

Rethinking Feminist Judging[†]

MICHAEL E. SOLIMINE*

SUSAN E. WHEATLEY**

INTRODUCTION

For nearly two centuries no woman served on the United States Supreme Court and very few served on either the lower federal courts or state courts. Today, Sandra Day O'Connor and Ruth Bader Ginsburg are members of the U.S. Supreme Court, and burgeoning numbers of female judges have joined them on other federal and state courts.¹ Contributing to this change, the Clinton administration is appointing unprecedented numbers of women to the lower federal courts.²

The increasing number of female judges, not coincidentally, has been accompanied by questions about whether female judges and female judging are distinctive in some way, and by calls for further increasing the number of female judges. Some writers assert that female judges approach cases and make decisions in ways that their male colleagues are unable or unwilling to do. According to these writers, most if not all female judges engage in contextual analysis, consider a broad range of factors, and tie their decisions less to arbitrary rules than to flexible standards.³ Drawing on these empirical

[†] © 1995 by Michael E. Solimine & Susan E. Wheatley. All Rights Reserved.

* Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. J.D., 1981, Northwestern University; B.A., 1978, Wright State University.

** Partner, Taft, Stettinius & Hollister, Cincinnati, Ohio. J.D., 1986, Northwestern University; B.A., 1982, Yale University. For their helpful comments on an earlier draft, we thank Jean Braucher, Richard Myers, and Joseph Tomain, none of whom necessarily agrees with the views expressed here.

1. As of 1993, approximately 91 women were serving as federal district or appellate judges—approximately 11% of the total number of federal judges. As of the same date, approximately 35 women were serving on state supreme courts—approximately 10% of that total. MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 893-94 (1994); see also Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 *JUDICATURE* 68, 69 (1994) (reporting that as of 1994, 14% of all federal judges were women).

2. In the first year of his administration, President Clinton nominated 11 females and 17 males to federal judgeships. This percentage of women (nearly 40%) is far higher than the proportion appointed by preceding administrations. Henry J. Reske, *A Report Card on Clinton's Judges*, A.B.A. J., Apr. 1994, at 16, 16; see also Goldman & Saronson, *supra* note 1, at 73; Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 *SMU L. REV.* 1861, 1866 (1994); Paul M. Barrett, *More Minorities, Women Named to U.S. Courts*, *WALL ST. J.*, Dec. 23, 1993, at B1.

During the 1992 Presidential campaign, then-candidate Clinton called for more female judges to be appointed, and added that "public confidence in our federal judiciary is furthered by the presence of more women lawyers and minority lawyers on the bench, and the judicial system and the country benefit from having judges who are excellent lawyers with diverse perspectives." *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57, 57. In contrast, then-President Bush defended his record of appointing female federal judges, and added that the judiciary should be "open to qualified candidates from all different backgrounds—regardless of race or gender." *Id.* Bush insisted that, under his administration, he would make sure that "qualified women and minority candidates get fair consideration for the bench." *Id.*

3. E.g., Sharon E. Rush, *Feminist Judging: An Introductory Essay*, 2 *S. CAL. REV. L. & WOMEN'S STUD.* 609, 627-32 (1993). The leading work in this genre is Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986). In her article, however, Professor Sherry does not appear to argue that most or all female judges decide cases in a distinctive manner. See *infra* part I.B.

assumptions, other writers take the next step by affirmatively calling for more women to be appointed or elected to the bench. They argue that the allegedly distinctive nature of female judging, coupled with the different life experiences of women, will lead to improved judicial decision-making⁴ and to a more diverse and representative judiciary.⁵

Most of these arguments appear, to date, virtually without critical comment. There has been some effort to critique the first assumption—that most or all female judges actually decide cases in a different manner from male judges.⁶ There has been little critical effort, however, to engage systematically the normative call for more female judges.⁷ This Article will undertake to fill these gaps. The general position is that both the empirical assumptions underlying feminist judging and the call for more female judges are problematic.

Part I summarizes feminist jurisprudence and the literature on feminist judging.⁸ Parts II and III analyze the empirical and normative underpinnings, respectively, of the call for more female judges. Part II first summarizes the existing social science evidence testing the asserted differences between female and male judges. It then reviews and compares the voting records and opinions of Justices Ruth Bader Ginsburg and Sandra Day O'Connor during

4. See Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. J. 159, 161 (1986) (“[W]e can expect that an influx of women into the judiciary will result in a corresponding decrease in gender-biased decision making.”); Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1243 (1993) [hereinafter Tobias, *Closing the Gender Gap*] (“[N]umerous female judges could beneficially affect substantive decisionmaking, especially in areas such as discrimination.”); Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483-84 (1991) (asserting that the differing backgrounds of female judges could improve the judicial system).

5. See Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 177 (1990) (“The appointment of more female judges could correspondingly help persuade fellow citizens of the neutrality of the justice system.”); Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 197 (1993) (arguing that the attributes of female judges would improve the judicial system); cf. A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1034-35 (1993) (“An unrepresentative judiciary, however, affects both the public’s perception of the judiciary and the judiciary’s perception of the public.”).

Commentators in other countries have debated these issues as well. See, e.g., Sean Cooney, *Gender and Judicial Selection: Should There Be More Women on the Courts?*, 19 MELBOURNE U. L. REV. 20 (1993).

6. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 407-08 (1990); sources discussed *infra* part II.

7. E.g., Reske, *supra* note 2, at 16 (quoting Thomas Jipping of the Free Congress Foundation, who argues that it is “inappropriate to either choose or evaluate the judiciary based on quotas. The only thing some of these groups care about is race and gender.”); Jeffrey Yacker, *Overboard on Balance*, N.Y. TIMES, Apr. 17, 1994, at E16 (arguing, in a letter to the editor, that it is “self-righteous, symbolic political correctness” to insist that retiring Justice Harry Blackmun be replaced by a woman or a non-white because society should “neither judge nor confuse the intellectual validity of political and ideological ideas with the genetic backgrounds of those who marshal their cause”).

8. We deliberately employ the word “feminist” rather than “feminine” in this regard. Most of the literature on point agrees that the former term carries more ideological weight than the latter, and that it assumes a political agenda with which not all women may agree. See Sherry, *supra* note 3, at 583 n.172. It is precisely the call for *feminist* judging, which we think fairly characterizes much of the literature advocating more female judges, that bears the brunt of most of our criticism. Nonetheless, our primary concern is with the call for more female judges, regardless of whether they purport to have a “feminist” agenda. See *infra* part I.B.

the Supreme Court's 1993 Term. Part II concludes with a review of the literature on how female judges describe their own judicial role.

Part III presents a qualitative critique of the assertion that there should be more female judges, concluding that the arguments advanced to support this position are not well-founded. Putting aside assumptions of whether all or most female judges do in fact act differently than their male counterparts (a matter considered in Part II), the normative call fails for three reasons. First, it incorrectly assumes that feminist jurisprudence possesses a coherent and consistent core of principles which can aid or direct any judge in deciding a broad range of particular cases. Second, the assumption that female judges can (and should) decide cases in a feminist way collides with the still-viable strands of legal thought which condemn stereotypes and demand impartial judging. Third, the advocacy for female judges, standing alone, is inconsistent with important aspects of democratic theory. Such advocacy assumes that judges are representatives of a constituency, a concept of some controversy. Even if the judicial representation model is accepted, in whole or in part, feminist judges by definition do not represent one-half of the population. By any measure, feminist judges fit very uneasily in most conceptions of the proper role of the judicial system.⁹

Part IV presents several important caveats to this analysis. Specifically, this Part explains that our views respecting feminist judges are not hostile to supporting the development and application of a feminine, or feminist, jurisprudence, or indeed to supporting a call for more female judges. Establishing and meeting a goal of having more women on the bench is justified to remedy the past discrimination against women in consideration for judgeships, and to generally enrich the perspectives of the judiciary as a whole. The Conclusion reiterates this latter position.

I. FEMINIST JURISPRUDENCE AND FEMINIST JUDGING

This Part briefly summarizes what most commentators consider to be the current strands of feminist jurisprudential thought. It then turns in more detail to the portion of that thought concerning female judges.

A. The Three Waves of Feminism and Feminist Jurisprudence

Feminist jurisprudence has received considerable continuing attention in academic literature, and for our purposes only a skeletal outline is necessary.¹⁰ The meaning of "feminism" itself is elusive. Katharine Bartlett has defined feminism as "a self-consciously critical stance toward the existing

9. We confine ourselves to a critique of feminist judging, though we acknowledge that much of our analysis might call into question similar assertions that there should be more judges of particular racial, religious, and/or political subgroups. Our empirical and normative critique might play out differently for other groups, and thus we hesitate to paint with broader brushes than those already used.

10. More in-depth discussions of this point can be found in two recently published casebooks. See KATHARINE T. BARTLETT, *GENDER AND LAW* (1993); BECKER ET AL., *supra* note 1.

order with respect to the various ways it affects different women 'as women.'"¹¹ More recently, Helen Haste has identified as a common characteristic of all forms of feminism

the challenge of authentic self-definition. . . . [T]he agenda is to claim an authentic voice for women in their own destiny. Not only an authentic voice, but an authentic view: to perceive the world through women's eyes rather than holding a mirror up to men; to see the self as one experiences it rather than as it is experienced through men's perceptions.¹²

Although the specific content of "feminism" may differ, the basic point is that women must *self-consciously* define themselves and their world.

Feminist jurisprudence, not surprisingly, confronts the same issues: Are men and women different, and if so, what effect does, or should, that difference have on the law? In general terms, three waves have characterized the evolution of feminist jurisprudential thought. In the first wave, the primary goal of feminist jurisprudence advocates was to equalize governmental treatment of gender. The primary tool to achieve that goal was litigation.¹³ The second wave, occurring in the 1980's, was heavily influenced by Carol Gilligan's book, *In a Different Voice*.¹⁴ This work focused more on the discriminatory impact of even putatively gender-neutral practices. Gilligan's work inspired a third wave of debate, continuing to the present day, between advocates of equality and essentialness. That debate asks: To what extent are feminist goals (whatever those might be) advanced or retarded by insisting on legal equality, and to what extent are they advanced or retarded by recognizing that, at least in some areas, women are different enough from men that legal and policy recognition of the difference is necessary?¹⁵ This third wave of feminist thinking continues to struggle with the issue of whether men and women are essentially different, and if so, how.¹⁶ The fundamental and unresolvable issue of "difference" necessarily underlies all discussions of feminist jurisprudence and judging.

