

7-1-2014

Book Review: Gender and Judging

Thadd A. Blizzard

Follow this and additional works at: <http://repository.uchastings.edu/hwlj>

Recommended Citation

Thadd A. Blizzard, *Book Review: Gender and Judging*, 25 *Hastings Women's L. R.* 267 (2014).

Available at: <http://repository.uchastings.edu/hwlj/vol25/iss2/7>

This Book Review is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Women's Law Journal* by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.

Book Review: *Gender and Judging*

*Hon. Thadd A. Blizzard**

The recently published book *Gender and Judging*¹ brings together a wide-ranging collection of scholarly works that together present the story of women's difficulties in becoming judges, the degree to which they have in some ways overcome those difficulties, and the impact women have had on society in their role as judicial officers. It is a rich resource for those beginning study in this area, or continuing investigation of an evolving subject.

The editors have done an admirable job treating a topic of this breadth and complexity in a single work. Confronted with a variety of articles written from multiple perspectives including differing legal systems, cultures, languages, and approaches, the editors have nonetheless provided an accessible and logically-structured work.

The book is vast in scope, comprised of thirty contributions by thirty-two scholars, of whom twenty-eight are female and four male.² Nineteen countries from five continents are represented, covering both the common law and civil law systems.³ While no work as a practical matter can comprehensively embrace every aspect of this topic throughout the entire world, this volume presents works of sufficient diversity to provide the reader with an impressive cross-section of information.

I. THE STRUCTURE OF GENDER AND JUDGING

The Introduction to *Gender and Judging* consists of a highly useful "Overview and Synthesis."⁴ There, the editors explain that the articles in

* Thadd A. Blizzard, B.A. (Literature), J.D., M.A. (Literature), LL.M. (International Legal Studies), M.Phil. (Comparative Medieval Literature), is a Superior Court Judge in Sacramento, California. Before his appointment to the bench in 2009, he was admitted to the Bars of California and New York, and practiced in the field of complex civil litigation and arbitration in both states. While in New York, he was awarded a fellowship to study German law by the Deutscher Akademischer Austauschdienst. In California, he served as a judicial staff attorney for the First District Court of Appeal, was certified as an appellate specialist by the State Bar, and taught appellate advocacy as an adjunct professor at the University of the Pacific, McGeorge School of Law.

1. GENDER AND JUDGING (Ulrike Schultz & Gisela Shaw eds., 2013.) [hereinafter GENDER AND JUDGING].

2. *Id.* at vi.

3. *Id.*

4. Ulrike Schultz & Gisela Shaw, *Introduction: Gender and Judging: Overview and*

the book are divided into seven subject areas, which they describe as “currently dominating academic debates.”⁵ The Overview and Synthesis, which precedes these articles contains data, commentary, and discussion based upon the works of the contributing writers as well as other sources,⁶ presented in a unifying manner that brings together and builds upon points made in the individual articles.

The Overview and Synthesis is organized into several main headings and a number of subheadings. These main headings are: “What the Book is About;” “The Advancement of Women in the Judiciary;” “The Judiciary: Still a Gendered Organization?;” “Do Women in the Judiciary Make a Difference?;” “Feminist Judges and Judging;” “Gender Trainings for the Judiciary;” followed by the editors’ “Conclusion.”⁷ The contents of the Overview and Synthesis freely draw upon the contributed articles (and other sources) to provide a cohesive narrative.

To describe and comment on related aspects of the Overview and Synthesis as well as individual articles (to a degree), the present Review will make reference to both based upon subject matter.

A. A PRELIMINARY NOTE ABOUT A PREVIOUS BOOK BY THE SAME EDITORS, *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*

It is useful to consider the present work in the context of a previous book published by the same editors ten years earlier, entitled *Women in the World's Legal Professions*.⁸ In the prior book, the focus was not limited to

Synthesis, in GENDER AND JUDGING, *supra* note 1, at 3 [hereinafter *Introduction*].

5. *Introduction*, *supra* note 4, at 4. These seven subject areas are: (1) Pioneers and Eminent Women Judges (“The history of women in the judiciary: Why were women kept away from judicial office? How did they finally manage to break into the judicial ivory tower? What were their early contributions to the dispensation of justice?”); (2) Women Judges’ Work and Careers (“How does the judicial selection process work? What are the career paths and career options? What are women judges’ experiences, their attitudes towards judging, and their psychological experiences in their daily work?”); (3) Gender Perspectives in Judging (“To what extent does gender matter in judging? Do women judge differently from men? Do they contribute to a more gender equal society? Are they inclined to specialise in particular areas of law?”); (4) Gendered Construction of the Judiciary (“How does the judiciary view itself? How do women fit into this picture which, after all, has traditionally been determined by men?”); (5) Feminist Judges and Feminist Adjudication (“What makes a female judge a feminist judge? What are the expectations (s)he is confronted with? Is there such a thing as a feminist adjudication process? How do we explain the reluctance on the part of many female judges to identify themselves as feminists?”); (6) Quotas and Diversity (“How can the share of women in the judiciary be increased? Why does it matter? Do we need quotas? What is the significance of diversity within the judiciary?”); and (7) Gender Training for the Judiciary (“Ought legal training to include gender training? If so, what form should it take? What are the issues arising?”). *Id.* at 4.

6. For citations of sources relied upon in the *Overview and Synthesis* other than articles appearing in GENDER AND JUDGING, see *References*, *id.* at 44–47.

7. GENDER AND JUDGING, *supra* note 1, at xiii; *Introduction*, *supra* note 4, at 3–44. *Cf.* the seven subject areas referenced in footnote 5, *supra*.

8. WOMEN IN THE WORLD'S LEGAL PROFESSIONS (Ulrike Schultz & Gisela Shaw eds., 2003). In its preface, the editors of the present work, GENDER AND JUDGING, explain that

women in the judiciary, though some discussion of that topic appears there and will be referenced here occasionally. Since the topics in the prior book (women as legal professionals) and the new book (women as judges) necessarily overlap, some of the articles now presented in *Gender and Judging* understandably discuss the history of women becoming lawyers. As the editors point out in *Gender and Judging*, for example, it was “only in the late nineteenth century that the struggle of the first women’s movement for the right of entry into higher education as well as for civil rights for women paved the way for the first women to become lawyers.”⁹ This of course had a profound impact on the ability of women to become judges.

Since *Women in the World’s Legal Professions* provides a rich discussion of women entering legal education and law practice generally, it will not be addressed here except in passing, since the present focus is on the specific issue of women in the judiciary. *Women in the World’s Legal Professions* is, however, recommended as a starting place for reading in this area.

B. APPROACHES TO GENDER AND JUDGING

The authors acknowledge that there were many different styles and presentation methods appearing in the volume: “Approaches and styles [of the contributing authors] vary depending on the authors’ personalities as well as their professional backgrounds.”¹⁰

their new book “builds on the work of the Women and Gender in the Legal Profession Group, established in 1994,” which is itself “a sub-group of the RCSL [Research Committee on Sociology of Law] Working Group on Legal Professions, which, for its part, can look back at a 30-year tradition of collaboration.” *GENDER AND JUDGING*, *supra* note 1, at vi. The efforts leading to the present work were brought together at a special workshop on “Gender and Judging” at the International Institute for the Sociology of Law in Oñati, Spain in June 2009. *Id.*

9. *Introduction*, *supra* note 4, at 7.

10. *Introduction*, *supra* note 4, at 4. The editors note that,

A historian handles her subject differently from a psychologist. A sociologist tends to go for a more theoretical approach than a jurist. The various national cultures also play their part. Some contributions are more narrative and descriptive, others more argumentative, and yet others [are] designed to provide specific views on certain issues, such as, for instance, a treatise on diversity. . . . Some contributions incline more towards the sociology of organizations, others towards that of the professions. Authors differ in their handling of feminist and also of queer theory, which impacts particularly on their discussion of the changes brought about by the feminization of the judiciary. . . . A number of articles are based on authors’ empirical quantitative and qualitative research, their arguments frequently supported and illustrated by quotations from interviews with judges and prosecutors of both sexes.

Id. at 4–5. One author used “linguistic analyses” while others “make use of textual and image analysis.” *Id.* at 5. The “majority of contributions approach the object of their investigation in a critical mode; be this the judiciary as an institution that has, historically, tended to disregard or even reject women as a resource and that even today regards them with some suspicion; [or] be it the practice of adjudication that fails to do justice to women

C. DIFFERENCES BETWEEN THE CIVIL AND COMMON LAW WORLDS

Early in the Overview and Synthesis, the editors discuss some fundamental differences between civil law and common law judiciaries,¹¹ and the fact that the judiciary in civil law countries includes both judges and prosecutors.¹² This forms an important context for the entire book.

Some significant distinctions between the civil and common law systems bear directly upon gender differences in their respective judiciaries. For example, in civil law countries, it is easier for women to enter the judiciary, since

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 therefore happened about two decades earlier in civil law countries than in common law countries. . . .¹³

The editors also explain some important differences in the role of the judge in the common law and civil law systems that affect the nature and function of judging:

In the two big legal systems of the world, the very process of judicial decision-making is governed by contrasting ideologies. In

and lacks the necessary gender sensitivity. [Further,] . . . [s]ome contributions . . . also pursue a political aim (i.e., toward gender justice), and do not shy away from openly criticizing their judicial system.” *Id.* at 4–5.

11. *Introduction, supra* note 4, at 5. For example, the editors point out that, [i]n 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 25 and 35. 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. These tend to be appointed in middle age (40–50 years), the key criterion being professional achievement, or . . . they are elected. Another key difference between the two judicial systems is that of the number of judges, with civil law countries having much higher numbers[.]

Id. One of the reasons for the need for a higher number of judges in civil law countries is “that their judges produce extensive and detailed written reasonings for their decisions.” *Id.* at 5–6. Also noteworthy is the fact that “[a] civil law judge’s position in the legal field is high but not to be compared to that of a common law judge who commands a higher social status as well as a higher income in a more exclusive judicial system than his or her civil law counterpart.” *Id.* at 6.

12. “The judiciary in civil law countries comprises judges as well as prosecutors. . . . In many countries the practical training for the two positions differs. In others, such as some German states, Syria, and Pakistan, members of these professions may or even have to switch from one to the other.” *Introduction, supra* note 4, at 6–7.

13. *Introduction, supra* note 4, at 6.

common law countries, a judge, according to convention, is a passive arbiter, an umpire. In civil law countries, judges have a more active role, they direct the proceedings. They act as anonymous interpreters of the law according to specified interpretation rules and pass judgments in the name of the state or the people.

Judges in common law countries have greater discretion in reaching their decision by “distinguishing” the case in hand 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 with a view to their personal character and background, ie [sic] financial status, political affiliation, life experience as a man or woman, religious belief, sexual orientation, ethnicity, and personal qualities.¹⁴

Another important point is “that the civil law ideology of the impersonal neutral judge applying the law in strict compliance with formalized rules, makes it almost a taboo to discuss the influences of gender on judging in civil law countries.”¹⁵

In common law, ie [sic] adversarial, systems, prosecutors act as equal opponents to defending counsel. In civil law, ie [sic] inquisitorial systems . . . the ideology requires that prosecutors, judges and counsel should jointly work to achieve, or at least aim to achieve, justice.”¹⁶ The editors assert, “In both systems [however,] the final judgment is the product of a process of communication, hence the importance of a gendered view of this process.”¹⁷

14. *Introduction, supra* note 4, at 6 (internal citations omitted).

15. *Introduction, supra* note 4, at 6.

16. *Introduction, supra* note 4, at 7.

17. *Introduction, supra* note 4, at 6.

