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On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges

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1877
ON THE BIAS: FEMINIST RECONSIDERATIONS OF THE ASPIRATIONS FOR OUR JUDGES

JUDITH RESNIK*

After [Malcolm Lucas] completed his statement, Lucas was asked [by the Commission on Judicial Appointments] only one question — whether he had preconceived ideas about any issue that might go before him. He said he had none. [Thereafter, Lucas was sworn in as an Associate Justice on the California Supreme Court].

As reported by Dan Morain, Lucas Sworn in as High Court Justice, Los Angeles Times, April 7, 1984, Part 2, at 1, Col. 1.

Question No. 4: "Do you think women judges will make a difference in the administration of justice?" . . .

Well, I answer honestly. "What does my being a woman specially bring to the bench?" It brings me and my special background. All my life experiences — including being a woman — affect me and influence me. . . .

. . . My point is that nobody is just a woman or a man. Each of us is a person with diverse experiences. Each of us brings to the bench experiences that affect our view of law and life and decision-making. . . .


* Professor of Law, University of Southern California Law Center. Copyright, 1988, Judith Resnik.

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INTRODUCTION: A DIALOGUE BETWEEN TRADITIONS

The conveners of this Symposium have asked us to think about judicial election, judicial selection, and judicial accountability. Although plans for the symposium were made more than a year ago, the subject remains topical — capturing newspaper headlines, television air time, and law professors' conversations — as we continue to debate the qualities of Rose Bird, Cruz Reynoso, Joseph Grodin, Robert Bork, Douglas Ginsburg, and most recently, Anthony Kennedy. These debates have taken for granted some attributes of judging that I will examine. I am interested in the person of the judge and in the qualities demanded for legitimate judging. I have two central questions: First, what are the contemporary aspirations for those who judge? Second, how do feminist theories inform or challenge these aspirations?

At one level, the answer to the first question is so easy that some might suggest it is a "straw person." A vast body of legal literature addresses the question of what qualifies a person to be a judge. We speak about seeking individuals who will be "impartial," "disengaged," "independent," and who will hear both sides and judge fairly. Yet, as I will describe in some detail below, what constitutes these qualities is complex. The current state of the law reflects either irreconcilable disagreements about when impartiality exists or unending difficulties in applying the theoretical demands for impartiality and disengagement. The tensions between stated expectations and practice lend an air of unreality to the articulated demands for impartiality. As the opening excerpt from the confirmation proceedings of Justice Lucas illustrates, current requirements for impartiality seem almost perfunctory — either


I should acknowledge my ethnocentricity at the outset. This essay addresses the role of the judge in the United States. For a rich comparative analysis, see Mirjan R. Damaska, The Faces of Justice and State Authority (1986); for a cross-cultural analysis, see the series of articles on judicial "conflicts of interest" in 18 AM. J. OF COMP. L. 689 et seq. (1970).
not to be taken seriously or to be understood as ritualistic incantations of a tradition, the content of which is obscure.

To preview my second concern, feminist approaches inform the discussion of who shall be our judges by raising questions about the very terms — disengagement, impartiality, independence — that we have long taken for granted. For example, some feminist theories can be used as the basis to criticize the narrowness of the current conceptualization of desirable judicial attributes and to argue for supplementation: that our judges have an "ethic of care" as well as an ethic of justice.\(^2\) Other feminist approaches see such assimilation as impossible — that the qualities of impartiality, disengagement, and independence cannot coexist with the values of nurturance, connectedness, and interdependence. Another feminist critique\(^3\) raises questions about the very office of the judge, with its dependence upon hierarchy\(^4\) and violence.\(^5\) The position of power held by contemporary judges could well be incoherent in a world in which interactions are not premised upon the domination imposed by current hierarchical relations. Still other feminist approaches leave the office of the judge intact but seek profound transformation of the image of the judge — from a powerful unrelated "Other" to a connected, powerful, and responsible not-so "other."\(^6\) In short, feminist perspectives can both help us to understand why the received tradition is incomplete and unsatisfying and to create other conceptions of the judicial.

Two additional introductory comments are in order. First, note the difference in longevity between the received traditions of judging and feminist considerations of aspirations for our judges. For hundreds of

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3. See Catharine A. MacKinnon, Feminism Unmodified (1987); MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 Signs: A Journal of Women in Culture and Society 515 (1982); MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs: A Journal of Women in Culture and Society, 635, 658 (1983) ("Once masculinity appears as a specific position, not just as the way things are, its judgments will be revealed in process and procedure, as well as in adjudication and legislation.").


years, legal commentators have written about the attributes of good judges. There is a view in the United States of who shall judge; that view is both codified and regularly expounded — even though complex and far less determinate than might be thought at first glance. But the idea that women may participate in deciding who the state should empower to judge, let alone in ways at odds with the conventional wisdom, is of recent vintage. Moreover, there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never aspire to be) as solidified as the legal doctrine of judging can sometimes appear to be.