B. Feminist Judging

In her scholarship, Professor Suzanna Sherry has set the framework for discussion of the nature of judging by women. Her leading work is primarily an analysis of the opinions of Justice Sandra Day O'Connor.¹⁷ In that essay,

11. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833 (1990). For other definitions, see Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 413-15 (1994); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 115-16; and Wendy Kaminer, *Feminism's Identity Crisis*, ATLANTIC, Oct. 1993, at 51, 51.

12. HELEN HASTE, *THE SEXUAL METAPHOR* 189 (1994).

13. See BECKER ET AL., *supra* note 1, at 21-24.

14. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

15. See generally BECKER ET AL., *supra* note 1, at 50-52; Gayle Binion, *The Nature of Feminist Jurisprudence*, 77 JUDICATURE 140 (1993).

16. See Jane E. Larson, *Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252 (1993).

17. See Sherry, *supra* note 3.

Sherry argues that "modern men and women, in general, have distinctly different perspectives on the world,"¹⁸ with the masculine perspective embodied in pluralist liberal theory, and the feminine vision resembling classical republican theory.¹⁹ These differences, she contends, are empirically grounded. Drawing heavily on the work of Carol Gilligan and others,²⁰ Sherry suggests that "while women emphasize connection, subjectivity, and responsibility, men emphasize autonomy, objectivity, and rights."²¹

Likewise, Sherry argues, these differences (if they exist) would presumably be reflected in a feminine jurisprudence by a female judge. Reviewing Justice O'Connor's voting record and opinions from the time of her appointment to the date of Sherry's writing (1981-1986), Sherry argues that her thesis is, on the whole, borne out. In particular, she states that community values inform Justice O'Connor's application of the Establishment Clause of the First Amendment and that, accordingly, she has advanced a test which focuses on whether the state endorsement of religion communicates a message that nonbelievers are excluded from the polity.²² Similarly, in various discrimination cases, Justice O'Connor has emphasized the effect that the law being challenged has on membership in the community.²³ Sherry adds that it is "not surprising" that Justice O'Connor has been particularly receptive to claims of gender discrimination.²⁴

According to Sherry, a community perspective helps to explain Justice O'Connor's generally pro-prosecution perspective in criminal cases. In such cases, Justice O'Connor emphasizes the state's interest in removing a threat to the community.²⁵ Accordingly, she emphasizes responsible decision-making by the jury in a criminal case, and not simply the adjudication of the criminal defendant's rights. One example of this point is Justice O'Connor's concurring opinion in *Caldwell v. Mississippi*,²⁶ a case in which the majority overturned a death sentence on the ground that the prosecutor impaired the defendant's rights by informing the jury that any death sentence it imposed would be reviewed on appeal. Justice O'Connor emphasized the way in which the prosecutor's statement improperly "diminished the jury's sense of

18. *Id.* at 543.

19. *Id.* at 543-44.

20. *Id.* at 580-91. A good review of Gilligan's work, reactions to it, and subsequent research appears in Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1550-54 (1993).

21. Sherry, *supra* note 3, at 582. Professor Sherry also spends considerable time linking feminine aspirations with civic republicanism. *Id.* at 550-79. A critique of this linkage is beyond the scope of this Article. For a useful analysis, see Judith A. Baer, *Nasty Law or Nice Ladies? Jurisprudence, Feminism, and Gender Difference*, 11 WOMEN & POL. 1, 25-26 (1991). See generally Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994) (discussing the differences and similarities between civic republicanism and feminist arguments).

22. Sherry, *supra* note 3, at 593-95 (discussing, inter alia, Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

23. *Id.* at 595-601.

24. *Id.* at 595.

25. *Id.* at 604.

26. 472 U.S. 320, 341 (1985) (O'Connor, J., concurring).

responsibility.²⁷ In general, Sherry argues that Justice O'Connor favors contextual standards rather than bright-line rules,²⁸ a view that fits comfortably within Sherry's notion of a feminine jurisprudence.

Overall, Sherry's article is descriptive. Indeed, she goes to great lengths to downplay any prescriptive implications of her conclusions. Thus, she criticizes the notion that one has to personally experience an aspect of law before contributing to it,²⁹ and she eschews the word "feminist." In her view, that word carries with it a political agenda that may not be shared by all women.³⁰ With these caveats, Sherry seemingly diminishes her study's implications for judicial selection, the primary focus of this Article. Indeed, her remarks can be read as suggesting that there should not and need not be a concerted effort to appoint more female judges, since some male, and yet not all female, jurists can employ feminine jurisprudence.

In this leading work, Sherry seems to carefully avoid a normative call for the appointment of more women to the bench. Nevertheless, Professor Sherry did take that prescriptive step in another, less-noticed article, *The Gender of Judges*.³¹ In that article, Sherry offered three ways in which female judges (or at least most female judges) differ from male judges (or at least most male judges). First, the mere presence of female judges in the judicial system has an educative function that should raise gender consciousness. Second, the participation of female judges should create more sympathetic treatment of gender issues. Third, female judges have a different perspective than male jurists.³² The first two differences, she says, should eventually diminish as gender discrimination erodes. The last difference, however, is not a product of gender discrimination and therefore justifies the inclusion of more female judges, even as (or if) gender discrimination withers.³³

Though Sherry remains somewhat elusive on that final point, other writers have explicitly called for more female judges. As previously noted,³⁴ some of these writers rely primarily on the disproportionately lower number of women currently on the bench. Other writers take a harder line, arguing that the notion of judicial independence and impartiality is culturally driven, and that more female judges are needed to correct or compensate for the male bias hidden in such notions.³⁵ Similarly, still others argue that only female judges can advance feminist aspirations, and that women should do so openly once they become jurists.³⁶

27. *Id.* at 342.

28. Sherry, *supra* note 3, at 605-08.

29. *Id.* at 581 n.169.

30. *Id.* at 583 n.172.

31. Sherry, *supra* note 4, at 169.

32. *Id.*

33. *See id.* at 159, 169.

34. *See sources cited supra* notes 4-5.

35. *E.g.*, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

36. *E.g.*, Rush, *supra* note 3, at 621-29. For a futurist scenario in which female judges explicitly advance feminist causes, see *Green and Feminist Scenario*, in *ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020*, at 47, 48, 53 (James A. Dator & Sharon J. Rodgers eds., 1991).

The post-Sherry scholarship thus embodies both empirical and normative concepts, and they are difficult to disentangle. Once it is assumed that (most) female judges act in ways different from (most) male judges, the implications for the judicial selection process are difficult to escape—women should be selected as judges *because* they are women. Likewise, a call for a gender-sensitive judicial selection process invariably assumes that gender distinctions exist among the behaviors of male and female judges. The following Parts of this Article consider these assumptions and conclusions.

II. EMPIRICAL PERSPECTIVES

The roles of women in our legal system have been subject to increasing empirical scrutiny. Thus, the view that women bring a distinctive voice to such tasks as lawyering,³⁷ teaching law,³⁸ and sitting as jurors,³⁹ has been explored elsewhere. This Part considers the distinctive role or roles that women may play as judges.⁴⁰

A. Social Science Perspectives on Female Judges

The increasing number of female judges has elicited an increasing number of studies by social scientists on the differences, if any, made by women jurists. One recent summary of the research concludes that, on the whole, the

Sometimes one finds caveats to the bold calls for more feminist judging. *E.g.*, Rush, *supra* note 3, at 610 n.2 (“I do not mean to suggest that feminists have a lock on non-traditional legal decisionmaking, that all women are feminist judges, or that only women can be feminists.”). We find this statement to be unconvincing, since the writer makes little effort to reconcile this self-imposed limitation with her explicit advocacy of the need for more female judges. As we hope to demonstrate below, this limitation, if taken seriously, considerably undermines the theory behind the call for more female, and feminist, judges.

Louis Menand has made a similar point with regard to the possible contradictions in accentuating the positive aspects of a diverse judiciary while ignoring the negative:

In this most inclusive sense, multiculturalism means something like the following: a person’s race, gender, or sexual orientation should be noticed when the difference noticing it would make is a positive one, but it should not be noticed when the difference noticing it would make is negative.

Many people feel, for example, that it is a good thing for one of the justices on the United States Supreme Court (assuming he or she is qualified in every other respect) to be African American, on grounds that an African American is likely, for obvious historical reasons, to have a special perspective on constitutional issues, and it is important for that perspective to be represented on the Court. But if someone were to refer negatively to an opinion written by this justice as “an African-American perspective on the law,” most people would consider the remark offensive, since it would mean noticing race in a way that implies an accusation of bias—even though “bias” was, in a sense, exactly what that justice was expected to contribute to the Court’s deliberations.

Louis Menand, *The Culture Wars*, N.Y. REV. BOOKS, Oct. 6, 1994, at 16, 16 (reviewing RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA’S FUTURE* (1994)).

37. See BARTLETT, *supra* note 10, at 623-36; BECKER ET AL., *supra* note 1, at 856-60.

38. See BECKER ET AL., *supra* note 1, at 828-41.

39. See BARTLETT, *supra* note 10, at 640-44.

40. Previous discussions of women as judges appear in BARTLETT, *supra* note 10, at 636-39, and BECKER ET AL., *supra* note 1, at 893-96.

studies "offer little empirical support for the theory that women judges will speak in a unique feminine voice."⁴¹ Our review of the research leads to the same conclusion. In general, empirical studies show only slight, if any, differences between the overall voting behavior of male and female judges along the dimension of gender.