II. THE ADVANCEMENT OF WOMEN IN THE JUDICIARY¹⁸

Women becoming members of the judiciary “was even harder to achieve” than women becoming lawyers.¹⁹ In “all countries,” there were “heated debates” about “whether women could act as judges.”²⁰ A common theme of these discussions was “that women would not be able to judge objectively due to their emotionality and their biologically-based mood swings.”²¹ Another argument “repeatedly put forward was that women would be too precious for the tough legal world and that they would need to be protected from it.”²²

Now that it is well established that women can function perfectly well as judges, albeit with progress still to be made in their participation, it seems particularly interesting to discuss whether there actually are differences in the way women and men approach the task of judging. The present writer believes that consideration of whether such differences exist can be beneficial to the judicial process. While the sections of the book treating this subject are not predominant in size or scope, they will be given

18. In addition to the discussion in the Overview and Synthesis on this subject, related articles are presented under the heading “Pioneers and Eminent Women Judges.” GENDER AND JUDGING, *supra* note 1, at 50. Articles discuss historical developments in Ontario, Canada (Mary Jane Mossman, *Becoming the First Women Judges in Ontario: Women Lawyers, Gender and the Politics of Judicial Appointment*, in GENDER AND JUDGING, *supra* note 1, at 51); the United States (Elaine Martin, *Profiles in Leadership: Eminent Women Judges in the United States*, in GENDER AND JUDGING, *supra* note 1, at 69); Israel (Eyal Katvan, *The Entry and Integration of Women into Judicial Positions in Israel*, in GENDER AND JUDGING, *supra* note 1, at 83); and the Weimar Republic in Germany (Marion Röwekamp, *First Female Judges in the Weimar Republic in Germany: Reflections on Difference*, in GENDER AND JUDGING, *supra* note 1, at 103). Also, articles appear under the heading “Women Judges’ Work and Careers” relating to France (Anne Boigeol, *Feminisation of the French ‘Magistrature’: Gender and Judging in a Feminized Context*, in GENDER AND JUDGING, *supra* note 1, at 125); Northrhine-Westfalia, Germany (Ulrike Schultz, *‘I was noticed and I was asked . . .’ Women’s Careers in the Judiciary, Results of an empirical study for the Ministry of Justice in Northrhine-Westfalia, Germany*, in GENDER AND JUDGING, *supra* note 1, at 145); Kenya (Winifred Kamau, *Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions*, in GENDER AND JUDGING, *supra* note 1, at 167); Syria (Monique C. Cardinal, *The Impact of Women on the Administration of Justice in Syria and the Judicial Selection Process*, in GENDER AND JUDGING, *supra* note 1, at 191); Australia (Kathy Mack & Sharyn Roach Anleu, *Skills for Judicial Work: Comparing Women Judges and Women Magistrates*, in GENDER AND JUDGING, *supra* note 1, at 211); and Switzerland (Revital Ludewig & Juan LaLave, *Professional Stress, Discrimination and Coping Strategies: Similarities and Differences between Female and Male Judges in Switzerland*, in GENDER AND JUDGING, *supra* note 1, at 233). The heading “Quotas and Diversity” presents papers from the United States (Sally J. Kenney, *Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States*, in GENDER AND JUDGING, *supra* note 1, at 461); England and Wales (Kate Malleson, *Gender Quotas for the Judiciary in England and Wales*, in GENDER AND JUDGING, *supra* note 1, at 481); and the United Kingdom (Erika Rackley, *Rethinking Judicial Diversity*, in GENDER AND JUDGING, *supra* note 1, at 501).

19. *Introduction*, *supra* note 4, at 7.

20. *Introduction*, *supra* note 4, at 7.

21. *Introduction*, *supra* note 4, at 7.

22. *Introduction*, *supra* note 4, at 7.

special attention in this Review.

The editors provide a table of data about thirty-two countries, which includes (where available) the date the first woman became a judge there.²³ The dates range from 1870 (USA) to 2008 (United Arab Emirates).²⁴ It is surprising to learn how recent the dates are for the first women judges in some countries, for example: Canada (1943), Great Britain (1945), France (1946), Netherlands (1947), Italy (1963), Portugal (1974), New Zealand (1975).²⁵

In many countries, the admission of women into the judiciary did not bring rapid change. For example, it was only in the late 1970s that “significant increases” in the number of women judges occurred in Continental Europe, “as growing economic prosperity and women’s increasing share in education and training” took place.²⁶

The editors point out, however, that there has been “a veritable explosion of numbers of female law students since the 1990s,” such that “[i]n many countries women now represent more than half of all students in legal education.”²⁷ This increase in the number of female law students has also led to an increase in the number of female judges:

In many countries women judges now represent at least one third of the total. This is true even of a Muslim state such as Pakistan, the first to call itself an Islamic Republic; where the first appointment of a female judge took place in 1974. Similar developments have occurred in many states of South and East Asia, such as India and the Philippines, where women’s access to judicial office was delayed for a long time.²⁸

Indeed, in a “steadily increasing number” of European countries, the number of women judges “far exceeds that of men.”²⁹ This is not the case in “the Anglo-American world,” though “it remains unclear why and in which states the share of women judges develops faster or more slowly.”³⁰

The editors state that

[i]n Arab countries with a pro-Western orientation, such as Syria, women have also gained their share in the judiciary. Yet, this has to be seen in the light of the move towards traditional values and the reinforcement of Sharia, the religious laws of Islam, and the coming to power of Muslim brotherhoods, . . . [which] . . . raises the question whether the progress made in women’s participation

23. “Table: Women in the Judiciary.” *Introduction, supra* note 4, at 9–13.

24. “Table: Women in the Judiciary.” *Introduction, supra* note 4, at 12–13.

25. “Table: Women in the Judiciary.” *Introduction, supra* note 4, at 10–13.

26. *Introduction, supra* note 4, at 14.

27. *Introduction, supra* note 4, at 14.

28. *Introduction, supra* note 4, at 14.

29. *Introduction, supra* note 4, at 14.

30. *Introduction, supra* note 4, at 14.

in education and work will at some point be reversed.³¹

A. GENDER FACTORS IN RECRUITMENT AND ENTRY INTO THE JUDICIARY

The editors begin this important topic with observations about significant differences between civil and common law countries in access to the judiciary.³² In civil law countries, “entry to the judiciary immediately follows the completion of legal education and training.”³³ As an example, in Germany, candidates who have completed their academic studies “undergo two years of practical training in various fields of legal work,” and then take a state exam that may award “qualification for judicial office,” which is then followed by three years of practice “on probation.”³⁴

As a rule in civil law countries, therefore, “success in examinations determines access to the profession,” since it is “a rational criterion that can be expected not to discriminate against women.”³⁵ Assessment results can still be affected by gendered factors, however, for example where oral examinations are given.³⁶

In China, male applicants are more overtly preferred, where the job description for judges includes “harsh working conditions, travel, and on-site investigation.”³⁷ In Arab states such as Syria and Egypt, judges are limited to a period of years in one office, then moved to other courts and cities, which for women in traditional family structures in these countries represents a considerable hardship.³⁸

It is fascinating to note “in many African and Asian countries the participation of women has helped restore public trust in the judiciary, since women are less prone to bribery.”³⁹

In Commonwealth countries, judges are usually appointed by “Judicial Appointment Commissions,” which have undergone procedural reforms in recent years “in order to counteract the low participation rate of women,” which has been consistently below the international average.⁴⁰ In the United Kingdom, the process of appointing judges traditionally involved “canvassing senior lawyers” in a process occasionally referred to as “secret soundings.”⁴¹ This process “ensure[d] a homogeneity amongst judges as they were chosen from a narrow range of educational backgrounds often

31. *Introduction, supra* note 4, at 15 (citing Cardinal, *The Impact of Women on the Administration of Justice in Syria, supra* note 18).

32. *Introduction, supra* note 4, at 15–18.

33. *Introduction, supra* note 4, at 15.

34. *Introduction, supra* note 4, at 15.

35. *Introduction, supra* note 4, at 15.

36. *Introduction, supra* note 4, at 16.

37. *Introduction, supra* note 4, at 16.

38. *Introduction, supra* note 4, at 16–17.

39. *Introduction, supra* note 4, at 16.

40. *Introduction, supra* note 4, at 17.

41. *Introduction, supra* note 4, at 17 (citing Malleson, *Gender Quotas, supra* note 18).

with family connections to the legal profession, . . . it excluded women and potentially talented applicants who were not sufficiently well-known to the judiciary and the bar.”⁴² Reforms of this system have moved toward selection on the basis of merit.⁴³

As the editors point out, however:

The problem lies in translating the concept of merit into practice. What constitutes merit and potential? What criteria are to be applied in the absence of any positive description of the realities of work? Or in other words: What are the key qualities required for a good judge? Do women have these to the same extent as men?⁴⁴

These questions are among the most interesting in the book. Stated differently, are there attributes of a good judge that women are able to fulfill as well, better or not as well as men? Or perhaps there is no discernible difference between the basic judging capabilities of women and men. Taking the issue even further, do women tend to have traits that should be encouraged and enhanced in a fair and effective judiciary?

Regarding judicial elections, as in many states in the U.S., “the recruitment process is even harder to influence. Electors are not likely to appoint women unless social movements and interest groups mobilize and articulate appointing women as a demand.”⁴⁵

B. WOMEN IN SENIOR JUDICIAL POSITIONS

“In civil law countries the bulk of women is gathered in courts of first instance, [and] in common law countries the larger part hold positions as magistrates or recorders, i.e. lower judicial functions.”⁴⁶ The editors conclude that

[H]igher courts are far from achieving equality of numbers and a fully gender-integrated bench. Feminisation is happening, but in all countries the principle still applies that the higher the position, the smaller the share of women, even in states where women currently represent over 60 per cent of all judges.⁴⁷

42. *Introduction, supra* note 4, at 17 (citing Michael Blackwell, *Old Boys' Networks, Family Connections and the English Legal Profession*, PUBLIC LAW 426 (2012)).

43. *Introduction, supra* note 4, at 17.

44. *Introduction, supra* note 4, at 17 (internal citations omitted).

45. *Introduction, supra* note 4, at 17. The editors note that, “[i]n the US, for instance, there are still courts without any female or black female judges.” *Id.*

46. *Introduction, supra* note 4, at 18.

47. *Introduction, supra* note 4, at 19. In this regard, it is interesting to note that the California Supreme Court currently is headed by a female Chief Justice, and the majority (4 of 7) of the justices on that court is female, though this was only recently achieved. According to demographic data provided on the California courts' official website, as of December 31, 2012, there were nearly identical percentages of women judges at the Court of Appeal (31 of 100, i.e., 31%) and Superior Court (484 of 1549, i.e., 31.2%). *See generally* www.courts.ca.gov. Prior to the appointment of the current Chief Justice

The editors state that a “glass ceiling continues to exist” for higher judicial office, which they attribute to “naturally subjective assessments” and “the tendency towards system self-replication,” as well as a continuing “lack of transparency in the process.”⁴⁸

C. HORIZONTAL STRATIFICATION

The editors pose the issue of “whether alongside vertical stratification there exists also a horizontal stratification, with female enclaves within the judiciary that work as a career impediment.”⁴⁹ The editors note that, “it seems that only in a few countries are there clearly marked tendencies to shunt women into special jurisdictional courts (mainly family or juvenile law, or rural courts that hear small claims).”⁵⁰

D. JOB SATISFACTION

Despite these obstacles, the judiciary “is an employer particularly favoured by women.”⁵¹ In Germany, surveys revealed that judicial positions were considered highly attractive by women since they offer a career with “prestige, respect, good gender-neutral pay, secure employment, a regular work schedule with a manageable workload, all of which helps to achieve a good work-life balance,” including “maternity and parental leave, and very flexible part-time working patterns . . .,” though this is of course not the case in every country.⁵²

Thus, “[i]n spite of any shortcomings of the judiciary regarding the treatment of women, women (like men) enjoy a high degree of professional satisfaction. Indeed, women’s satisfaction, considering their standard of living, exceeds that of men.”⁵³

(effective January 2011), the percentage of women judges on the California high court was closer to that of the lower courts (3 of 7, i.e., 42.8%). *Id.*

48. *Introduction, supra* note 4, at 19. The paucity of women judges at higher levels has been explained in various other ways: “One explanation offered is that men are more strongly career oriented, that women avoid early career decisions, that for women bringing up children takes precedence over careers [and] women have competing life targets. Another explanation is that women anticipate failure to be appointed and therefore decide not to apply. Some people claim that women lack the necessary qualities and commitment. It is therefore not surprising that women have lower perceived efficacy—i.e., they are as motivated as men to make a career but have more doubts as to their ability to do so. Also their perception of self-efficacy—their trust in their own abilities—falls short of those of men. This is a feature shared by female judges and prosecutors with other women in higher ranking professions. And they often lack support from their partners who need them at home for their own support—a classical male career criterion.” *Id.* (citing Boigeol, *Feminisation of the French ‘Magistrature’*, *supra* note 18) (internal citation omitted).

