appointed in 1973 to the Philippine Supreme Court.

Various constitutional democracies followed suit as they modernised. For example, Israel appointed Miryam Ben Porat in 1977; the United States, Sandra Day O'Connor in 1981; Canada, Bertha Wilson in 1982; Australia, Mary Gaudron in 1987; India, M. Fathima Beevi in 1989; South Africa, Yvonne Mokgoro and Kate O'Regan in 1994; Ghana, Georgina Theodora Wood in 2002; the United Kingdom, Brenda Hale in 2004; and Indonesia appointed Maria Faradi Indrati in 2008 to its new Constitutional Court. Slowly these countries – except for the United Kingdom and Indonesia – began to appoint more women to sit simultaneously. Unlike their male contemporaries, however, these women never constituted 50 per cent, let alone 100 per cent, of the members of constitutional courts.

With very few exceptions, as noted above, the same is true globally. There were or are women on constitutional courts in many other countries that are, or proclaim aspirations to being, constitutional democracies. To illustrate, they include or included: Tehani al-Gebali (Egypt), Carmen Argibay (Argentina), Rena Asimakopoulou (Greece), Shirani Bandaranayake (Sri Lanka), Susan Denham (Ireland), Dame Sian Elias (New Zealand), Julia Motoc (Romania), Miriam Naveira (Puerto Rico), Ellen Gracie Northfleet (Brazil), Jasna Omejec (Croatia), Effie Papadopoulou (Cyprus) and Ineta Ziemele (Latvia). Some served as Chief Justices on their national constitutional courts. Moreover in Africa alone 18 women served as Chief Justices in 14 countries between 1990 and 2014, including Mabel Agyemang (Gambia), Domitille Barancira (Burundi), Salifou Fatimata Bazeye (Niger), Aloysie Cyanzayire (Rwanda), Frances Johnson-Morris (Liberia), Nthomeng Majara (Lesotho), Marie Madeleine Mborantsui (Gambia), Maria do Ceu Silva Monteiro (Guinea-Bissau, Anastasia Msosa (Malawi), Aloma Mariam Mukhtar (Nigeria), Mireille Ndiaye (Senegal), Elisabeth Pognon (Benin), Uma Hawa Tejan-Jalloh (Sierra Leone) and Georgina Theodora Wood (Ghana) (see: Dawuni and Kang 2015: 49-50). Their elevation and dispersion notwithstanding, few if any of these chief justices sat or sit on courts composed predominantly or entirely of other women.

Rwanda exemplifies one of the exceptions. The first Rwandan woman appointed to the Supreme Court was Immaculee Nyirinkwaya in 1995 (see: Kamatali 2016: 142). Subsequently Rwanda evidenced the greatest presence of women on a Supreme Court with 50 per cent women from 2008 to 2012 (Bauer 2016: 159). However, when the number of seats on the Rwandan Supreme Court increased, the representation of women fell to 41 per cent between 2013 and 2015 (ibid). Even so, Rwanda is in the vanguard of constitutional courts that have increased women's presence. In stark contrast are countries that for religious and other reasons refuse to appoint women to their national constitutional courts. Pakistan and Botswana are prime examples of this egregious failure to allow women to adjudicate constitutional cases. In sum the 'feminization of the judiciary … is not happening uniformly across the world' (Dawuni 2016: 7). Rackley and Kenney's calls for parity are sorely needed.

We are not bereft of feminist legal scholarship about the judgments of women justices on constitutional courts. Feminist scholars have written articles and book chapters that focus on specific features of their constitutional decisions (for example, Bauer and Dawuni 2016; Schultz and Shaw 2013a). In a few contexts such as reproductive rights or veiling, some scholars have employed comparative approaches to analysing constitutional cases that included women justices (for example, Cook, Erdman and Dickens 2014; Ferrari and Pastorelli 2013). As well, scholars have written books about the lives and work of individual women justices (for example, Anderson 2001; Hirschman 2015; Burton 2010). Some women judges on constitutional courts author articles and/or deliver presentations on constitutional matters (for example, Baer 1998; Barak-Erez 1994, 2008; Beevi 1998; Sotomayor 2002). But these studies are not legion, if only because these women judges are significantly fewer in number, and their appointments more recent, than their male counterparts.

Another genre of scholarship, while not necessarily about women judges, nonetheless illuminates the contributions that feminist perspectives can make to constitutional adjudication. These contributions emanate from scholars who have chosen to re-write selected constitutional judgments from a feminist perspective. Six Canadian feminist constitutional judgments led the way (Réaume 2006), followed shortly thereafter by a series of 'feminist judgments' volumes pertaining to cases in the United Kingdom

(Hunter, McGlynn and Rackley 2010), the United States of America (Stanchi, Berger and Crawford 2016) and Australia (Douglas, Bartlett, Luker and Hunter 2014a) with Ireland (Enright, McCandless and O'Donoghue) to follow in 2017. Some encompassed other areas of public and private law in addition to constitutional law. Women justices originally authored only a few of the judgments chosen for feminist re-framing. When viewed along with the developing scholarship analysing women's constitutional decisions, 'feminist judgments' scholarship not only engages actively with substantive legal content but also makes compellingly transparent the value of Hunter and Kohen's advocacy for increasing feminist justices on constitutional courts.

The next two Parts of the chapter offer more specific illustrations of how women judges perform; that is how they decided constitutional cases about, or with significance for, women's equality. The cases – drawn from Australia, Canada, Germany, India, Indonesia, Israel, South Africa, the United Kingdom and the United States of America – illuminate the voices of women justices who, whether identified as feminists or not, felt compelled to issue judgments on matters of concern to women while sitting on their respective national constitutional courts. Part 4 (First women speak) reports cases where the only, often the first, woman on the court wrote a judgment while Part 5 (Women in dialogue) examines cases where more than one woman authored a judgment. The judgments issued when the first and only woman spoke are important because they convey voices of women judges to the parties, the public and their brethren on the bench. The women in dialogue judgments raise the bar, illustrating women judges comprehensively performing the tasks of deciding cases.

4 FIRST WOMEN SPEAK

This Part sets out a selection of eight constitutional judgments by six women judges who sat as the first and only woman justice (or in one case, as the second but still only woman). American Justice Sandra Day O'Connor and Canadian Justice Bertha Wilson delivered the earliest of these selected judgments, one each about equality rights and abortion. Australian Justice Mary Gaudron and Indian Justice Sujata Manohar also decided two late-twentieth century cases about equality rights. In the twenty-first century, United Kingdom

Baroness Brenda Hale and Indonesian Justice Maria Farida Indrati rendered conflicting rights opinions about veiling and polygamy respectively. Although these judgments spanned almost three decades and issued from courts that operated under distinctive constitutional regimes, they dispel any doubts about women's capacity to serve as constitutional jurists.

4.1 **Justice Sandra Day O'Connor (United States)**

Early in her first term on the USSC, Justice O'Connor wrote the majority (5-4) judgment in a constitutional sex discrimination case, *Mississippi University for Women v Hogan* (MUW, 1982). She held that excluding males from MUW's School of Nursing 'perpetuated the stereotyped view of nursing as an exclusively woman's job' (MUW: 729). Justice Lewis F. Powell Jr's dissent, that MUW 'simply is not a sex discrimination case' (MUW: 745) because single-sex nursing schools reflect student preferences, was recycled fourteen years later in Justice Antonin Scalia's dissent in *US v Virginia* (VMI, 1996), another constitutional sex discrimination case. In her majority opinion in VMI ordering the admission of women to the formerly all-male military institute, Justice Ginsburg reiterated Justice O'Connor's lesson about the harm of gender stereotyping. Therefore, in one of her earliest decisions Justice O'Connor spoke not only disapprovingly to her dissenting brethren about their 'archaic' views (MUW: 725) but more significantly and constructively to another woman not appointed to the USSC for more than another decade (Siegel 2005: 317).

In 1983, in her first abortion decision, *City of Akron v Akron Center for Reproductive Health* (*Akron*), Justice O'Connor rejected the pregnancy trimester approach of the 1973 case *Roe v Wade* (which legalised abortions up to the point of the foetus's viability) as too dependent on changing medical technologies, but not its precedential value for women's constitutional right to choose an abortion before viability. Aware that some brethren on the USSC refused to distinguish approach from precedent and rejected both, she preserved the *Roe v Wade* precedent by developing a new approach: an 'undue burden' test focused on women's health and choice. Some feminists viewed her test as too restrictive (Miller 1985: 522) especially when she applied it to uphold pre-abortion requirements for hospitalisation, parental consent, informed consent, 24-hour waiting periods, disposal of

foetal remains and parental, albeit not spousal, notification (*Akron*, *Planned Parenthood of South Eastern Pennsylvania v Casey*, and *Ayotte v Planned Parenthood of Northern New England*). However, when Justice Ginsburg subsequently relied on the undue burden test to dissent in the partial-birth abortion ban case (*Gonzales v Carhart*), other feminists approved (Kay 2015: 25). More approved (Robson 2016) when, in 2016, the three women on the USSC – Justices Ginsburg, Sotomayor and Kagan – and two male justices decided that requiring abortion clinics to meet the strict standards of ambulatory surgical centers and their doctors to have admitting privileges at local hospitals constituted undue burdens (*Whole Woman's Health v Hellerstdet*). Thus Justice O'Connor spoke compellingly to her brethren about the importance of *Roe v Wade* and left a very significant constitutional legacy for the women who followed her on the USSC.

4.2 **Justice Bertha Wilson (Canada)**

When the Supreme Court of Canada decriminalised abortion (*R v Morgentaler*, 1988), Justice Wilson supported the most progressive of three pairs of male justices who differed over the interpretation of the right to 'security of the person' in section 7 of the then new Canadian Charter of Rights and Freedoms (Charter). The progressive pair interpreted security as protecting physical and psychological health from state interference. The dissenting pair wanted more, demanding a pre-existing constitutional right to abortion, which Justice Wilson countered by demanding they produce a constitutional law compelling a woman to carry a foetus to term (*Morgentaler*: 161). On the other hand, the concurring pair wanted less, rejecting psychological health as an element in security of the person, which led Justice Wilson to assert: 'It is probably impossible for a man to respond, even imaginatively … because he can relate … only by eliminating the subjective elements of the female psyche which are at the heart of the dilemma' (*Morgentaler*: 171). However, Justice Wilson went further than her brethren, alone invoking the Charter's right to liberty and interpreting it as 'the right to make fundamental personal decisions without interference from the state' (*Morgentaler*: 166). Her interpretation of liberty has a peculiar track record. When male Justices – Justice La Forest (B. (R.) para 80 and *Godbout v Longueuil (City)*, para 66) and Justice Bastarache (G. (J.) para 49 and *Blencoe v British*

Columbia (Human Rights Commission) para 54) – and also scholars (for example, Hogg 2007: 47-9) cited it, they always appended words of caution. Yet such words are unnecessary given the Court's pervasive 'no rights are absolute' refrain. Recently, moreover, the Court quoted Justice Wilson's interpretation of liberty but attributed it to Justice Bastarache in Blencoe (*Carter v Canada*: para 64).