Studies from the 1970's and early 1980's support this conclusion. Studies of the sentencing behavior of state trial judges,⁴² state supreme court justices,⁴³ and appointees to the United States courts of appeals⁴⁴ in gender discrimination cases, show only slight differences between the decisions of men and women on the bench. On the other hand, some studies of state supreme court justices⁴⁵ and federal district judges⁴⁶ seem to show, respectively, that female judges tend to be more liberal than their male counterparts, and that they tend to consider personal liberty and minority policy cases differently.⁴⁷ Even the latter study, however, found that gender comparisons had little explanatory value for different voting behavior over a broad range of cases, and the authors speculate that the judicial selection process or the socialization experience of a legal education tended to weed out those with nontraditional views of judging.⁴⁸

The most ambitious recent empirical studies were conducted by political scientists Sue Davis, Susan Haire, and Donald R. Songer.⁴⁹ Each hypothesized that if Professor Sherry's characterization of Justice O'Connor's jurisprudence were correct, and if it held true for all or most judges, then those judges would vote differently than their male colleagues in at least three areas. First, women would be more conservative in obscenity cases (as sexual material oppresses women and damages the "moral fiber of the community"). Second, women jurists would be no more liberal or conservative than their male colleagues in search and seizure cases (another assault against the community). They would, however, be more liberal in employment discrimination cases (due to an emphasis on rights that are interdependent, such as full

41. Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126, 128 (1993).

42. E.g., John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 320 (1981); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, SOC. SCI. J., Apr. 1977, at 77, 86.

43. E.g., Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 150 (1986).

44. E.g., Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328, 335 (1986); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 171-72 (1983).

45. E.g., David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987).

46. E.g., Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985).

47. Ironically, in Walker and Barrow's study, the male judges were found to be more liberal than the females, contrary to expectations. *Id.* at 608-09.

48. *Id.* at 614-15. All of these studies were hampered by the relatively small number of women and cases under study (a consequence, of course, of the relatively small number of women judges).

49. See Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994).

membership in the community).⁵⁰ To test these hypotheses, Davis, Haire, and Songer examined a sample of published opinions from 1981 to 1990, involving the twenty-two female judges who sat on the United States courts of appeals during that period.⁵¹

The results of these studies supported only the last of the three hypotheses. Contrary to the predictions of the researchers, the study revealed that the gender of judges had no statistically significant explanatory value regarding the judges' votes in obscenity and search and seizure cases. In contrast, other factors such as the perceived ideology of the judge (operationalized by the party of the President who appointed her) better predicted votes in these areas. Only in the third area, employment discrimination cases, did the gender of the judge appear to make a difference.⁵² Interestingly, this difference was not restricted to gender cases, but included all forms of discrimination.⁵³

The authors concluded that their studies provide only limited support for extending the Sherry hypothesis outside the realm of employment discrimination. The authors further concluded that the failure of the studies to demonstrate gender differences across subject areas might be explained by the different voice hypothesis being "simply wrong—that women's purported tendency to approach and resolve moral and legal problems differently from men does not exist."⁵⁴ Instead, women judges might be more likely to favor victims of discrimination because they have themselves been subject to gender discrimination (or empathize more with those who have), rather than because they employ a different mode of legal analysis.⁵⁵ Yet another explanation is that the statistical measures of voting behavior may not readily capture different voice reasoning.⁵⁶

The study by Davis and her fellow researchers is not the last word, of course. As more federal and state female judges sit for longer periods of time, undoubtedly researchers will subject their work product to further statistical scrutiny. At the present time, however, the literature does not support the hypothesis that female judges systematically decide cases differently than their male colleagues.⁵⁷ Rather, to the extent that there are systematic differences

50. Songer et al., *supra* note 49, at 429.

51. Davis et al., *supra* note 49, at 131; Songer et al., *supra* note 49, at 429-30.

52. Davis et al., *supra* note 49, at 132; Songer et al., *supra* note 49, at 432-36.

53. Songer et al., *supra* note 49, at 435-36.

54. Davis et al., *supra* note 49, at 133 (footnote omitted).

55. *Id.* at 133; Songer et al., *supra* note 49, at 437.

56. Davis et al., *supra* note 49, at 133.

57. We do not believe that another recent study by David Allen and Diane Wall contradicts our conclusions. See David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156 (1993). Allen and Wall studied the 59 women who served on 41 state supreme courts between 1922 and 1992. Taking a sample of cases in which those women participated, they sought to measure a different voice by examining dissenting behavior. *Id.* at 159-61. They found that these dissents usually evinced a liberal or pro-woman position. *Id.* at 161-65. To their credit, the authors acknowledge several limits on the inferences one can draw from their study. As they observe, there are difficulties in using only *dissenting* opinions to study a different voice, and the political party of the judges involved also plays a large role in explaining the results. *Id.* at 165.

in voting behavior between male and female judges, other variables such as political party affiliation play a much stronger role.

These conclusions are subject to some qualification. The empirical studies analyze only the judges' votes and decisions. At the trial court level, which absorbs vast numbers of judges, decision-making is only a part of what judges do. Judges also manage cases, deadlines, and discovery disputes; assist or exhort the parties to settle; and decide essentially unreviewable issues such as entitlement to emergency relief and matters of attorney conduct. Because of the difficulty in measurement, very few empirical studies grapple with these issues.⁵⁸ Thus, the studies of voting behavior illuminate only one small portion of what judges do. Perhaps further study would reveal subtle differences between the way female and male judges discharge these less visible duties.⁵⁹ If so, the empirical basis for the view that gender differences exist would stand on firmer ground.

B. Justices Ginsburg and O'Connor in the 1993 Term

Professor Sherry contends that Justice O'Connor, to some extent, speaks in a different judicial voice than her male colleagues on the Supreme Court. Sherry especially notes the contrast between O'Connor's opinions in certain cases and those of then-Justice William Rehnquist, her putative ideologically conservative ally.⁶⁰ Whether Sherry, then or now, properly characterizes O'Connor's jurisprudence is a matter of some debate.⁶¹ To the extent that empirical evidence can inform the debate, the weight of authority does not support Sherry's position. One study by Sue Davis of Justice O'Connor's votes from the 1981 Term through the 1991 Term concludes that "the findings presented here do very little to support the assertion that O'Connor's decision making is distinct by virtue of her gender."⁶² While O'Connor is, overall, somewhat more liberal than Rehnquist, the differences "may have simply been due to ideological or legal factors unrelated to her sex."⁶³ Still another study asserts that O'Connor does not represent most women's attitudes (as measured by public opinion polls regarding specific issues) any more than her male colleagues do.⁶⁴

58. See Herbert Jacob, *Decision Making in Trial Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 213 (John B. Gates & Charles A. Johnson eds., 1991) (reviewing the empirical literature).

59. For one example of such a study, albeit one that does not focus on possible gender differences, see Peter D. Blanck et al., *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 *IOWA L. REV.* 653 (1990).

60. Sherry, *supra* note 3, at 592.

61. E.g., POSNER, *supra* note 6, at 407 n.23 ("With each year's batch of O'Connor's opinions, the feminist interpretation of her judicial philosophy becomes less and less plausible.")

62. Sue Davis, *The Voice of Sandra Day O'Connor*, 77 *JUDICATURE* 134, 139 (1993).

63. *Id.*

64. Thomas R. Marshall, *Symbolic Versus Policy Representation on the U.S. Supreme Court*, 55 *J. POL.* 140, 145-46 (1993); see also Thomas R. Marshall, *Law, Public Opinion, and Gender Rights* 8 (Apr. 1994) (paper presented at the annual meeting of the Midwest Political Science Association, on file with the *Indiana Law Journal*).

Even if one acknowledges that Justice O'Connor does not consistently speak in a different judicial voice, perhaps other female judges do. The presence of Justice Ruth Bader Ginsburg on the United States Supreme Court for the 1993 Term provides an excellent opportunity to revisit this issue. One of the problems plaguing past empirical research is the difficulty in ascribing difference to gender as opposed to other factors. Studying female judges who sit on a multimember court mitigates this problem. In such a situation, the judges all hear the same cases so one cannot attribute differences in voting to such factors as disparate fact situations.⁶⁵

For these reasons, we consider the voting and opinion-writing behavior of Justices O'Connor and Ginsburg for the 1993 Term.⁶⁶ Justice Ginsburg largely lived up to the predictions that she would be a "centrist" Justice with moderate, liberal leanings.⁶⁷ While Justice Ginsburg voted with Justice O'Connor in approximately seventy percent of the cases decided during the Term,⁶⁸ the two female Justices disagreed, in whole or in part, in a number of the Term's significant decisions—including those involving aider and abettor liability under the federal securities laws,⁶⁹ the scope of bargaining units subject to the National Labor Relations Act,⁷⁰ the commercial speech rights of certified public accountants,⁷¹ the ability of states to tax multinational enterprises,⁷² the reach of the Takings Clause,⁷³ the limits on state court awards of punitive damages,⁷⁴ and the coverage of vote dilution claims

65. Walker & Barrow, *supra* note 46, at 600.

66. There is considerable literature evaluating the supposed "freshman effect" on the voting behavior of Supreme Court Justices. The freshman effect hypothesizes that until new Justices are fully acclimated to their position, they will defer to their colleagues. The evidence of such an effect is decidedly mixed. *See, e.g.,* Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 AM. J. POL. SCI. 1142 (1993) (providing possible explanations why some Justices experience freshman effects while others do not); Christopher E. Smith & Scott P. Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 173-77 (1993) (discussing the freshman effect and assessing Justice Thomas' voting behavior against the common indicators used to gauge the effect). In our view, Justice Ginsburg's first Term does not provide compelling evidence for or against the "freshman effect." *Cf.* Christopher E. Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 80 (1994) (arguing that Justice Ginsburg's assertiveness in writing opinions and lack of any adjustment period indicate no freshman effect in her case).

67. *See* Jesse H. Choper, *Benchmarks*, A.B.A. J., Nov. 1993, at 78, 79-80; *Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24; *see also* Peter Huber & Richard Taranto, *Ruth Bader Ginsburg, a Judge's Judge*, WALL ST. J., June 15, 1993, at A18.

68. *See The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 373 (1994) (analyzing the Justices' voting behavior through a statistical table).

69. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994) (O'Connor, J., in majority; Ginsburg, J., joined dissent).

70. *NLRB v. Health Care & Retirement Corp. of Am.*, 114 S. Ct. 1778 (1994) (O'Connor, J., in majority; Ginsburg, J., wrote dissenting opinion).

