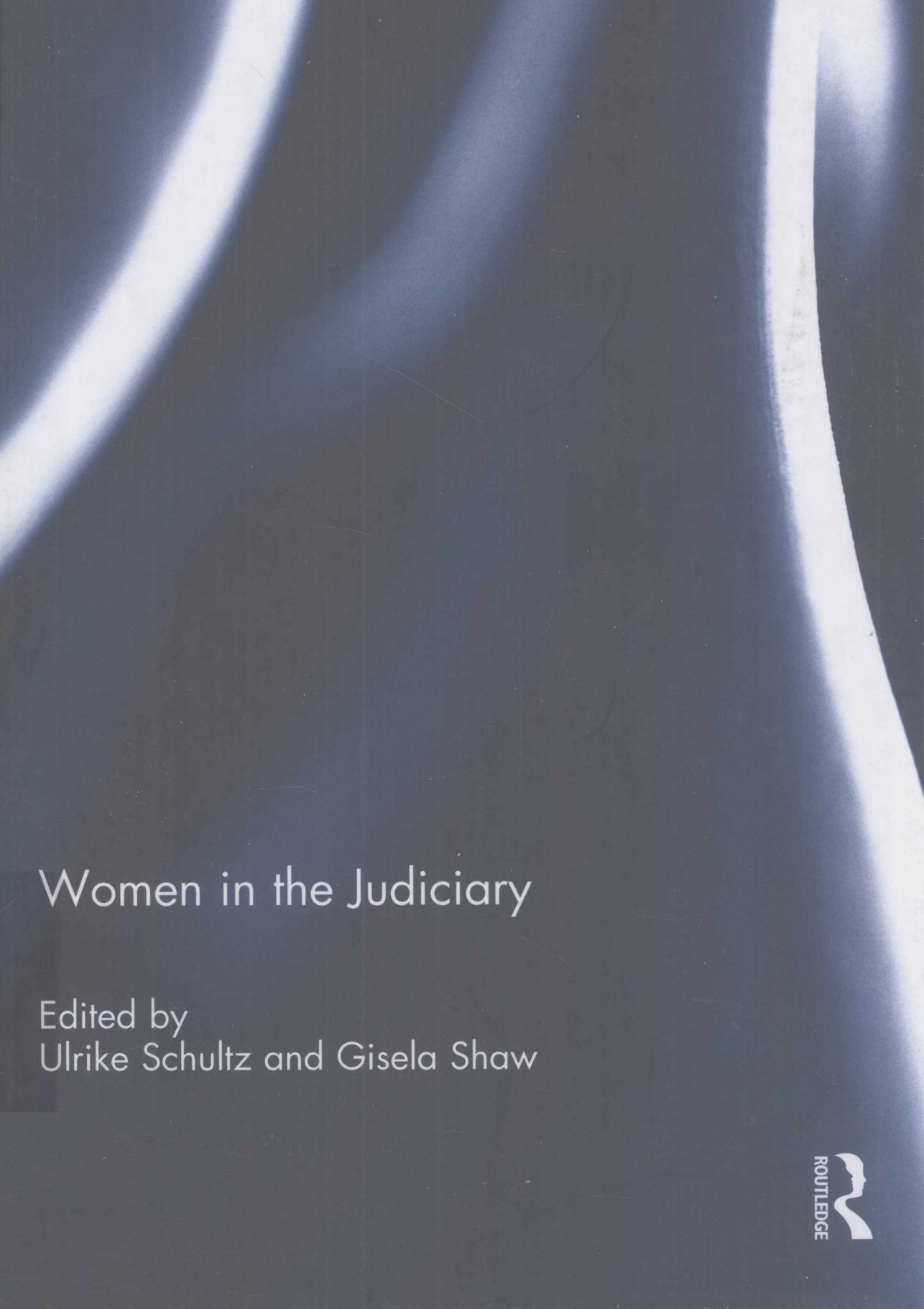

Women in the Judiciary

Edited by
Ulrike Schultz and Gisela Shaw

ROUTLEDGE

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INTRODUCTION

Gender and Judging

Does gender matter in judging? And if so, in what way? Who are the women judges? How did they get into office? How do they organise and live their lives? What are their professional careers? What constitutes a good judge? And finally: do women judge differently from men (or even better)?[1] These are the questions which a Collaborative Research Network (CRN) of the Law and Society Association (LSA) on 'Gender and Judging' has put on its agenda.

