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WORKSHOP ON JUDGING: DOES GENDER MAKE A DIFFERENCE?

INTRODUCTION

Herma Hill Kay* and Geraldine Sparrow**

The legal profession was once entirely a man’s field. Even now, in the United States and Canada, men dominate the law.1 When women sought entry into the field in the mid- to late nineteenth century, the initial response appeared to be that women lacked both the physical stamina demanded by a rigorous public profession and the mental capacity to think “like lawyers.”2 Seen as unsuitable to study or practice law, their incursion was forbidden. In many places, women were denied admission to law school3 and refused membership in the prac-

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3. See Karen Berger Morello, The Invisible Bar 44 (1986) (noting that the first woman to enter a U.S. law school, Lemma Barkaloo, was accepted at Washington University at St. Louis in 1869 after having been rejected by Harvard and Columbia); Sylvia B. Bashlevkin, Women in the Law: Canada, 8 Comparative Law Yearbook 3, 4 (1984) (noting that Clara Brett Martin applied to the Law Society of Upper Canada to study law in 1892, but was rejected on the ground that she was not a “person.” She
ticing bar.\textsuperscript{4} When women persevered despite these barriers,\textsuperscript{5} they were greeted with hostility both in many law schools\textsuperscript{6} and in the profession.\textsuperscript{7} Most nineteenth century women lawyers in the U.S. either practiced alone or under the protection of their lawyer-husbands or fathers.\textsuperscript{8}

The trickle of women into the legal profession in the United States began to swell after World War II;\textsuperscript{9} but in both Canada\textsuperscript{10} and the U.S.,\textsuperscript{11} the numbers did not increase dramatically until the 1970s. Despite their growing numbers, women still encountered resistance, especially in U.S. elite law schools where male law professors enjoyed holding “Ladies’ Day” class sessions in which women students were succeeded in her quest with the help of Ontario Premier and Attorney-General Oliver Mowat, who intervened in her case). See also John D. Blackwell, Martin, Clara Brett, The 1999 Canadian Encyclopedia: World Edition 1440 (1998) (pointing out that Clara Brett Martin became the first woman lawyer in the British Empire when she was admitted to practice in Ontario on February 2, 1897 and that she went on to earn Bachelor of Civil Law (1897) and LL.B. (1899) degrees).

4. See Bradwell v. Illinois, 83 U.S. 130 (1872) (affirming the Illinois Supreme Court’s refusal to admit Myra Bradwell to the bar); Re Mabel French, [1912] 1 D.L.R. 80 (refusing to admit Mabel French to legal practice in New Brunswick); Langstaff v. Bar of the Province of Quebec, [1915] 47 R.J.Q. 131 (holding that women could not be admitted either to the study or practice of law).

5. See Virginia G. Drachman, Sisters in Law 12-13 (1998) (noting that U.S. women in the late nineteenth century relied both on litigation and statutory reform to gain admission to the bar, filing numerous lawsuits between 1869 and 1901 and obtaining the passage of state legislation that permitted women to practice law). In Canada, the British North America Act, which limited the membership of the Senate to “persons” was invoked as well to deny membership in the bar to women. This provision was challenged by five women from Alberta, including Canada’s first woman judge, Emily Ferguson Murphy, in the Supreme Court of Canada. That Court, however, answered the question referred to it by the “five ladies” – whether women are eligible for appointment to the Senate – in the negative. See In the Matter of a Reference as to the Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867 [1928] S.C.R. 276, 279, 290. Susan Jackel reports that Murphy and the other women carried the so-called “Persons Case” to the Privy Council in Britain, which ruled in 1929 that women were indeed persons under the BNA Act. See Susan Jackel, Murphy, Emily, The 1999 Canadian Encyclopedia: World Edition 1539-40 (1998).

6. See Drachman, supra note 5, at 51-55.

7. Id. at 64-65.

8. Id. at 88-89; 103-110. See also Carrie Menkel-Meadow, Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers, (Richard L. Abel & Philip S.C. Lewis) III Lawyers In Society 196, 201-02 (1989).