Second, this work is intended to enable a dialogue between two traditions — the law of judges and feminist theory — that have not, heretofore, spoken with each other. I hope to address an audience familiar with one or the other topic, but not necessarily familiar with the terms of both. Consequently, the first two sections of this essay are devoted to explaining the legal requirements of judging — largely by reference to the law of disqualification — while the third and some of the fourth sections provide examples of feminist theories and practices. Thereafter, I explore the interaction between the two traditions. Given the assumption of my readers’ varied expertise, let me begin by explaining my title. Bias is not only a word used by legal scholars to indicate an impermissible kind of judgment. “On the bias” is a phrase familiar to those who cut and sew cloth; as Webster’s Dictionary explains, the bias is “a line diagonal to the grain of a fabric, [and is] . . . a line often utilized in the cutting of garments for smoother fit.”

I. THE RECEIVED TRADITION

I run the risk of being called pretentious because I am about to quote myself. I use the following quote not as an exercise in self-elevation but rather as an admission of complicity with the tradition that I will question below. In 1982, concerned about a move towards more “managerial judges,” I wrote:

8. See HARDING, THE SCIENCE QUESTION, supra note 7, at 243 (arguing for “open acknowledgment, even enthusiastic appreciation, of certain tensions that appear in the feminist critiques,” as contrasted with the “coerciveness” of “modern science.”).
Until recently, the United States' legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially. The mythic emblems surrounding the goddess Justice illustrate this vision of the proper judicial attitude: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions.10

This passage summarized the views, found in Supreme Court opinions and in legions of commentary, on the appropriate judicial stance. From the Code of Judicial Conduct 11 to federal statutes,12 the buzz words are the same: "Impartiality" is required; "bias" is forbidden. Judges must not have economic or personal stakes in the lawsuits adjudicated; rather judges must be disengaged, gaining nothing from the decisions rendered.

Before debunking sets in — first in the form of showing that the theoretical aspirations are often not required in practice, and second in the form of raising questions about whether, in theory, these aspirations are themselves so desirable — let me pause to celebrate the impulses that lead to these aspirations for judges. One of the central challenges faced by judges is to separate themselves from the sovereigns that employ them.13 A judge is always an employee of the government. However,

10. Judith Resnik, Managerial Judges, 96 HARV. L. REV. 376 (1982). As will be discussed infra notes 244-54 and accompanying text, my questioning of this statement does not necessarily require retraction of the criticisms I made of managerial judges.


A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as lawyer in the matter in controversy or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.

As of 1984, 45 states and parts of the federal system had adopted the Code, in whole or in part, by rule or statute. See STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 4 (1984); MODEL RULES OF PROFESSIONAL CONDUCT; CODE OF JUDICIAL CONDUCT; ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT (1987).

12. The relevant federal statutes are 28 U.S.C. §§ 144, 455.

Unlike ordinary government employees, a judge has extraordinary powers. A judge must rule on lawsuits to which the government is a party and thus must sometimes rule against her or his employer — must contradict the very government that empowers the judge to speak, that gives the judge her or his grant of jurisdiction. To borrow Robert Cover's eloquence, "[f]or that ultimate purpose — speaking truth to power — there must be a jurisdiction of the judge which the [government] cannot share."

A sovereign's power is a genuine threat to fair judgment. Judges of all eras have encountered sovereigns who seek to have judges render decisions that please. Robert Cover told several such "folktales of jurisdiction," about the battles between (sometimes) brave judges and sovereigns. In our generation, we have examples that demonstrate the powers of the sovereign. When (then) federal district judge Herbert Stern presided at a criminal hijacking trial in the United States Court for the District of Berlin, the State Department attempted to instruct him on how to decide the case. The judge asserted his jurisdiction, his power to disagree with the sovereign by sitting in judgment of its actions. Judge Stern succeeded in resisting governmental pressure in the highly visible criminal hijacking prosecution, but he was more vulnerable when civil litigants sought the assistance of the United States Court for the District of Berlin. The State Department relieved Judge Stern of his duties and

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14. Between June 30, 1985 and June 30, 1986, 254,828 civil cases were filed in the United States district courts. The United States was a plaintiff in 60,779 and a defendant in 31,051. In other words, the United States was a party to more than one-third of the civil cases and was, by definition, a party to all of the 41,490 criminal cases filed during the same time period in the federal district courts. 1986 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS [hereinafter, ADMINISTRATIVE OFFICE REPORT] at 169 (Table C), 175 (Table C2), 232 (Table D-1). See also United States v. Zuger, 602 F.Supp 889 (D. Conn. 1984) (pro se litigant challenged judge's capacity to preside in tax prosecution because judge's salary paid by the government), aff'd, 755 F.2d 915 (2d Cir. 1985), cert. denied, 474 U.S. 805 (1985).