71. *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994) (Ginsburg, J., wrote majority opinion; O'Connor, J., concurring in part and dissenting in part).

72. *Barclays Bank PLC v. Franchise Tax Bd.*, 114 S. Ct. 2268 (1994) (Ginsburg, J., wrote majority opinion; O'Connor, J., concurring in part and dissenting in part).

73. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (O'Connor, J., in majority; Ginsburg, J., joined dissent).

74. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994) (O'Connor, J., in majority; Ginsburg, J., wrote dissenting opinion).

under the Voting Rights Act.⁷⁵ In all of these cases, Justices O'Connor and Ginsburg took what most would regard as the conservative and liberal positions, respectively. Perhaps this superficially suggests that ideology, rather than gender, motivates their decision-making.

Of particular interest are the cases involving what Sherry described as feminine, communitarian interests. On that score, the evidence of whether O'Connor and Ginsburg share a feminine jurisprudential vision is mixed. The Term's only Establishment Clause case was *Board of Education of Kiryas Joel Village School District v. Grumet*,⁷⁶ in which a majority of the Justices found that a public school district created especially for a particular religious group violated the Clause. Justice Ginsburg silently joined Justice Souter's plurality opinion, but Justice O'Connor wrote an opinion concurring in part and concurring in the judgment. In that opinion, O'Connor once again expressed her dissatisfaction with the Court's three-part test for evaluating cases under the Establishment Clause.⁷⁷ Among other things, she argued that the test was overly rigid and was not conducive to dealing with different facts raised by the myriad of cases.⁷⁸ Reiterating her position (as noted by Sherry) that the appropriate test is whether the government has made "adherence to religion relevant to a person's standing in the political community,"⁷⁹ she found that the test had been violated since the law in question, "rather than being a general accommodation, singles out a particular religious group for favorable treatment."⁸⁰ Justice Ginsburg joined a brief concurring opinion by Justice Stevens, in which he argued that the state law established, "rather than merely accommodat[ed], religion."⁸¹ From these opinions, it is difficult to determine whether Justice Ginsburg disagrees with Justice O'Connor's position on the Establishment Clause.⁸²

75. *Holder v. Hall*, 114 S. Ct. 2581 (1994) (O'Connor, J., joined plurality; Ginsburg, J., wrote dissenting opinion).

76. 114 S. Ct. 2481 (1994).

77. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

78. *Kiryas*, 114 S. Ct. at 2499-500 (O'Connor, J., concurring in part and concurring in the judgment).

79. *Id.* at 2497 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment)).

80. *Id.* at 2497-98.

81. *Id.* at 2495 (Stevens, J., concurring).

82. At first blush, Justice Stevens' concurring opinion may seem fairly innocuous. However, he took care to emphasize that, in his view, a religious sect was "segregating itself and preventing its children from associating with their neighbors," which "unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith." *Id.* These remarks seem to be similar to Justice Stevens' prior views in Free Exercise and Establishment Clause cases (as well as substantive due process cases) in which he has argued that the state can only seek to enforce secular, rather than religious, interests. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566-67 (1989) (Stevens, J., concurring in part and dissenting in part). See generally Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 64-66 (1991) (discussing cases in which Justice Stevens rejected various state interests as having a religious purpose and serving no secular purpose). In contrast, Justice O'Connor appears to take a less hostile view of purportedly nonsecular governmental purposes. See *Kiryas*, 114 S. Ct. at 2498 (O'Connor, J., concurring) ("The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools."); Myers, *supra*, at 41-42. If the approaches of Justices Stevens and O'Connor are distinct in this regard, the joinder of Justice Ginsburg in the Stevens (but not the O'Connor) concurrence in *Kiryas* suggests yet another divergence in O'Connor's and Ginsburg's jurisprudence.

Sherry also identified employment discrimination cases and those involving gender as candidates for different treatment by female judges. In these instances, the evidence of similar voices by O'Connor and Ginsburg is equivocal. They were in agreement in cases of particular concern to women, such as those involving the use of peremptory jury challenges solely on the basis of gender,⁸³ the application of civil RICO to pro-life demonstrators,⁸⁴ and the First Amendment rights of pro-life protestors.⁸⁵ Likewise, O'Connor authored the Court's opinion in the widely heralded *Harris v. Forklift Systems, Inc.*,⁸⁶ in which the Court held that a Title VII plaintiff alleging sexual harassment could make out a claim without evidence of concrete psychological harm. Instead, courts must consider the totality of the circumstances to determine if there was an "abusive work environment."⁸⁷ In a concurring opinion, Ginsburg expounded on these points, and recognized that it remained an "open question" whether gender classifications are suspect and thus subject to the strictest scrutiny under Equal Protection case law.⁸⁸

But the voices of the two female Justices in these gender and discrimination cases are not without nuances. In the peremptory challenge case, Ginsburg silently concurred, but O'Connor wrote a concurring opinion arguing that the result was not cost-free. She contended that the peremptory challenge "remains an important litigator's tool and a fundamental part of the process of selecting impartial juries," and that limits on its use gave her "pause."⁸⁹ She added that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case,"⁹⁰ and that in another case the person seeking to use that intuition might be a "battered wife."⁹¹ This concurrence hardly seems restricted to a communitarian perspective. Likewise, it is worth noting that both Justices silently concurred in the majority opinion in *Landgraf v. USI Film Products*,⁹² in which the Court held that certain provisions of the 1991 Civil Rights Act are not retroactive. This was a significant defeat for the civil rights plaintiffs' bar, and one which is incongruent with the thesis that feminist judges would favor discrimination plaintiffs.

One area of broad agreement between O'Connor and Ginsburg appears to be statutory construction. Feminist theory generally eschews rules in favor of standards,⁹³ and it would seem to follow that feminists would favor a flexible approach to statutory interpretation⁹⁴ rather than the strict textualism

83. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

84. See *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994).

85. See *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994).

86. 114 S. Ct. 367 (1993).

87. *Id.* at 370-71.

88. *Harris*, 114 S. Ct. at 372, 373 & n.* (Ginsburg, J., concurring).

89. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring).

90. *Id.* at 1432.

91. *Id.* at 1433.

92. 114 S. Ct. 1483 (1994).

93. See *supra* text accompanying note 28.

94. We stand by this statement, even though the renaissance of interest in statutory interpretation during the 1980's and 1990's seems largely a male enterprise (see, for example, William Eskridge,

followed by Justices Antonin Scalia and Clarence Thomas.⁹⁵ A review of the opinions drafted by Justice Ginsburg indicates that she is comfortably in the mainstream of the Court's statutory interpretation jurisprudence.⁹⁶ Her position seems quite similar to that of Justice O'Connor.⁹⁷

The 1993 Term's criminal law cases did not provide noteworthy opportunities to explore the influence of gender. There were several cases in which O'Connor diverged from Ginsburg's position in favor of the defendant,⁹⁸ but no great jurisprudential divide was revealed. Of greater interest was the Court's revisiting of the *Caldwell* case, described above.⁹⁹ In *Romano v. Oklahoma*,¹⁰⁰ the majority found that the *Caldwell* holding was not violated in a capital case in which the jury was told (contrary to state law) that the defendant had been sentenced to death in another case. Relying in part on Justice O'Connor's concurring opinion in *Caldwell*, the majority stated that the "jury was not affirmatively misled regarding its role in the sentencing process."¹⁰¹ Concurring in *Romano*, O'Connor further distinguished her *Caldwell* views by observing that the prosecutor's statement was permissible because the information given to the jury was accurate, even though it may have lessened the jury's sense of responsibility.¹⁰² Justice Ginsburg authored a dissenting opinion joined by three other Justices, in which she found no

Phillip Frickey, Richard Posner, etc.). We are unaware of any broad review of this topic from a feminist perspective. Compare Bartlett, *supra* note 11 (arguing for feminist legal methods as a means of achieving substantive feminist goals); and Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991) (arguing that the "feminine" voice can aid the legal representation process by allowing communication to remain tentative and exploratory) with Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66-69 (1992) (positing that standards-based decision-making better facilitates equality, the common good, and communication about why decisions come out in a particular way).

95. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J. L. & PUB. POL'Y 401, 401 (1994) (contending that only Justices Thomas and Kennedy follow Justice Scalia's approach).

96. See *Holder v. Hall*, 114 S. Ct. 2581, 2624 (1994) (Ginsburg, J., dissenting); *United States v. Granderson*, 114 S. Ct. 1259 (1994) (Ginsburg, J.); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993) (Ginsburg, J.); see also *Ratzlaff v. United States*, 114 S. Ct. 655, 662 & n.18 (1994) (Ginsburg, J.) (invoking the canon of construction that a resort to legislative history is improper when statutory text is clear).

97. For both Justices Ginsburg and O'Connor, the secondary citation of choice in statutory construction cases was Clark C. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (book review). See *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994) (O'Connor, J.); *Staples v. United States*, 114 S. Ct. 1793, 1806 (1994) (Ginsburg, O'Connor, JJ., concurring); *Granderson*, 114 S. Ct. at 1267 n.10 (Ginsburg, J.).

98. E.g., *McFarland v. Scott*, 114 S. Ct. 2568 (1994) (Ginsburg, J., in majority; O'Connor, J., concurring in part and dissenting in part); *Nichols v. United States*, 114 S. Ct. 1921 (1994) (O'Connor, J., in majority; Ginsburg, J., wrote dissenting opinion); *Ratzlaff*, 114 S. Ct. at 655 (Ginsburg, J., wrote majority opinion; O'Connor, J., joined dissent); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (Ginsburg, J., in majority; O'Connor, J., concurring in part and dissenting in part).

99. See *supra* text accompanying notes 26-27.

100. 114 S. Ct. 2004 (1994).

101. *Id.* at 2010.

102. *Romano*, 114 S. Ct. at 2013 (O'Connor, J., concurring).

meaningful distinctions from *Caldwell*.¹⁰³ *Caldwell*, then, does not seem to provide a vehicle to explore feminist criminal procedure.

To be sure, one must be cautious about drawing inferences about the comparative performance of any two Justices from just one Term of the Court. From this limited data, however, one can conclude that while there appear to be broad areas of agreement between Justices O'Connor and Ginsburg, the amount of divergence calls into question the notion of a feminist (or feminine) style of judging which would encompass all female jurists.