9. See Cynthia Fuchs Epstein, Women In Law 4, Table 1.1 (2d ed. 1993) (reporting that the percentage of women in the legal profession rose from 2.4 in 1940 to 3.5 in 1950).

10. See Report of the Canadian Bar Ass’n, supra note 1, at 47 (noting that in British Columbia, only 3.2% of members of the Law Society were women in 1971, but they represented 21.1% of members in 1990; and that in Ontario, 83% of practicing women lawyers, compared to 42% of male lawyers, had been called to the bar during the previous decade).

11. See Carson, supra note 1, at 3 (noting that in 1971, 3% of lawyers were women, while by the start of 1995, almost one-quarter were women).
required to stand up and discuss cases, such as rape prosecutions, designed to embarrass them before their male classmates.\textsuperscript{12} After graduation, U.S. women found the job search difficult, especially those who ventured into law firms. Many found themselves isolated as the only woman the firm hired to satisfy its "woman quota,"\textsuperscript{13} or relegated to the law library, well out of sight of paying clients.\textsuperscript{14}

Women have served as judges in the United States for more than one hundred years and in Canada for eighty-five years. In neither the U.S. nor Canada was the first woman to serve as a judicial officer a lawyer. Esther McQuigg Morris, who was named Justice of the Peace in South Pass City, Wyoming, in 1870, was a milliner,\textsuperscript{15} while Emily Ferguson Murphy, who was appointed police magistrate in 1916 for Edmonton and then Alberta, was a writer and journalist whose pen name was Janey Canuck.\textsuperscript{16} The first woman on the U.S. federal bench, Florence Ellinwood Allen, was appointed to the United States Court of Appeals for the Sixth Circuit by President Franklin Delano Roosevelt in 1934; she previously held the distinction of being the first woman to sit on a state supreme court, having been appointed to the Supreme Court of Ohio in 1922.\textsuperscript{17} Women judges were not present in the United States in significant numbers until the mid-1970s. On October 25, 1979, Judge Joan Dempsey Klein convened the first meeting of women judges in Los Angeles with more than one hundred in attendance.\textsuperscript{18}

Unlike women lawyers in large law firms, however, women judges could not be hidden once they ascended to the bench. In Anglo-American and Canadian legal settings, the judge is the quintessential authority figure. Perhaps because so much depends on the exercise of judicial authority, the emergence of women judges serving alongside their male colleagues stimulated scholarly interest in the question whether women judges approach the task of judging in the same way as men. This question and its ramifications were the focus of the Workshop on Judging held at the University of California School of Law at Berkeley (Boalt Hall) in the Spring Semester 2000, and is the subject of the papers presented there and published in this symposium.
Unlike the earlier challenges to women’s entry into the profession, which put into question women’s competence and ability as lawyers, the question concerning women’s mode of functioning as judges seeks to explore the relevance of gender differences among judges. By the time this inquiry was offered for serious discussion in the mid-1980s, the situation of women in legal education and the legal profession in the U.S. and Canada had changed dramatically. For one thing, the number of women had increased substantially. The percentage of women among J.D. students in ABA-approved U.S. law schools had risen from 4% in 1965 to 40% in 1985 and among LL.B. and B.C.L. students in Canada and Quebec to 30% between 1986 and 1990. In the U.S., “Ladies’ Day” was history, although many women felt themselves to be silenced in the classroom. Outside the classroom, however, women students began to find their voice through editing and publishing specialized women’s law journals. Women constituted approximately 13% of the legal profession in the U.S. and Canada in 1985. The National Association of Women Judges was formed in 1979 with 166 members, and women Justices were appointed both to the U.S. and Canadian Supreme Courts.

Additionally, women in legal education and the legal profession were beginning to examine their situation and prospects more closely.