Justice Wilson's contribution to the Court's first Charter equality rights case (*Andrews v Law Society of British Columbia* (*Andrews*)) also goes virtually unrecognised. All subsequent equality rights jurisprudence (for example, *Law v Canada (Minister of Employment and Immigration)*; *R v Kapp*; *Kahkewistahaw First Nation v Taypotat*) always gives full credit for interpreting this provision to one of the two male justices who wrote separate judgments in this case, Justice McIntyre. This jurisprudence (and scholars) credit him with rejecting similarly situated or formal equality analysis although what he actually wrote was that it should not be accepted as a 'fixed rule or formula' (*Andrews*: para 30). Supposedly, he instead adopted substantive equality analysis. However, Justice McIntyre never used this terminology. More importantly, as Justice Wilson wrote without naming him, he situated his equality analysis 'only in the context of the law which is subject to challenge' whereas he should have situated it 'in the context of the place of the group in the entire social, political and legal fabric of our society' (*Andrews*: para 5). In other words, the latter context is the requisite for substantive equality analysis, a conclusion she repeated in later cases (*R v Turpin* and *McKinney v University of Guelph*) and one that Justice Claire L'Heureux-Dubé reiterated in the equality rights 'trilogy' of decisions (*Egan v Canada* (*Egan*); *Miron v* Trudel; and *Thibaudeau v Canada*). Justice L'Heureux-Dubé alone understood the fundamental constitutional principle that distinguished Justice Wilson's equality analysis from Justice McIntyre's. In her words, 'discriminatory effects must be evaluated from the point of view of the victim, rather than from the point of view of the state' (*Egan*: para 41). Thus while largely unrecognised, Justice Wilson's contributions to equality and liberty analyses are constitutionally significant.

4.3 **Justice Mary Gaudron (Australia)**

Early in her 16 years as the first and only woman on the High Court of Australia, Justice Mary Gaudron wrote one of seven judgments in a case interpreting 'discrimination' in section 117 of the Australian Constitution (*Street v Queensland Bar Association*). Her six brethren decided that the State of Queensland's bar admission rules treated an out-of-State lawyer differently from his intrastate comparator by requiring him to reside and/or practice in the State; they all agreed that treating him differently constituted 'discrimination'. Their approach was consistent with the prevailing conception of equality as formal. Contemporary scholars maintain Australia has never moved beyond formal equality (for example, Graycar and Morgan 2007, 2009 and 2012). However, one scholar questioned whether Justice Gaudron relied on formal equality (Simpson 2007: 265) when she asked whether treating the out-of-state lawyer differently was appropriate to his difference (*Street*: para 27). Since 'neither a change of residence to Queensland nor cessation of practice elsewhere … would work an instantaneous acquisition of knowledge of the laws of Queensland', they were inappropriate to his difference which was his disparity of knowledge, and discriminated against him (*Street*: para 30). By considering the consequences of the impugned law for the out-of-State lawyer and not just its language, therefore, Justice Gaudron's conception of equality was more consistent with substance than form (Simpson 2007: 277-8). Nevertheless, her new conception which later decisions adopted, some co-authored by her (*Castlemaine Tooheys Ltd v South Australia*; *Kartinyeri v Commonwealth*; *Austin v Commonwealth*; *Mulholland v Australian Electoral* Commission; *Permanent Trustee Limited v Commissioner of State Revenue*), has yet to be acknowledged as substantive rather than formal equality (Karpin and O'Connell 2005: 34).

4.4 **Justice Sujata Manohar (India)**

Although the first woman to sit on the 31-person Supreme Court of India, Justice Fathima Beevi, may not have written any equality rights judgments, the second woman justice, Sujata Manohar, did. Early in her term and also as the only woman on the Court, Justice Manohar upheld the constitutionality of an affirmative action program for women in public employment (*Government of A.P v P.B. Vijayakumar and Another* (*Vijayakumar*). A male law student claimed the affirmative action program – a preference for hiring 30 per cent

women, other things being equal – discriminated against unemployed men contrary to the prohibition against sex discrimination in Article 16 of the Indian Constitution. In other words, the student relied on formal equality. However, Justice Manohar decided the program fell under another constitutional provision that explicitly permitted States to set up special programs for women. She described this provision, Article 15(3), as having been inserted in the Constitution to recognise that Indian women 'have been socially and economically handicapped' for centuries; 'to eliminate this socio-economic backwardness and to empower them'; and 'to strengthen and improve' their status by 'creating job opportunities' (*Vijayakumar*: para 7). Asserting special employment provisions for women are 'an integral part of Article 15(3),' she held that its power 'is not whittled away in any manner by Article 16' (ibid). Not only is Justice Manohar's description of Article 15(3) consistent with substantive equality; as well it conforms to the Indian tradition 'that is strongly in favour of quotas and affirmative action measures for deprived groups' (Nussbaum 2005: 179).

4.5 **Lady Justice Brenda Hale (United Kingdom)**

Appointed a Law Lord in 2004 and transferred in 2009 to the new Supreme Court of the United Kingdom, Baroness Hale remains the only woman on the twelve-person Bench. Among her early decisions was a conflicting case about religious dress. Denbigh High School rejected Muslim teenager Shabina Begum's request to wear a form of women's Islamic dress (jilbab) other than the one (shalwar kameeze) of three approved uniforms that she had worn for two years (*R (Begum) v Governors of Denbigh High School* (*Begum*): para 46). The former was the more modest religious dress; neither headscarves nor niqabs were in issue because the school permitted the former and the claimant did not wear the latter. Unlike three of her four brethren on the panel, Lady Hale found the school's rejection of Begum's claim constituted 'an interference with Shabina Begum's right to manifest her religion' (*Begum*: para 93). Like her brethren, however, she agreed the school authorities could reject Begum's jilbab. Baroness Hale accepted the authorities' justification that other Muslim girls would 'face pressure to adopt it even though they do not wish to do so' (*Begum*: para 98). In other words, she enabled 'the school authorities to pick and choose

between religious beliefs or shades of religious belief' (*SB, R v Denbigh High School* EWCA: para 93). Or, as the feminist 'judge' who critiqued the judgment wrote, it 'places the costs ... solely on Shabina Begum, a young school girl from a religious minority, rather than on public institutions such as Denbigh High School which have greater political, social and economic power' (Malik 2010: 340). Her critique applied an intersectional analysis that could have yielded an outcome consistent with substantive equality.

4.6 **Justice Maria Farida Indrati (Indonesia)**

In 2008 Indonesia appointed the first woman Justice, Maria Farida Indrati, to the nine-member Constitutional Court created in 2003. Justice Indrati, the only woman and only Christian on this otherwise male Muslim bench (Hosen 2016: 3), concurred in a conflicting rights case about religious marriages. Machica Mochtar challenged a law that required civil registration of religious marriages to claim the benefits of support and inheritance for children from their fathers. Her late husband had failed to register their Islamic marriage, possibly a 'calculated strategy' (Butt 2012: 196) to prevent his other wife learning about his polygamous relationship. In a judgment replete with references to Islamic marriages as legal marriages, the other eight justices read the civil registration benefits into religious marriages but only if the children could prove blood relationships with their fathers (*Decision Number 46* (*Decision*)*:* para 3.14). Unlike her brethren who viewed registration as administrative, Justice Indrati held it was also substantive, existing 'to protect women and children' (*Decision*: para 6.2). She focused particularly on the impairments faced by women in unregistered religious marriages, of which there are 'still many' (*Decision*: para 6.4). They are vulnerable to neglect, domestic violence, contract marriage and their husbands taking mistresses (*Decision*: para 6.2), and they lack state 'protection for the marital status, joint properties, inheritance and other rights arising due to marriage' (*Decision*: para 6.5). In other words, Justice Indrati recognised their intersectionality, unlike her brethren who simply abandoned them, and she urged state and religious entities to 'synchronize' religious and registration laws related to marriage (*Decision*: para 6.2). If adopted, her remedy could promote substantive equality.

In sum, all six women justices proved more than able to perform the tasks of constitutional adjudication required to decide the eight foregoing cases. Specifically they rendered decisions that improved the lives of women while at the same time leaving legacies that contributed to changes in constitutional doctrine, sometimes immediately, sometimes later. With respect to abortion, Justices O'Connor and Wilson intervened in controversies much larger than any one woman could resolve but they made enduring legal arguments. With respect to equality rights, the same two Justices along with Justice Gaudron aspired to promote substantive equality within judicial contexts determined to obfuscate reliance on formal equality. Justice Manohar's task was to sustain substantive equality in a context where it was threatened by a reversion to formal equality. Finally, the only women on constitutional courts created in the twenty-first century, Baroness Hale and Justice Indrati, faced conflicting rights cases where it took much (lonely) judicial courage to challenge the mainstream political-legal culture by conducting intersectional analyses that might result in substantive equality.

5 WOMEN IN DIALOGUE

As the foregoing illuminates, women justices on different national courts do not always agree with each other even when they rely on constitutional doctrine about equality rights. The same is true when more than one woman sits on the same constitutional court. Although American, Canadian and Australian cases contain instances where more than one woman wrote a judgment, whether majority, concurring or dissenting, this Part of the chapter turns to equality cases decided in South Africa, Israel and Germany. In 1997 the two women justices on the South African Constitutional Court issued judgments in a men's equality claim (as had Justices O'Connor and Manohar before them). In 2015 the two women justices on the Israeli Supreme Court issued separate concurrences in a class action that required them to contextualise discrimination (as had Justices Wilson and Gaudron). Also in 2015 three women justices on the German Constitutional Court decided a conflicting rights case involving Muslim women (as had Lady Hale and Justice Indrati). What matters is why the South African, Israeli and German women jurists wrote separate

opinions. Did they express different views about sex equality and if so with what consequences for women?

5.1 South Africa: Justices Yvonne Mokgoro and Kate O'Regan

In *President of the Republic of South Africa and Another v Hugo (Hugo*) in 1997, a male prisoner challenged the constitutionality of an inaugural Act by President Nelson Mandela pardoning approximately 440 imprisoned mothers but not fathers of children under the age of 12. Seven of the nine male Justices concurred with Justice O'Regan's analysis of why this pardon did not meet the test of unfair discrimination. After acknowledging that the pardon discriminated by stereotyping mothers as playing a special role raising young children, Justice O'Regan found the discrimination was not unfair because of the fact that mothers actually bore a proportionately greater burden of child-rearing (*Hugo*: para 109). Scholars viewed upholding the constitutionality of the Act as an approach and outcome 'most in line with a contextual, substantive, and group-based understanding of equality' (Jagwanth and Murray 2005: 246).

On the other hand, Justice Mokgoro's approach was different; she emphasised that the Act did discriminate unfairly against men by evoking stereotypical assumptions about their aptitudes for child-rearing (*Hugo*: para 92). Despite her reservations about this stereotyping including that of fathers in traditional African societies (*Hugo*: para 93 n.10), she accepted the justification that the Act eased the plight of some children and only temporarily denied parenthood to some fathers (*Hugo*: para 106). That is, Justice Mokgoro's finding of constitutionality was as contextual and group-based as Justice O'Regan's. Their agreement about the outcome suggests scholars should read their judgments together as a dialogue about the existence of two distinctive approaches to analysing substantive equality, the more so because both of their judgments contrasted sharply with that of one of their brethren who relied on formal equality to rule that the Act unfairly discriminated against men and could not be justified because 'parents are parents' (*Hugo*: para 85).