C. Female Judges on Judging

Another source of information regarding the behavior of judges is the jurists themselves. Writing by judges about the art of judging has a rich history in American legal literature,¹⁰⁴ and more recently female judges have contributed to the lore. If Sherry's thesis is correct, one might expect a defense of, or at least a description of, some form of feminist judging from women on the bench. In our view, the writing of women jurists does not meet this expectation. Rather, in virtually all instances female judges describe their roles in the traditional framework utilized by male jurists.¹⁰⁵

Several examples demonstrate this point. To begin, Justice O'Connor seems uncomfortable with Professor Sherry's description of her work.¹⁰⁶ O'Connor argues that such "gender differences currently cited are surprisingly similar to stereotypes from years past."¹⁰⁷ To the extent that such differences really exist, O'Connor concludes that "the different voices will teach each other."¹⁰⁸ In the same vein, at the ceremony during which President Clinton announced her nomination, then-Judge Ginsburg remarked on "the work of a good judge."¹⁰⁹ Invoking traditional icons such as Justice Holmes, as well as Chief Justice Rehnquist and Justice O'Connor, she opined that "a judge is bound to decide each case fairly in a court with the relevant facts and the applicable law even when the decision is not, as [Rehnquist] put it, what the home crowd wants."¹¹⁰ Other female judges have been even more blunt in forgoing a feminist judging model.¹¹¹

103. *Id.* at 2013-18 (Ginsburg, J., dissenting).

104. *See, e.g.*, BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); FRANK M. COFFIN, *THE WAYS OF A JUDGE* (1980); POSNER, *supra* note 6.

105. A good example of the literature (revisiting the writings of Cardozo), with citations to the writings of female judges, is Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965 (1993).

106. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991) ("One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues.") (footnote omitted).

107. *Id.*

108. *Id.* at 1557.

109. *Transcript of President's Announcement and Judge Ginsburg's Remarks*, *supra* note 67, at A24.

110. *Id.*; *see also* Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1188-98 (1992) (discussing collegial judging).

111. *See, e.g.*, Miriam G. Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39, 44 (1993) (federal district judge stating that gender plays no role in a particular judge's decisions); Mark Curriden, *A Jurist of First Impression*, NAT'L L.J., Sept. 6, 1993, at 1 (quoting a state supreme court justice as

These seemingly gender-neutral descriptions of judging might be dismissed on a number of grounds. Many of these female judges are older and may have received little, if any, formal exposure to modern feminist thinking, and such thinking has perhaps been expunged in the judicial selection and socialization process.¹¹² Female judges drawn from the more modern generation of female law students and lawyers may express different views. And perhaps these writers, consciously or not, were not truthfully describing their actual thought processes when they render decisions.¹¹³ It is possible that they either did not fully appreciate their own judicial philosophy, or were dissembling for the benefit of the audience.

We, however, are willing to take these writers at their word. Accordingly, there seems to be no great rush among those women who are judges to embrace feminist judging. Instead, the role they subscribe to seems to be the traditional one of a neutral, impartial decision-maker. To the extent that such a role is possible, perhaps these judges feel that it is a desirable and proper model, a matter the next Part of this Article explores.

From a variety of sources—statistical compilations of voting, comparisons of the opinions of two female Justices on the same Court, and descriptions of the judicial role—the empirical evidence does not support the assumption that women decide cases differently from men. This is not to say that Sherry's thesis is wrong or without value. Surely, with some judges in certain types of cases, it is analytically helpful to describe or justify decisions as an example of feminine judging. By the same token, the evidence, considered over many jurists and over a broad range of cases (complemented by their own writings on the subject), demonstrates that most female judges, in most cases, render decisions in ways that are not distinctive to their gender. If that is true, it considerably undermines the empirical grounding of the call for more women judges.

III. NORMATIVE PERSPECTIVES

The empirical evidence outlined above does not demonstrate that most or all women judges do, or will, render decisions in a distinctively feminine or feminist manner. Nonetheless, it is possible that women judges do render decisions or conduct their court's business in a manner that is different from male judges, even though that has not been empirically established. On the

saying, "I do not want to be known as the black judge or the woman judge, but a fair and hard-working judge."); *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138, 145 (1990) (female federal district judge remarking, "Do women look at fairness and justice differently? I don't think so.").

112. See Davis, *supra* note 49, at 133. Justice Ginsburg is a notable exception to this generalization. See BECKER ET AL., *supra* note 1, at 27, 30 (describing Ginsburg's role as an ACLU attorney challenging sex discrimination in the 1970's).

113. See Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

assumption that this might be the case, this Part considers the troubling normative implications raised by this prospect.

A. Coherence and the Feminist Model of Judging

Those advocating more female judges appear to assume that there is a stable body of feminist theory upon which such judges can and should draw. The assumption of advocates of gender-sensitive judicial selection—while rarely expressly articulated—is that feminist jurisprudence has clearly defined principles which a female judge can use to help her make decisions. If a judge can turn to a coherent version of feminism, that version will be a resource for, and perhaps a check upon, her conduct. The problem is that there is currently no such coherent version to justify the calls for more female judges.

To their credit, feminist legal theorists have not been shy about the internal divisions within feminist jurisprudence. To cite a few examples, some feminists argue for women's reproductive rights, while others suggest that a communitarian vision would permit the state to regulate abortions, at least to some degree.¹¹⁴ Some feminists argue that the government can and should regulate pornography, since it subjugates women and leads to violence against them, while others argue that First Amendment rights should control.¹¹⁵ Some feminists argue that alternative dispute resolution ("ADR") better serves women's abilities and interests rather than the zero-sum game of formal litigation, while others argue that women's rights are better protected by litigation because women often occupy weaker bargaining positions and thus may stand to lose in ADR.¹¹⁶ Undoubtedly, other issues could be mentioned. We do not wish to belabor the point, much less take a position on these controversies, but only wish to observe that a putatively feminist judge will receive ambiguous signals from her jurisprudence.

Putting such disputes to one side, it is still not clear how feminist theory will help judges make decisions in actual cases, apart from other legal tools already available to them. Professor Harold Koh has suggested that feminist theory supplies a powerful cognitive and critical dimension that is absent or undeveloped in much formal jurisprudential theory.¹¹⁷ Nonetheless, he contends that feminist theory has a limited constructive dimension. Thus, he asks: How do feminist legal concepts "meaningfully affect the day-to-day operation of, say, Rule 11 or a § 1404 transfer or a § 1292 interlocutory appeal?"¹¹⁸

114. See BECKER ET AL., *supra* note 1, at 408-14; see also Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858 (1993).

115. See BARTLETT, *supra* note 10, at 578-87; BECKER ET AL., *supra* note 1, at 313-52; Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993); Joan Kennedy Taylor, *Does Sexual Speech Harm Women? The Split Within Feminism*, 5 STAN. L. & POL'Y REV. 49 (1994).

116. *E.g.*, BARTLETT, *supra* note 10, at 535-38; BECKER ET AL., *supra* note 1, at 856-67.

117. Harold H. Koh, *Two Cheers for Feminist Procedure*, 61 U. CIN. L. REV. 1201, 1202 (1993).

118. *Id.* at 1205.

Drawing attention to these apparent inconsistencies on policy and the seeming lack of formal constructs might prove too much. Any legal theory is subject to some criticism of internal division and lack of practical application across many cases.¹¹⁹ On the other hand, Koh can be answered. For example, consider Federal Rule of Civil Procedure 11 (and its state counterparts), which sanctions frivolous conduct by attorneys.¹²⁰ In ruling on such a motion, a female jurist informed by feminist theory might well ask questions left out by traditional legal thought, such as those concerning the gender implications of the case, the resources available to the parties and their respective attorneys, whether one attorney was, purposefully or not, pushing the legal or factual envelope in the case, whether such actions should be encouraged, even if they did not create an actionable claim in the case at hand, and other issues concerning the real world of litigation.¹²¹ But feminist theory would not be particularly distinctive in asking many of these questions, as law and economics, critical legal studies, metaprocedure, and other schools of thought would ask similar questions.¹²²

This is not to say that feminist theory cannot speak specifically to procedural¹²³ or other issues seemingly free of gender implications. Nor does this Article suggest that there is not common ground among feminists of all stripes, or even that the value of consistency cannot itself be questioned.¹²⁴ But as of now, feminist legal theory is not sufficiently developed, consistent, or coherent to act as a resource for, or a check upon, a woman selected as a judge.

B. Feminist Judging, Classical Judging, and Stereotypes

Advocates for increasing the number of women on the bench seem to fall into two categories which, thus far, this Article has treated together. One school takes the hard line that female jurists should explicitly advance a feminist agenda of, among other things, suppressing pornography¹²⁵ or

119. Minow, *supra* note 11, at 134, n.63.

120. It is an understatement to observe that the 1983 revision to Rule 11 has generated enormous controversy and criticism, mostly from the plaintiffs' bar, which in part led to a revision to the Rule in 1993. For a brief overview of the enormous literature on these issues, see Carl Tobias, *Congress and the 1993 Civil Rules Proposals*, 148 F.R.D. 383 (1993).

121. See, e.g., Bartlett, *supra* note 11, at 836-67 (identifying legal methods distinctive to feminism: (1) asking the "women question" (that is, have gender issues been left out of consideration); (2) feminist practical reasoning; and (3) consciousness raising).

122. See Koh, *supra* note 117, at 1205-06; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989) (reviewing ROBERT M. COVER ET AL., *PROCEDURE* (1988)).

123. See Symposium, *Feminist Jurisprudence and Procedure*, 61 U. CIN. L. REV. 1139 (1993).

124. Minow, *supra* note 11, at 134-38; cf. Koh, *supra* note 117, at 1206-07 ("In raising all of these concerns, I am acutely aware that I could be accused first, of asking that feminist procedure be delivered up in a nicely wrapped box, and second, that I may be engaging in traditional male criticisms: formalistically demanding that values be operationalized into rules or that all internal inconsistencies of an emerging theory be eliminated.")