15. Cover, Folktales of Justice, supra note 13, at 190.

16. Id. at 183-90. For example, Cover recounted a story, from the Babylonian Talmud, offered to explain the phrase: "The king does not judge and we do not judge him." According to the tale, the judges of the Sanhedrin called King Yannai to testify in a case involving one of his servants. The King appeared and challenged the court; he would only testify if all the judges would so command him. All except Simeon ben Shetah declined to order the King to testify. Simeon then appealed to God to call the weak judges to account. The Angel Gabriel responded by killing them all, save the brave judge Simeon. Id. at 184.
sent him home. Although Judge Stern could be fired from his job in the specially convened "Article II" court in Berlin, he was able to return to his protected, life-tenured job as an Article III judge. When discussing his actions in defiance of the State Department, Stern wondered how much his safety net of life tenure empowered him to rule as he believed was right.

The drama in Berlin is not the only example of a sovereign's attempt to influence judges. The recent defeat of former Justices Rose Bird, Cruz Reynoso, and Joseph Grodin, all of the California Supreme Court, is another example of sovereign power, this time in the personage of the popular vote rather than the executive branch. The electorate (prompted by a massive media campaign) turned the unpopular justices out of office. Yet a third example comes from commentators who report that the Reagan administration's selection process depends upon applicants' prospective allegiance to the goals of that government. Whether a "litmus" test exists in fact or not, the government retains the capacity to choose which of its judges shall be promoted to higher office. While federal judges' jobs may not depend upon their willingness to please, benefits may flow to those who do. Little wonder then that we hope for judges who are independent, that we aspire to an impartiality that pays no special attention to the government as litigant, that we reinterpret the blindfold of justice as protecting judges from the knowledge of the identity of the parties.


18. The United States Court for Berlin had been created as part of the United States' post-World War II occupation of Berlin; the executive branch had administrative authority and had appointed Stern. United States v. Tiede, 86 F.R.D. at 237.


21. Susan F. Rasky, Administration Renews Struggle to Agree on an Acceptable Choice, N.Y. Times, Nov. 8, 1987, at 1, col. 4. Some report that Justice Department officials interview candidates on their beliefs about a variety of issues likely to be confronted by the Supreme Court.

22. See Kenneth L. Karst, Woman's Constitution, 1984 DUKE L. J. 447, 496 ("The traditional figure of Justice wears a blindfold, to avoid being influenced by the identity of the parties"). Cf. Curtis & Resnik, supra note 13, at 1754-64 (blindfolds became frequent in Justice imagery around the sixteenth century; some of the blindfolds were used as derisive commentary on the limits of justice).
In addition to seeking judges who are impartial and independent, we hope our judges will not prejudge lawsuits. The concern about prejudgment may be related to the issue of independence: If prejudgment is based upon the identity of the litigants, one can be concerned about decisionmaking unrelated to the merits of a dispute. A ban on prejudgment in itself is somewhat less obvious; judgment is permissible, but prejudgment is a problem. Deciding at one point in time versus another is not intrinsically faulty unless the assumption is that prejudgment is based upon incomplete or inaccurate information. Prejudgment is suspect in the context of a system that assumes an increase in information over time and designates specific points in time when the act of judging becomes legitimate. Prejudgment is also suspect in the context of fear of unequal access to the person of the judge. The idealized moment of trial provides a scene of equality. All the information, the litigants, and the judge are assembled at one time, so that judgment can be rendered. The ban on prejudgment may thus be understood either as a derivative concern, related to litigant inequality, or as a policing device, to control litigants and decision-makers so as to legitimate judgments.

One can also understand the impulse towards seeking judges who lack self-interest. Judges hold awesome powers in this society. Their judgments change lives, transfer assets, imprison individuals, and even determine life and death. How tremendously frightening it would be to think that judgments were motivated by personal gain, that the interests of others were routinely sacrificed to advance judges' self-serving goals. Statements of the requirement of disengagement assuage our anxiety about judicial promotion of self.