5.2 Israel: Justices Daphne Barak-Erez and Esther Hayut

Kolech, an Orthodox women's legal aid organisation brought a class action against an Haredi radio station, Kol Barama, that refused to allow women to be on-air personalities or be interviewed for any extended period of time (Rosenberg 2015). The three justices each wrote a judgment agreeing that Kolech could bring the class action even though the organisation did not meet the criterion for standing as a public authority or individual injured party. While the male justice found special circumstances justified allowing Kolech to bring the class action, the two women justices agreed that his interpretation of class action law was too restrictive. Over a decade ago (at the time of writing) scholars identified 'historically entrenched legal mechanisms' as impeding the enhancement of women's status through rights litigation (Hirschl and Shachar 2005: 228). Yet restrictive interpretation still exists and in Justice Hayut's words 'may detract from the power of class action as a tool to promote public interests' (*Kol Barama Radio Ltd v Kolech-Religious Women's Forum* (*Kol Barama*) Hayut J: para 3). The legislature wanted to encourage class actions, including those that might come from a broad spectrum of workers' organisations (*Kol Barama*: para 3). Judges should treat class actions not like conventional lawsuits but rather as effective tools for public civil enforcement (*Kol Barama*, Hayut J: para 4). Although her four-paragraph judgment focused on the legal context, Judge Hayut also noted the irony of an organisation named 'Kolech' which means 'your voice (female)' bringing an action against 'Kol Barama' which is the biblical voice of one of the Jewish 'foremothers' (*Kol Barama*, Hayut J: para 2).

Justice Barak-Erez elaborated three aspects of women's voice in her twelve-paragraph judgment. First, she echoed Justice Hayut's judgment that since the case was about giving religious women a voice, restrictive procedural requirements should not silence this voice by disqualifying Kolech from bringing the class action (*Kol Barama*, Barak-Erez J: para 4). Were women to represent themselves rather than through Kolech, they would be seen as challenging the community's leadership, which is frowned upon for religious women (*Kol Barama*, Barak-Erez J: para 4). A class action allows these women to both remain part of the community and gain a voice they never had before (*Kol Barama*, Barak-Erez J: para 4). Second, excluding women from full radio participation discriminates by silencing them in the public sector (*Kol Barama*, Barak-Erez J: para 6-8), thereby

denying pluralism (*Kol Barama*, Barak-Erez J: para 9). Third, to the male justice's distinction between what religion requires and what it allows (*Kol Barama*, Danziger J: para 53) she responded that even when 'discrimination is necessary in the eyes of religious law, it does not mean it should have greater weight against the right infringed' (*Kol Barama*, Barak-Erez J: para 11). Accordingly, women's voices could prevail over religious voices, an outcome the male justice supported by finding that the radio station had not shown the religious norm (women have no place in the public sphere) was required (*Kol Barama*, Danziger J: para 54). In sum the women's judgments were complementary - one emphasised the legal context without ignoring women and the other, the women's context without ignoring law – consistently with the Israeli tradition of three-person panel concurrences.

5.3 **Germany: Justices Susanne Baer, Gabriele Britz and Monika Hermanns**

In 2015 Germany's First Senate of the Federal Constitutional Court decided that a State law imposing a general ban on religious dress for teachers was not compatible with freedom of religious beliefs; and the exemption for Christian and occidental cultural values was unconstitutional because it discriminated on the grounds of religion (Press Release No. 14/2015). The complainants were a teacher wearing a headscarf and a social worker who substituted an off-the-shelf woollen hat covering her ears and a garment covering her neck, for example, a polo turtleneck, when ordered to remove her headscarf (BVerfG 471/10: para 26 and 1181/10: para 8). The two women on the First Senate, Justices Baer and Britz, were part of the six person majority judgment; the two-person dissent included Justice Hermanns, a substitute from the Second Senate chosen by drawing lots when a male member of the First Senate was ordered not to participate (Press Release No. 14/2015).

Court decisions are anonymous, leaving readers to speculate about authorship from biographical details available about the justices. Although the Court's homepage does not provide religious affiliations, it does reveal some intersectional qualities. In particular only one of the three women justices – Justice Baer – self-identifies as a gender studies scholar and a lesbian. Indeed, globally she may be one of only two self-identified lesbian justices on constitutional courts, the other being Justice Virginia Bell on the High Court of Australia.

Irrespective of whether Justice Baer's intersectional qualities suggest her authorship of the majority opinion, clearly the women justices differed about the constitutionality of the headscarf ban and the Christian-occidental cultural values exemption.

The majority found covering the head in public was a religious duty adhered to by some Muslim women and banning religious dress would apply disproportionately to these women to exclude them from the teaching profession, while the exception would allow Christian nuns who wear the habit and Jewish men who wear the kippa to continue to teach (Press Release No. 14/2015). They decided that this unequal treatment could not be constitutionally justified by the aims of preserving peace at school or the neutrality of the state. The ban was too abstract, making assumptions about the symbolism of headscarves that were impermissible and demeaning (Mahlmann 2015: 896-8). Should concrete instances be forthcoming, however, a ban (but not the exemption) might be constitutionally acceptable. The dissent countered with the contention that there were good reasons to deem an abstract danger to the peace at school or the neutrality of the state sufficient to justify a general prohibition of religious dress. For them, certain clothing had a strong religious connotation such that the headscarf but not the hat or turtleneck should be prohibited. In sum, the dissent subordinated the religious freedom of the headscarf-wearing Muslim woman to the competing rights of anti-headscarf citizens represented by the state. On the other hand, the majority refused to rely on assumptions about competing rights. Instead they applied an intersectional analysis that emphasised the importance of treating religions, and particularly minority religious women, equally.

An analysis of these judgments confirms that women justices have different views about sex equality, and they talk about these views to each other in addition to the parties, the public and their brethren. While I am tempted to compare the feminist content of their judgments, such an approach could potentially be divisive. It might encourage, rather than rehabilitate, anti-feminists. Instead I argue that an analysis of their multiple judgments illuminates the richness of women's adjudicative diversity. Women can differ over approaches to substantive equality (Justices Mokgoro and O'Regan), complementary contexts (Justices Hayut and Barak-Erez) and intersectional rights (Justices Baer, Britz and Hermanns). However, their diversity serves to sustain Justice Ginsburg's proposal 'Why not

nine women?' In other words, they show that women can comprehensively perform the tasks of adjudicating constitutional cases. Far from endangering constitutionalism and the rule of law, therefore, their jurisprudential record suggests appointing more women justices may enhance constitutional adjudication.

6 CONCLUSION

The legacy of women who sat or sit on national constitutional courts is their performativity. They have done and are doing the work of effective constitutional adjudication. Yet their efficacy counts for little globally. The appointment of women to these courts is disproportionately low relative to their availability in the legal profession and population more generally.

A major barrier is gender bias which manifests in qualifications, selection processes and stereotypes that favour men. Qualifications that demand experience in addition to legal knowledge and good judgment revitalise the profession's historical exclusion of women. Selection processes dominated by men perpetuate worldwide traditions of almost invariably appointing their own sex to fill vacancies. Stereotypes of women as feminist activists evoke scenarios of feminist conspiracies that would subvert constitutional adjudication and hence the rule of law. More than twenty years ago (at the time of writing) a scholar likened the judiciary 'to the priesthood of a secular religion, a simile that underscores its masculinity, as well as the conceptual difficulty encountered by many in changing the gender of the judge' (Thornton 1996: 201).

Yet change could come through parity and feminist appointment policies in countries like Pakistan and Botswana that have no women on their constitutional courts or in countries that have a 'single token woman' such as India (Nussbaum 2005: 175), Indonesia and the United Kingdom. Moreover, in countries that have a 'near female majority' such as Canada (Dixon 2010: 298), the United States of America and Australia, or in the few countries such as Bulgaria, Latvia and Serbia with a majority of women, Justice Ginsburg's proposal for all-women constitutional courts merits serious consideration.

Pragmatically we do not know the effect of an entirety of women on constitutional courts. Is it likely their decisions would be unanimous where unanimity is optional, or

would there be dissents or concurrences? Would some subject matter be particularly contentious? If so, would controversies attach to conventional constitutional issues involving the rule of law, interpretive approaches, judicial review, federalism, civil rights, indigenous rights, pluralism and/or competing rights? Might women justices be more deferential to governments or more prone to judicial activism? Would conflicts arise among them over cases involving women's rights to liberty, security or equality in contexts such as work, family, politics, crime or violence? Would intersectional claims focused on race, ethnicity, gender, sexuality, religion, disability, age, and others, unite or divide women-dominated constitutional courts? Would their constitutional decisions comport with and promote feminist conceptions of justice?

We have no hypotheses, let alone answers, for the foregoing questions about all-women constitutional courts. Nevertheless, far from posing a threat to democracy or the rule of law, the legacy of women jurists' voices suggests they would promote constitutional justice for women and men.

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[1] The first woman judge may have been Brigh Brigaid who held office as a *brehon* or judge in Ireland circa 50 A.D. 'Brigh is mentioned in the Senchus Mór, a compendium of the ancient laws of Ireland, and her decisions were cited as precedents for centuries after her death' (Wikipedia: 'Brehon'). Whether any of her decisions qualify as constitutional adjudication is beyond the purview of this chapter which focuses on the work of women judges appointed to modern constitutional courts.

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INTRODUCTION

Law, History, and Feminism

Tracy A. Thomas

Tracey Jean Boisseau

Feminist Legal History offers new visions of American legal history that reveal women's engagement with the law over the past two centuries. The essays in this book look at women's status in society over time through the lens of the law. The conventional story portrays law as a barrier or constraint upon women's rights. While law has and continues to operate as a restraint upon women's full participation in society, law has also worked as a facilitating structure. The overall picture gleaned from the snapshots in time offered in this book shows the actualizing power of the law for women. Women have used the law historically as a vehicle to obtain personal and societal change. Even more, women have used feminist theory to transform the law itself to incorporate an appreciation of gendered realities.

The essays here locate women at the center of a historical understanding of the past. In what has been called "engendering legal history," the works integrate the stories of women into the dominant history of the law and then seek to reconstruct the assumed contours of history.[1] The authors recover the women and their contributions that have been omitted from history, enabling a rewriting of the traditional historical narratives. The research fills in some of the missing pieces of legal history, and goes further to offer alternative interpretations of the general discourse of law: "[t]hings we thought we new about American history turn out to be more complex than we had suspected."[2] The essays test familiar generalizations and challenge the social construction of gender. Using historical inquiry, the authors focus on the details and social

context, rather than the legal rules, to better understand the meaning and impact of the law. The details are important to avoid overgeneralizations and superficial descriptions of how and why events occurred in the past. Such re-examinations of American legal history contribute to discussions of the law and policy decisions of today in ways that promote women's rights, women's interests, and women's empowerment.