Work started in 2006 at the LSA Conference in Baltimore, and has since been continued vigorously at a number of major subsequent events: a conference for women lawyers in Latin America organised by Beatriz Kohen in Buenos Aires in April 2007; the international socio-legal conference in Berlin in July in 2008 organised jointly by the LSA, the Research Committee on Sociology of Law (RCSL) and national socio-legal organisations (where five panels presented a total of 18 papers); the LSA conference in Montreal in May 2008; the meeting of the Working Group for the Comparative Study of Legal Professions in Berder, France, in June 2008; the RCSL Conference in Milano in July 2008, a special workshop on gender and judging at the International Institute for the Sociology of Law in Oñati, Spain, in June 2009[2], the meeting of the Legal Profession Group in Paris in 2010 and several panels at the LSA conferences in Denver 2009, Chicago 2010 and San Francisco 2011. In short, 'Gender and Judging' has emerged as an issue of considerable and lasting interest to socio-legal scholars.

The 'Gender and Judging' project, a truly international venture with contributors from around the world, builds on work of the Women and Gender in the Legal Profession Group (a sub-group of the RCSL Working Group on Legal Professions). This Group was established in 1994 and can, by now, point to a range of publications, most prominently the collection *Women in the World Legal Professions*[3] and a special issue of this journal[4]. In addition, many articles in books and journals have been inspired by the work of the group.

The CRN on 'Gender and Judging' focuses on the following areas:

- gender aspects of judicial education and training
- gender aspects of selection and careers
- women judges at work (job satisfaction, stress, coping strategies)

- gendered construction of judges in the media
- gendered judging
- judging in family courts
- gendered communication in the courtroom
- female judicial leaders (eminent women judges, first women judges, the pioneers)

In keeping with its international character, the project adopts a comparative perspective (including a historical dimension) with the aim of identifying any differences between the way in which women and men approach and conduct their judicial work, as well as between the impact of their gender and work on the judicial system. In this book, which is the first collection of articles on 'Gender and Judging', all the issues listed above are addressed in some form, be it merely in passing or in greater depth. Common to all contributions is the central question: do women judges judge differently from men judges? Do women judges add a different voice? This was a question first raised in the 1990s under the influence of 'difference feminism'[5] and today remaining as topical as ever.

Four contributions deal with women judges in common law countries (UK, Australia, USA), two with women judges in a civil law system (Argentina and Syria), and another with women judges and dissenting opinions in a mixed jurisdiction (Canada), although dissenting opinions are rather more a feature of common law than civil law systems.

In comparing developments regarding women judges in different countries, it is important to keep in mind a number of relevant fundamental differences between civil law and common law systems. In civil law countries, a judicial career is one of a number of separate career paths open to law graduates, which means that judges start their careers at the age of between twenty-five and thirty-five. As they are public servants, entry later in life is, as a rule, not possible, and formal qualifications are crucial to access to the judiciary. By contrast, in common law countries, judges are chosen from among experienced legal practitioners, the key criterion being professional achievement.

In the two legal systems, the very process of judicial decision-making is governed by contrasting ideologies. In civil law countries, judges pass judgments in the name of the state or the people as anonymous interpreters of the law and representatives of state power. Judges in common law countries have more discretion in the process of finding the law by 'distinguishing' the case from precedents. They 'make the law'. The judgment is therefore more closely connected to their personality, and the reasoning in the decision will be more often scrutinized and criticized with a view to their personal character and background, i.e. financial status, political affiliation, life experience as a man or woman, religious belief, sexual orientation, ethnicity and personal qualities.

