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# Feminism In The Nineties: Coalition Strategies

Donna Hitchens<sup>†</sup>

In June of 1990, in a hotly contested race, I had the good fortune to be elected to the San Francisco Superior Court. My career as a civil rights lawyer, the process of running for the bench, and the experiences I have had since my election lead me to believe that there are two important issues that should be addressed by legal feminism in the nineties. First, we need to challenge the conception of an unbiased judiciary. Second, just as we need to make room for difference on the bench, we need to embrace difference in our legal theories and put them into practice. In the following discussion, I will share some personal experiences with you that I hope will highlight these points.

The process of running for a judicial position was extremely enlightening in many respects. The most dramatic lesson from the campaign was the dichotomy between how the voters and those in the legal profession view the bench. The inevitable conclusion from my experience is that it is time to confront the traditional presumptions—myths—that are perpetuated about the desirable characteristics of a judge. In that regard, I would like to explore two themes with respect to the way the judiciary is traditionally viewed: first, I would like to challenge the assumptions about the values that judges should reflect; and second I will confront the common accusation that those of us who are activists or who come from civil rights backgrounds have a presumed bias that automatically disqualifies us from judicial positions.

Over and over again in litigation throughout the country, women of color, men of color, and white women who sit on the bench are immediately challenged in civil rights cases, because they are presumed to be biased. When was the last time a white male judge was challenged solely on the basis of his gender and race? Well, probably not recently, because you're just going to get another white male judge. But assuming there were more options available, very few of us, who have done civil rights litigation, would walk into court and say, "Your Honor, I don't know you at all, but you're a white male and therefore you'd be biased in this case, and I don't want you to hear it." But I will tell you that corporate attorneys defending civil rights cases, especially employment discrimination cases, do not hesitate to take that position.

I think we need to remember that no judge stands outside of either a personal or a social context. So, I submit to you that bias is not the issue; the

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<sup>†</sup> Judge of the Superior Court, San Francisco. This article is based on a speech delivered at the Conference, *Feminism in the 90s: Bridging the Gap Between Theory and Practice*.

issue is what one does with his or her bias and what personal qualities one brings to the work of judging.

My proposal for a new conception of the judiciary challenges the traditional conception of an unbiased judiciary. Consider the California bench at the time of my campaign. There were twenty-nine superior court judges in the City and County of San Francisco. Eleven of them had been appointed by our then-Governor George Deukmajian. Of the eleven he had appointed there was one woman. All but two that he appointed had been former district attorneys or deputy attorneys general. (In other words, they came only from governmental or prosecutorial positions.) Of the judges sitting on the bench, there were five straight white women and five men of color. There were no women of color, no lesbians, and no gay men. The governor had eight years to diversify his appointments to the bench. Many people in San Francisco, especially women lawyers, felt that the Governor was implementing a political agenda in his appointments to the bench. It came to a head early in 1990 when he appointed two more men. Both were members of the Olympic Club, a very elitist, exclusive men's club in the San Francisco Bay area where extensive business "networking" is accomplished. While their membership in the Olympic Club was made public by the press, the implications of such membership—the class implications, the race implications, as well as the sexism inherent in these memberships—were never analyzed.

Like many of you, I had personally confronted the judicial bias reflected in the lack of diversity in Governor Deukmajian's appointments. As an "out" lesbian litigator, doing primarily civil rights litigation for the last thirteen years, it would have been hard to avoid. In one of my first cases, I represented a woman who had been excluded from consideration for a deputy sheriff's position in a suburban county in California. She had taken the physical and written tests for the position, and had scored among the top five candidates to fill the vacancy. The next part of the procedure was for her to take a polygraph examination. So sure enough, she showed up for the polygraph examination, and the polygraph examiner asked, "Have you ever had a sexual relationship with a person of the same sex?" And she said, "Well, yes I have." She said, "Is that going to disqualify me?" And he said, "Oh, I don't know, when was the last time?" "Last night," she responded. As a result of this information, the county sheriff decided that she was no longer qualified to be a deputy sheriff. We took this to court. The other side brought in a psychiatrist. I'll never forget it. It was thirteen years ago, and I still remember this witness. Among other things, he testified about the prisoner's right to privacy; you probably haven't learned about that because they don't have much. But he was under the impression that prisoners have a right to privacy, and their defense was that a lesbian deputy sheriff in the jails would offend that right to privacy. I, of course, asked him how people would know. And he gave me a quick course in "dyke detection." The psychiatrist testified that