The introduction provides the context necessary to appreciate the essays in this book. It starts with an overview of the existing state of women's legal history, tracing the core events over the past two hundred years. This history, while sparse, provides the common foundation for the authors, and establishes the launching point for the deeper and more detailed inquiries offered here. Following this history is an exploration of the key themes advanced in the book. In Part I, *Contradictions in Legalizing Gender*, the essays develop analyses of the law's contradictory response to women's petitions. The essays in this section provide evidence of how law operated as a barrier to limit women's power, and challenge the assumptions that such barriers have been eliminated today. Yet the essays in part I also present a more nuanced historical picture. They show the law's facilitation of women's agency and power, often based on the same gendered norms that elsewhere produced limitations. Part II of the book, *Women's Transformation of the Law*, shows women's impact upon the law and illustrates how women changed the law to incorporate their own, gendered, perspectives. By "feminizing" the legal process and altering the substantive law to respond to women's needs, women were able to shape the law in their own image.

The introduction concludes with an overview of feminist legal thought. An appreciation of such theory and methodology is important to understanding the lens through which the authors and advocates over time approached the problems presented. *Feminist Legal History* is not just a

collection of stories about women. Instead, it is a feminist inquiry of the historical record, in which feminist theory illuminates the positions and motivating beliefs of women over time.

Women's Legal History Thus Far

The history of women in the law is still a work in progress. The existing narrative of women's legal history is somewhat skeletal, which is not surprising given that the field is relatively new.[3] The research, however, shares a common foundation, even as that history is being re-imagined by ongoing scholarship. The conventional story in law tells of women's linear progress from oppression under the law to equal opportunity in modern times. History is viewed as a series of small steps, as women slowly eradicate the legal barriers to their full empowerment. This collection shows that such incrementalism did not prevail in the law and that existing historical accounts of women's legal rights are one dimensional.

The popular notion of women's history is often expressed as first wave and second wave feminism. The first wave spans the seventy-five years when demands for suffrage were prominent, beginning with Elizabeth Cady Stanton's *Declaration of Sentiments* in 1848 to adoption of the Nineteenth Amendment to the Constitution and women's right to vote in 1920. "Second wave feminism" refers to the women's liberation movement of the 1960s and 1970s often symbolized in mass media representations by Gloria Steinem—the quintessential liberated "career woman"—and Betty Friedan, the iconic middle-class housewife who documented the dehumanizing effect of her experience in the influential book, *The Feminist Mystique* (1963). The feminism that emerged in the 1960s and 1970s, however, was composed of a more complex and diverse set of political, social, and cultural challenges to a patriarchal order than could be

adequately represented by either Steinem or Friedan. And, the nineteenth century campaigns for the rights of "woman" were rent with racial and class tensions that remain hidden when recounted only from the point of view of Cady Stanton. Despite significant focus on these contentious issues in the scholarship produced by historians of women's social history, official histories of law and women often continue to put white, middle-class, women with professional ambitions and economic privilege—whether living in the nineteenth or twentieth century—at the center of their analysis. Yet, it is important to recognize the intricacies of the way that race and class tempers and shapes gender inequities as well as hinders cross-race and class alliances among women in order to appreciate the complexities of women's activism and legal situations over time.

Conventional legal histories of women tend to begin in the period before the first feminist wave with studies of coverture and women's legal invisibility inherited from English common law. From the earliest times of American law, married women were "protected" by the law of coverture which provided that a woman was covered legally by her husband and thus "relieved" of rights to property, wages, child custody, or suffrage. The English treatise writer, William Blackstone, summarized the existing common law. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing."[4] In practice this meant that a married woman could not own or control her own property or earnings, devise property by will, enter into contracts, have custody of her children, be liable for her own debts, or sue or be sued in court. A husband was permitted to provide physical correction or "domestic chastisement." The law allowed and even obligated him to control his wife since he was liable both for her civil debts

and criminal misdemeanors. Blackstone explained that the legal disabilities of coverture were "for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England." Historians, however, have found some evidence of women's autonomy during these early times. As Mary Beth Norton demonstrated in her book, *Founding Mothers and Fathers*, women exercised social and legal power in colonial America as midwives and on women's juries constituted for paternity determinations.

The dominant gender ideology of the late eighteenth and early nineteenth centuries evolved into one of separate spheres for men and women. The law embraced the popular cultural notion that women were relegated to the private sphere of home and family, while men dominated the public spheres of work and politics. Women's political role as a citizen of the new republic was cast in terms of domestic responsibility. Under this view of republican motherhood, women were entrusted to educate their sons as virtuous republican citizens. Linda Kerber in her classic book, *Women of the Republic: Intellect and Ideology in Revolutionary America* (1980), wrote of the ways women took advantage of their duty to raise civically responsible children by learning to read and taking seriously their role as educators of the young. This domestic role was intensified and sentimentalized in the first half of the nineteenth century by the promotion of a "cult" of domesticity. "True women," according to the "cult" focused all their efforts on the home and were protected from public responsibilities. In Barbara Welter's often cited delineation, in addition to domesticity they evinced piety, purity, and submission to the men of their family and community. This ideology of course was neither an accurate description of women generally speaking nor was it an attainable ideal for any but the small strata of white middle-class women in this rapidly industrializing period. It was an aspiration applicable only to those women who did not have to labor at farm work, enter into commercial relations at market,

work as servants in other family's homes, or work for remuneration outside their homes—for example, in the burgeoning textile industry. Though the ideology was full of contradictions, it was widely remarked upon and worked to justify and endorse the lack of political rights for women in the public sphere by presumably elevating them as the treasured "angels" of the private sphere.[5]

Challenges to this idea of women's need for protection the law of coverture began with the Married Women's Property Acts in the 1840s. They changed some of the express legal restrictions on women's rights to property and limited husband's prerogatives over that property. The first series of enactments barred the creditors of husbands from seizing the property of married women. Later acts allowed married women to retain their personal property and earnings, sign contracts, and sue and be sued. The acts were motivated as much by the credit crises and wealthy fathers protecting their daughters as from feminist motivations to reform the law. The new statutes were also part of the larger codification movement which sought to restrict the discretion of judges by reducing common law rules and equitable practices to express statutory terms. Most of this legislation was limited in scope. It did not, for example, provide wives with joint ownership of all property accumulated during marriage. Nonetheless, the reforms were the first steps toward recognizing women's economic and familial status.[6]

Women's demands for equality in the family sometimes extended to claims for political rights. On July 19 and 20, 1848, in Seneca Falls, New York, Elizabeth Cady Stanton presented her *Declaration of Sentiments* which contained 18 demands for social, political, and legal equality. The first demand on the list of claims for equal property, custody of children, and employment, was the right to vote. The movement for women's equal political and public rights became part of the nation's social discourse, led by Stanton and Susan B. Anthony's National

Association for Woman's Suffrage and Lucy Stone's American Association for Woman's Suffrage. The organizations differed on the legal tactics for suffrage—the American pursuing a state-by-state approach and the National seeking federal action. They also disagreed about the involvement of men as officers (American allowed) and on support for the Fifteenth Amendment mandating suffrage for black men, but not women (National opposed).

In 1873 in Rochester, New York, Susan B. Anthony tried to vote, arguing that the newly-enacted Fourteenth Amendment granted women this right in federal elections. She was jailed, yet her sentence was stayed thus prohibiting her from challenging the law on appeal. The following year, in *Minor v. Happersett*, Virginia Minor pursued the legal argument in the courts arguing that the Fourteenth Amendment's protection for the "privileges and immunities of citizenship" guaranteed women the right to vote. The Supreme Court rejected her claim, narrowly interpreting the new amendment to hold that voting was not a privilege of citizenship and blocking women's juridical strategies to secure suffrage.[7] A suffrage amendment was introduced into Congress in 1878, and endlessly reintroduced, until it emerged from committee in 1914 and was quickly and easily defeated. A few states like Wyoming and Utah granted women the right to vote by the end of the century but, in the absence of a federal mandate, most continued to deny women this right until 1920.

In the late nineteenth century, the suffrage movement gained new traction with the additional support of socially conservative groups like the Women's Christian Temperance Union. These organizations, originally established to oppose the sale and consumption of alcohol, endorsed the ideology of "true womanhood" by reiterating women's purity and relative insulation from the amorality of the marketplace. They sought the vote for women on grounds that they were morally and spiritually superior to men and thus better suited to caretake society.

They specifically argued that female leadership was best able to attend to social problems sparked by the increasing pace of immigration and urbanization, such as a rise in alcohol consumption which threatened the home as a protected haven for women and children. This application of "true womanhood" logic to promote women as "social housekeepers" was a powerful and effective new strategy of female reformers producing new roles and even professions for women, but nonetheless did not produce widespread acceptance of putting the vote in the hands of women.

The final impetus for women's suffrage would not come until after the turn of the new century when more radical logic demanding women's political equality to men pushed aside conservative "true woman" ideology, and more subversive measures demanding women's right to vote finally won the day. In 1917 while Carrie Chapman Catt, as representative of the merged National-American Woman's Suffrage Association, engaged President Woodrow Wilson in discussion, Alice Paul, Lucy Burns, and other members of the National Woman's Party led silent pickets and protests in front of the White House. They continued these protests for six months until they were jailed on the charge of obstructing the sidewalk. In prison Paul led hunger strikes and endured forced feedings and inhumane treatment. The events triggered a public and political outcry sufficient to push the dormant suffrage amendment to the forefront. Meanwhile, additional congressional alliances were secured by recourse to racially divisive strategies that garnered the support of conservative southern congressmen happy to swell the ranks of white voters by adding white women to the rolls. In the immediate aftermath of the First World War, a combination of powerful rhetorics invoking modernity, democracy, and national and racial superiority tipped the scales in favor of woman suffrage.[8] The Nineteenth Amendment to the Constitution guaranteeing women's right to vote was finally passed in 1920.[9]

During this time women also sought access to other levels of power such as the right to practice law. A few women were benevolently granted admission to the bar and thus licensed to practice as lawyers. These included Arabella Mansfield in Iowa in 1870, and Charlotte Ray, the first African American female lawyer, licensed in D.C. in 1872.[10] Other women--like Phoebe Couzins, Emma Barkelo, and African American Mary Ann Shadd Cary–succeeded in part when they were allowed to attend some of the newly-emerging law schools. Most women though were refused access to the legal profession based on their sex. Myra Bradwell, a Chicago woman who worked in her husband's law office and published the *Chicago Legal Times*, sought admittance to the bar in 1869 after passing the state bar examination with honors. The Illinois Supreme Court refused to license her because she was a woman. In 1873 the U.S. Supreme Court in *Bradwell v. Illinois* affirmed that decision and denied women the right to practice law. In a concurring opinion that has become a classic reading in American history courses, Justice Bradley, with pointed reliance on "true woman" logic, wrote that women should be confined to their separate domestic sphere.