20. See Elizabeth Mertz, with Wamucii Njogu & Susan Gooding, What Difference Does Difference Make? The Challenge for Legal Education, 48 J. LEG. ED. 1, 16-36 (1998) (reviewing studies of diversity in the law school classroom, preparatory to presenting their own quantitative and qualitative study in which outside observers taped and systematically analyzed diversity in law school teaching at eight law schools); see also L. Amede Obiora, Neither Here nor There: Of the Female in American Legal Education, 21 L. & Soc. Inquiry 355, 368-71 (1996) (reporting on similar studies).


22. See Carson, supra note 1, at 4, Table 2; John Hagan, Gender in Practice 10 (1995) (noting that female membership in Canada was over fifteen percent in the period 1971-81 and 1986).

23. See Rossman, supra note 18, at 1238 & n.5 (pointing out that NAWJ was established on October 25, 1979, with 166 founding members, representing 114 different courts in twenty-eight states, the District of Columbia, and the Virgin Islands). Justice Sparrow was informed by the NAWJ office that the organization’s current membership is over 1,400, and that it is itself a member of the International Association of Women Judges, which added that it has 4,350 members in eighty-five countries.

24. Justice Sandra Day O’Connor was appointed to the U.S. Supreme Court by President Ronald Reagan in 1981; Madam Justice Bertha Wilson was appointed to the Supreme Court of Canada by Prime Minister Pierre Elliott Trudeau in 1982.
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The first comprehensive U.S. law school casebook on sex-based discrimination appeared in 1974, followed by a second in 1975.25 These materials facilitated the offering of courses on the subject across the country.26 The first Canadian text of this kind appeared in 1990.27 Chief Justice Robert N. Wilentz of New Jersey created the first Task Force on Women in the Courts in 1982,28 followed by the appointment of similar study groups in thirty jurisdictions by 1990.29 The American Bar Association established its Commission on Women in the Profession in 1987, and the Canadian Bar Association created its Task Force on Gender Equality in 1991.30 At the recommendation of the Canadian Task Force, Professor Mary Jane Mossman of Osgoode Hall Law School designed and presented courses on gender equality to members of several large Toronto law firms between 1994 and 1997.31 Among women legal scholars, many drawing on the work of women academics in other fields,32 the question of gender difference was being explored. It was in this context that Professor Suzanna Sherry published her first articles in 1986 on the subject of gender differences among judges.33


26. In 1976, 55 law teachers listed themselves as having taught courses on Women and the Law from one to five years, and one (Professor Ruth Bader Ginsburg) as having taught the course from six to ten years. See Directory of Law Teachers 1154 (AALS, 1976). One year later, in 1977, the numbers had risen to 104 and three (including Professor Ginsburg) respectively. See Directory of Law Teachers 1067-68 (AALS, 1977).


30. See Deborah Rhode, The Unfinished Agenda: Women and the Legal Profession 30 (ABA Commission on Women in the Profession, 2001); Report of the Canadian Bar Ass'n, supra note 1.


32. One of the most influential of these works was Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

Drawing on the work of psychologist Carol Gilligan, Professor Sherry argued that "modern men and women, in general, have distinctly different perspectives on the world and that, while the masculine vision parallels pluralist liberal theory, the feminine vision is more closely aligned with classical republican theory..." She went on to point out that "[a] feminine jurisprudence, evident, for example, in the decisions of U.S. Supreme Court Justice O'Connor, might thus be quite unlike any other contemporary jurisprudence."

Professor Sherry's thesis was challenged by others, among them some women judges who failed to discern any job-related performance differences between themselves and their male colleagues. Thus, Associate Justice Ruth Bader Ginsburg, then serving on the U.S. Court of Appeals for the D.C. Circuit, observed in a 1986 speech to the Seventh Annual Conference of Women Judges, when asked what I think of the thesis that women and men speak in or respond to different voices or have fundamentally dissimilar psyches and moral systems, I demur. I am fearful, or suspicious, of generalizations about the way women or men are. My life's experience indicates that they cannot guide me reliably in making decisions about particular individuals. At least in learning and practicing law, I have uncovered no natural superiority or deficiency in either sex. In class or in grading papers over seventeen years, and now in reading briefs and listening to arguments, I have rarely detected any identifiably male or female thinking — or even penmanship.