most lesbians wear tailored clothes; they tend to wear their hair short; they don't wear much make-up; and "they sit with their feet firmly planted on the floor and their knees fourteen inches apart." (Never again have I traveled without a ruler.) I was relatively sure, however, after concluding that case, which was highly publicized, that my career would go nowhere. Luckily, that has not been the case.

One of my motivations for running for judicial office was the frustration of thirteen years of civil rights litigation experience before judges who, by and large, could not grasp either the theories of equality or the realities of people's lives that were being articulated. We have had to litigate these cases before judges who often didn't understand these theories or realities because they had no life experience from which to gain the empathy and the understanding they needed—judges who had, for some reason, been unable to bridge that gap in their own knowledge by some means other than personal life experience. I am frustrated with a system that presumes that straight white conservative men are fair, free from bias, without prejudice, have proper judicial temperaments, are independent, and are able to be aloof from the political and societal problems of the community they serve.

This traditional profile of an "unbiased" judge was a recurrent theme among those opposing my candidacy. After my election to the Superior Court in June of 1990, an article, written by a retired judge of the Superior Court, appeared in *The San Francisco Attorney*, the publication of the Bar Association of San Francisco. This article maintained that the independence and integrity of the whole California judiciary was in serious jeopardy. It was in serious jeopardy for four reasons: one reason was a recent Ninth Circuit Court of Appeals ruling that allowed partisan organizations to endorse a judicial candidate; the second reason was the evolution of independent judges—people retiring from the bench and then getting hired to be private judges; the third reason was the low salary paid to judges, compared with what these men could make in a corporate law firm—with such low salaries, it's clearly women's work (I don't understand why there aren't more women on the bench); and the fourth was my victory over an incumbent judge.<sup>1</sup> Clearly my candidacy challenged some of the prevailing perceptions of the judiciary.

When I decided to run I was told that I couldn't win. I was told that I couldn't win because no incumbent judge had been defeated in San Francisco in sixteen years; no lesbian had ever been elected in any city-wide election; no lesbian served at the superior court level anywhere in the country; I couldn't raise the money; the voters wouldn't be interested in the race and wouldn't understand the issues; and because it was a non-partisan race.

Moreover, in deciding to run, I had personal struggles with the traditional conception of judging and with what it meant to run for the bench and to be

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1. Charles Egan Goff, *Politics and Judging*, S.F. ATT'Y, Dec. 1990-Jan. 1991, at 9.

a judge.<sup>2</sup> There is something about feminist theory and seeing oneself as a feminist that appears incompatible with being a judge. It makes me very nervous that I am going to sit in judgment of other people's lives. Generally judges don't talk about their power because the very system of the judiciary, I think, encourages power inequity and oppression. Judges are in power relationships. There's no question about it. It's very seductive stuff; you have to be very careful about it because you spend eight hours a day, or more, in these power relationships. And of course people think that judges are practically infallible with regard to the law. Even my five-year-old daughter fell prey to this misconception: I was in the bathroom the other day, brushing my teeth, and I left the water running; she came in, and she scolded, "You left the water running; don't you know there's a drought? And you, a judge." As a result of the assumption that judges are especially law-abiding, know the law, and are above the law, we are not generally held to a high level of accountability. Rather than being taught how we can be self-critical, compassionate, able to confront and recognize our own prejudices, we're taught to be detached, aloof, very private, separate, and apart from the community, and to pretend that once we don the black robe, we'll make the best decisions. If we don't know the answer or fear we have made the wrong decision, we are supposed to: 1) rule, and 2) move on—don't go back and reflect on it, don't fret, don't re-evaluate, just move on to the next case.