> 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 paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.[11]

Bradwell eventually worked to change the law in Illinois, and was licensed to practice in 1890. Similarly, Belva Lockwood was denied the right to practice in the U.S. Supreme Court–until she successfully petitioned Congress to change the law. The Supreme Court,

however, subsequently denied her right to practice in the state courts of Virginia, citing states' rights and *Bradwell*.[12]

Despite the disempowering nature of protectionist ideology underlying much of nineteenth-century law, female labor reformers utilized the same theory to secure rights for women in the workplace. Progressive labor activists like Florence Kelley, head of the National Consumers League, believed all workers needed protective legislation mandating minimum wages and maximum hours of labor. Kelley began with protections for women workers to gain a toehold for more general reforms. She strategized correctly that courts and legislatures would be more amenable to protecting "helpless" women than men.[13] The U.S. Supreme Court took this approach in the 1908 case of *Muller v. Oregon* to uphold protective legislation limiting working hours for women to ten a day. In view of women's disadvantage in the struggle for subsistence because of "physical structure and a proper discharge of her maternal function,"[14] Justice Brewer wrote, Oregon was allowed to adopt such a rule. The Court was aided in its decision by the first "Brandeis Brief" presenting social science evidence of women's weakened status and need for protection. The brief, written and researched by Josephine Goldmark and Brandeis with Kelley's influence, included medical evidence that women's blood and muscles had more water content than men's and noted that children of working women were injured by inevitable neglect. The brief explained women's need for more time than men outside of work: "[F]ree time is not resting time, as it is for a man. . . . For the working-girl on her return from the factory, there is a variety of work waiting. She has her room to keep clean and in order, her laundry work to do, clothes to repair and clean, and, besides this, she should be learning to keep house if her future household is not to be disorderly and a failure."[15] While this evidence accepted by the Supreme Court seemed limited to support for a gender-specific ruling, the Court subsequently extended its

decision to men in *Bunting v. Oregon* by supporting hours restrictions for all "persons."[16] The Court backed away from these decisions in 1923 by invalidating a minimum wage law for women in *Adkins v. Children's Hospital* on freedom of contract grounds said to be applicable to both men and women.[17] Protective labor legislation returned to favor during the New Deal in *West Coast Hotel v. Parrish* (1937) when the Court upheld a law nearly identical to that in *Adkins*.[18]

After the passage of women's suffrage, disagreements resurfaced between Progressive activists focusing on women's differences and liberal feminists seeking equal treatment of women under the law. In 1923 Alice Paul first proposed the Equal Rights Amendment to change the U.S. Constitution to provide that "equality of rights shall not be denied or abridged on account of sex." Though introduced into Congress it was not passed by Congress and sent to the states for approval until 1972. The Amendment was defeated when it failed to obtain the necessary ratification by two-thirds of the states though many states amended their own state constitutions to include an ERA. The debate against the ERA was led by Phyllis Schlafly and the conservative organization of which she was head, Eagle Forum. Schlafly, a mother of six children and a fulltime working lawyer and activist, demanded that women had the right to be treated like "ladies" and that social differences such as motherhood must be kept sacred. Schlafly claimed that the ERA would mandate abortion, require women to serve in the military, release men from obligations to support their wives and children, and require unisex bathrooms—issues that became hot button points of debate in the media to the obscuring of other issues that were more widely accepted in the public mind such as equal pay for equal work.

As the ERA debate unfolded, abortion became a lynchpin issue for the women's rights debate. Women's right to choose and control their own bodies emerged as a central concern for

many feminists. The twentieth-century feminist argument for abortion built upon arguments of earlier feminists. In the mid-nineteenth century abortion under the common law was available from midwives and was legal prior to quickening (usually late in the fourth month of pregnancy), until an aggressive public campaign to criminalize abortions led by doctors rendered the practice risky and illicit. Between 1850 and 1880 most states outlawed abortions and restricted contraception, thereby reinforcing traditional power roles between men and women and emphasizing women's social duty to bear children. The federal Comstock Act enacted in 1873 classified information concerning contraception and abortion as obscene-and prohibited selling or distributing contraception or abortion devices.[19] Nineteenth-century women's rights advocates did not often publicly endorse abortion or contraception—indeed, most stridently avoided any association with the advocates of such. Nonetheless, many were outspoken about customs enshrined in law that denied women the right to control their own body and sexuality. These advocates supported "voluntary motherhood" by which they meant the right of married women to determine when and how many children they would bear by asserting their right to refuse their husband's demands for sex. Others, sometimes known as 'free lovers," insisted on the right and obligation of wives (as well as husbands) to dissolve their marriages if love no longer motivated them to engage in intimate sexual acts. Though the idea that women ought to be free to choose motherhood as well as to indulge their sexuality (within marriage at least) at their own discretion and in accordance with their own personal feelings remained controversial until well into the twentieth century, it was clear that the precepts of "true womanhood" was undergoing radical review even before the end of the nineteenth.

After the turn of the century, radical ideas about women's sexual freedom and right to birth control exploded onto the public consciousness. Women like Emma Goldman—the "free

lover" and anarchist—and Margaret Sanger—the progressive reformer, eugenicist, and nurse—helped expand the idea of voluntary motherhood by focusing their efforts on legalizing contraception. Goldman publicly flaunted local ordinances that reinforced the idea that women should present themselves as non-sexual beings. Sanger started the birth control movement by opening the first birth control clinic in New York in 1916. She was arrested for distributing birth control, though in affirming her conviction, the New York Court of Appeals interpreted the law to allow doctors to prescribe contraception to prevent "disease." Sanger's clinic, renamed "Planned Parenthood" in 1942, went on to challenge the Comstock Act and other laws prohibiting contraception. In a series of cases culminating in the U.S. Supreme Court's decision in *Griswold v. Connecticut* in 1965, the Court recognized a constitutional right of privacy for contraception.[20]

Many early birth control advocates including Goldman and Sanger had personally favored a woman's freedom to choose abortion--but expediently suppressed that issue in the campaign for contraception laws. Though they may have agreed upon this tactic, the two women approached the broader issue of birth control from widely differing perspectives particularly when it came to immigrant and poor women. Goldman, an immigrant herself, championed the rights of laboring women and embraced radical political critiques of capitalism. Sanger's eugenic outlook colored her appeals for birth control as well as sterilization as mechanisms which might succeed in inhibiting poor, disabled, and criminalized women from reproducing—as if poverty, disability, or criminality were signs of racial degeneration. Half a century later, demands to legalize abortion would no longer be motivated by such eugenic visions. By the early 1970s large numbers of women and doctors allied together to advocate for the availability of medically safe

abortions for all women. This alliance grew to encompass a majority of voters, many of whom would embrace a new "pro-choice" movement in the 1980s.

Yet it was not at the ballot box but in the courts where abortion first gained traction as the primary feminist issue. In 1973, in *Roe v. Wade*, the Supreme Court held that a woman had the right to choose an abortion in the first trimester of a pregnancy.[21] Using historical information on the permissiveness of abortions prior to quickening, the Court relied upon the constitutional right to privacy, rather than the right to equality, as a basis for affirming women's reproductive rights. Thirty-four years later, in 2007, the Court restricted this right to abortion in its decision in *Gonzales v. Carhart,* upholding bans on late term or "partial-birth" abortions. In that decision the court referenced an idea reminiscent of the nineteenth century protectionist ideology that surrounded court decisions concerning women—only this time the state sought to protect women against themselves citing the unintended emotional consequences the court believed abortion produced in women such as sadness and remorse.[22]

Throughout this period the equality movement gained momentum in the courts and legislatures in ways that went beyond the issue of reproductive rights for women. One of the first successes was Title VII of the 1964 Civil Rights Act prohibiting race and sex discrimination in employment. The sex classification has sometimes been believed to have been added to the bill in an attempt to defeat its passage.[23] In theory it worked to expand the legislation to include key issues that specifically impinged upon women's lives. Enforcement of the new law, however, was weak. The Equal Employment Opportunity Commission (EEOC) focused its attention on enforcement of race claims. It showed a lack of serious concern about sex discrimination in employment by deciding in 1965 that sex segregation in job advertising through use of male only help wanted ads was permissible. This outraged Betty Friedan and other women who, in 1966,

responded by founding the National Organization of Women (NOW). NOW quickly organized to support women's equality by challenging the EEOC to take forceful actions against workplace sex discrimination under Title VII.

The employment cases were most successful when stereotypes of women's lack of equal ability to perform certain types of work was debunked. Equality theory, however, sometimes floundered in pregnancy cases where the courts confronted physical differences between men and women. Different treatment because of pregnancy, the Supreme Court held, was not discrimination "because of sex."[24] Congress reversed this result by passing the Pregnancy Discrimination Act of 1978. The act relied on an equality theory requiring employers to treat pregnant employees similarly to other temporarily disabled employees. The sameness/difference debate continued over the issue of parental leave. When California passed legislation granting pregnant employees, but not all parents, four months of unpaid leave and a guaranteed return to work, the Supreme Court upheld the legislation on grounds of women's difference and their need for special protection. The Family Medical Leave Act of 1993 rejected this theory by guaranteeing 12 weeks of (unpaid) medical and childcare leave equally to both men and women.

One of the leading figures for sex equality in the courts in the 1970s was Ruth Bader Ginsburg who directed the Women's Rights Project at the American Civil Liberties Union while a professor at Columbia Law School. She later became the second woman to serve as a Justice of the United States Supreme Court. Ginsburg was the chief architect of the strategy that built the foundation for contemporary sex discrimination law. The strategy of the Women's Rights Project was designed to attack gender stereotypes across the board. As Ginsburg explained it, they set out to attack separate spheres assumptions built into the law. "[T]he objective was to obtain thoughtful consideration of the assumptions underlying, and the purposes served by, sex-based

classifications."[25] She attacked the fundamental premise of the law's differential treatment of men and women—typically rationalized as reflecting "natural" differences between the sexes—that had historically contributed to women's subordination and their confined "place" in a man's world.

In challenging sex-based classifications across the board, Ginsburg attacked laws on many different subjects including those like alimony or survivor benefits that appeared to favor women. She opposed laws barring women from working as bartenders or serving on juries as well as those preventing men from receiving alimony. As historian Linda Kerber demonstrated in her work *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998), the law denied women equality not only where they sought equal benefits but also where they sought equal obligations like jury service. The Supreme Court first recognized women's right to equal treatment under the Fourteenth Amendment in *Reed v. Reed* (1971) when it struck down a state law that created a preference for men to serve as administrators of estates. The Court refused to accept the gender stereotype that women were not capable of financial management. Using *Reed* as a baseline, Ginsburg then encouraged the Court to adopt a heightened level of scrutiny for reviewing distinctions on the basis of sex. In *Craig v. Boren* (1976) the Justices adopted a form of intensive review though not as rigorous as that used for distinctions on the basis of race. Twenty years later, when Ginsburg herself was on the Court, she wrote an opinion for the majority in the case of *United States v. Virginia* (1996) that seemed to apply an even stricter standard of scrutiny in striking down Virginia Military Institute's male-only admission policy.

The essays in *Feminist Legal History* both build upon and challenge this basic history to expand our understanding of women and the law. The authors pick up where the classic story of

women's legal history leaves off, adding new events, providing new details, and suggesting alternative explanations for the traditional historical narrative. The stories told here are detailed and contextualized. By patiently fleshing out the specifics of legal events, the essays avoid oversimplification and provide opportunities to challenge existing generalizations about women, their treatment under the law, and traditional narratives of legal history.