49. *Introduction, supra* note 4, at 20.

50. *Introduction, supra* note 4, at 20.

51. *Introduction, supra* note 4, at 18.

52. *Introduction, supra* note 4, at 18 (citing Maria Rita Bartolomei, *Gender and Judging in Traditional and Modern Societies: A Comparison of Two Case Studies (Ivory Coast and Italy)*, in *GENDER AND JUDGING, supra* note 1, at 283).

53. *Introduction, supra* note 4, at 21.

E. AGE, ORIGIN, SEXUAL ORIENTATION

Because appointment of women to the judiciary in larger numbers has begun only recently, “their average age is below that of men.”⁵⁴

There is not much data on the social origins of male or female judges. In Germany, female law students in the 1970s came from higher social strata than male law students.⁵⁵ In England, senior judges “are characterized by an establishment background, often with family connections with the legal establishment,” and, of note, “it seems this applies even more strongly to the small number of women judges among them.”⁵⁶ In Pakistan, “female judges tend to be the wives and daughters of the liberal elite upper class.”⁵⁷

Little is known of the sexual orientation of male or female judges and public prosecutors. “In some countries, especially in the Near, Central and Far East, this has remained a taboo subject.”⁵⁸ In “Europe, North America and Latin America there are legal institutions for same-sex cohabitation thus indicating that sexual orientation other than heterosexual is accepted to a degree.”⁵⁹ The editors posit, “Whether members of the judiciary of same-sex orientation are open about their sexual orientation is a different question.”⁶⁰

F. PROMOTING WOMEN IN THE JUDICIARY

Due to antidiscrimination guidelines and rulings of the European Court of Justice, “positive action and quotas are legal within the European Union.”⁶¹ In Germany, target quotas are set by law, “however, in practice, in the judiciary these quotas hardly ever have any bearing on actual appointments.”⁶² Kenya operates on a “one third” gender requirement for public office.⁶³

The “economic argument” for gender parity, i.e., “that gender parity pays in economic terms, the so-called ‘business case for equality,’ is of no relevance to the judiciary,” the editors assert.⁶⁴

54. *Introduction*, *supra* note 4, at 21.

55. *Introduction*, *supra* note 4, at 21 (citing Ulrike Schultz, *The Status of Women Lawyers in Germany*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS*, *supra* note 8, at 295).

56. *Introduction*, *supra* note 4, at 21 (citing Blackwell, *supra* note 42, at 426).

57. *Introduction*, *supra* note 4, at 21.

58. *Introduction*, *supra* note 4, at 21.

59. *Introduction*, *supra* note 4, at 21.

60. *Introduction*, *supra* note 4, at 21.

61. *Introduction*, *supra* note 4, at 22.

62. *Introduction*, *supra* note 4, at 22. The German system evidently provides that to achieve gender parity, women have to be given preference in appointments and promotions in the case of equal qualifications where there are no specific distinguishing factors on the part of the competing candidate. *Id.*

63. *Introduction*, *supra* note 4, at 22.

64. *Introduction*, *supra* note 4, at 22. The editors suggest “a more appropriate question would be that of quality,” that is, quoting contributor Brenda Hale, “whether an increase in

As an overall observation on this subject, the editors state that, for measures in this area to be successful, “it is important that the promotion of women goes beyond mere lip service and becomes an aim supported by society as a whole. Yet we observe worldwide that this is very rarely the case, irrespective of ongoing efforts to create gender equality.”⁶⁵ The editors note that, particularly in Anglo-American countries, “The aim of gender equality has been integrated into the diversity discourse, with the risk that the aim of gender justice gets buried under efforts to stop discrimination of other kinds.”⁶⁶

Addressing the question why gender diversity “matter[s] over and beyond the aim of gender justice that follows from basic rights and the principle of equal rights,”⁶⁷ the editors point to several arguments: One is “the need for equal participation, namely that equal participation of men and women in the justice system is an inherent and essential feature of a democracy without which the judiciary cannot enjoy public confidence and legitimacy.”⁶⁸ Another argument is “the concept of inclusive diversity which describes the idea of equal representation of judges with diverse background on the bench, with the judiciary as the third power better reflecting society and representing litigants irrespective of their sex, sexual orientation, and ethnicity.”⁶⁹ Other arguments “are that women bring to the judiciary different perspectives based on different life experiences, different attitudes and values, which add richness and texture to the judicial system,” and that gender diversity is a “counterbalance [to] the traditional perception of judging as a ‘masculine’ enterprise.”⁷⁰

the share of women, ‘the incorporation of difference on the bench,’ would change or even improve the ‘judicial product.’” *Id.* For more on this, see the discussion in Section III.C, *infra*, “Gender and the Quality of Judgments.”

65. *Introduction, supra* note 4, at 23.

66. *Introduction, supra* note 4, at 23.

67. *Introduction, supra* note 4, at 23.

68. *Introduction, supra* note 4, at 23 (citing Winifred Kamau, *Women Judges and Magistrates in Kenya, supra* note 18).

69. *Introduction, supra* note 4, at 23.

70. *Introduction, supra* note 4, at 23 (citations omitted). This topic is addressed more fully in Section III.B, *infra*, “The Issue of Gendered Judging.”

III. THE JUDICIARY: STILL A GENDERED ORGANIZATION? DO WOMEN IN THE JUDICIARY MAKE A DIFFERENCE?⁷¹

This discussion begins by referencing the historical perception, continuing “until very recent times” that “male gender was part of the judicial model, deeply inscribed in the judicial script.”⁷² “The traditional prototype of a judge was an outstanding white male bourgeois personality of high morality, humanistic, mild, the loving father of a happy family.”⁷³ One contributing scholar points out that this perception “adds heterosexuality as a silent norm inherent to the system.”⁷⁴

Male judges were, and are, seen as “representatives and servants of the state, exerting authority, incorporating an ideal of objectivity covering their individuality with a black robe.”⁷⁵

The editors ask, “[h]ow do women fit into this picture, women about whom a female appeal court president in Germany recently said, ‘They have made justice livelier and more colourful?’”⁷⁶ Here the editors refer to the notion of judges as “asexual beings” used by a Brazilian scholar in an article appearing in the earlier book, *Women in the World’s Legal Professions*.⁷⁷ The editors’ present point was that “the robe attracts respect

71. In addition to the discussion in the Overview and Synthesis under these two subject headings, related articles are presented in *GENDER AND JUDGING* under the heading “Gender Perspectives in Judging,” which consists of papers discussing Germany (Ruth Herz, *Gendered Experiences of a Judge in Germany*, in *GENDER AND JUDGING*, *supra* note 1, at 255); the Netherlands (Bregje Dijksterhuis, *Women Judges in the Netherlands*, in *GENDER AND JUDGING*, *supra* note 1, at 267); Ivory Coast and Italy (Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 283); Argentina (Andre L. Gastron, M. Angela Amante, and Rubén Rodriguez, *Gender Arguments and Gender Perspective in Legal Judgments in Argentina*, in *GENDER AND JUDGING*, *supra* note 1, at 303); and South Africa (Ruth B. Cowan, *Do Women on South Africa’s Courts Make a Difference?*, in *GENDER AND JUDGING*, *supra* note 1, at 317). Additionally, under the heading “Gendered Construction of the Judiciary,” articles are presented from New South Wales, Australia (Leslie J. Moran, *‘May it Please the Court’: Forming Sexualities as Judicial Virtues in Judicial Swearing-in Ceremonies*, in *GENDER AND JUDGING*, *supra* note 1, at 337; and England and Wales (Hilary Sommerlad, *Let History Judge? Gender, Race, Class and Performative Identity: A Study of Women Judges in England and Wales*, in *GENDER AND JUDGING*, *supra* note 1, at 355).

72. *Introduction*, *supra* note 4, at 24.

73. *Introduction*, *supra* note 4, at 24.

74. *Introduction*, *supra* note 4, at 24 (citing Moran, *‘May it Please the Court’*, *supra* note 71).

75. *Introduction*, *supra* note 4, at 24.

76. *Introduction*, *supra* note 4, at 25.

77. Elaine Botelho Junqueira, *Women in the Judiciary: a Perspective from Brazil*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS*, *supra* note 8, at 437, 446. Therein, Junqueira described the fact that some respondents to her questions engaged in what she called “the myth of judicial impartiality,” in which they “saw the judge as equidistant from both parties and, therefore, necessarily asexual . . . [with the consequence that] gender would remain outside the decision-making process.” *Id.* at 446. Junqueira commented however that the notion of “thinking like an asexual is associated with thinking more like a man and denying one’s feminine identity, since it would mean thinking in accordance with the dominant

from the outside world [that] helps women to adapt to the ruling image thereby turning themselves into 'asexual beings.'"⁷⁸

Yet, "women remain the 'other' who cannot be entrusted with certain activities and functions and who must be feared as undermining the familiar judicial image, given that from time immemorial women as a group have been suspected on the basis of their emotionality of being incapable of objectivity."⁷⁹

In the eyes of their superiors and colleagues, motherhood in particular imparts women with classical female qualities such as empathy, mercifulness, indulgence and tolerance, qualities that run directly counter to . . . [and] . . . threatens the familiar and established image of the judiciary.

This, in turn leads to a tendency towards self-replication by means of conscious or unconscious defence mechanisms and strategies to maintain at least the outer appearance of masculinity . . . [including] . . . attempts to fill mostly with men leadership positions that are crucial to determine the judicial public image. . . . Somewhere in the background is also the secret fear that feminization of the judiciary might bring about the devaluation of the institution.⁸⁰

As an article from the Netherlands mentions, during a discussion of the feminization of the judiciary brought about by the fact that since 2008 women outnumber men in the judiciary in that country, women judges were said, among other things, to work more efficiently because "[w]hen a female judge is judging you are sure to be home early, because the potatoes are waiting."⁸¹

The question then arises "whether the entry of large numbers of women together with the diversity discourse are capable of producing new judicial

decision-making processes which are, following a feminist point of view, necessarily masculine. In other words, if the law is being quoted and applied under a male dominated system, claiming to be asexual is synonymous with male definitions of justice." Junqueira, *Women in the Judiciary: a Perspective from Brazil*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, *supra* note 8, at 437, 446.

78. *Introduction*, *supra* note 4, at 25. As noted, Junqueira's original use of the phrase was that it was in some ways a "myth." See *infra* note 81. A contributor to the present book, Leslie J Moran, explores sexuality and gender of the judiciary, concluding that the "biographical and autobiographical texts" used in swearing-in ceremonies in New South Wales, Australia "provide ample evidence that sexuality is a very public dimension of the judicial body" which "has long been fashioned . . . as exclusively heterosexual"; but he also finds "perhaps more suprising[ly] . . . central to the achievement of this sexual cultural formation is a set of social relations" that he describes as "same-sex professional reproduction." Moran, "May it Please the Court", *supra* note 71, at 350.

79. *Introduction*, *supra* note 4, at 25.

80. *Introduction*, *supra* note 4, at 25.