In other words, judges cultivate the impression that the bench is not political. Because I challenged this view of the judiciary, I was often accused of politicizing the bench. The theory was that if people ran against incumbents it would politicize the bench and therefore negatively impact the integrity and independence of the bench. In response to these criticisms, I would argue that it was not my candidacy that politicized the bench; the Governor had already politicized the bench by a long series of appointments of white, heterosexual, male prosecutors. I merely brought a new set of experiences and perspectives and challenged the bench to recognize already existing biases.

When I decided to enter the judicial race, I chose to resist the tendency to pretend that I was a person without opinions. At the very least, it would have been disingenuous. As an attorney, I had remarkable opportunities to work on an incredible variety of cases. I have worked on a major lawsuit on behalf of women and Black male firefighters against the San Francisco Fire Department. I have worked on cases concerning the INS workplace raids. I've also had the opportunity to work closely with other civil rights communities. These experiences have informed my opinions and biases and will assist me greatly as I take on the responsibilities of being a judge.

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2. For a more thorough discussion of bias see Judith Resnik, *On the Bias: Feminist Reconsideration of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988). This article provided me with some assistance in trying to work through this conflict, take on the role that I have, and be consistent going between my job and who I am.

My different conception of judging shaped my campaign strategy. It was reflected in the three themes of my campaign. One was diversity and affirmative action. One was community involvement. And one was access to justice. I did go out and talk about affirmative action. And I did go out and talk about the inherent class bias of the judicial system—that it was not available to people who did not have economic means. I talked about the responsibility of judges to be involved in the communities in which they serve. And people responded. They understood those issues. They cared about those issues. And they were more than happy and interested to talk about those issues. As a result, the endorsements for my candidacy were really overwhelming. Essentially, one group of people to whom I have to give a great deal of credit were lesbians of color. Women working on my campaign went back into their communities and, sometimes for the first time, came out as lesbians in those communities. Such action takes a remarkable amount of courage. Together we were able to build a coalition of the Latino community, the African American community, the Asian American community, the lesbian and gay community, the women's community, labor, environmentalists, and tenants' rights activists. That's what ultimately made my election possible. I think, and I hope, that San Francisco is stronger for the work that these women performed.

Working and developing relationships with people in the community and using the skills and sensitivities that I have learned from them has taught me the value of bringing personal experiences to judging. In this vein, it seems to me that women, and some men, bring to the bench the particularly invaluable experience of parenting. It is much better preparation for being a judge than an intense litigation background. As a parent, I negotiate conflicts every day. Conflicts that are very emotionally intense. I'm constantly trying to craft creative settlement agreements between my five-year-old and my eight-year-old. When that fails I often receive pleas; they're always innocent. I take testimony. Usually that testimony includes an accusation of another perpetrator, i.e., one's sister. I impose sentencing that is hopefully creative. And despite my attempts to be appropriate in my sentencing, I am always accused of bias and unfairness. My verdicts are always followed by a motion for reconsideration. When that motion is denied, they take an appeal to the other mother. These are just examples of the personal and social context that we bring to the bench.

So, I stand before you, as I think I did before the voters, telling you that I am biased. I am political. I am critical of the characteristics generally associated with being a good judge, and I am critical of the judicial system. I don't think that any of those things will make me a bad judge. It is time that we challenge those characteristics traditionally associated with "good" judging. I submit to you that we need to redefine the qualities that make a good judge, and we need to take, as multiple communities working together, control over

the judiciary. I do believe that it's critical to the civil rights work that many of us have done or are doing to change the people who are interpreting those situations and interpreting those laws. A good law is no good unless it's upheld and unless it's applied. And we won't get that result until we have a judiciary that reflects the community that's present right here, right now.