Contradictions in Legalizing Gender

Part I of *Feminist Legal History* focuses on the law's effect on women. It begins with an examination of the uneven ways in which the law has responded to women's assertions of social power and demands for control over their own lives. The chapters in this section display the complex ways in which law recognized women's rights and the contradictory responses to women's claims to autonomy and power. This ebb and flow of women's empowerment contrasts with the conventional understanding of incremental, but linear, progress toward the eradication of barriers to women's empowerment. The historical inquiries offered in this book disclose a more complex and variegated relationship between women, law, and society—marked not by steady progress, but by a variety of contradictions, inconsistencies, and tensions.

The opening chapters of this section show women using the law to achieve agency and control of their circumstances. These chapters show that during times when it was assumed that women did not have access to the courts, women were in fact able to achieve limited power and recognition of their legal rights. This came at a time when it was procedurally difficult for women to access the courts because laws of coverture denied women standing to sue as a plaintiff, prohibited women on juries, and often denied women the opportunity to testify as

witnesses. The research here suggests that early judicial recognition of women's autonomy was based upon an assertion of gender difference. Difference and women's need for special protection was a basis for awarding privileges and benefits. Chapters by Professors Chused and Schlanger illustrate how women's perceived difference was the basis for granting legal rights or control over their circumstances. The view of women as different underlies Richard Chused's essay on the women's temperance movement in Ohio in 1873. Women considered themselves morally distinctive when they sat in bars calling for an end to consumption of alcohol and expressed reluctance to enter the male-defined sphere of the courts. Chused's work shows, however, that when women were forced into the courts after injunctions seeking the end of their demonstrations were sought they organized to use the forums to their advantage and achieved a measure of social change. Margo Schlanger reveals how late nineteenth-century cultural assumptions about the fragile and emotional nature of women enhanced their tort recoveries for personal injuries in transportation accidents. In contrast to much of the conventional wisdom holding that women were erased from the standards of tort law by being subsumed into the male category of "reasonable man," Schlanger's work shows that courts treated gender as an important factor in assessing appropriate standards of care. They took women's experiences and capabilities into account in a way that was frequently, though not uniformly, friendly to women and their needs.

These advances for women were unparallel with other developments in the law. While obtaining benefits in some areas, women were denied rights in others. While courts empowered women through grants of agency in tort cases as Schlanger discusses, they also denied women's claims to equal employment as lawyers in *Bradwell*. Leti Volpp's chapter shows the inconsistent application of gendered power when race was a dominant force. She explores the intersection of

race and gender in marriage by narrating stories of the way immigration laws functioned through the first third of the twentieth century to exile women citizens from the United States upon their marriage to non-citizens. The history of dependent citizenship and marital exile shows how notions of incapacity were foundational to racial and gendered disenfranchisement from formal citizenship. Such notions of incapacity, reflected in laws of coverture and race-based exclusion, were deeply connected to "true womanhood" ideals which were assumed to be unattainable by Asian women. In exploring the historical practices of exclusion from the nation, Volpp offers some broader lessons about the gendered and racialized nature of American citizenship.

This inconsistent response to the needs of women continued through the second half of the twentieth century and into the present moment. Cases still arise in which gender serves as a legally significant basis upon which to deny women rights and autonomy. The remaining chapters of part I take up themes about difference as subordination by focusing on stories about the military and abortion. During the 1970s the staunch conservative advocate Phyllis Schlafly infused these two issues into the debate over constitutional sex equality during the battle to obtain ratification of the Equal Rights Amendment. Schlafly turned the debate over constitutionally-guaranteed equality into emotionally-charged arguments about abortion and mandated military service. Jill Hasday and Melissa Murray take up the issue of women and the military. Hasday explores how military service by women has been a lightening rod in the debate over gender equality. Women are still excluded from military registration, draft eligibility, and some combat positions. This record of women's legal status in the military, Hasday asserts, provides important counterevidence of the prevalent assumption of formal sex equality in the law. Yet she shows how many how extrajudicial actors—such as Congress, the executive branch, the public, and the military itself—have changed their views to be more supportive of women's

role in the military. Extrajudicial transformations have shifted the norms that shape the constitutional equal protection and rendered the Supreme Court's constitutional interpretations denying equality in the military less plausible over time.

One consequence of women's exclusion from equal opportunity in the military is explored by Melissa Murray in her chapter on the GI Bill after World War II. The bill is often seen as one of the most successful laws of the modern age that offered returning World War II veterans an unprecedented array of educational and economic opportunities. Murray complicates this inherited narrative by showing the gendered impact of the bill. She argues that the bill was part of the New Deal's gendered legacy that was explicitly structured to facilitate the wage-earning capabilities of returning male veterans. This structure further entrenched the understanding of men as wage-earners and women as their home-bound dependents. The resurrection of the GI Bill following the Iraqi War renews the concern over the gendered consequences of these laws.

Maya Manian takes the discussion about using difference theory to deny rights to women up to the present day by focusing attention on the Supreme Court's decision on abortion in *Gonzales v. Carhart* (2007). In *Carhart* the Court upheld restrictions on partial birth abortions citing women's emotional frailty and inability to appreciate the future emotional harm they might suffer from as a result of abortion. Viewing women as in need of protection, the Court denied women access to medical procedures. The Court used perceptions about gender differences and the weakness of women to deviate from the usual rule supporting a patient's right to make informed health care decisions. In these cases of abortion and the military, the court resurrected coverture-like assumptions about women's inherent inferiority and need for

protection without reference to the intervening cases affirming gender equality or the historical examples of difference as a basis for empowerment.

Taken together the chapters in this part show the spotty legal pattern affirming women's agency sprinkled throughout the case law over two hundred years. The early women's history was not as constrained as the conventional narrative suggests. Glimmers of empowerment shine through in areas like marriage, tort, and temperance. Nor is the recent past as empowering as many suppose with continued restraints on women's right to control key aspects of their personhood such as medical care and employment. In these cases we see the law operating as a barrier working to block women's access to social and legal rights.

Women's Transformation of the Law

The second part of the book explores how feminists were sometimes able to remake existing legal norms and transform the law itself. The careful examinations of women's engagement with the law show how women used their own experience to transform gendered legal norms. At times they marshaled feminist theory to remake the law. Women's legal activism altered traditional legal concepts and re-conceptualized basic notions of fairness and justice. This transformation shows that feminists understood law as more than just a fence to knock down. Law was not just a barrier to equality but also a tool that could be remade to incorporate the reality of gender.

The section begins with an essay by Tracy Thomas on Elizabeth Cady Stanton and her use of the law to develop the notion of a legal class of gender. The notion of an identifiable social group of *women* was a categorization that became crucial to the establishment of modern

notions of equality jurisprudence under the law. Stanton used the law of coverture and domestic relations to illustrate the commonalities among women due to sex despite their different classes, races, and religions. The establishment of a concept of group identity provided a baseline for her subsequent work on legal reform and forged a critical component of modern sex discrimination law.

Essays that follow, by Gwen Jordan, Felice Batlan, and Mae Quinn, reveal how women changed the legal process itself in order to accommodate their visions of legal norms. Women at the turn of the twentieth century expanded legal advocacy into work for social causes using lawyers to represent the concerns of communities and advocate for social change. This new type of lawyering based upon women's experiences in the community expanded the types of problems redressed by the courts beyond the private law economic concerns of contract and property. Gwen Jordan traces the development of legal aid in Chicago. She focuses on the efforts of the Protective Agency for Women and Children, founded in 1886 to assist working women with their legal harms. She shows how the daily practice of the agency radicalized the activists and quickly transformed their core mission into an effort to force the legal system to recognize and redress the gendered harms suffered by women and girls. These efforts to use the law to secure justice for the gendered crimes against women endured constant and often overwhelming opposition.

Felice Batlan adds a new and important gloss to the history of legal aid bureaus. She challenges the existing narrative of male-dominated societies by making the radical claim that the concept of organized free legal aid for the poor grew out of women's work. Batlan shows how the sphere of legal aid was deeply feminized from the 1860s through 1910 in organizations in New York City, Chicago, and Philadelphia. The claims of women clients against employers

and husbands dominated the legal aid work handled primarily by elite and middle-class women. Like Jordan, Batlan concludes that the women's strategic activities were broadly embraced and established a paradigm for cause lawyering and the proliferation of legal aid societies in the twentieth century.

The need to alter the legal process to match social realities also was seen in the courts as Mae Quinn explores in her essay on Judge Anna Moscowitz Kross and the auxiliary case workers she helped to train and organize. Quinn examines how Kross sought to rethink the role and goals of criminal courts expanding their boundaries to permit community involvement in their operations in part through the use of female volunteer case workers and probation officers. She suggests that today's criminal justice reformers might take notice of Kross's judicial innovations that relied on private funding and citizen involvement in criminal court operations while also noting the potential dangers of such an approach.

The remaining essays in part II show how women continued this transformative effect to change the law itself. Essays by Professors Dodd, Baker, and Boris document three instances in which women altered the terms and abstract rights embodied in the law. Women advocates reconceptualized the actionable harms to include injuries more common to women. Guided by feminist understandings of women's experience, advocates worked to alter the very terms of the law itself to force it to include the gendered realities of women.

Lynda Dodd details the petitioning efforts of Alice Paul and the National Woman's Party in early twentieth-century efforts to pass the Nineteenth Amendment guaranteeing women the right to vote. Dodd explores how Paul's passionate political leadership style utilized more aggressive demonstrations and media measures outside standard judicial and legislative avenues in order to more effectively achieve legal reform. These efforts were the crucial steps that pushed

a fifty-year-old idea to completion and enshrined a concept of gender equality in the U.S. Constitution. Carrie Baker's essay on the establishment of sexual harassment as an actionable claim also portrays the external and internal processes required to achieve legal change. Baker details the diverse group of plaintiffs, political groups, lawyers, and law professors who helped codify a common employment experience of women into a new cause of action. Creating law where previously there was none, women infused feminist theory and practical gendered experience into legal action. Eileen Boris's essay takes the recognition of women's transformative power of the law up to the present day. She details the evolution of women's equal pay claims and the Supreme Court's use of procedure to limit their impact. The transformation came with the first legislative act of Barak Obama's presidency when he signed into law the Fair Pay Act giving women sufficient time to bring pay discrimination claims. However Boris illustrates the limitations of this change which fails to take account of class and race issues intertwined with equal pay that impact homecare workers and other women in traditionally female jobs.

Together the chapters in Part II demonstrate the way in which women have changed the law. Their efforts to "feminize" the law were important to incorporating gendered experiences into the legal norms. Women, often acting intentionally and reliant upon feminist theorizing of women's experience under the law, worked to transform the law to make it more responsive to their realities.

Feminist Legal Thought

An appreciation for feminist legal theorizing is vital to the historical analyses featured in this collection of essays. The authors in this book adopt a feminist lens through which to interpret and analyze past events. They are particularly attuned to the ways in which women have been denied power, equality, and self-determination. Before delving into the historical details contained in the following chapters, it is important to get a sense of the feminist legal theory driving these writings and the women advocates of the past.