Madam Justice Bertha Wilson of Canada was more guarded. She observed, [t]aking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective... I have in mind areas such as the law of contract, the law of real property, and the law applicable to corporations. In some other areas of the law, however, a distinctive male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women's sexuality that, in this day and age, are little short of ludicrous.

Professor Sherry's initial paper focused on Justice Sandra Day O'Connor, a jurist who was both the first and, for twelve years, the

34. See Gilligan, supra note 32.
35. See Sherry, supra note 33, at 543.
36. Id.
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only woman to serve on the United States Supreme Court. Today, women are less frequently isolated as the only female on the bench. Justice Ruth Bader Ginsburg joined Justice Sandra Day O’Connor on the United States Supreme Court on August 10, 1993. Canada’s Supreme Court currently has three women Justices: Chief Justice Beverley McLachlin, who was appointed as a justice on March 30, 1989 and elevated to Chief Justice on January 7, 2000; Madam Justice Claire L’Heureux-Dubé, appointed on April 15, 1987; and Madam Justice Louise Arbour, appointed September 15, 1999.

The increased number of women jurists is even more dramatic among U.S. state high courts. An early count found twenty-two women state high court judges sitting in 1984. That number had nearly doubled to forty-two by 1992, and had almost redoubled as of December 31, 2000, when there were eighty-seven women out of 332 justices on U.S. state high courts, or twenty-six percent. On two of these courts, women even constituted a majority of the justices. The Minnesota Supreme Court was the first to have a majority of women justices in the early 1990s, and the Massachusetts Supreme Court currently has a majority of women, including the Chief Justice. In 1992, most of the courts with active women jurists had only one lone woman, and courts with two or more women serving together were infrequent. In contrast, by the end of 2000, nine state supreme courts in the U.S. had three women justices out of a seven member bench, and four state supreme courts had two women justices out of

39. See Beverly B. Cook, Women Judges: A Preface to Their History, 14 Golden Gate U. L. Rev. 573, 577 (1984) (these women are listed by name in Appendix I, id. at 608).


41. This count was taken from the lists of high court judges for the 50 states and the District of Columbia printed in the last published volume that appeared during the year 2000 of each of the seven West Group Regional Reporters: 759 A.2d, 735 N.E.2d, 617 N.W.2d, 8 P.3d, 533 S.E.2d, 766 So. 2d, and 27 S.W.3d (2000). We are grateful to our colleagues on various law faculties and state courts who verified the sex of several of these women whose names were indeterminate.

42. Between January 4, 1991, when Justice Sandra S. Gardebring joined Justices Rosalie E. Wahl, M. Jeanne Coyne, and Esther M. Tomljanovich on the Minnesota Supreme Court, and August 30, 1994, when Justice Wahl retired and was replaced by a man, there were four women and three men on the Court. See 461 N.W.2d V (1991); 517 N.W.2d V (1994).


44. See Allen & Wall, supra note 40, at 156. The turnover among these jurists seems relatively high: of the forty-two women listed by Allen and Wall as currently serving in 1992, we counted only twenty-one who remained on state high court benches as of December 31, 2000. See supra note 41.

45. These nine are California (Justices Joyce L. Kennard, Kathryn Mickel Werdegar, and Janice Rogers Brown), see 8 P.3d VI (2000); Colorado (Chief Justice Mary J.
a five member bench. Only two state supreme courts had no women justices as of December 31, 2000. Currently in Canada, thirty-six out of 124, or twenty-nine percent, of provincial appellate court judges are female. Some of these women seem to differ among themselves in their judgments and approaches to judging nearly as much as they do from their male colleagues. The regularity with which some of them reach different outcomes—even in cases presenting so-called “women’s issues”—suggests that this is an appropriate moment to revisit the general question of whether women judges approach their role in a unique and gender-related fashion.