125. See, e.g., Rush, *supra* note 3, at 614-27.

upholding abortion rights.¹²⁶ These results are quite consistent with the goals usually attributed to the feminist agenda.¹²⁷ The other, more populous, school takes a softer line, apparently not calling for female judges to advance a specific agenda but arguing that they can and should bring a different form of legal reasoning to bear on legal controversies.¹²⁸ While the second school is far more palatable to the Authors, ultimately both are flawed: the first school clashes with the long-standing goal of impartial judging, while the second is based on the stereotypical assumption that only women can engage in feminist jurisprudence.

In the classical model of judging, jurists are neutral, impartial decision-makers. They render decisions by laying aside their personal and policy preferences and objectively applying legal principles to the facts of a particular case. This process will lead to a result which the judge applies no matter what she or he thinks of the result, of the law that required it, or of the anticipated reaction. This model has long-standing roots in our legal culture¹²⁹ and is reflected in the Code of Judicial Conduct,¹³⁰ among other things.

Many skeptics, particularly among academics, find this model to be quaint and ludicrous. For some, the notion of women jurists aggressively and openly pursuing a feminist agenda is apparently not beyond the pale.¹³¹ The model of an impartial judiciary remains potent, however. According to the Supreme Court, the Due Process Clause requires an impartial tribunal,¹³² and the Court has taken pains to emphasize that its legitimacy is grounded in the law, not in the Justices' policy preferences or in response to political pressures.¹³³ Judges themselves frequently state that they address most cases and issues in a principled manner, and argue that the notion of a politicized American judiciary is vastly overstated.¹³⁴ Indeed, even cynical academics

126. See, e.g., *id.* at 627-28.

127. E.g., Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1191-1208 (1994) (acknowledging that not all feminists, much less all women, would agree on *one* agenda, but nonetheless listing on the feminist agenda the following items: physical security, equal employment and education opportunities, family structures and welfare policies, reproductive freedom, and increased political representation).

128. See *supra* notes 4-5 and sources cited therein.

129. POSNER, *supra* note 6, at 4-23.

130. See MODEL CODE OF JUDICIAL CONDUCT Canons 1, 3 (1990).

131. Cf. BARTLETT, *supra* note 10, at 640 (suggesting that one reading of Resnik's article is that "more female judges will make a difference [perhaps] because female judges will be biased *in favor of women*") (emphasis in original); Resnik, *supra* note 35 (criticizing assumptions of impartiality). For further discussion of putatively impartial judging and its critics, see *infra* part IV.

132. E.g., Weiss v. United States, 114 S. Ct. 752, 761 (1994); cf. Litek v. United States, 114 S. Ct. 1147, 1158 (1994) (Kennedy, J., concurring) ("One of the very objects of Law is the impartiality of its judges in fact and appearance.").

133. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814-16 (1992) (plurality opinion).

134. See David M. Ebel, *So—What's Your Judicial Philosophy?*, 20 LITIGATION, Fall 1993, at 3; Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decision Making*, 1991 WIS. L. REV. 837; Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL ED. 307 (1987); Myron H. Bright, *Getting There: Do Philosophy and Oral Argument Influence Decisions?*, 77 A.B.A. J., Mar. 1991, at 68; cf. Callins v. Collins, 114 S. Ct. 1127, 1127 (1994) (mem.) (Scalia, J., concurring) (reasoning that the constitutionality of the death penalty

labor to create jurisprudential theories "to supply a new foundation for the favored decisions of the Court that will provide a more plausible basis for concluding that they are grounded in law, rightly understood."¹³⁵

These sentiments are not confined to the legal community. There is considerable social science evidence suggesting that ordinary citizens expect and desire the legal system to utilize adversarial procedures with neutral decision-makers.¹³⁶ Likewise, recent opinion polls support the Court's assumption that its public legitimacy is premised on its putatively principled decision-making.¹³⁷ And perhaps most pertinent for the matter at hand, a recent study found a preference for procedural fairness cutting across gender lines.¹³⁸

While this Article is not oblivious to the fact that the real world makes classical judging an aspiration but not always a reality,¹³⁹ that model should remain a goal. Perhaps in agreement, the second, softer school of gender-sensitive judicial selection does not call for partial judging. Rather, it holds that female judges can uniquely bring to bear the useful tools of compassion, preference for standards over rules, and a general understanding of gender issues. The problem with this school is the assumption that women, and only women, can possess or utilize these techniques. To the contrary, not all female judges engage in feminist theory; moreover, some male judges utilize the techniques often thought to be the province of female judges. The second school's assumption, then, is based on a stereotype.

Like judicial partiality, drawing lines based on stereotypical assumptions of human behavior has long been disfavored in the law. With regard to gender, the Court's equal protection jurisprudence stands as a good reference for this disfavor.¹⁴⁰ To the extent that feminist legal techniques can be uniquely operationalized, it seems doubtful that *all* female judges utilize them (or, for that matter, advance a feminist agenda).¹⁴¹ Likewise, *male* judges can and do apply feminist jurisprudential principles. Sue Davis compared the opinion-writing behavior of female judges on the Ninth Circuit Court of Appeals to

should be determined by constitutional text and not by the personal views of the Justices), *denying cert.* to 998 F.2d 269 (5th Cir. 1993); Marcia Coyle, *Breyer Charts Moderate Course to High Court*, NAT'L L.J., July 25, 1994, at A11 (reporting that during the discussion of capital punishment at his confirmation hearings, Judge Stephen Breyer stated that if a judge has personal views that run contrary to prevailing law, recusal is appropriate).

135. Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 138 (1994).

136. See, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

137. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

138. E. Allan Lind et al., . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269 (1994).

139. See *infra* part IV.

140. E.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

141. Cf. Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 141-42 (1987) (suggesting that female judicial appointees of President Reagan are more conservative than those of President Carter).

that of male jurists on the same court with similar background characteristics.¹⁴² Davis, like Sherry, focused on cases that raised equal protection, employment discrimination, and other issues that could potentially demonstrate a different judicial voice.¹⁴³ The potential was not realized. She concluded:

Do women judges speak in a different voice? Sometimes, some female judges do. But sometimes, some men judges also speak in that different voice. The results presented there do not provide empirical support for the theory that the presence of women judges will transform the very nature of the law.¹⁴⁴

Thus, the voices of female and male judges cannot be neatly categorized. In the words of Richard Posner, "for every Rehnquist [there is] a Brennan,"¹⁴⁵ or, one should add, for every Edith Jones¹⁴⁶ there is a Lewis Powell¹⁴⁷ or a Harry Blackmun.¹⁴⁸

Two other claims might be advanced to further qualify the second school as advocating for more female judges. The first argument is that not *all* female judges (or no male ones) will engage in feminist analysis. Rather, female judges are only *more likely* to utilize feminist methodology than their male counterparts.¹⁴⁹ The second argument is that consciously or not, few female judges will explicitly advance a feminist agenda. Instead, the likely impact made by female judges will be on the margins. More specifically, in deciding fact-sensitive legal issues, female judges may be more likely to inform their exercise of discretion by feminist methodology. This may be especially true at the trial level, where judges typically engage less in law development (as opposed to the approach taken by their appellate counterparts) and more on the application of settled legal principles to disparate fact situations.¹⁵⁰

These caveats seem to soften the position of partial, feminist judging with which this Article takes issue. Taken as such, these positions are examples of stereotypical thinking. Even if "most" members of a certain group are said to engage in a common type of conduct, that still leaves a greater or lesser number of that group who do not engage in the specified conduct. Such broad generalizations hardly seem a firm basis upon which to baldly call for more

142. Sue Davis, *Do Women Judges Speak "In a Different Voice?" Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143 (1992-1993).

143. *Id.* at 148-52, 154-57 (describing the study's methodology).

144. *Id.* at 171.

145. POSNER, *supra* note 6, at 407.

146. See Tobias, *supra* note 5, at 179-80 (discussing the alleged lack of sympathy expressed by United States Fifth Circuit Judge Edith Jones for the defendant in a death penalty case).

147. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 42-43 (1994) (describing the flexible, balancing approach found in much of Justice Powell's jurisprudence).

148. See Richard C. Reuben, *Justice Defined*, 80 A.B.A. J., July 1994, at 46, 48-50 (describing the compassion expressed in much of Justice Blackmun's jurisprudence).

149. See sources cited *supra* note 36.

150. See BARTLETT, *supra* note 10, at 640 (suggesting that contextualization, under a feminist theory, would mean that a judge would, among other things, "pay more deliberate attention" to the facts and the relationships among the parties).

women jurists. On a related note, the asserted marginal impact of feminist judging is largely based on the assumption that women—not men—engage in contextual analysis. Such analysis may well be a good thing on its own terms, but there is no good reason to assume that male judges cannot utilize it as well.

C. Feminist Judging and Representation

As this Article has observed, a number of writers have argued that more women jurists are needed to ensure a judiciary that is more representative of the populace.¹⁵¹ These arguments seem analytically similar to those outlined above. Representation arguments assert that the present, male-dominated judiciary must be failing to advance the concerns of most women, for if these concerns were being advanced, presumably there would be less (or no) need for more equitable representation.¹⁵² Nonetheless, restating the issue in terms of democratic theory sheds light on the issue, and asks whether judges are, or should be, representatives of the populace.

A powerful source for the notion that judges are representatives is the Supreme Court's decision in *Chisom v. Roemer*.¹⁵³ In that case, the majority held that the Voting Rights Act applied to a state's judicial elections. In the course of the opinion, the Court considered the coverage of the phrase, "to elect representatives of their choice," as used in the Act.¹⁵⁴ The majority acknowledged that "judges need not be elected at all," and that, "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."¹⁵⁵ Nonetheless, the majority held that such judges are statutory "representatives," since they have "prevailed in a popular election."¹⁵⁶ Indeed, the majority emphasized that the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics" will not be resolved by simultaneously electing judges while claiming that they are indifferent to the popular will.¹⁵⁷

151. See sources cited *supra* note 5. Some commentators have argued that a diverse judiciary can be attained (including the addition of more female judges) without sacrificing the quality of the individuals appointed. See BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 136 (1991); Tobias, *Closing the Gender Gap*, *supra* note 4, at 1244. This Article does not dispute that the goals of diversity and quality are compatible; rather, it supports the second goal, but finds the first to be an inappropriate one—one that should not be attained by the implicit use of quotas to hurriedly increase the number of women jurists.