There is significant disagreement among feminists as to what "feminism" is or what it should be. The term "feminist" itself first appeared in common parlance in the United States around 1913 and was used to describe an emerging women's social movement expanding beyond the contours of the suffrage issue.[26] The precepts of feminism, however, existed well before this time as evidenced by the philosophies and approaches of the earlier "woman's movement." Modern definitions include dry explanations of feminism as a "theory of political, economic, and social equality of the sexes," as well as more activist and transformative definitions of feminism as "sharing an impulse to increase the power, equality, and autonomy of women in their families, communities, and/or society."[27] At its core, feminism is based upon a concern for women combined with an opposition to their subordinate status in society.

Feminist legal theory, as an intellectual movement, emerged in law schools in the 1970s at a time when women began entering the academy in significant numbers. Feminist theorists share a core belief in the subjugation of women and the need for change. Feminist legal theory is premised upon the belief that the law has been instrumental in women's subordination in society. Feminist legal scholars start with the assumption that law's treatment of women has not been fair or equal, and they are suspicious of legal standards. Feminist jurisprudence seeks first to explain the ways in which the law has played a role in creating discrimination against women. The

inquiry describes the nature and extent of discrimination and then asks how and why women continue to occupy a subordinate position. Feminist theory then moves pragmatically to seek effective strategies to change women's status by reconceptualizing the law. Within this broader umbrella of feminist legal theorizing, legal scholars have commonly identified four distinct schools of thought: liberal, difference, dominance, and post-modern [28] Each of these types of feminist thinking differs in its identification of the legal mechanism that causes women's subordination and in the type of legal change needed to eradicate gender discrimination.

Liberal or equality feminist thinking tends to emphasize the sameness of women to men. Equality theory is based on the premise that there are no legally relevant differences between men and women. Equality theory views the individual woman as a rational, responsible agent, who is able to control and maintain equality through her own actions and choices, if permitted. Liberal legal theorists are thus committed to allowing individuals to be free to choose their own style of life in the economic, political, and personal spheres. Liberal feminism seeks the removal of barriers and laws that treat women differently than men and demand equal access to public and private rights. Drawing from Aristotle's theory of justice, equality is defined as the equal treatment of women who are similarly situated to men. Liberal equality theory has dominated the law, both in advocacy and reasoned support of judicial decisions, by providing a seemingly objective and easy equation by which courts evaluate claims of gender inequality. For example the Supreme Court's test for assessing equal protection violations under the Fourteenth Amendment is whether women are "similarly situated" to men. This theory of liberal feminism was advanced by nineteenth-century suffrage advocates like Elizabeth Cady Stanton and Susan B. Anthony who sought the removal of legal barriers that denied women the right to vote based on the natural equality of men and women. Many second-wave feminists of the 1970s echoed

these liberal equality theories in their renewed demand for an Equal Rights Amendment, which would have enshrined in the U.S. Constitution the guarantee against denial or abridgment of rights on account of sex.

In contrast to liberal feminism's focus on gender similarities, difference feminism tends to highlight the fundamental cultural—and sometimes biological—differences between women's and men's experiences of their bodies and their relations with others. Difference feminism underscore the limitations of equality analysis and its inability to "to take into account real sex differences between women and men, to recognize that gender is a social construct, to acknowledge differences among women, particularly with regard to race, and to take into account the gendered dimensions of legal and social institutions."[29] Legally relevant differences include those that are biological, such as pregnancy, or those that are socially constructed, such as primary childcare responsibilities. Difference feminism argues for legal accommodation of the realities of women's gendered lives in a way that does not reinforce women's unequal and inferior status.[30] Feminists operating under these precepts might seek special legal treatment for women's differences or they might critique facially neutral laws that affect women and men disparately. Difference theorists tend to recommend laws that ease the burdens that gendered expectations place on people, usually to the detriment of women. They also criticize the legal culture's failure to adequately recognize or compensate women's gender-specific injuries, such as domestic violence, sexual harassment, or date rape.[31]

Cultural feminism, sometimes affiliated with difference feminism, elevates the identifiable gender differences of relation and maternity to a level of celebration. Feminists who lean in this direction often focus on how "women's 'different voice'--with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could

find greater expression in the law."[32] Modern cultural feminist theory as articulated in the mid-1980s based its belief in women's relational nature on findings found in scholarly texts such as Carol Gilligan's *In a Different Voice* (1982). Gilligan draws on her psychological research of stages of moral development experienced by boys and girls to argue against the notion that women should be encouraged to act and think more like men. She opposed undervaluing girls' relational approach to resolving moral dilemmas utilizing an ethic of care as compared to boys' approach to resolving dilemmas based on the abstract logic of rules. Cultural feminists see in Gilligan's work support for their elevation and idealization of women's culture. Cultural feminism refuses to concede to male standards of behavior and values by seeking out and valuing women's own voices and experiences. To promote and enhance women's cultural difference from men, they often celebrate women's maternal role and other traditional activities associated with women. Cultural feminism's celebration of women's separate culture and values has been well integrated into American popular culture and taken up by many contemporary women as a way to resolve essential dilemmas in their personal lives in ways that liberal feminism often seems to evade rather than resolve. Most scholars as well as non-scholarly activists appear to combine aspects of both cultural and liberal feminism into their general outlook on women. But clashes between the two somewhat opposing ideas have led to complex legal scenarios.

The tension between the sameness/difference debate is illustrated in the classic women's legal history case of *Equal Employment Opportunity Commission v. Sears*.[33] In *Sears*, the government challenged the absence of women in high paying commission sales jobs at the chain of stores. Sears argued that female employees lacked interest in these commission sales because they involved products they did not like, required weekend work hours, and involved aggressive

sales tactics. The court accepted expert evidence that women were differently situated with respect to job preferences and thus could be treated unequally by Sears' commission and promotion policies. The company's expert, feminist historian Dr. Rosalind Rosenberg, testified that women dislike high pressure sales, prefer working regular hours during the day when children are in school, and seek personal identification through relationships rather than employment.[34] The judge rejected contrary evidence offered by plaintiff's expert, another feminist historian, Dr. Alice Kessler-Harris. She opined that when given the opportunity women, like the symbolic "Rosie the Riveter" of World War II, embraced high-volume, hard work requiring assertive behavior.[35] Feminists watched with dismay while two seemingly "pro-woman" perspectives pitted feminist historians and legal practitioners against one another.

While liberal and difference feminism dueled in the *Sears* case, legal feminists scholars from the dominance school of thought opted out of this conundrum altogether by relocating the problem away from women or the law's treatment of them and toward challenges to basic notions of power as historically enshrined in the law itself. Dominance theorists view the legal system as a mechanism for the perpetuation of male dominance. This systemic dominance denies women their agency and autonomy, and deprives them of their ability to actively control their own lives and circumstances. Dominance theory depicts women as victims of patriarchal oppression and, therefore, in need of systemic change in legal norms. The most notable proponent of the dominance theory for the last twenty-five years has been law professor Catharine MacKinnon. Sexuality is central to MacKinnon's dominance account.[36] She argues that women's sexuality is socially constructed by male dominance and that women's subordination results primarily from the sexual dominance of women by men. Dominance theorists recommend retreating from scrutiny of individual laws and social constraints, moving toward reform of the entirety of the

law and its use as a mechanism for women's dominance and subordination. MacKinnon applied her theory to advocate legal change in areas highlighted by sexual dominance—rape, sexual harassment, and pornography. MacKinnon's work with Andrea Dworkin on anti-pornography laws attacked one of the causes of male dominance—men's social construction of women's sexuality.[37] They initially met with some success at the local government level, helping to enacted anti-pornography ordinances in Indianapolis and Minneapolis, but the laws were subsequently overturned by the courts as unconstitutional restraints on protected free speech.[38]

A crucial insight that dominance theorists contributed to feminist considerations of the law is the lack of objectivity and inherent maleness of the law. Feminists identified legal norms as definitionally male, infused with male bias, and historically created by and for men. As Catharine MacKinnon asserted in her 1984 essay, *Difference and Dominance: On Sex Discrimination*, the law uses men as the measure of all legal rights.

> Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.

The intellectual roots of dominance theory came principally from discourses outside of the law, including the fields of women's studies, women's history, social history, and feminist

scholarship in sociology, anthropology, psychology, and literary criticism. Another major influence was the Critical Legal Theory movement of the 1980s. Theorists associated with this school expanded upon the radical critique of the indeterminacy of the law. They demonstrated the ability of the law to vary based on the distinguishing facts of each case called into question the objective abstraction of the rule of law. And they revealed the extent to which social and political bias and context rather than rules are the determinative factors in judicial decisionmaking. Given these inherent problems with the law itself, some feminist critical legal scholars began to view legal reform itself as futile. They opted out of efforts to use the law as an avenue of feminist change and instead focused on social and political action. Other feminist law practitioners, activists, and scholars continued in their efforts to change the law, armed with a greater understanding of the extent of the hurdles in their path as a consequence of the work produced by critical legal theorists.

Alongside and fueling the rise of critical legal studies, postmodern feminist theory emerged in the mid-1980s as a vibrant new academic school of thought that would prove influential to many disciplines key to the study of women and gender—though its reception among feminist legal scholars has been uneven. Like dominance theorists, postmodern legal feminists radically challenge the idea of an objective rule of law by revealing its underlying political functions. But unlike dominance theory whose focus remains on the experiences of women set in opposition to men as a class of oppressors, postmodern theory questions the very classifications of "women" and "men." Postmodernists tend to question not only gender norms that aim to dictate women's role in society but the foundational idea that gender is a natural expression of an authentically and inherently sexed body. Rejecting a focus on women's experiences per se, these theorists aim to analyze and call attention to a seemingly infinite

spectrum of ways of performing and embodying gender. For Judith Butler, a key theorist in this field, there is no essential truth to women's experience or to gender as a social reality. Rather there are many complex, inter-related, and internally contradictory performances of gender emerging from political power struggles that are ongoing and unavoidable. Following Michel Foucault, many postmodern feminists view power as rooted in *discourse* (politicized systems of meaning which include the law). According to this notion of power, the gendered self is neither an agent nor a victim of power but a product of a field of gendered power relations which are, at times, expressed and produced juridically. Postmodern feminist theorists attempt to intervene strategically in the field of power by exploiting and exposing the inevitable contradictions in gendered (as in all) discourse.[39]

There has been significant opposition to postmodern feminist theory from all quarters of social science but particularly as it applies in law. The concern is that a disbelief in foundational truths about women, gender relations, and the nature of justice undermines the stark realities of advocacy to end the discrimination and subordination that women experience. Many feminists working within and outside of the academy to achieve political and legal justice for women feel strongly that, in the absence of an acceptance of women as more than merely an illusory product of discourse, political change to improve women's status, particularly legal change, becomes more difficult to conceptualize and work toward.[40]

Despite these pragmatic concerns about postmodern feminist legal theorizing of gender, the anti-essentialist critique that lies at the heart of this theory has been taken up by many different kinds of feminist scholars with profound implications for feminist theorizing of law. Honed most effectively within the body of work produced by womanists, feminists of color, and queer theorists publishing in the 1980s and 1990s—and bracketing some of the more abstract

postmodern concerns regarding gender as an effect of power—anti-essentialist feminist theorizing of women's experience dismisses the claims of any one set of theories to explain or describe patriarchal oppression as much as it objects to the tendencies of liberal theories to reduce all women to one image of womanhood. Anti-essentialist feminist writings have mounted powerful challenges to an assumption embedded in much of liberal feminist theorizing that there is one universal or essential woman's voice and reject theories that reduce all women to one uniform group. These scholars like Kimberlé Crenshaw, Angela Harris, and Patricia Cain criticized the work of previous feminist scholars and activists for basing their conclusions on the experiences of white, middle class, heterosexual women. Their premise is that the lived experiences of women differ depending upon such factors as race, class, ethnicity, and sexual orientation—none of which can be separated out from women's experience of gender. Given this complexity, they reject the goal of devising one overarching feminist strategy and instead recommend considering legal policies from the perspective of multiple groups of women with multiple allegiances and identities. Like postmodern theorists more generally, and lending complexity to feminist legal analysis, anti-essentialist theorizing of women's experience rejects the idea that gender issues as expressed by and experienced in the law can or should be considered in isolation from other axes of identity within which all women actually experience discrimination and oppression.