In common law countries, the judiciary commands a higher social status as well as higher incomes, than in the civil law world. Both factors may work as hidden mechanisms to keep women out or hinder them from getting in. In civil law countries it is easier for women to enter the judiciary, as key access criteria for judicial office, such as formal qualification and examination results, are more rational and transparent and therefore more easily met by women than those in the common law world, where professional visibility, favourable evaluations of professional achievement, and access to – traditionally male – networks are of crucial weight. The increase in the number of

women in the judiciary in civil law countries therefore happened about two decades earlier than in common law countries, and more of them have by now reached career positions. On the other hand, the question remains whether an increase in the proportion of women in the judiciary may not actually contribute to a lowering of judicial prestige and income, as women traditionally have not been associated with perceptions of personal importance and the role of breadwinner of the family. Possible developments will have to be watched closely.

All of these differences explain why problems of women's access to judicial careers have been more frequently analyzed and discussed in the common law than in the civil law world. One important further reason is that the civil law ideology of judicial objectivity, of the neutral judge applying the law in strict compliance with formalised rules, makes it almost a taboo to discuss influences of gender on judging in civil law countries. Yet, the subject is equally important, and there are, of course, shared problems.

Common law countries represented in this collection are more familiar with issues of diversity. The colonial past, multi-cultural societies and migration have created diversity on the bench earlier and more visibly than in most civil law countries. This adds to the differences in perception of the issue at stake. The intersection of gender with another of the above mentioned qualities or with biographical features (religion, sexual orientation, age, ethnicity) may have led to a more intense experience of discrimination on the part of judges in the common law world as well as of their clients. So-called intersectional discrimination in the European Union is an important issue for anti-discrimination policies.

What makes a judge a feminist judge? Do feminist judges make a difference? What can women expect from feminist judges? These are the fundamental questions addressed by Rosemary Hunter. Do feminist judges (which may well include men) by definition practise feminist judging, i.e. introduce women's perspectives and experiences, a conscious pro-care agenda; or are they more likely to adapt to the system or to be transformed by it? Rosemary Hunter identifies four major aspects of judging where feminist judges may differ from others:

- court process
- case outcome
- reasons given for a decision
- 'extra-curricular' activities.

She concludes 'that while it is unrealistic to make generalisations or to impose demands upon women judges as a whole, feminist judges both can and ought to make a difference'.

Baroness Hale, the first female Law Lord in the UK, describing herself as 'just a bit different', is convinced that difference on the bench 'subtly changes and ultimately improves the judicial product'. Erika Rackley uses the House of Lords' decision in *Secretary of State for the Home Department v K(FC); Fornah (FC) v Secretary of State for the Home Department* [2006] as 'a lens through which to explore the "difference" of the woman judge and, in particular, the developing jurisprudence of Baroness Hale'. The case, involving a claim for asylum based on danger of female mutilation in the home country, demonstrates that Baroness Hale brings to bear a better understanding of life realities and legal problems encountered by women on account of their

sexuality than her male colleagues. Erika Rackley concludes however that the mere suggestion of difference in the context of adjudication remains contentious, and she rejects the 'different voice' as a dangerous myth. Acknowledging that women on the bench are an irritant disrupting established patterns of masculinity, she considers diversity on the bench as important because it attracts the best, facilitates a better chance of understanding problems facing people, and thereby creates greater public confidence in the judiciary.

Reg Graycar, drawing on her experience as a barrister, takes a deep and critical look at the consequences of diversity on the bench and at how otherness may colour a judgment. She warns that we need to pay careful attention to what judges know about the world, how the things they know translate into activities as judges. Giving examples of cases from various common law countries, she analyses how the concepts of bias, partiality and perspective are connected via notions of 'otherness' to outsider judges and 'other' legal decision makers.