The Boalt Hall Workshop on Judging had two components. A seminar on the subject, co-taught by Justice Geraldine Sparrow of the Ontario Court of Justice and then-Dean Herma Hill Kay, was offered to Boalt students in the Spring Semester 2000. The seminar was inaugurated by a day-long Workshop on Judging which featured keynote papers by Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada and Justice Kathryn Mickle Werdegar of the California Supreme Court. Judges from state and federal courts offered comments on each paper.

The title of Madam Justice Claire L’Heureux-Dubé’s paper, Outsiders on the Bench: The Continuing Struggle for Equality, aptly summarizes her own view that women have made significant gains as judges, but are far from achieving an equal voice. She noted preliminarily that the Charter of Rights and Freedoms, Canada’s first constitutionalized bill of rights, was passed only in 1982. Therefore, it reflects the contemporary Canadian vision of liberty and the state which places less emphasis on individual rights and more on collective interests than does the earlier U.S. Bill of Rights. Section 15 of the Charter guaran-

Mullarkey and Justices Rebecca Love Kourlis and Nancy E. Rice), see 8 P.2d VI (2000); Louisiana (Justices Jeannette Theriot Knoll, Catharine D. Kimball, and Bernette Johnson) see 766 So.2d VI (2000); Michigan (Chief Justice Elizabeth A. Weaver and Justices Marilyn J. Kelly and Maura D. Corrigan), see 617 N.W.2d V (2000); Nevada (Justices Miriam Shearing, Nancy A. Becker, and Deborah A. Agost), see 8 P.3d VII; New Jersey (Chief Justice Deborah T. Poritz and Justices Virginia Long and Jaynee LaVecchia), see 759 A.2d VIII; Ohio (Justices Alice Robie Resnick, Deborah L. Cook, and Evelyn Lundberg Stratton), see 735 N.E.2d VII (2000); Virginia (Justices Elizabeth B. Lacy, Barbara Milano Keenan, and Cynthia D. Kinser), see 533 S.E.2d V (2000); and Wisconsin (Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and Diane S. Sykes), see 617 N.W.2d VI (2000).

46. These four are Idaho (Chief Justice Linda Copple Trout and Justice Cathy Silak), see 8 P.3d VI (2000); New Mexico (Chief Justice Pamela B. Minzer and Justice Petra Jimenez Maes), see 8 P.3d VII; North Dakota (Justices Mary Muehlen Maring and Carol Ronning Kapsner), see 617 N.W.2d VI (2000); and Rhode Island (Justices Victoria Lederberg and Maureen Goldberg), see 759 A.2d XIII (2000).

47. These two are Indiana (which has had a woman justice in the past), see 735 N.E.2d VI (2000) and South Dakota, (which we are informed has never had a woman justice); see 617 N.W.2d VI (2000).

48. These figures were provided to Justice Sparrow by the Office of the Commissioner for Federal Judicial Affairs, Judicial Statistics, Ottawa, Ontario.
tees both procedural and substantive equality, with the proviso that
the guarantee will not preclude affirmative action programs.

Despite these guarantees in the Charter, Madam Justice
L’Heureux-Dubé described many ways in which women are outsiders
on the bench. First, she noted that she and Madam Justice Beverly
McLachlin, now Chief Justice of the Supreme Court of Canada, are in
the minority more frequently than their male colleagues. Second, she
cited the Canadian Bar Association Task Force Report on Gender
Equality for two propositions: 1) that women often must prove that
they merit their judicial appointments, and 2) that women are often
accused of bias because of their gender, membership in a minority
group, feminism, or civil rights activity.49 She illustrated these pro-
positions by giving a summary of cases in which female and minority
judges had been asked to recuse themselves. These cases include that
of a tribunal member in Australia who was accused of bias because she
was pregnant;50 an African-American judge in New York who was
asked to step down from presiding over a sex discrimination case be-
cause she was a woman who, as a lawyer, had represented clients
claiming race discrimination;51 and a Canadian tribunal member
hearing a sex discrimination case who was attacked because of her
prior work and writing in this area.52