81. *Introduction*, *supra* note 4, at 26 (citing Bregje Dijksterhuis, *Women Judges in the Netherlands*, *supra* note 71, at 272).

subjectivities.”⁸²

A. VIEWS OF PIONEERING AND EMINENT FEMALE JUDGES ON THE INFLUENCE OF WOMEN ENTERING THE JUDICIARY

The editors refer to the study of the first female judges in the Weimar Republic, Germany, appointed in the 1920s, who “were convinced that their entry into the profession would have a marked influence on jurisprudence.”⁸³ “They thought they would not ‘switch off their emotional considerations as completely as the majority of male judges’ and would

82. *Introduction*, *supra* note 4, at 26. In raising this question, the editors refer to the article by Sommerlad, *Let History Judge?*, *supra* note 71, at 355. Sommerlad states, *inter alia*, that “[a] range of theories . . . enable us to critique the hegemonic, rationalist model of social change, and these point to the need to focus on context and process and the social relations which provide the basis for inequalities. For instance, one of Bourdieu’s primary concerns has been with the durability and deep embedding of gender in socio-structural arrangements and cultural practice. The relative autonomy of masculine domination despite historical transformations in patriarchy also shows us that new social forms do not supplant their predecessors; rather, different temporalities are co-enacted in social practice. Social change is thus simultaneously cumulative and contested.” *Id.* at 358 (internal citations omitted). After discussing data derived from research conducted with a small number of women judges about how they “positioned themselves within the range of competing discourses which now circulate within the field, how they conceptualized the judicial role and how they established their authority and negotiated the collegiality they must enact as part of their bid for recognition,” *id.* at 355, Sommerlad states that,

[t]he discourse of diversity, together with women’s active contestation of existing structures and practices and occasional engagement in the new judicial performativities, appears to be challenging the homologous relationship between masculinity and legal authority, producing some destabilisation of the judicial field. However, my data suggest that the extent to which cultural change is taking place is strictly constrained. In part this stems from the fact that women judges are already socialized into the rules of the profession; as lawyers they have achieved their subjectivity through the discourses and power structures which speak through them The problem also lies in seeking to diversify the judiciary through bureaucratic initiatives premised on a formal equality regime, since this assumes . . . that the resources for telling and displaying the self are equally available to all and, further, that these performances are read equally, objectively. Grounded in a rationalist ideology, such initiatives overlook the non-rational basis of society, the fact that social structures are based on affective bonds, with affective interactions, creating classifications of behaviour which sustain these structures There is a corresponding failure to recognize that the judiciary fits the description of a “categorically bounded network . . . which hoards access . . . and develops practices that perpetuate this restricted access.”

Id. at 371–72 (citations omitted).

Sommerlad concludes that

[t]he data clearly illustrate the consequent resilience of the discourse of gender difference, of which, of course, the law is a major vector. The iterative process of producing identities can therefore be construed as a struggle centered around recognition and authorisation and the power to recognise and authorise remains with men.

Id. (citations omitted).

83. *Introduction*, *supra* note 4, at 27 (citing Rówekamp, *First Female Judges*, *supra* note 18, at 103).

'comprehend the case more intuitively' . . . [while] [a]t the same time they never doubted that their legal education ensured that their feelings were governed and controlled by exact, objective, logical juridical thinking."⁸⁴

In the case of these early German judges, the conclusion reached is:

Female judges in Germany appear to have made an impact, albeit an impact that is not really measurable. They understood their work to be more comprehensive in approach than that of most of their male colleagues. While strictly adhering to the norms, standards, and traditions of their profession and wanting to assimilate to the profession, they also wanted to reveal the "human" side of the law and thus stressed the view propagated by the bourgeois women's movement that women should work in the spirit of a caring or welfare morale. Carol Gilligan years later called that approach "logic of care" (Gilligan, 1984). In medicine, this approach would have been called "holistic," located somewhere between that of a "vocation" and a "profession." Female judges believed that their femininity would improve the workings of the law, they saw it as complementary, as an "alternative" to the male way of understanding their profession. The law was the tool to guarantee justice and that is how they interpreted it; but they considered that the way the law was applied was too cold, with the feminine element missing.⁸⁵

Unfortunately, this view tended to limit the role of women in the judiciary:

Legal fields like welfare, juvenile or family law shared one thing: they represented the legal expression of the "supportiveness" of women. Thus, women judges saw themselves predestined to work especially in these fields, which coincided with the view held by male jurists and officials at ministries of justice. Ironically, they indirectly and unwittingly supported the resistance to female judges working in legal areas that men considered to be more important and influential.⁸⁶

Similar experiences are described regarding American female judges.⁸⁷ Each of the women judges who provided information "equally stress[ed]

84. *Introduction*, *supra* note 4, at 27 (citing Röwekamp, *First Female Judges*, *supra* note 18). Röwekamp also states that these early female judges "saw their best chances to unfold their special 'feminine and motherly character' in those legal fields that were thought to be suitable for women," such as guardianship and juvenile law. Röwekamp, *First Female Judges*, *supra* note 18, at 115.

85. Röwekamp, *First Female Judges*, *supra* note 18, at 116–17.

86. Röwekamp, *First Female Judges*, *supra* note 18, at 117.

87. *Introduction*, *supra* note 4, at 27 (citing Martin, *Profiles in Leadership*, *supra* note 18).

the unique perspective women bring to the bench.”⁸⁸ One female jurist (Judge Dorothy M. Nelson, of the United States Ninth Circuit Court of Appeals) spoke of “the qualities of mental alertness, intuition, and the spiritual qualities of love and service in which women are strong and how they can positively influence the adversary system.”⁸⁹ Judge Nelson has “promot[ed] the idea of Alternative Dispute Resolution (ADR) [as] a legal approach that fits neatly with the notion of women as uniquely contextual thinkers”⁹⁰

The first female British Law Lord (Brenda Hale) thought that, “the incorporation of difference on the bench subtly changes and, ultimately, improves the judicial product.”⁹¹

Justice Ruth Bader Ginsburg of the United States Supreme Court (the second female Justice) has stated: “There are perceptions that we have because we are women. It’s a subtle influence. We can be sensitive to things that are said in draft opinions that [male justices] are not aware can be offensive.”⁹²

In Canada, two of the first female judges “did not focus on gender:”

Even though their successes may have resulted from pressure on the gatekeepers on the part of the women’s movement, these successful women lawyers [firmly distanced themselves from the women’s movement and] continued to deny that gender had any significance in the practice of law [They] were always required to work within the traditions of the “gentleman’s profession” of law, and to accept gender neutrality as fundamental to the ideals of modern legal professionalism.⁹³

“In sum,” the editors conclude, “there is a whole variety of possible

88. *Introduction, supra* note 4, at 27.

89. *Introduction, supra* note 4, at 27 (quoting Martin, *Profiles in Leadership, supra* note 18, at 76). Martin also quoted Judge Nelson as saying: “While men and women must achieve full equality with respect to education, employment, salaries and achievement opportunities, men and women have some distinct attributes, which must be present if we are to have a just and peaceful society.” Martin, *Profiles in Leadership, supra* note 18, at 76.

90. Martin, *Profiles in Leadership, supra* note 18, at 75. Judge Nelson’s view is that “justice would be better served by the implementation and expansion of systems of ADR . . . [because] . . . ‘the adversarial system is too costly and too inefficient for many types of disputes.’” *Id.* at 75–76.

91. *Introduction, supra* note 4, at 27.

92. *Introduction, supra* note 4, at 28. The editors also quote the “now notorious” remark of Justice Sonia Sotomayor (the third female and first Latina Justice of the United States Supreme Court) in 2001 that “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life,” without comment except to note that it has been referred to as a remark (according to the press) that “launched a thousand tantrums” during her nomination to the Supreme Court in 2009. *Id.* at 27–28.

93. *Introduction, supra* note 4, at 28 (citing Mossman, *Becoming the First Women Judges in Ontario, supra* note 18, at 61) (alterations in original).

starting-points for a discussion about whether there is an essential difference between women and men judges and their respective work.”⁹⁴

B. THE ISSUE OF GENDERED JUDGING

This question, suggest the editors,

is as controversial as that whether intelligence is innate or a product of education and training, that is the environment.

Are women's characters gendered by nature? Do they have generally shared qualities that are typically female (empathy, mercifulness, lenience, tolerance, gentleness)? Or are they and their attitudes and judgments formed by cultural environments and typical of women and their life experiences? Or, again, are any differences merely the product of individuals' characters, education, life circumstances, financial situation, family status, political views, etc.?⁹⁵

94. *Introduction, supra* note 4, at 28. Worthy of note is the approach described by Junqueira in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* in analyzing the “process of feminisation of the judiciary” in her country, Brazil. She conducted an “empirical enquiry carried out by means of interviews with female judges from Rio de Janeiro in order to establish the possible impact of gender on judicial decision-making processes in Brazilian courts.” Elaine Botelho Junqueira, *Women in the Judiciary: A Perspective from Brazil*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS, supra* note 8, at 437–38. Junqueira noted that “American analyses remind us that the phrase ‘feminisation of the legal professions’ must be used with care, since it could refer both to the quantitative increase in the number of women and to the change of relationships within the judiciary.” *Id.* at 438 (citing Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The ‘Feminization’ of the Legal Profession*, 24 *OSGOODE HALL L. REV.* 89 (1986)). “Quantitative investigations attempt to understand the reasons for the increase in the presence of women in the profession, that is to say, how it is that the traditional obstacles to the entry of women are gradually being overcome.” *Id.* (citing Beverly Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS*, National Center for the State Courts, Virginia (1978)). “The qualitative approach can be subdivided into two main aspects. The first stresses the importance of the influence of female characteristics on judicial decisions. The profession can only be feminized, therefore, if and when feminine characteristics—supposedly distinct from masculine ones—are acknowledged in the performance of professional activities.” *Id.* (citing Sue Davis et al., *Voting Behavior and Gender on the US Courts of Appeal*, 26 *JUDICATURE* 129, 130 (1993); David Allen & Diane Wall, *Role Orientations and Women State Supreme Court Justices*, 26 *JUDICATURE* 156, 158 (1993); CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Susan Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, U. RICHMOND L. REV. 28 (1994)). “The second type of qualitative approach focuses on the presence of women on the Bench as an opportunity for them to liberate themselves from the state of submission in which they have traditionally found themselves.” *Id.*

95. *Introduction, supra* note 4, at 29. The editors note that, [w]hen in the late 1980s we were planning the comparative project ‘Women in the World's Legal Professions,’ we began by asking: Do women change the legal profession? Does the legal profession change women? These questions followed in the wake of the feminism of difference current in the 1980s. Then, in the 1990s, feminism committed itself to structuralism and deconstruction of gender. Its aim was to overcome social gender with

“The problem is and remains,” the editors point out,

that if the emphasis is on differences between men and women, then one inevitably drifts towards the “patriarchal dilemma,” providing ammunition for those men who “have always known that women are different,” i.e., weaker, and thereby weakening the position of feminists attempting to define and describe such differences. Yet, the question remains central to any study of women’s path towards access to the professions, denied to them on the basis of their being different.⁹⁶

Since the turn of the millennium, “the predominance of diversity discourses has given preference to approaches emphasizing individualism and subjectivisation.”⁹⁷

Attempting to study differences due to gender “is made harder by the fact that male and female gender intersects with other aspects of difference . . . such as age, race/ethnicity, family background, class/social stratum, sexual orientation, [and] religion.”⁹⁸ Besides these factors, “personality traits such as looks, manners and behaviour, which determine human interaction have an influence on personal value systems and take concrete form in individuals’ life experience.”⁹⁹

“Regarding self-presentation,” the editors assert, “there can be no disagreement . . . [that] . . . [f]emale corporeality differs from that of males. We read about female judges pondering how to dress, whether to dress in a way that signals femininity or to veil it.”¹⁰⁰ “Regarding male judges’ body language, one of [the contributors] . . . commented that ‘men convey that sense of self-importance in their body language, there’s no sense of awkwardness or embarrassment—they look you straight in the eye and demand attention.’”¹⁰¹ By contrast, another contributor observed women judges “using their sex appeal and feminine charm to capture male attention.”¹⁰²

traditional gender roles and character constructed by patriarchy, although paradoxically enough many feminists cherished a ‘we, the women’ rhetoric which in itself presupposes difference. The vast majority of the authors in that volume [WOMEN IN THE WORLD’S LEGAL PROFESSIONS] discuss—most of them critically—the thesis advanced by Carol Gilligan, the pioneer of difference feminism of those years, i.e., that women’s voice differs from that of men and their ethic is one of care as opposed to a male ethic of justice.”