An important source of differing opinions between women and men are dissenting and concurring votes in judicial judgments. This provides the focus for the contribution of Marie-Claire Belleau and Rebecca Johnson, with special reference to the Supreme Court of Canada. Belleau and Johnson have kept careful track of female dissenters over the years, concluding that dissenting and even concurring votes (i. e. dissenting opinions but final consent) were much more frequent among women than among men. However, in recent years the number of such votes has declined, giving rise to speculation and discussion as to whether key issues in the context of women's rights have now been settled. Is there less need now to break with traditions? Have women adapted more to a general norm? Do they, in times of unrest, feel more strongly in need of unanimity among judges of both sexes?

Interesting insights on this question may derive from research by Bryna Bogoch from Israel[6] who has analysed judgments published in legal databases. She not only found that decisions by women are underrepresented in the databases but also that women's decisions are significantly longer. Is it because they differ in their arguments? Or do they want to explain their reasoning in more detail to the parties?

Sally Kenney analyses the literature on women judges by political scientists over the past decades in the US, arguing that 'carefully examining the body of work of three pioneering scholars, Beverly Blair Cook, Elaine Martin, and Sue Davis, yields insights beyond the particular subject matter and helps us to understand sex and gender more generally'. One suggestion is that we should understand gender as producing tendencies among generational cohorts rather than trying to identify essential sex differences. Differences in entry and career can be related to sex, but sex differences will not necessarily lead to different judgments giving gendered views, and judges in general influence others but not in a gendered and predictable way.

Finally, Monique Cardinal and Beatriz Kohen deal with questions of gender in the judiciary of civil law countries. Both show that, although in these countries there is awareness that they cannot waste the competence of their well-educated women; the problems faced by women keen on a judicial career are comparable to those of their sisters in the Western world.

Monique Cardinal, on the basis of comprehensive empirical research on women and the judiciary in Syria (where the first female judge was appointed in 1975), describes the appointment process, training and judicial career path, making a valuable

contribution to our limited knowledge of the role and place of women lawyers in a Muslim Arab country.

Beatriz Kohen sets out to find answers to the question whether the participation of women changes the judiciary. She does so by empirical research on gender differences in the values and attitudes of family judges in the City of Buenos Aires using Gilligan's ethic of care approach. She explores how men and women judges perceive their office, how they imagine the 'ideal' judge, what their motivation is to become a judge, and how they assess the special contribution of women judges to the judiciary. Judges of both sexes do identify differences. She herself finds that women tend to apply a more interdisciplinary approach to reaching a decision, not only relying on their professional techniques but integrating to a greater extent social workers and other family experts in their work. However, she, too, concludes (concurring with her fellow authors) that, overall, there is no evidence of clear-cut gender-based differences.

These articles add diverse and fascinating contributions to a debate that started thirty years ago but leaves ample space for further discussion.

Ulrike Schultz & Gisela Shaw
September 2008

Notes

1 Cf. Ulrike Schultz, Richten Richterinnen richtiger? In *Frauenbilder.* Ed. by Ulrike Schultz for the Northrhine-Westfalian Ministery of Health, Social Matters, Women and Family, Düsseldorf, 2005, 117 – 126
2 Organisers: Sally Kenney (USA), Ulrike Schultz (Germany), Gisela Shaw (UK) ed. by Ulrike Schultz and Gisela Shaw, Oxford: Hart, 2003
3 *Women in the Legal Profession*, in *IJLP* vol. 10, no. 2, July 2003
4 About the notion of different voice: Gilligan, Carol, 1982. *In a Different Voice.* Cambridge, Mass: Harvard University Press
5 Still unpublished work, presented at the LSA Conference in Montreal in May 2008

Can *feminist* judges make a difference?

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

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

Introduction

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

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

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

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

Who is a feminist judge?

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

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

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

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

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

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

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

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

What should a feminist judge do?

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

Asking the woman question

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

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

Including women

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

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

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

Challenging gender bias

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

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

Contextualisation, particularity and attention

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

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

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

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

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

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

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

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

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

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

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

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

Making feminist choices

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

Full-time feminism

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