Finally, she detailed a recent vicious attack on her own impartial-
ity by an Alberta appellate court justice whose decision in a sexual
assault case had just been reversed by the Supreme Court of Canada.53
In ruling that the complainant had impliedly consented to sexual ac-
tivity, Justice McClung had referred to the defendant as merely mak-
ing "clumsy passes,"54 and to the fact that the complainant had not
been "wearing a bonnet and crinolines."55 In her concurrence,
Madam Justice L’Heureux-Dubé criticized these remarks as perpetuat-
ing "myths and stereotypes."56 In response, Justice McClung wrote a
letter to the editor of a national newspaper, calling her remarks a
"graceless slide into personal invective."57 The letter prompted fur-
ther sharp attacks in the press on both sides by legal personalities. Complaints to the judicial conduct commission followed.\textsuperscript{58}

Madam Justice L’Heureux-Dubé concluded that the fracas exemplifies the treatment of women as outsiders on the bench. They are attacked for lack of impartiality, she argues, when they are merely bringing their life experiences to the bench – something which will contribute to, not subtract from, the concept of a fair, representative, and independent judiciary.

In Justice Kathryn Mickle Werdegar’s judicial career, which spans two courts, she has experienced both serving as the “lone woman” on the California First District Court of Appeal, and then first as one of two, currently as one of three, women on the California Supreme Court. In her keynote address, she asked her audience, “Did I make a difference?” Her response for the period of her service on the intermediate Court of Appeal focused on the perceptions of her associates – staff, colleagues, women appellate attorneys and litigants – for whom her mere presence on the bench elicited reactions, whether positive or negative. Her response for her ongoing service on the California Supreme Court focused on possible jurisprudential differences between the men and women justices on that court. She challenged the audience to decide whether “a woman’s perspective” might have influenced the result in five cases, each arguably raising “women’s issues,” in which she authored the majority opinion.

Justice Werdegar describes the five cases in her paper. At the time three of them were decided, the seven member California Supreme Court was composed of three women and four men. In one of these three cases, questioning the existence of a child’s cause of action against the mother’s employer for fetal injuries resulting from toxic fumes in the workplace, the Court was unanimous in recognizing the child’s right to sue.\textsuperscript{59} In one of the remaining two, involving the question whether women injured by breast implants could sue the manufacturer’s parent corporation, the Court was split 6-1 in denying the suit.\textsuperscript{60} In the other, involving the question whether a biological father had a constitutional right to establish a relationship with a child born to a married woman against her wishes, the Court divided 5-2 in refusing to recognize the father’s right.\textsuperscript{61} In all three of these cases, the two women justices voted with Justice Werdegar. In the final pair of cases, decided at a time when the Court had only two women Justices and five men, the women’s votes were divided. In one of these cases, which featured a 4-3 split, the Court held that a landlady could not refuse, on religious grounds, to rent her property to an unmarried

\textsuperscript{58} The text of the Canadian Judicial Council’s response to the complaint, which resulted in a reprimand to Justice McClung, is available at http://www.cjc-ccm.gc.ca/english/newsreleases.htm.

\textsuperscript{59} Snyder v. Michael’s Stores, Inc., 16 Cal. 4th 991 (1997).

\textsuperscript{60} Artiglio v. Corning, Inc., 18 Cal. 4th 604 (1998).

\textsuperscript{61} Dawn D. v. Superior Court (Jerry K.), 17 Cal. 4th 932 (1998).
couple. In the other, the Court divided 5-2 in holding a hospital liable only for negligence, rather than imposing strict liability for the actions of a male hospital technician who sexually molested a female patient. In both of these cases, the other woman justice dissented from Justice Werdegar's majority opinion.

Justice Werdegar declined to answer her own question about the relevance of gender to the outcome of these cases, and chose to leave an analysis of the voting patterns of the three California women Supreme Court Justices to others. She did note, however, that accounts in the legal press of these women's backgrounds, political philosophies, and frequency of dissents suggest that they have "some real differences" that may be unrelated to gender. Looking only at the cases she identified, it seems plausible that the woman who dissented in two cases was taking a more liberal view of the law than the majority.