Introduction, supra note 4, at 29.

96. *Introduction, supra* note 4, at 29.

97. *Introduction, supra* note 4, at 29. This, the editors say, “facilitates discussions about gender differences while also depriving them of some of their previous weightiness.” *Id.*

98. *Introduction, supra* note 4, at 29–30.

99. *Introduction, supra* note 4, at 30.

100. *Introduction, supra* note 4, at 30.

101. *Introduction, supra* note 4, at 30 (referring to Hilary Sommerlad’s interview results, Sommerlad, *Let History Judge?*, *supra* note 71).

102. *Introduction, supra* note 4, at 30 (referring to Bartolomei, *Gender and Judging in*

Of significance, however, is the fact that “performance of professional roles generally tends to blur such differences; individuals adapt to and imitate existing patterns as well as responding to organisational normative requirements.”¹⁰³ Additionally, an investigation of the ways in which men and women judges in Switzerland handle professional stress caused by “time pressure, problems with colleagues, and the pressure to reach decisions” led to the conclusion that “both sexes report similar experiences and that there are no differences in the impact of professional stress on their private lives.”¹⁰⁴ Yet the same investigation

found significant gender differences. Women judges used external mediation and social support, i.e., direct discussions on cases and conversations with family and friends as coping strategies significantly more than men judges. Women judges also feel that their judging role is more difficult for them than for men. They feel that they have a harder task than men, that their personal lives interfere with their professional goals and that they experience more gender discrimination.¹⁰⁵

A contributor from France offered this perspective: “Neither men nor women hold a monopoly on a particular behaviour, but a quality encountered perhaps more frequently with women than men is a capacity to listen. They are happy to consult with others, discuss issues with their team, and make sure that questions have been fully explored, without this impeding their ability to make a decision.”¹⁰⁶ The same contributor states:

Traditional and Modern Societies, supra note 52).

103. *Introduction, supra note 4, at 30.* Several of the contributors noted that “women judges may even go for greater harshness and give a masculinised performance in order to counteract gendered expectations.” *Id.*

104. *Introduction, supra note 4, at 31* (citing Ludewig & LaLave, *Professional Stress, Discrimination and Coping Strategies, supra note 18, at 233*). Ludewig and LaLave concluded that “women and men judges reported more similarities than differences in their experiences of professional difficulties. Women and men judges also use many similar coping strategies. They employ value hierarchies, objective distancing, court settlements, mediation, social support and avoidance, suppression and distraction. They reported similar sleeping difficulties and professional stress due to hindrances from an inability to separate their work from their personal lives. Both experienced similar psychological and physical complications. Women and men judges were equally content with many aspects of their lives, with similarities in job satisfaction, family life satisfaction and standard of living.” Ludewig & LaLave, *Professional Stress, Discrimination and Coping Strategies, supra note 18, at 248.*

105. Ludewig & LaLave, *Professional Stress, Discrimination and Coping Strategies, supra note 18, at 248.* These authors note that “[a]lthough these differences do not appear sufficient to support a gender differences hypothesis, they are important in an assessment of the subjective perceptions of women and men judges.” *Id.*

106. Boigeol, *Feminisation of the French ‘Magistrature,’ supra note 18, at 141* (quoting a former female General Prosecutor at the Court de Comptes). Boigeol first asked in 2003 whether there is a “feminine model of administering justice,” noting that “the question has hardly been addressed in France.” Anne Boigeol, *Male Strategies in the Face of the Feminisation of a Profession: the Case of the French Judiciary, in WOMEN IN THE WORLD’S*

The impact of feminisation in the judiciary and in the courts has still to be analysed. Even if the ideology of the disembodiment of judges in the service of impartiality is very strong, even if judges are all trained in the same way, even if courts' work is more and more standardised, that does not mean that judges are "social eunuchs"¹⁰⁷

A "comprehensive socio-legal study of the entire Australian judiciary... provides insights into what male and female judges consider to be important for their work."¹⁰⁸ While some differences were found, those contributors concluded that:

The most important finding from our research is the considerable similarity among all judicial officers, regardless of gender or court, in their relative assessment of the various qualities or skills. Nearly all respondents regard legal values as essential for their daily work, while two-thirds to three-quarters consider legal skills and interpersonal qualities as essential or very important. Many of the differences that emerge are primarily ones of intensity.¹⁰⁹

Research in Germany in the late 1980s and 1990s "about women's perception of gender differences in their professional work produced somewhat different results":

Female judges and prosecutors claimed that their style of working was different [from] that of their male colleagues. The women specified certain feminine elements that in their view should be

LEGAL PROFESSIONS, *supra* note 8, at 401, 415. She stated that "[w]ith regard to advocacy, numerous studies have been conducted in the wake of Menkel-Meadow's work (1985), which in turn was an attempt to see whether Gilligan's theories on gender difference could be applied to findings on women in the legal profession." *Id.* (citing Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39 (1985)). "On the other hand, little has been done in relation to the impact of feminisation on the way judges work. So far, there is little evidence to verify Menkel-Meadow's hypothesis that women lawyers have a distinctive voice of their own." *Id.* at 415. Ten years later, in the present book, Boigeol similarly states:

In common law countries, the usual way of thinking about the issue of gender and judging is to look at the relationship between the gender of judges and their sentences. In civil law countries very little research has been done on the subject. Nor is the topic easy to approach as the first reaction of judges is always to reject the assumption that there might be any correlation between gender and judging—a reaction not specific to France. "I challenge you to find any difference between a decision taken by a male judge and a decision taken by a female judge" said a female president of a court in an interview.

Boigeol, *Feminisation of the French 'Magistrature'*, *supra* note 18, at 140 (internal citation omitted).

107. Boigeol, *Feminisation of the French 'Magistrature'*, *supra* note 18, at 141.

108. *Introduction*, *supra* note 4, at 31 (citing Mack & Anlue, *Skills for Judicial Work*, *supra* note 18, at 211).

109. Mack & Anlue, *Skills for Judicial Work*, *supra* note 18, at 217.

incorporated into the administration of justice in general: improving the emotional climate, strengthening communication and cooperation between the parties involved in the trial, reducing both the hierarchical distance from the parties and competitiveness among colleagues. Surprisingly congruent were statements from male judges and prosecutors in Germany who in the 1990s attended further judicial training courses. Characteristics they considered feminine were: emotionality, a high level of sensitivity, empathy, preparedness to solve problems on an emotional level, a lower risk of restricting oneself to juristic dogma.¹¹⁰

The editors refer to “subjective perceptions” of gender differences in style and behavior of judges as being “supported by socio-linguistic analyses of communication in court hearings in Israel,” though no article in the current book addresses this.¹¹¹

110. *Introduction, supra* note 4, at 32 (internal citations omitted) (citing Schultz, *Women Lawyers in Germany, supra* note 55). In 2003, Schultz addressed the interesting question of “whether the legal profession changes women or whether women change the legal profession,” given that legal training in Germany “aims to assimilate students to the image of a profession traditionally cast in a masculine mould.” Schultz, *Women Lawyers in Germany, supra* note 55. In addressing this question, Schultz explained the image of the German housewife, classically described in the 1799 poem “Das Lied von der Glocke” (“The Song of the Bell”) by Friedrich von Schiller, memorized by generations of German schoolchildren, which set forth role of women as “domestic, . . . not public . . . [.] the indefatigable and hard-working housewife and mother” which is “deeply ingrained in the German idea of womanliness.” *Id.* at 296. Schultz also described her experience in giving a lecture at the German national academy for judges on “Women in Court.” In 1994, she asked her audience of twenty-two men and five women to complete a questionnaire, asking them to “list female qualities observed in their female colleagues which could play a role in court proceedings.” *Id.* at 314. She found that

[t]heir answers matched the catalogue of qualities I had compiled from the study on women in the Hessian judiciary, including emotiveness, sensitivity, empathy, greater ability or readiness to use emotional tools to help in the understanding of clients’ problems, little inclination to restrict themselves to legal dogmatism, openness, willingness to discuss things, sympathy, ability to listen, co-operative behavior, absence of aggressiveness.

Id. Schultz put this list forward “with some hesitation, anticipating protest, criticism and, at worst, hilarity, “but “to [her] great amazement [she] found it being discussed as a catalogue of competencies that was seen as a tool to improve procedural practice.” *Id.* Schultz did comment that afterwards she was “criticized and blamed for dissipating absurd and noxious ideas—by two of the female judges.” *Id.* n.37.

111. In *WOMEN IN THE WORLD’S LEGAL PROFESSIONS, supra* note 8, a contribution by Bryna Bogoch addressed this topic. There, Bogoch included a section in her paper entitled “Role: Gender and Professional Style.” She stated that “[t]he question of whether women bring a particular style to the practice of law, or how gender is manifested in professional behavior has hardly been studied in Israel.” Bryna Bogoch, *Lawyers in the Courtroom: Gender, Trials and Professional Performance in Israel, in WOMEN IN THE WORLD’S LEGAL PROFESSIONS, supra* note 8, at 247, 253. Bogoch herself conducted research “which sought to discover whether women had a ‘different voice’ in the judging of criminal offenses.” *Id.* She found “that women judges alone on the bench were more lenient than men in the sentencing of offenders convicted of severe crimes against the person.” *Id.* However, when a panel of three contained at least one woman judge, the decision was more severe than the all-men panels.” *Id.* Bogoch concluded:

In Italy, contributing author Bartolomei found that “differences with male colleagues are to be found more in the process rather than the outcome of the judgment.”¹¹²

[F]emale lawyers [in Italy] agreed that the gender of a judge sometimes can make a difference to the outcome of a case . . . [because] . . . even if it is impossible to tell whether another judge deciding the same case would reach the same decision, women judges tend to show a repetitive normative pattern of behaviour, especially in family law, juvenile or immigration hearings, where they reveal a great ability to establish good relationships and to be empathetic, while also paying attention to relevant details.¹¹³

This is referenced by the editors in the context of the theory of “home-knitted law”¹¹⁴ in which female judges “find intuitive-unofficial legal practices, where values like bargaining, sympathy, sharing and solidarity are widespread.”¹¹⁵

While the results may partially support the association of women with a more caring, rehabilitative, non-punitive approach, the fact that women judges imposed lower sentences for sexual offenses than for bodily harm offences indicated no special sympathy on the part of women judges for the victims of rape and sexual assault.

Id. “Moreover,” Bogoch concluded, “both men and women judges generally imposed higher sentences on those who harmed adults rather than children; only in all-male panels were sexual offences against minors treated more seriously than offences against adults.”

Id. “In fact,” Bogoch found, “instead of a different voice, these differences between men and women judges are more successfully explained by the still tenuous position of women judges in the professional hierarchy that prevents the development of a separate collective voice.” *Id.*

112. *Introduction, supra* note 4, at 32 (citing Bartolomei, *Gender and Judging in Traditional and Modern Societies, supra* note 52, at 283–301).

113. Bartolomei, *Gender and Judging in Traditional and Modern Societies, supra* note 52, at 293.

114. HANNE PETERSEN, *HOME KNITTED LAW: NORMS AND VALUES IN GENDERED RULE-MAKING* (1996).

115. *Introduction, supra* note 4, at 32 (citing Bartolomei, *Gender and Judging in Traditional and Modern Societies, supra* note 53, at 283). Bartolomei’s research in the Marche region of Italy, where the first woman was appointed to the judiciary only in 1965 was based on observation at ten law courts and in-depth interviews with forty female judges, twenty female lawyers, ten male judges and ten male lawyers. *See Introduction, supra* note 4, at 289 n.10. Bartolomei’s data from interviewing the female judges was summarized into three main topics: (1) the balance between family and work; (2) the perception of one’s own role and relationships with male colleagues; and (3) the possible contributions to legal culture. *Id.* at 289. Bartolomei noted:

In the workplace generally we witness more solidarity, mutual assistance, reciprocity and cooperation among female judges and lower court personnel, who are predominantly women, than among female judges themselves. In many courts we find patterns of collaborative behaviours among women as well as gendered practices, which could be assimilated to either Petersen’s notion of ‘norm of consideration’ or to her concept of “home knitted law.”