This summary of feminist legal thought attempts to outline the major trends in feminist theorizing that currently thrive and hold particular salience for present-day scholarship on women and the law. But it does not account for the specificity of historical social movements within feminist activism. The "second-wave" alone boasted myriad forms of feminist organizing including Marxist-feminist (having a great deal of influence on the rising ranks of academic

feminists and social historians of women in particular) and radical feminist (the Redstockings, for instance, bringing a new emphasis on consciousness-raising among women and attention to women's personal experiences under patriarchy as a political condition) who were active and vocal during the 1970s. Nor does it detail the intense conversations among womanists, feminists of color, third-world feminists, lesbian feminists and queer feminists whose scholarship and activism came to the fore in the 1980s.

Even within the more dominant current strains of feminist theorizing, there is much contention and confusion existing between these various forms of feminist thinking about the law and about women's historical status. Yet this book maintains that although the debates among feminist legal theorists, women's historians, and legal historians are grounded in sharp differences over how to conceptualize power, gender identity, and women's experience under the law, there is a core methodology that feminists employ to analyze social and legal problems. "Thinking like a feminist" means thinking in a gender conscious way.[41] It is relevant to the analysis whether the actors are male or female. Feminist legal theory "proceeds from the assumption that gender is important in our everyday lives and recognizes that being a man or a woman is a central feature of our lives."[42] To paraphrase a feminist adage popular since the 1970s, "the personal is *still* political." Feminists validate women's individual personal experiences as important political and legal issues and this context is critical to their legal reasoning. The storytelling of personal narratives allows for the consciousness-raising by which individuals derive collective significance or meaning from their experiences. Feminists working in the field of law commonly use the legal method of *deconstruction* to take apart the law as it appears on its face to look beyond the seeming objective legal rules in order to consider the deeper structures and values underlying those rules. Through deconstruction feminists can reveal

gendered assumptions and biases that contribute to the formulation of the rules of law. Feminists see that the underlying assumptions are infused with male bias. They work to "unmask the patriarchy." Laws have historically been made by and for men. The law has been, and in many cases continues to be, based upon male norms, with legal rights being defined in male terms. Feminists see how male privilege and assumptions that fed the development of the law have been reinforced by the patriarchal structure of religion and society. A basic agreement on these underlying precepts permits us to engage each other in the analysis of women's real-life and historic experiences with the law. Rather than bemoaning the differences among us, these differences can been seen as providing a productive and creative space for expansive thinking about the law and women.

The full spectrum of feminist legal theory is evident within the chapters of this book. The authors and the women in their stories adopt differing strands of feminist legal theory to advance their claims. As Elizabeth Cady Stanton remarked in 1869: "[I]t matters not whether women and men are like or unlike, woman has the same right as man has to choose her own place." She explained: "We started on [the equality] ground twenty years ago, because we thought, from that standpoint, we could draw the strongest arguments for woman's enfranchisement. And there we stood, firmly entrenched until we saw that stronger arguments could be drawn from a difference in sex, in mind as well as body."[43] As Stanton's frank admission reveals, a strong strain of pragmatism has long run through feminist legal advocacy as has an awareness of the need to utilize a wide range of feminist theories in order to persuade a policymaker or court of the merits of a claim. If there is any common link uniting the contributors and editors of this volume it is a commitment to what might be called pragmatic feminism. Pragmatic feminism claims that "rather than looking to one approach to solve all problems in all circumstances, we should regard

the variety of approaches available today as a set of tools to be used when appropriate."[44] It may also be true that feminist legal theory is more holistic and integrated than the compartmentalization of thought suggests. The essays in this book support such a conclusion that feminism is more nuanced and complex than any one theory, and that each theory advances part of the larger reform of women's rights.

* * *

The essays collected in *Feminist Legal History* explore the interaction between women and the law and offer a kind of applied legal history of feminist legal studies. Like other feminist legal theory projects the works contained here are concerned with the personal, private experiences of women, and are "born of the world, responding to real lives and needs, reflecting the law and society tradition of reasoning from the world to law."[45] This kind of applied legal scholarship seeks to make history directly relevant to modern legal discourse. "In essence, what we need is a useable past," as Professor Alfred Brophy has suggested, calling for "a history of law—of court decisions, statutes, and the practices of law enforcement—that is both accurate and relevant to understanding questions we have today, giving rise to optimism that once people have facts they will think the same."[46] *Feminist Legal History* attempts to provide this type of useable past with the hope it will impact future changes in the law that are responsive to the lived realities of women.

NOTES

1. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQ. 823 (2005).

2. Linda K. Kerber & Jane Sherron De Hart, *Gender and the New Women's History*, WOMEN'S AMERICA: REFOCUSING THE PAST 2-3 (6th ed. 2004) (adopting framework of GERDA LERNER, THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY 145-59 (1979)).

3. See JOAN HOFF, LAW, GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (2d ed. 1994); KERMIT HALL, PAUL FINKELMAN & JAMES W. ELY, JR., EDS., AMERICAN LEGAL HISTORY (3d ed. 2005); KERBER & DE HART, *supra;* see also MARY BECKER, CYNTHIA GRANT BOWMAN, MORRISON TORREY, EDS., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 1-51 (2d ed. 2001).

4. William Blackstone, *Commentaries*, Book 1, chp. 15, Of Husband and Wife (1765).

5. NANCY COTT, THE BONDS OF WOMANHOOD (1982); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966).

6. The work on coverture and the MWPAs provided some of the first work in the field of women's legal history. See ELIZABETH B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861 (1987); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 1860-1930, 82 GEO. L.J. 2127 (1995); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 1850-1880, 103 YALE L.J. 1073 (1994); Richard Chused, *Married Women's Property Law*, 1800-1850, 71 GEO. L.J. 1359 (1983); Peggy A. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts*, 24 BUFF. L. REV. 683 (1975).

7. 88 U.S. 162 (1874).

8. ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 (1998); MARJORIE SPRUILL WHEELER, NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES (1993); AILEEN KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920 (1981).

9. ELLEN CAROL DUBOIS, FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869 (1978); ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE:

THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959); Tracy A. Thomas, "Women's Suffrage," 5 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 251(David S. Tanehaus, ed. 2008).

10. See VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 37, 45 (1998); Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580 (2009); J. Women's Legal History Biography Project, http://www.law.stanford.edu/library/womenslegalhistory/profiles.html (last accessed January 8, 2010).

11. 83 U.S. (16 Wall.) 130 (1873).

12. JILL NORGREN, BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT (2007); Ex Parte Lockwood, 154 U.S. 116 (1984); Jordan, 619-20.

13. NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS (1996); Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, in TRANSFORMATION OF THE LAW II (forthcoming).

14. 208 U.S. 412 (1908).

15. The Brandeis Brief in full is available at The University of Louisville Law Library, http://www.law.louisville.edu/library/collections/brandeis/node/235; See also Justice Ruth Bader Ginsburg, Muller v. Oregon: *One Hundred Years Later*, 45 WILLAMETTE L. REV. 359 (2009).

16. 243 U.S. 426 (1917).

17. 261 U.S. 525 (1923).

18. 300 U.S. 379 (1931).

19. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 55-71 (2002); LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1967-1973 (1997); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 308-14 (1992).

20. 381 U.S. 479 (1965); see People v. Sanger, 118 N.E. 637 (N.Y. 1918); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law In The Twentieth Century*, 100 MICH. L. REV. 2062, 2122 (2002); ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 88, 231 (1992).

21. 410 U.S. 113 (1973).

22. 550 U.S. 124, 127 S.Ct. 1610 (2007).

23. The "sex" amendment was introduced to laughter by Howard Smith, a conservative Virginia representative who was a known opponent of the civil rights legislation, and thought by many accounts to be a means of obstructing the bill's passage. Smith, however, was a staunch supporter of the Equal Rights Amendment. See CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988); Cindy Deitch, *Gender, Race, and Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act,* 7 GENDER & SOCIETY 183 (1993); Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1991).

24. General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII); Gedulig v. Aiello, 417 U.S. 484 (1974) (14th Amendment).

25. Justice Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s,* 1989 U. CHI. LEGAL. F. 16.

26. NANCY COTT, THE GROUNDING OF MODERN FEMINISM 3, 13-14 (1987). For a thorough discussion of the emergence in popular parlance of the term "feminist" in 1913, as well as the implications of the retroactive use of this term to describe nineteenth-century suffragists and other activists, in the United States as well as Europe, see Karen Offen, "Defining Feminism: A Comparative Historical Approach," in 14 *Signs: Journal of Women in Culture and Society* 119-57 (1988) and the dialogue that ensued between Offen and other scholars on this topic in multiple essays included in 15 *Signs: Journal of Women in Culture and Society* 1 (Autumn 1989).

27. Merriam-Webster Dictionary; LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 367 (2002).

28. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 12 (2d ed. 2006); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 36-39 (2006); Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90).

29. KAREN J. MASCHKE, ED., FEMINIST LEGAL THEORIES ix (1997).

30. Martha Fineman, *Feminist Theory in Law: The Difference it Makes*, 2 COLUMBIA J. OF GENDER & LAW 171 (1992); Martha Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); see MASCHKE, ix-x.

31. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

32. CHAMMALLAS, 27.

33. 629 F. Supp. 1277 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

34. Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, *reprinted in Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company*, 11 SIGNS 757 (1986).

35. Written Testimony of Alice Kessler-Harris, *reprinted in Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company*, 11 SIGNS 767 (1986); Alice Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, *in* UNEQUAL SISTERS: A MULTI-CULTURAL READER IN U.S. WOMEN'S HISTORY 545 (Vicki L. Ruiz & Ellen Carol DuBois, eds.) (2d ed. 1994).

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38. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

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41. LEVIT & VERCHICK, 45-53; CHAMALLAS, 12.

42. CHAMALLAS, xix.

43. Elizabeth Cady Stanton, "Miss Becker on the Difference in Sex," REVOLUTION, Sept. 24, 1868.

44. MINDA, 146 (quoting law professor Mary Becker).

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46. Alfred L. Brophy, *Considering Reparations in the Dred Scott Case*, *in* DRED SCOTT AT 150 (Christopher Bracey, David Konig & Paul Finkelman, forthcoming 2009).