In recent years, with the numbers of women on the bench increasing, scholars have sought empirical evidence of the existence of gender differences in judging. Many of these studies were published in the November-December 1993 issue of *Judicature*. Thus, David Allen and Diane Wall identified four possible role orientations that might be adopted by women judges: the Representative, the Token, the Outsider, and the Different Voice roles. They then examined patterns of agreement and disagreement among men and women judges on U.S. state supreme courts to see which roles were adopted by a sample of 24 female justices. The authors divided the court decisions into three areas: women's issues, criminal rights, and economic liberties. They concluded that the preponderance of women justices lean toward the interests of their gender in cases involving "women's issues" — namely, sex discrimination, sexual conduct and abuse, medical malpractice, property settlements and child-parent relations. In particular, they found that women justices have pushed the law forward in sex discrimination cases. In cases involving criminal rights and economic liberties, however, gender differences are not as apparent, although women justices are disproportionately in dissent. This

64. Justice Werdegar mentioned one other case, in which she did not author the majority opinion, but in which she is thought to have influenced the outcome: Warfield v. Peninsula Golf & Country Club, 10 Cal. 4th 594 (1995) (holding that a country club was forced to grant the female plaintiff a full voting membership, contrary to its rules, after a divorce court had awarded her the joint membership she had previously shared with her husband). In Warfield, the Court split 5-2, with the two women then on the court voting in the majority over a strong dissent by one of the most liberal male members of the court and another by the Chief Justice.
66. See Allen & Wall, supra note 40, at 158-61.
leads the authors to conclude that "women state supreme court justices act as Representatives when confronted with issues that are of immediate concern to women [and] that a large number of [them] behave as Outsiders, while a smaller proportion manifest behavior indicative of the Different Voice role."\footnote{67} 

A study of judges of the U.S. courts of appeal came to a similar conclusion. Sue Davis, Susan Haire, and Donald R. Songer conclude that the women they studied supported sex discrimination claims at a rate of 63%, compared to men at 46%, and that women were more likely than men to support the claims of criminal defendants, but that their voting patterns in obscenity cases were indistinguishable by gender.\footnote{68} 

Finally, Sue Davis studied the decisions of Justice Sandra Day O'Connor to test Professor Suzanna Sherry's thesis that O'Connor has developed a feminine jurisprudence.\footnote{69} Davis finds little indication that Justice O'Connor's decisions are influenced by her gender, although Davis notes a tendency towards liberalism in equality rights cases.\footnote{70} In a similar study contained in her unpublished M.A. Thesis, Candace White of the University of Calgary studies opinions of the women Justices of the Supreme Court of Canada.\footnote{71} Although certain theoretical differences exist, she finds that, as in the U.S., the women Justices are more likely to support women's interests in "women's issue" cases, particularly those involving equality rights. In so doing, she believes they are bringing their life experiences to bear. 

Among the papers in this Symposium, that by Heather Elliott is devoted to constructing further testable hypotheses capable of producing empirical data relevant to the existence or non-existence of gender differences among judges. Disclosing at the outset that she is wary of the implicit essentialism in the claim that women judges behave differently than men and that their varying judicial behavior is gender-related, she offers a research plan designed to measure the validity of this claim. Elliott begins by observing that, as relatively new arrivals on the judicial scene, women jurists do not and cannot be expected to write on a clean slate. Following Madam Justice Wilson's lead,\footnote{72} she identifies several well-established doctrines of judicial restraint that confine the initiative of all judges: stare decisis, incrementalism, justiciability, and collegiality. Next, she posits that women

\footnote{67. Id. at 165.} 
\footnote{68. See Sue Davis, Susan Haire & Donald R. Songer, Voting Behavior and Gender on the U.S. Courts of Appeals, 77 JUDICATURE 129, 131-32 (1993).} 
\footnote{69. See Sherry, supra note 33.} 
\footnote{71. See Candace C. White, Gender Differences in the Supreme Court of Canada, A Thesis Submitted to the Faculty of Graduate Studies, Department of Political Science, University of Calgary (Dec. 1998) (copy on file with the authors).} 
\footnote{72. See Wilson, supra note 38, at 515 (noting that both female and male judges "are subject to the duty of impartiality.").}
might be differently affected than men in at least three ways by these doctrines. She then offers hypotheses to test those potential differences, and sketches out some methods that might be used to achieve that end.