Id. at 290 (citing HANNE PETERSEN, *HOME KNITTED LAW: NORMS AND VALUES IN GENDERED RULE-MAKING* 16, 47, 49 (1996)). Regarding Bartolomei’s second topic, “[i]n general women judges consider themselves more patient and sympathetic than their male colleagues

Regarding the impact of women judges on the current legal culture (within the scope of her study—one region in Italy), Bartolomei found an interesting phenomenon:

In my interviews, women judges initially tended to deny any difference or capacity that could be derived from gender. But this initial denial was frequently reversed later on closer reflection. Along with Kohen, I think that “this first denial could be explained as a strategy on the part of women judges to . . . avoid discrimination by asserting that they do not make any difference in adjudication and that women can administer justice as well as men.”¹¹⁶

Further, Bartolomei tells us:

Interviewing women judges, I clearly perceived a strong willingness—indeed a determination on their part—to focus on the concrete situation of participants in the proceedings, to reason from the broader social context on which the legal rules in question operate and to produce a decision that is individualised rather than abstract. Taking everything into consideration, they try to approach legal issues in a way that is not strictly formalistic and goes straight to the point. They do not worry about diverging from precedent and current jurisprudence. Furthermore, they do not indulge in juridical technicalities and tend to avoid adjourning a case only for procedural or technical reasons. In my experience of courts, women judges rarely decide that a case cannot proceed.¹¹⁷

Bartolomei's contribution also contains a fascinating discussion of “traditional procedures for conflict resolution in Ivory Coast, where women can be found to have their own courts of justice.”¹¹⁸ This discussion is based on fieldwork done among the Abnon ethnic group.¹¹⁹ Bartolomei

and more willing to find the best solution for everybody.” *Id.* at 291.

116. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52 at 292 (citing B. Kohen, *Family Law Judges in the City of Buenos Aires: A View from Within*, 15(1-2) INT'L J. LEGAL PROFESSION 111, 116 (2008)).

117. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 292–93. Bartolomei quoted one interviewee as saying: “I think that the experience of being female is a crucial element of being more willing and able to hear and understand the stories of women litigants and of listening carefully and respectfully about their lives. Our own experience enables us to respond sympathetically and to succeed in putting gendered experiences into legal discourse.” *Id.* at 292.

118. *Introduction*, *supra* note 4, at 32–33.

119. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 285. Bartolomei explains that “[t]he Constitution of the Ivory Coast makes no explicit provision for political and judicial institutions other than those of the state. In spite of that, the *Abnon* institution of sacred kingship and a matrilineal kinship system persists and the administration of justice by a traditional King, Queen Mother and both male and female chiefs continues to be widespread.” *Id.* at 285–86.

explains the role of the “Queen Mother” in Abron society as

the symbol of femininity and the fertility upholder; she represents and acts for all the kingdom’s women, defending their claims and rights at any social level. She is in charge of ritual dances and ceremonies and manages women’s public works. She runs one or more villages and co-chairs the royal council with the King, controlling and balancing his power and the elders’ influence as well. Her favorable opinion in the designation of a new king is a condition sine qua non.¹²⁰

The Queen Mother’s “major competence and powers are linked to the administration of justice.”¹²¹

The Queen Mother, in fact, has the right to interfere in the dispensation of justice by the King and his royal council, even asking for mercy or a reduction of sentence. Furthermore, she chairs her own council, which has exclusive jurisdiction in the resolution of conflicts that arise among women. She continues largely to retain her traditional monopoly in the settlement of disputes in both divorce matters and quarrels between women and foreign men. In the exercise of this role, the Queen Mother avails herself of the services of the council of “women elders” which assists and advises her mostly whenever she has to deliver a final decision on sentences of lower rank female chiefs which are appealed against.¹²²

Examining the dispensation of justice under this system, Bartolomei found that “in reaching their decision—women more than men—make a synthesis between experience and decision-making in such a way as to find the best solution for all parties.”¹²³

C. GENDER AND THE QUALITY OF JUDGMENTS

The editors acknowledge that “[j]udgments are hard to evaluate, and judicial quality hard to measure.”¹²⁴ One approach is to deal with the elements of “production, influence and independence,” while trying to identify gender effects.¹²⁵ “Production” is measured by the number of

120. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 286 n.8 (internal citation omitted).

121. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 286.

122. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 286.

123. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 287.

124. *Introduction*, *supra* note 4, at 33.

125. *Introduction*, *supra* note 4, at 33 (citing S.J. Choi, M. Gulati, M. Holman & E. Posner, *Judging Women*, 8(3) J. EMPIRICAL LEGAL STUD. 504 (2011)) [hereinafter *Choi et*

opinions and pages published per judge per year.¹²⁶ “Influence” refers to citation counts and the number of citations of High Court decisions by out of state courts.¹²⁷ “Neither criterion produced specific gender differences, except that in family law courts women were quoted more frequently than men, which gives greater influence to their opinions in this area.”¹²⁸

Choi, et al. “did find differences regarding independence from or resistance to partisan pressure.”¹²⁹

D. “GENDER CODED” CASES

Here the editors summarize the “main findings” of efforts to “disentangle the influence of gender on judging” as it relates to specific legal areas.¹³⁰ They caution that such findings “tend to be sparse and widely dispersed” and also “tend to derive from research on common law rather than civil law countries.”¹³¹

1. Workplace Sexual Harassment Cases

One study found that “in cases of workplace sexual harassment, male judges were more likely to find for plaintiffs when at least one female judge was on the panel, and that both liberal and conservative female judges were more likely than their male counterparts to support plaintiffs.”¹³² Similar effects of women judges on judicial panels were identified by other studies.¹³³ The explanations offered for these panel

al.].

126. *Introduction, supra* note 4, at 33.

127. *Introduction, supra* note 4, at 33.

128. *Introduction, supra* note 4, at 33. Choi et al., *supra* note 125, concluded from this latter finding that: “Here we find indications that female judges not only wrote in a pro-woman fashion but expend more effort than men do in shaping the law in areas of greater interest to women.” *Id.* The editors point out that “these findings are underlined by those of a study on ‘The Publication of Judicial Decisions in Family Law in Israel’ by Bogoch, Halperin-Kaddari, Katvan, which states that female judges wrote longer and more detailed judgments.” *Id.* Similarly, “Elaine Junquiera . . . discovered that female judges in Brazil provide more thoroughly elaborated reasonings than men.” *Id.* at 33 n. 25.

129. *Introduction, supra* note 4, at 34. Their findings were that, among male and female judges considered by U.S. political party affiliation,

Republican men judges emerged as least independent. Republican women and Democratic men judges were more likely to agree with judges of their own political party. And Democratic women proved to be the most independent group. The authors consider this as solid evidence that gender differences may affect the outcome of a case, accepting that an interpretation requires taking into account a number of other factors . . .

Id.

130. *Introduction, supra* note 4, at 34.

131. *Introduction, supra* note 4, at 34.

132. *Introduction, supra* note 4, at 34 (citing J. L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1759-90 (2005)).

133. *Introduction, supra* note 4, at 34 (citing C. L. Boyd, L. Epstein, & A. Martin, *Untangling Causal Effects of Sex on Judging*, 54 AMER. J. POL. SCI. 389 (2010)). The editors also refer to “panel effects” in Italy reported by Bartolomei, but note that

effects are: “deliberation on the one hand, deference—that male judges see female colleagues in gender-coded cases as more credible and persuasive—logrolling (trading of decisions in the hope that female judges will follow their decisions in other cases), and finally moderation, that the presence of a female judge moderates male judges’ opinions.”¹³⁴

2. Immigration Law Cases

One scholar found a “gender gap in asylum judging;” women immigration judges were 44 percent more likely to grant asylum than male judges.¹³⁵ “In an asylum case in the UK, the so-called Fornah case, the first female Law Lord Brenda Hale pushed her colleagues towards extending the concept of asylum, originally intended to help the politically prosecuted, to include those threatened by female genital mutilation.”¹³⁶

3. Family Law Cases

In family courts, “there is evidence that female judges tend to be less generous than their male counterparts with respect to women asking for alimony.”¹³⁷ “At least the fear that women prefer women does not seem to

“interviewees qualified this observation by adding that the influence of women’s view on men’s was unpredictable.” *Id.*

134. *Introduction, supra* note 4, at 35 (citing Peresie, *Female Judges Matter, supra* note 134).

135. *Introduction, supra* note 4, at 35 (citing C. Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender*, in *Refugee Roulette. Disparities in Asylum Adjudication and Proposals for Reform*, Georgetown University Law Center, Public Law and Legal Theory Research Paper No 10-24 and University of California, Irvine School of Law, Legal Studies Research Paper No 2010-14, (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586402).

136. *Introduction, supra* note 4, at 35 (citing E Rackley, *What a Difference Difference Makes: Gendered Harms and Judicial Diversity*, 15 (1-2) INT’L J. LEGAL PROFESSION 37–56 (2008)).

137. *Introduction, supra* note 4, at 35 (citing *inter alia* M Fuszara, *Women Lawyers in Poland under the Impact of Post-1989 Transformation*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS, supra* note 8, at 371; Junquiera, *Women in the Judiciary: a Perspective from Brazil*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS, supra* note 8). Fuszara found, in her study in Poland: “The most common complaint against judges examining maintenance claims (including female judges) is that they take ‘the men’s side,’ burdening women with the whole problem of not only raising but also maintaining a child.” Fuszara, *Women Lawyers in Poland, supra*, at 376. “Charges of overindulgence towards men are frequently linked to situations where men are alcoholics. ‘When the judge is a woman, it’s even worse, as she takes pity on alcoholics.’ And, ‘Why does the court take the side of those with a drinking problem? We need money to live on too.’” *Id.* at 377. Fuszara’s findings further indicated that:

[T]he large proportion of women in the Polish judiciary, including family law courts where sometimes all judges are women, does not automatically imply a breaking up of gender stereotypes applied in the adjudication process. Divorce cases in particular reveal that women judges tend to sustain stereotypes of male and female roles in the family. This leads us to conclude that in a patriarchal society the same traditional patterns of gender relationships are passed on to both sexes and are then applied by them in professional life, including judicial work.

be justified.”¹³⁸

4. Criminal Law Cases

The editors ask: “Do women pass more lenient sentences” in criminal law cases?¹³⁹ A German study twenty years ago “concluded that women showed no more openness or willingness to take into account individual circumstances in apportioning sentences than did their male colleagues.”¹⁴⁰ This finding was confirmed in a study in Italy, where “female judges tend to support more stringent penalties than their male colleagues in cases of violence and sexual violence,” but an opposite conclusion was reached by work done in Israel, where it was found that “women judges passed more lenient sentences for men’s sexual offences.”¹⁴¹

Another German study in 1995 “concluded that participation of a

Id. at 377. Junqueira found, in her work in Brazil:

Almost all respondents acknowledged that women decide family problems differently from men. But what does this mean in practice? Could it be that female judges adopt a more protective attitude towards the female party, granting requests for maintenance, while men (who may be financially exploited by ex-wives) choose a stricter approach out of a sense of solidarity with the men against whom the claims are being made? Quite on the contrary, respondents agreed that female judges are much ‘tougher’ in cases of requests for alimony made by women, while male judges are more generous and decide in favour of the claimant.

Junquiera, *Women in the Judiciary: a Perspective from Brazil*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS*, *supra* note 8, at 448. In looking for reasons for this, Junqueira stated: “[T]he objective attitude taken by female judges was seen by them as helping women who request a financial contribution from their ex-husbands to better develop and fulfill their potential as human beings.” *Id.*

138. *Introduction*, *supra* note 4, at 35. The editors refer to work done in Holland by Bregje Dijksterhuis, who was “astonished to find that, as far as she could see, female judges did not argue in favour of their sisters” at meetings of the Dutch Judicial Alimony Commission. *Id.* (citing B. Dijksterhuis, *Women Judges in the Netherlands*, *supra* note 71, at 267).