152. It might be argued that representation also includes the goals of education and having women as role models. See Sherry, *supra* note 4, at 159-63; see also *supra* text accompanying notes 32-33; *infra* part IV.

153. 501 U.S. 380 (1991); cf. Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 439 (1992) (arguing that the outcome in *Chisom* was a referendum on legal realism).

154. See 42 U.S.C. § 1973(b) (1988).

155. *Chisom*, 501 U.S. at 400 (quoting League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 622 (1990)).

156. *Id.*

157. *Id.*

In dissent, Justice Scalia argued that the "ordinary meaning" of the term "representatives" does not include judges.¹⁵⁸ Scalia asserted that while the judges in question were elected, they did not purport to act on behalf of the populace.¹⁵⁹ According to Scalia, "the judge represents the Law."¹⁶⁰ We feel that Justice Scalia got the better of the argument (as our defense of the classical model of judging should indicate), but it is unnecessary here to refile *Chisom*. Even accepting the jurisprudential authority of the majority decision, it does not provide a weighty argument for the proposition that judges are representatives. First, it does not speak to the characterization of federal judges. As the *Chisom* Court itself observed, federal judges were granted the protection of life tenure precisely to shelter them from public opinion.¹⁶¹

Second, *Chisom* says little about those state court judges who are *not* elected. Approximately a dozen states select judges without any sort of election. Of the others, about a dozen have some version of merit selection coupled with retention elections. The remainder select most or all of their judges through partisan or putatively nonpartisan elections.¹⁶² Those states that, like the federal system, do not utilize judicial elections appear to fall outside the representation model.

Finally, even those states that do elect judges fall uneasily within such a model. Some have argued that those states, by utilizing elections, forgo any claim that their judges are unlike other elected officials.¹⁶³ But the mere presence of such elections does not bear the historical weight placed on them by key critics. Most judicial elections can be traced to the spasm of populism which occurred during the Jacksonian Era,¹⁶⁴ but the trend since that time has been to abandon the election process.¹⁶⁵ Furthermore, modern judicial election campaigns are hardly models of representative democracy. Almost without exception, such elections have exhibited a high percentage of uncontested races, or contested races virtually devoid of meaningful debate. Voters have been found to possess low levels of information about judicial

158. *Id.* at 410 (Scalia, J., dissenting).

159. *Id.*

160. *Id.* at 411.

161. *Chisom*, 501 U.S. at 400.

162. See THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 227-35 (1992-93 ed.) (collecting information on judicial selection techniques for each state); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1589-90 (1990) (providing information on each state's judicial selection procedures); Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 459-63 (1993) (discussing the various methods of judicial selection employed by the states). It is difficult to be more specific about the actual numbers of states employing each of the various selection procedures, since some states have various forms of selection/election for only *some*, but not all, judges. Furthermore, there is a lack of uniformity between states.

163. See *Chisom*, 501 U.S. at 401; Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Election*, 62 U. CIN. L. REV. 823, 869-71 (1994).

164. Slabach, *supra* note 163, at 836-37; Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966).

165. Scheuerman, *supra* note 162, at 466.

candidates or the positions they take on various issues.¹⁶⁶ Given current ethical limitations on what judicial candidates' themselves can say about issues,¹⁶⁷ the low visibility of the candidates among the electorate is not surprising. Many judicial races degenerate into little more than partisan politics, name recognition, and incumbency advantage.¹⁶⁸

Indeed, some might find the dismal lack of substantive debate in judicial elections to be desirable since it insulates judges from political pressures more appropriate for other branches of government. But the notion that *any* branch of government, even the judiciary, is unaccountable in some way to the people it serves is disquieting in a democracy.¹⁶⁹ Citizens live with this ambivalence knowing that the judiciary is at least *indirectly* accountable. Substantive law can be changed through legislation or constitutional amendment. Even where judges are not elected, the populace can indirectly affect the composition of judicial personnel by electing the officials who engage in the selection.¹⁷⁰ In addition, where judges are subject to periodic direct or retention election, the candidate can be rejected, although this is a rare occurrence.¹⁷¹

In the end, it is difficult to support the view that judges, even in an elective state system, are representative in nature. In our view, it hardly provides a secure basis to label all judges "representatives" and then insist that they mirror the composition of the public as a whole. It is entirely appropriate and necessary in a democracy that citizens demand that the executive and legislative branches of government represent them. Such representation by judges, however, is antithetical to the classical model that requires them dispassionately to apply the law to individual cases. At the very least, one can aspire to the classical model of the judiciary, while recognizing that the diverse methods of selection and the human nature of judges once in office hinder its realization.

166. See PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980); Elliot E. Slotnick, *Review Essay on Judicial Recruitment and Selection*, 13 JUST. SYS. J. 109 (1988).

167. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990); see also *id.* Canon 3(B)(9) (imposing similar limitations on public comments by non-candidate judges regarding issues which might affect matters pending before the court); Brian L. McDermott, *The Constitutionality of Canon 7(B)(1)(c) of the Code of Judicial Conduct: Free Speech Rights of Judges*, 25 CREIGHTON L. REV. 855 (1992) (discussing the pre-1990 version of the rule).

168. See DUBOIS, *supra* note 166; Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420 (1982); Maura Anne Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994). More recent works suggest that judicial races may have a higher salience for voters than is generally believed. See, e.g., Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300 (1992); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28 (1989).

169. See Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

170. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

171. Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 136 (1989); cf. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306 (1994).

Some have argued that creating "safe" districts for racial minorities under the Voting Rights Act will lead to an unhealthy "balkanization" of American politics, since it discourages candidates from appealing to *all* groups for electoral support.¹⁷² A similar balkanization is apparent if we allow judges to become subject to political, racial, or gender capture.¹⁷³ Making judicial selection subject to de facto quotas will undermine the independence of the judiciary, an ideal worth preserving. At the very least, the public expectation of a fair and impartial judiciary will be devalued if it is widely known or accepted that a particular jurist is an "African-American," "white," "Catholic," or "female" judge, instead of just a "judge."¹⁷⁴

IV. THE LIMITS OF GENDER NEUTRAL JUDGING AND JUDICIAL SELECTION

Thus far, this Article has argued that, on the whole, there is little empirical evidence to suggest that female judges decide cases in a fundamentally different manner than their male counterparts, and accordingly, there is little

172. See, e.g., *Holder v. Hall*, 114 S. Ct. 2581, 2598-99 (1994) (Thomas, J., concurring); *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993); cf. Lani Guinier, [*E*]rasing Democracy: *The Voting Rights Cases*, 108 HARV. L. REV. 109, 132-37 (1994) (arguing that the current systems of "winner take all" districting leads to balkanization as well); Lani Guinier, *Don't Scapegoat the Gerrymander*, N.Y. TIMES, Jan. 8, 1995, § 6 (Magazine), at 36 (making a similar argument). See generally Peter Applebome, *Fitting Designer Districts into Off-the-Rack Democracy*, N.Y. TIMES, Sept. 25, 1994, at E4.

173. The notion that judges should not simply serve narrow constituencies is underscored by the fact that in virtually all states that elect judges, the jurisdiction of the judge's court is coterminous with the electoral basis of the court. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 869, 872 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994). Thus, we view with dismay proposals to insure election of minority judges by carving up electoral districts out of a larger jurisdictional base. See, e.g., Slabach, *supra* note 163, at 869-71. Whatever efficacy this may have for other branches of government, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 149 (1994) (advocating remedies other than redistricting, such as cumulative voting, to increase the political power of electorally disadvantaged groups), it is particularly inappropriate for judges. See *Nipper v. Smith*, 39 F.3d 1494, 1544-45 (11th Cir. 1994) (en banc); Pasquale A. Cipollone, Comment, *Section 2 of the Voting Rights Act and Judicial Elections: Application and Remedy*, 58 U. CHI. L. REV. 733, 759-63 (1991). Such a districting plan is now in effect in the Hamilton County Municipal Court in Cincinnati, Ohio. See *Mallory v. Eyrich*, 707 F. Supp. 947 (S.D. Ohio 1989) (consent decree settling Voting Rights Act litigation).

Whether state judges are appointed or elected, drawing them from a statewide cadre is not necessary or practical. (Even in the federal system, where that literally occurs for Article III judges, most judges are from the geographic area of the court to which they are appointed.) Some geographic grounding for state judicial selection is thus appropriate. But the best balance of the sometimes conflicting goals of judicial accountability and independence is to make judicial jurisdictions coterminous with the populace that elects them.

174. The approach taken by this Article is consistent with the Supreme Court's treatment of a similar, ostensibly impartial adjunct to the court, the jury. In *J.E.B. v. Alabama ex rel. T.B.*, the Court held that the gender-based use of peremptory challenges was subject to heightened scrutiny, and since it was premised largely on stereotypes of how men and women jurors voted, it violated the Equal Protection Clause. 114 S. Ct. 1419 (1994). We do not understand the Court to call for affirmative action quotas to ensure proportionate representation on all juries. Rather, the Court simply held that the selection procedures for juries should be free of gender discrimination. See Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115 (1994). Likewise, this Article calls for gender-neutral selection of judges, see *infra* part IV, but it is inappropriate to insist that a certain percentage of judges be women.

cause to select more women judges simply because of their gender. This position might inspire accusations that we hold a highly idealized and wholly unrealistic view of judicial decision-making and judicial selection. This Part, however, both defends our idealism and acknowledges the harsh realities that deflate our hopes.