Both Justice Werdegar and Heather Elliott focus on appellate judging and in particular on judges who sit on the highest court of a particular jurisdiction. Jason Schultz, by contrast, examines the role of trial court judges in civil sexual assault cases. Using the lens of therapeutic jurisprudence, which was pioneered in drug courts and which seeks to determine how helpful a particular procedural practice or substantive rule of law is to the participants in such courts, he examines the ways in which women trial judges might make the courtroom experience of victims of civil sexual assault more beneficial. He draws on a Canadian study of sexual assault victims, most of whom were women, to analyze how women judges might influence litigant/victim perceptions for the better in three areas of the proceedings: findings on issues of fact, evidentiary rulings, and equitable relief. While acknowledging that his conclusions are “speculative,” Schultz thinks it not “far-fetched” to assume that women judges will be more sympathetic to women victims and thus provide a more therapeutic courtroom experience.

Two papers analyze the various ways in which women become judges, while the final paper examines the composition of a highly specialized court — the U.S. Court of Appeals for the Federal Circuit — on which only one woman jurist has ever sat. In her paper regarding judicial selection methods and their effect on women on the bench, Becky Kruse reviews the various appointment and election processes employed by the federal and state governments in the U.S. Statistics on federal court appointments reveal that the political party of the executive, and the personal interest of the President in achieving gender representation on the courts are both very significant factors in increasing the number of female appointees. Broad-based nominating commissions have been the tool of choice.

Kruse then summarizes a number of studies of varied appointment and election processes used in selecting state court judges. Although the wide variety of these methods makes it very difficult to reach conclusions, she suggests that elections pose difficulties for women candidates because women and minority voters, who might be expected to support female candidates, form a large part of the “voter drop off.” On the other hand, nominating committees employed in the appointment process are often heavily male and politically conservative. Voter education and representative committees offer the best hope for women judicial candidates.

In another paper focusing on selection of women for the judiciary, Megan McCarthy examines how the election process has affected and been affected by women candidates. Relying on extensive newspaper research, she divides the campaigns of women into three waves:
1) 1922 until 1992, when gender was not emphasized as a campaign issue; 2) 1992 until 1995, when it was; and 3) 1995-2000, when gender was again de-emphasized.

The second wave of female candidates, she concludes, emphasized gender in order to reflect feminist ideals such as the need for representative leadership and female role models. One negative byproduct of this emphasis was the identification of certain seats as “women’s seats,” in which women ran against each other for representative spots. As the electorate has become more accustomed to women judges, however, they have succeeded in greater numbers, and this success has encouraged women to promote themselves on gender neutral issues.

Finally, Brenda Simon examines the position of women on a specific court, the U.S. Court of Appeals for the Federal Circuit. Focusing mainly on that court’s exclusive jurisdiction over patents, she questions why only 6.3% of its members are female, and points to the importance of increasing that representation. She finds that three factors have held women back from appointment to this Court: 1) the need to live in the Washington, D.C. area; 2) the politics of federal judicial appointments in general; and 3) an arguable shortage of female candidates with scientific backgrounds and patent law expertise. She dismisses these arguments as simplistic, and submits that the female voice is essential in making determinations about issues of moral significance pending before the court, such as DNA sequencing.

The Workshop on Judging held at Boalt Hall, and this Symposium, represent a renewed effort to address the persistent question of gender differences among judges. With women judges becoming less unusual both in the U.S. and Canada than they were when this question was first raised more than fifteen years ago, and with women having women as colleagues on the same court more frequently than when it was reexamined seven years ago, it is our hope that these papers may help stimulate further research on the matter and that the research may yet produce some more definitive answers.