139. *Introduction*, *supra* note 4, at 36.

140. *Introduction*, *supra* note 4, at 36 (citing Schultz, *Women Lawyers in Germany*, *supra* note 55, at 271, 314). Therein, Schultz concluded:

We therefore need to acknowledge that the expectation of fundamental changes being brought about by the growing numbers of female judges is mistaken. Differences between male and female judges are in evidence as regards working styles, but hardly as far as outcomes are concerned. The *formation professionnelle* serves its purpose leaving only marginal gender differences. Many will find this a comfort. After all, one of the reasons why women were not admitted to legal studies and one of the objections against women practicing as judges was that they might be unreliable and inconsistent in their judgments—on men. We now know that, on the contrary, male offenders might be better served by women judges.

Schultz, *Women Lawyers in Germany*, *supra* note 55, at 316 (internal citation omitted).

141. *Introduction*, *supra* note 4, at 36. A suggestion for the basis for the different result in Israel has been that it is not a sign of “women’s natural leniency,” but instead “their desire to avoid signaling any special sympathy for their victims.” *Id.* (citing *WOMEN IN THE WORLD’S LEGAL PROFESSIONS*, *supra* note 8, at iv).

female judge basically made no difference in the expected results.”¹⁴² Yet another German study showed that “women were more leniently sentenced when they showed behavior conforming to stereotypical gender roles, while role breakers (‘tough women’) ran the risk of less sympathetic treatment and stiffer sentences.”¹⁴³

5. Supreme Court Judgments

Articles in *Gender and Judging* discuss the difference women have made as judges of the Supreme Court in South Africa,¹⁴⁴ Canada,¹⁴⁵ and Germany. In the South African study, the conclusion was “women did make a difference on the women’s rights cases, even when dissenting from the majority; that women would have made a greater difference if the promise of judicial diversity had been kept; and that the women also made a difference in cases that did not raise women’s issues.”¹⁴⁶ In Canada, the contributors “kept careful track of the female dissenters in the Supreme Court of Canada, concluding that dissenting and concurring votes . . . were much more frequent amongst women than men.”¹⁴⁷ In Germany, the analysis of judgments of the Federal Constitutional Court from the 1950s to the 1990s “has not led to tangible results, perhaps with the slight exception of the two judgments on abortion, although even here no clear women’s voice can be identified.”¹⁴⁸

In summarizing the findings related to gender-coded cases, the editors state: “[I]t becomes clear that even they fail to produce an unambiguous

142. *Introduction*, *supra* note 4, at 36. The same study found that “participation of a female prosecutor tended to lead to more lenient sentences and the participation of a female defence attorney to stricter ones.” *Id.*

143. *Introduction*, *supra* note 4, at 36 (citing Schultz, *Women Lawyers in Germany*, *supra* note 55, at 315). Schultz concluded that, “this means that cross-gender preferences work and they could work both ways from men to women and women to men.” *Id.*

144. Cowan, *Do Women on South Africa’s Courts Make a Difference?*, *supra* note 71, at 317–33. Cowan undertook “an analysis of [South African] Constitutional Court cases from 1994–2009 in which women’s sentences differed from men’s.” Schultz & Shaw, *Introduction*, *supra* note 4, at 37.

145. M. C. Belleau & R. Johnson, *Judging Gender: Difference and Dissent at the Supreme Court of Canada*, 15 (1-2) INT’L J. LEGAL PROFESSION 57 (2008).

146. Cowan, *Do Women on South Africa’s Courts Make a Difference?*, *supra* note 71, at 317. Cowan defined “women’s issues” as “issues clearly related to women’s rights or to matters of particular relevance to women’s experiences.” *Id.* at 322. Examples are the criminalization of prostitution, widow’s benefits for women not legally married, and the definition of rape. *Id.* Cowan concluded that on these issues the women Justices on the Constitutional Court “provided perspectives and arguments that would otherwise have been weaker or absent.” *Id.* at 332. On other issues, Cowan found, “they did not speak with one voice,” but “like their male colleagues, bring all they know and all that they have experienced to their understanding of the issues before them.” *Id.* at 333.

147. *Introduction*, *supra* note 4, at 37. In recent years the number of such votes has declined, raising the question “whether this is a consequence of key issues in the context of women’s rights having been settled.” *Id.*

148. *Introduction*, *supra* note 4, at 37. The editors note that in Germany dissenting and concurring opinions “were only introduced in 1970 and only for the Federal Constitutional Court,” and “[t]heir use has remained the exception (1% of cases).” *Id.* n.29.

answer to the question whether women judge differently from men.”¹⁴⁹

IV. FEMINIST JUDGES AND FEMINIST ADJUDICATION

This part of the book contains works that are somewhat less tied to information from a single country, bringing together concepts, experiences and conclusions that are more broadly applicable than those found in papers focusing on a particular geographical area. Presented here are: a writer in Canada;¹⁵⁰ a writer from the United Kingdom referencing the experiences of an Australian judge;¹⁵¹ a scholar educated in Britain, currently teaching in Italy, who writes about judges in Argentina;¹⁵² and an Australian barrister and professor emeritus writing about the significance of events that occurred in Canada.¹⁵³

An initial question that may be asked in this area is: “Who is a feminist judge?”¹⁵⁴ The editors suggest that “[n]ot necessarily only women but also men may be included. It depends on a ‘chosen’ difference in attitude and mind related to a political opinion and even a message, which implies that the women’s question has always to be kept in mind and asked.”¹⁵⁵ Interviews in England found “neither feminism nor social justice were cited as motivations for becoming judges.”¹⁵⁶ In Argentina, judges were reluctant to identify themselves as feminist, “as this could be misunderstood as revealing a tendency to bias.”¹⁵⁷

The editors point out that notwithstanding the above, feminist scholars “demand that judges should self-identify as feminists.”¹⁵⁸ The editors describe “feminist adjudication” as a “particularity model” of judging, which “involves feminist practical reasoning with a contextualization” in which “focus is placed on the person before the court, while drawing on a wider base of legal and social knowledge as well as emotional insight, and putting a greater emphasis on legal values such as a sense of fairness and protecting legal rights.”¹⁵⁹

149. *Introduction*, *supra* note 4, at 38.

150. Beverly Baines, *Must Feminist Judges Self-Identify as Feminists?* in *GENDER AND JUDGING*, *supra* note 1, at 379–98.

151. Rosemary Hunter, *Justice Marcia Neave: Case Study of a Feminist Judge*, in *GENDER AND JUDGING*, *supra* note 1, at 399–418.

152. Beatriz Kohen, *What’s in a Label? Argentine Judges’ Reluctance to Call Themselves Feminists*, in *GENDER AND JUDGING*, *supra* note 1, at 419–34.

153. Reg Graycar, *A Feminist Adjudication Process: Is There Such a Thing?* in *GENDER AND JUDGING*, *supra* note 1, at 435–57.

154. *Introduction*, *supra* note 4, at 38.

155. *Introduction*, *supra* note 4, at 38 (Hunter, *Justice Marcia Neave*, *supra* note 151).

156. *Introduction*, *supra* note 4, at 38 (citing Sommerlad, *Let History Judge?*, *supra* note 71, at 360).

157. *Introduction*, *supra* note 4, at 38 (citing Kohen, *What’s in a Label?*, *supra* note 152, at 428).

158. *Introduction*, *supra* note 4, at 38.

159. *Introduction*, *supra* note 4, at 38 (citing Baines, *Must Feminist Judges Self-Identify*, *supra* note 150). The editors note that this “echoes Hanne Petersen’s notion of home-

The editors ask, however,

can women expect feminist judges to defend women's causes and to act according to a pro-care agenda? Where women are denied civic rights and treated as inferior to fathers, husbands, sons and other men, this could be a necessity [But] such strategies become dubious if the law of the land opposes them¹⁶⁰

One contributor "asks whether the decision-making process could be deconstructed to develop a space for introducing feminist insights into decision-making processes before they get to an adjudicative forum, and whether a feminist approach can help to articulate harm in a more effective way."¹⁶¹

A number of academic projects "not only criticize but also rewrite judgments incorporating feminist perspectives."¹⁶² One such effort is a "feminist judgments project" in which "a group of feminist socio-legal scholars . . . have written alternative feminist judgments in a series of significant cases in English law."¹⁶³ Similarly, "in the Irish Feminist Judgments Project . . . a group of academics and practitioners write 'the missing feminist judgments' in a series of important Irish and Northern Irish cases."¹⁶⁴

In 2004, the Women's Court of Canada/Le Tribunal des Femmes du Canada "started the work of rewriting the Canadian Charter of Rights and Freedoms equality jurisprudence."¹⁶⁵ Also, "[a]n organisationally anchored form of routine gender review of key judicial decisions is practised in the International Criminal Court (ICC) as part of the Gender Report Card issued annually by the Women's Initiatives for Gender Justice," an initiative that the editors suggest "deserves to be drawn to the attention of

knitted law and Bartolomei's findings in her field work." *Introduction, supra* note 4, at 38 n.30.

160. *Introduction, supra* note 4, at 39.

161. *Introduction, supra* note 4, at 39 (citing Graycar, *A Feminist Adjudication Process, supra* note 153). Graycar's article addresses the "Canadian redress package designed in the Grandview adjudication process, which was to respond to the harms perpetrated on the women and girls who had been held in the Grandview Training School for Girls in the middle of the twentieth century." *Introduction, supra* note 4, at 39. The editors point out that "[w]omen's initiatives for gender justice exist in a number of countries with restitution commissions and people's tribunals, where a public space is created for justice outside the national court system. One example is the Women's International War Crime Tribunal in Tokyo of 2000 for victims of Imperial Japan's sexual slavery system (concerning the so-called 'comfort women') during World War II, set up as a critical alternative to the current system of Japanese courts." *Id.*

162. *Introduction, supra* note 4, at 39.

163. This group is led by Rosemary Hunter, Erika Rackley & Clare McGlynn, *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE* (2010). See also <http://www.kent.ac.uk/law/fjp/>.

164. *Introduction, supra* note 4, at 39 n.32. The Irish project was set up by Mairead Enright and Aoife O'Donoghue. *Id.*

165. *Introduction, supra* note 4, at 39. See <http://womenscourt.ca/home/>.

and recommended to other courts and court systems.”¹⁶⁶

V. GENDER TRAINING FOR THE JUDICIARY

The final section of the book presents papers about India,¹⁶⁷ Japan,¹⁶⁸ the Philippines,¹⁶⁹ Cambodia,¹⁷⁰ and Germany.¹⁷¹

The editors conclude that “[g]ender awareness in the judiciary is still low.”¹⁷² They ask, “What else can be done to enhance the quality of judgments in cases where gender questions are implicit, beyond the described feminist critique?”¹⁷³ The editors state that, while it “can be expected that the greater the number of judges with different backgrounds and experiences, the greater the range of ideas and information that will be contributed to the procedure, . . . the question is how diversity on the bench may colour a specific judgment.”¹⁷⁴ “In other words,” the editors explain, “otherness does not guarantee that other perspectives and standpoints are included in a judgment.”¹⁷⁵

Asserting that “gender consciousness should not be treated as a private matter but as a prerequisite for judicial office,”¹⁷⁶ the editors ask

how can gender sensitivity be achieved in the judicial process? The easiest, most effective and least contested way would be to include it in the law school curriculum. Unfortunately, this requirement for mainstreaming gender aspects has hardly been put into practice . . . [which] also goes for the systematic inclusion of

166. *Introduction*, *supra* note 4, at 40.

167. Ann Stewart, *Gender and Judicial Education in India*, in *GENDER AND JUDGING*, *supra* note 1, at 523–42.

168. Kayo Minamino, *Gender and Judicial Education in Japan*, in *GENDER AND JUDGING*, *supra* note 1, at 543–55.

169. Atsuko Miwa, *Engendering the Judiciary—Lessons from the Philippines*, in *GENDER AND JUDGING*, *supra* note 1, at 557–69.