Our strategy for the nineties should not be limited to fostering diversity within the judiciary, but should also include the development of a theory and a practice of advocacy that recognizes difference. We must use our personal experiences and social contexts to inform and shape our theory and advocacy. And a major part of this, that really has to be on our agenda for the nineties, is the politics of difference: that equality is not sameness. A respect for difference will lead us to growth and to wisdom. It can't be learned from isolation and detachment. Just as my colleagues on the bench will not learn about difference if they're not a part of the community in which they serve, feminist advocates and theorists cannot grow in isolation from one another. And so I think one of our greatest challenges in this decade is to build a coalition of mutual respect for our differences and to pursue an equality model that encompasses and recognizes difference.

To illustrate the need to recognize difference I'd point to the lessons we've learned in the area of child custody law. In the seventies, the feminist legal community responded to the call for more equal responsibilities among mothers and fathers in parenting children. We felt at that time that we couldn't be hypocritical; we couldn't have our cake and eat it too. So one of the things we did was to recognize the need to abolish the tender years doctrine, the presumption that mothers should have custody of young children. We did this out of an "equality is sameness" model, as we have with many other issues, like athletics and pregnancy. Perhaps such a strategy today is somewhat misguided. While there is no easy solution, I don't think the concept of recognizing difference is contradictory to the concept of equality. Understanding equality as a concept that is not inconsistent with difference is very important as we begin to develop our strategy for the future. For instance, perhaps the tender years doctrine should have been replaced with a model that recognized difference. That is to say, it may have been right to say that mothers shouldn't always have custody of children of tender years, but we didn't substitute a model that says maybe the primary caretaker should continue to have custodial care. I've practiced in domestic relations court and seen what has happened with our equality-as-sameness strategy there. What I've seen is that it has given fathers a greater tool for controlling the family, even once there's a separation or divorce, because they threaten to sue for custody. "If you come after me for child support, I'll sue for custody." When you look at the research on contested custody, when the father follows through, he wins a disproportionate number of those cases. When the father walks into the court room and says, "Gee, I change diapers," or "Gee, I bought shoes," he's a

saint. He has been immediately elevated in the eyes of the court, because a) he seems interested in custody once he has been involved in the children's lives and b) he even did one or two of the mundane tasks. There's no analysis of where the child's emotional strength comes from, who provides the day-to-day caring, and how the bonding has taken place. And obviously economic issues come into play because in separated homes the father usually has a greater proportion of the family income than the mother and children do. Often it's a 2-1 ratio. I've seen cases where the mother had custody of two children, and she had about one third of the combined income for three members of the family. The father had about two thirds just for himself. So, what I'm trying to point out is that we gave fathers a lot of the power over children that mothers previously had, without in any way giving them half the responsibility. We did this because there was no method to impose equal responsibility for the day-to-day care of the children on the fathers. We did it to a considerable degree at the expense of women.

Another example of the misapplication of the equality-as-sameness approach comes from the gay and lesbian movement. This has actually been a raging debate in the lesbian and gay community for several years now. One side of the debate has urged, "don't act out," "don't wear earrings," "don't look funny because those straight people won't like us; assimilate, be like them." And this is a very difficult debate because you hear people say you'll have a better chance of educating the broader community if they're not so afraid of us. On the other hand, what you've got is a call to buy into the dominant culture which is often oppressive. You know, my partner and I can get a station wagon. We can get a dog, and we can go to church. We've already got two kids, and guess what, we're still different. And when our children go to school and talk about their two mothers, they're still different. And there's nothing about that that's going to change. It will always be the case.

So despite the accusations to which we will no doubt be subjected, like "Oh, sounds like affirmative action," (which has become a dirty word in the press), I think that's exactly what we have to work harder and harder to achieve—the recognition of not only past discrimination, but the right and the ability to be different in the future and to have our difference respected.

The legal system obviously has a great deal of power over people's lives. I have tried to explore just two goals that I believe can make that system more just and humane. I truly believe that we can redefine the personal characteristics that are desirable in a bench officer, and work to get such people appointed and elected to these positions. I also believe we can, and must, redefine our concept of equality, and how we put that concept into theory and practice. These are goals that we can achieve in coalition with one another.