It appears to be common ground among many observers that judicial decision-making is partly or wholly "political" (invaded by the judge's partisan, moral, or personal policy views) notwithstanding what the "law" appears to require. Legal Realists and their intellectual successors in this century have long advanced this view.¹⁷⁵ Among political scientists, the classical model described above is the Legal Method; the view that nonlegal reasons influence judges is the Attitudinal Model.¹⁷⁶ Researchers have generated considerable evidence in support of the latter model, principally by correlating background attributes of judges (e.g., their political party) with their voting behavior (e.g., operationalizing decisions as either liberal or conservative).¹⁷⁷

Still, we do not wish to misrepresent the views of the critics of classical judging. Undoubtedly, their views are more nuanced than our brief summary indicates. These realist critics argue both that a model of judging based on pure deductive reasoning from precedent or other legal materials neither describes as a positive matter what most judges do, nor is necessarily desirable in order to reach fair and just results in individual cases. Instead, they see the tradition of common law as imposing both restraints (*stare decisis*) and providing leeway (emphasizing different facts or the social or economic context of individual cases) within which judges may operate. These traditions supply a determinate quality to the law that most realists can appreciate.¹⁷⁸

Perhaps, then, it is not surprising that the empirical support for the Attitudinal Model is not as one-sided as some may think.¹⁷⁹ It is difficult to disentangle and measure legal and nonlegal rationales. A "liberal" decision by a "Democratic" judge may be the result of a correct application of precedent.¹⁸⁰ Moreover, there are powerful constraints imposed by our legal culture on a truly result-oriented judge. Typically, judges justify their

175. See POSNER, *supra* note 6, at 19-28; Heidi L. Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994).

176. For a forceful restatement of the latter model, together with a compilation of social science support, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

177. See, e.g., C. Neal Tate & Roger Handberg, *Time Building and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-1988*, 35 AM. J. POL. SCI. 460 (1991).

178. See, e.g., POSNER, *supra* note 6, at 124-57; Paul Gewirtz, *Editor's Introduction to KARL LLEWELYN, THE CASE LAW SYSTEM IN AMERICA* at xv-xxiii (rev. ed. 1989). Those scholars within the Critical Legal Studies movement may prove to be an exception.

179. See Symposium, *The Supreme Court and the Attitudinal Model*, 4 LAW & COURTS 3 (Law and Courts Section, Am. Pol. Science Ass'n, Washington D.C.), Spring 1994, at 3-9 (reprinting critical commentary on SEGAL & SPAETH, *supra* note 176); Gregory A. Caldeira, Book Review, 88 AM. POL. SCI. REV. 485 (1994) (reviewing SEGAL & SPAETH, *supra* note 176).

180. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

decisions orally or in writing through ostensibly principled rationales. Judges are usually subject to reversal by higher courts.¹⁸¹ In addition, judges may be subject to removal if they fail to follow what legal convention demands.

Still, as realists we do not dispute that, consciously or not, "political" factors play a role, perhaps sometimes a large role, in the daily lives of trial and appellate judges. Female jurists are surely not any more or less immune to these influences than male judges. It is likely that most judges usually employ some version of what is called pragmatic or practical reasoning.¹⁸² That is, depending on the circumstances, most judges employ an eclectic mix of interpretative styles (*i.e.*, plain meaning, legislative intent and purpose, public policy, etc.) to reach what appears to be the correct and sound result within the confines of the precedent or positive law at issue. This reasoning may or may not be reflected in the formal logic of the judge's decision justifying a result. Regardless of the label one may apply to this process, it is not totally divorced from the classical model of judging. Therefore, that model remains a useful device against which to measure the aspirations of feminist judging.

We are likewise not oblivious to the realities of judicial selection. In those states that elect or appoint judges, the office may be viewed as a partisan spoil similar to any other.¹⁸³ Merit systems presumably filter out at least some of the politics. At the federal level, it has long been recognized that patronage and partisan factors play a role alongside merit—a large percentage of all Presidential appointees for Article III judgeships have traditionally been members of the appointing President's own political party.¹⁸⁴ But, it is not foolishly optimistic to contend that politics are not completely controlling in this area, either. In federal judicial appointments, politics and patronage play a role. As measured by the ratings of the American Bar Association, however, many or most of these appointments have some degree of merit, in that the nominees are considered to be at least "qualified."¹⁸⁵ Relatedly, Stephen Carter¹⁸⁶ and Carl Tobias¹⁸⁷ are correct in noting that the federal judicial selection process can be made more merit-based and less politicized. There

181. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 541-42 (4th ed. 1992).

182. See POSNER, *supra* note 6, at 455; Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 23-34 (1993); see also William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 33-36 (1994) (noting that the decisions of the U.S. Supreme Court Justices are usually explainable as a combination of the force of precedent, the substantive policy preferences of the Justices, and the Justices' perceptions of institutional competence).

183. Cf. Michael E. Solimine, *Constitutional Restrictions of the Partisan Appointment of Federal and State Judges*, 61 U. CIN. L. REV. 955 (1993).

184. See Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying On a Tradition*, 74 JUDICATURE 294 (1991).

185. Sheldon Goldman, *Federal Judicial Recruitment*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT*, *supra* note 58, at 189, 202-03.

186. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 147-55 (1994).

187. Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1274-86.

is no reason why similar reforms cannot be undertaken at the state level, principally by adopting some version of merit selection.

In an ideal world of judicial selection, women would presumably be randomly scattered in any particular field of candidates, and the composition of the judicial candidate pool would reflect the number of female lawyers in the population (about one-fifth of the total).¹⁸⁸ Given that women now constitute over one-third of bar admissions,¹⁸⁹ one would "expect women to make up 40% of the lawyer population in the second decade of the 21st century."¹⁹⁰ The intuitive appeal of proportionality¹⁹¹ perhaps explains why Justice O'Connor¹⁹² and others¹⁹³ have suggested a goal of approximately one-half of all judges being women.¹⁹⁴

Alas, the ideal world cannot yet be realized, given the minuscule number of female judges currently serving.¹⁹⁵ There is considerable evidence that women have been excluded from serious consideration for judgeships in the past.¹⁹⁶ This exclusion appears to be waning, but appropriate steps must still be taken to insure that women are part of the pool of lawyers considered for any given judgeship.¹⁹⁷

In the final analysis, the notion that there should be more women on the bench is based on an intuitive sense of fairness. At the root of the problem is the basic question of whether men and women are different. Empirical studies have not and probably cannot definitively determine whether there are differences *based on gender* in how men and women handle cases. Instinct and experience suggest that in all likelihood, there is not a meaningful difference. Nevertheless, the debate over whether men and women are different, and whether those differences have some role to play on the bench, seems unresolvable. This justifies to some extent the call for placing, and electing, more women to the bench. If there is a cognitive or psychological

188. See BECKER ET AL., *supra* note 1, at 841-44; BARBARA A. CURRAN & CLARA N. CARSON, AMERICAN BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s 3-4 (1994).

189. CURRAN & CARSON, *supra* note 188, at 3.

190. *Id.* at 4.

191. See *Holder v. Hall*, 114 S. Ct. 2581, 2597 (1994) (Thomas, J., concurring).

192. O'Connor, *supra* note 106, at 1549.

193. E.g., Cedarbaum, *supra* note 111, at 43.

194. Since we are critical of the concept of female judges as representatives, see *supra* part III.C., a more proper goal would be for the gender composition of judges to match that of the pool from which almost all judges are drawn.

195. See *supra* note 1. Note that even these small numbers—about 10% of the federal courts of appeals and state supreme courts—are about one-half of the current percentage of female attorneys. This difference is not staggering when one considers that most female lawyers are younger and have not yet entered the pool of candidates to be considered for judgeships. See CURRAN & CARSON, *supra* note 188, at 6.

196. CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 237-46 (2d ed. 1993); PERRY, *supra* note 151, at 118-20.

197. See Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 318 (1990) (noting that in a study of state systems, different methods of judicial selection do not significantly explain the presence or absence of women judges, but the percentage of women lawyers do).

difference in how men and women perceive the world,¹⁹⁸ those differing perceptions should be present on the courts.

The process of managing and deciding a case rests heavily on perception, language, stereotypes and first impressions. The conscious and unconscious strictures on judicial thinking, which *might* to some degree be gender-based, should be as diverse as possible. This is not to say that men and women will *decide* cases differently (the evidence so far indicates that they do not). It is to say that a broad mix of perceptions, assumptions and stereotypes which judges necessarily use in handling all the matters involved in their cases—large and small—will lead more often to decisions “that are legally defensible or in some sense ‘right.’”¹⁹⁹

Likewise, we are sympathetic to the educative and consciousness-raising functions that women judges can serve.²⁰⁰ In this context, judges can be role models, not as recipients of special treatment, but as positive symbols of women with influence in the realm of law.²⁰¹ Those goals can best be realized, however, when the judicial selection process considers candidates as individuals, rather than imposing quotas and insisting that a fixed number of judges be of one gender.

CONCLUSION

The empirical and normative implications of the recent call for more female jurists have largely escaped critique. This Article has sought to fill that gap. We, too, agree that there should be more female judges, but our reasons are more restrained than those of most advocates. The weight of the evidence demonstrates that most female judges do not decide cases in a distinctively feminist or feminine manner. This is fortunate, since there is a serious problem with blithely calling judges “representative,” and then claiming that judges for that reason alone should reflect the gender composition of the population. We do acknowledge, however, that there remains the critical issue of whether men and women bring different perspectives to bear in their roles as judges. Given the unsettled nature of this question, intuitive fairness justifies a goal of electing and appointing more women to the bench. We do not favor quotas, however. Rather, judicial selection procedures which broaden the perspective of who is qualified to be a judge ultimately will insure that more women become judges.

Shortly after her Supreme Court appointment, Justice Ginsburg remarked that she was in favor of a “diverse judiciary,” but was against “anything like proportional representation.”²⁰² She added that she looked forward to the

198. See GILLIGAN, *supra* note 14; JAMES Q. WILSON, *THE MORAL SENSE* (1994).

199. Bartlett, *supra* note 11, at 867; see also POSNER, *supra* note 6, at 412 n.33 (“The case for judicial awareness of the multiple perspectives in which it is possible to examine legal claims . . . supplies an argument for a diverse judiciary.”).

200. See *supra* text accompanying notes 32-33.

201. See BARTLETT, *supra* note 10, at 274-76 (discussing affirmative action in the context of gender).

202. Stephanie B. Goldberg, *The Second Woman Justice*, A.B.A. J., Oct. 1993, at 40, 41.

day when it would be regarded as "natural"²⁰³ for women to act as judges. We agree with Justice Ginsburg that the proper evolution of judicial selection and judging is one that is free of gender bias, rather than one that accentuates it.

203. *Id.*