170. Keiko Sawa, *Gender Training for the Judiciary in Cambodia*, in *GENDER AND JUDGING*, *supra* note 1, at 571–84.

171. Ulrike Schultz, *Do German Judges Need Gender Education?*, in *GENDER AND JUDGING*, *supra* note 1, at 585–89.

172. *Introduction*, *supra* note 4, at 40.

173. *Introduction*, *supra* note 4, at 40. In this context, referring to an analysis done in Argentina, “gender issues” are said to include issues

“[s]uch as abortion, adoption, child support, concubinage, marriage conventions, alimony obligations, crimes against marital status, crimes against honour, crimes against honesty, crimes against sexual integrity, crimes against freedom, the right to privacy, the right to health and personal integrity, the right to life, the right to visits, labour law, discrimination, divorce, filiation, paternity challenge, marriage, parental rights and legal separation.

Id. n.36.

174. *Introduction*, *supra* note 4, at 40 (citing R. Graycar, *Gender, Race, Bias and Perspective: OR, how otherness colours your judgment*, 15 (1-2) *INT’L J. LEGAL PROFESSION* 73 (2008)).

175. *Introduction*, *supra* note 4, at 40.

176. *Introduction*, *supra* note 4, at 40.

gender training in continuing legal education. Specific gender training is opposed by judges especially in well-developed legal systems . . .¹⁷⁷

because it is seen “as a possible attempt to introduce ideological re-education.”¹⁷⁸ Such training, “if it exists at all, takes a minimalist form.”¹⁷⁹ In Japan, for example, judges attend a one-hour lecture on women’s rights.¹⁸⁰

Countries have to submit, “in their regular reports to the UN for CEDAW (U.N. Convention on the Elimination of all Forms of Discrimination against Women), answers regarding ‘the implementation of education for judges especially focusing on indirect discrimination.’”¹⁸¹ In developing countries, “donors include gender training in projects on judicial development as one criterion for the allocation of financial support, as gender justice is not only considered as an integral part of the realisation of human rights, it also promotes countries’ economic success.”¹⁸² India, the Philippines, and Cambodia “as well as numerous other developing countries have implemented programmes for the development of gender responsiveness in the judiciary.”¹⁸³ In the Philippines, this effort has led, among other things, to a “Gender Justice Award” for judges who write “gender-responsive decisions.”¹⁸⁴ In Cambodia, “gender training is of particular importance following the era of Pol Pot and the Khmer Rouge, requiring the setting up from scratch of a new legal and judicial system,” which the editors describe as “a tall order” given the “poor quality ” and “hardly existing judicial personnel in an environment traditionally dominated by an ideology of women’s subordinate status.”¹⁸⁵

“Encouragingly,” the editors note, the article on India’s gender education of the judiciary “concludes that efforts made have been well worthwhile, attitudes have changed, and behavioural change has been encouraged.”¹⁸⁶

177. *Introduction, supra* note 4, at 40–41.

178. *Introduction, supra* note 4, at 41 (citing Schultz, *Do German Judges Need Gender Education?*, *supra* note 171).

179. *Introduction, supra* note 4, at 41.

180. *Introduction, supra* note 4, at 41 (citing Minamino, *Gender and Judicial Education in Japan, supra* note 168).

181. *Introduction, supra* note 4, at 41.

182. *Introduction, supra* note 4, at 41.

183. *Introduction, supra* note 4, at 41 (citing Stewart, *Gender and Judicial Education in India, supra* note 167; Miwa, *Engendering the Judiciary, supra* note 169; Sawa, *Gender Training for the Judiciary, supra* note 170).

184. *Introduction, supra* note 4, at 41.

185. *Introduction, supra* note 4, at 41. The editors note that “[s]imilar requirements [to those in Cambodia] will emerge in other countries currently embroiled in and devastated by warfare.” *Id.*

186. *Introduction, supra* note 4, at 42.

VI. CONCLUSIONS

Gender and Judging documents the enormous societal changes that have taken place over the last 150 years (though largely more recently than that) in which women have entered into the field of law, with a particular focus on their role as judicial officers. Starting from a point of complete non-participation through exclusion,¹⁸⁷ women are now widely accepted in the judiciary. In most of the Western industrialized world, women hold positions as judicial officers, with the civil law world leading the way ahead of the common law world.¹⁸⁸ In developing countries, female judges are beginning to appear, but their numbers and professional opportunities remain limited.¹⁸⁹ There is, however, concern that in some parts of the world cultural trends may cause the progress of women's participation in education and work to be reversed.¹⁹⁰

The process of change is therefore by no means completed. Women's competence continues to be questioned more frequently than that of their male colleagues, and gender stereotypes "remain deeply engraved in social collective memory," where women have tended to remain the "other."¹⁹¹ Where women judges are accepted or even form a numerical majority, the path into higher positions within the courts remains difficult.¹⁹²

Stepping back and viewing the level of success achieved so far in bringing women into the judiciary, while acknowledging that there is still progress to be made, it is important to consider the impact women have made and can continue to make in the judicial process. Have women made gender-specific contributions to the profession? If such gender-specific contributions can be identified, should they be encouraged? The editors tell us that there are a variety of possible starting-points for discussing whether there is an essential difference between women and men judges and their respective work.¹⁹³

The view that women judges have different attributes by virtue of being women is controversial. The editors ask whether women's characters are "gendered by nature," with shared qualities that are "typically female" (which might arguably include empathy, mercifulness, lenience, tolerance, gentleness); or whether, alternatively, their attitudes and judgments are instead "formed by cultural environments"; or, as yet another possibility, differences are merely the product of individuals' characters, education, life

187. There are rare exceptions to women's historical exclusion from the legal and judicial decision-making processes, such as the role of the Queen Mother and women elders in *Abron* society described by Bartolomei. See Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 285–89.

188. *Introduction*, *supra* note 4, at 42.

189. *Introduction*, *supra* note 4, at 42.

190. *Introduction*, *supra* note 4, at 15.

191. *Introduction*, *supra* note 4, at 42.

192. *Introduction*, *supra* note 4, at 42.

193. *Introduction*, *supra* note 4, at 28.

circumstances, financial situation, family status, political views, etc.¹⁹⁴

In some countries, there is a strong resistance to even considering whether differences exist between male and female judges.¹⁹⁵ Female judges in one study were found to initially deny any difference derived from gender, but on closer examination this denial was “frequently reversed.”¹⁹⁶

Adding to the complexity of this issue is the concern that if an emphasis is put upon differences between men and women, this may provide “ammunition” for any who seek to argue that such differences are weaknesses.¹⁹⁷ Further, gender is clearly only one aspect of the differences among people, which include age, race/ethnicity, family background, class/social stratum, sexual orientation and religion, as well as personality traits such as looks, manners, and behavior.¹⁹⁸

One approach to this subject is to consider whether there is a discernible influence of female characteristics on judicial decisions.¹⁹⁹ Such investigations test the concept of a woman’s “different voice,” suggested by Gilligan.²⁰⁰ The editors acknowledge that the contributions to *Gender and Judging* taken as a whole neither confirm nor refute Gilligan’s thesis of women’s other voice.²⁰¹ Even in “gender coded cases,” where the subject is arguably of greater interest to women, the research fails to produce an unambiguous answer to the question whether women judge differently from men.²⁰² And yet, the editors point out, we know that women in the judiciary “make a difference, however difficult to measure.”²⁰³

How do we know this? Some themes and patterns emerge in the description of women’s impact on the judiciary. Early pioneers among women judges thought they would comprehend cases “more intuitively,” with a more “motherly character.”²⁰⁴ While adhering to legal standards, these judges wanted to reveal the “human” side of the law, using a “caring or welfare morale.”²⁰⁵ This was seen by female judges as a complementary addition to the profession, which was “too cold, with the feminine element

194. *Introduction*, *supra* note 4, at 29.

195. Boigeol, *Feminisation of the French ‘Magistrature’*, *supra* note 18, at 140.

196. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 292.

197. *Introduction*, *supra* note 4, at 29.

198. *Introduction*, *supra* note 4, at 29–30.

199. Junqueira, *Women in the Judiciary: a Perspective from Brazil*, in *WOMEN IN THE WORLD’S LEGAL PROFESSIONS*, *supra* note 8, at 437, 438.

200. *See generally* Carol Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

201. *Introduction*, *supra* note 4, at 42–43.

202. *Introduction*, *supra* note 4, at 38.

203. *Introduction*, *supra* note 4, at 42–43.

204. *Introduction*, *supra* note 4, at 27; Röwekamp, *First Female Judges*, *supra* note 18, at 115.

205. Röwekamp, *First Female Judges*, *supra* note 18, at 116–17.

missing.”²⁰⁶ One pioneer spoke of the characteristics of mental alertness, intuition, and the “spiritual qualities of love and service in which women are strong”²⁰⁷ as well as the fact that women are “uniquely contextual thinkers.”²⁰⁸ Women are also seen as well-suited for alternative dispute resolution.²⁰⁹

One study found that women judges experience professional stress in ways similar to male judges, but handle it differently, using external mediation and social support including conversations with family and friends as coping strategies.²¹⁰ In a similar vein, another contributor found women had a greater capacity to listen, “consult with others, discuss issues with their team, and make sure that questions have been fully explored, without this impeding their ability to make a decision.”²¹¹

In comparing modern and traditional judicial processes in two very different societies, another contributor again found that women judges focused on the concrete situation of participants, in order to reason from a broader social context and render a decision that was individualized rather than abstract.²¹² This study too found women less formalistic, not worrying as much about diverging from precedent, and indulging less in “juridical technicalities.”²¹³

The editors describe the

challenge to create the ideal of a judge, a judge who is not only professionally qualified but also empathetic, a judge keen to introduce feminist insights into judicial decision-making processes and embodying the qualities which, according to many contributions should characterise the decision maker: common sense, compassion, patience, being a good listener, courtesy, a pleasant manner in court and broad life experience.²¹⁴

Gender and Judging is an excellent source for the complex and evolving facts and opinions in this area. Building upon this information, this reviewer suggests that a fruitful way forward, while continuing to increase the participation of women in the process, is not to debate the existence or meaning of differences, but instead to discuss and incorporate beneficial human attributes, from whatever source, for which all judges

206. Röwekamp, *First Female Judges*, *supra* note 18, at 117.

207. *Introduction*, *supra* note 4, at 27.

208. Martin, *Profiles in Leadership*, *supra* note 18, at 75.

209. Martin, *Profiles in Leadership*, *supra* note 18, at 75–76.

210. Ludwig & LaLave, *Professional Stress, Discrimination and Coping Strategies*, *supra* note 18, at 233, 248.

211. Boigeol, *Feminisation of the French ‘Magistrature’*, *supra* note 18, at 141.

212. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 292–93.

213. Bartolomei, *Gender and Judging in Traditional and Modern Societies*, *supra* note 52, at 292–93.

214. *Introduction*, *supra* note 4, at 43.

should strive.

Work done in Germany revealed the view of jurists of both genders that certain “feminine elements” should be incorporated into the administration of justice generally.²¹⁵ These were identified as “improving the emotional climate, strengthening communication and cooperation between the parties involved in the trial, reducing both the hierarchical distance from the parties and competitiveness among colleagues,” as well as “a high level of sensitivity, empathy, preparedness to solve problems on an emotional level, a lower risk of restricting oneself to juristic dogma.”²¹⁶

The question therefore should be whether certain traits are desirable in a judge and, if so, how to incorporate them into the attitudes, mindset and behavior of all judges. There can be no serious doubt that many of the characteristics described herein as “feminine” are suitable for any judge. To embrace these should be the goal of all judges. This is not intended to deny or limit the contributions of female participants, but instead to celebrate them more universally.

215. *Introduction*, *supra* note 4, at 32 (citing Schultz, *Women Lawyers in Germany*, *supra* note 55, at 314 n.37).

216. *Introduction*, *supra* note 4, at 32.

* * *