Two other aspects of disengagement might be understood from the differing vantage points of the judges and the judged. Disengagement may free judges to act. Psychologically, the distance between judges and their judgments may enable judges to render the decisions that so profoundly affect the lives of others. If freed from having to engage personally with what occurs subsequent to their judgments, judges may be enabled to impose rulings that would otherwise be too painful to pronounce. And, psychologically, those who are judged may wish for a judge who is, at some level, a mystical "Other," not like ourselves but endowed with special wisdom and insight.23

The imagery of Justice is emblematic of many of these hopes. The judicial icon is a goddess-like figure, frequently shown with scales, sword,

and, after the sixteenth century, with a blindfold. First a goddess within the Greek and Roman traditions, Justitia evolved into Justice, one of the cardinal virtues endorsed by Christianity. As the power to judge shifted from kings, in the name of gods, to kings in their own right, and then from kings to judges, governing bodies continued to adorn their buildings with scenes of the Last Judgment and with images of Justice. Not simply a relic of the past, Justice still appears in courthouses and other civic buildings throughout the country. How ironic, in a world in which all judges were men, that sovereigns continued to display Justitia as the paradigm judge. Yet, given the magnitude of the power that resides in judges, how appropriate to seek an Other, some mythical figure, quintessentially nonpartisan, who would have the wisdom of the divine.

Impartiality, freedom from bias or prejudgment, independence, disengagement. These are terms that are culturally dependent. Anthropologists remind us that other systems of justice do not require such attributes for their judges. But taken in the context of the exercise of judgment by state officials rather than by elders known to the community, in the context of the history of ongoing struggles between judges and sovereigns, and in the context of the immense power that judges possess, the quest for such qualities in judges can be readily appreciated.

24. Curtis & Resnik, supra note 13, at 1729-34.
25. Id. at 1729-30.
26. Id. at 1731-32, 1732 and Figure 1.
27. There are at least two exceptions. In the Book of Judges in the Hebrew Bible, one of the judges is a woman, Deborah. Most of the biblical "judges" were not judges in our sense of the word but were leaders who returned the people to the "path" of God. "The LORD set judges over them, who rescued them from the marauding bands." Judges 2:16, THE NEW ENGLISH BIBLE (Oxford University Press 1970). Deborah, however, is described as both a "prophetess" and a "judge." "It was her custom to sit beneath the Palm-tree of Deborah . . . and the Israelites went up to her for justice." Judges 4: 4-6. See generally Freema Gottlieb, Three Mothers, 30 Judaism 194 (1981).
II. THE FAR MORE COMPLEX REALITY

There are many examples of the gap between aspirations and practice.\textsuperscript{29} Below, I provide a few to identify the tensions between rhetoric and reality. After I discuss some feminist theories, I will return to these examples to consider how feminist approaches enlighten our understanding of what we demand of judges and why.

A. THE REALITY OF THE RULES

1. The Practice of Disqualification: Who Determines Who Shall Judge?

In the federal system, litigants who fear that judges do not possess the requisite impartiality, independence, or disengagement in a specific instance may seek to have those judges disqualified from adjudicating a particular case. The procedure for seeking judicial disqualification is set forth in two federal statutes, 28 U.S.C. section 144 and 28 U.S.C. section 455. Section 144 is general in its terms; a “timely and sufficient affidavit . . . [demonstrating] personal bias or prejudice” triggers disqualification.\textsuperscript{30} Section 445 offers more specificity by listing circumstances, such as “personal knowledge of disputed evidentiary facts,” service as “counsel, advisor or material witness,” and “financial interest” that mandate disqualification.\textsuperscript{31} The statutes do not detail the practice for decision-making, but congressional silence coupled with court decisions have led to a relatively uniform result: Under both statutes, the parties challenging judges make applications for disqualification to the very judges sought to be disqualified.\textsuperscript{32}


\textsuperscript{30} 28 U.S.C. § 144.

\textsuperscript{31} 28 U.S.C. § 455. The enactment of § 455 strengthened disqualification law, in the sense that a judge is now required to recuse him or herself under certain, specified circumstances. For recent Supreme Court interpretation of § 455, see Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194 (1988); for discussion of the legislative history, see McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1259-60 (5th Cir. 1983).

\textsuperscript{32} Section 144 requires disqualification upon the presentation of a “timely” and “sufficient” affidavit. Case law requires the challenged judge to assess the adequacy of the affidavit, but not the truth of the allegations. See Berger v. United States, 255 U.S. 22, 27 (1921) (interpreting the earlier enactment, § 21 of the Judicial Code, which provided for a judge to “proceed no further” upon the filing of an affidavit that the judge had a “personal prejudice or bias” against a party). Although § 455 is silent as to who shall hear disqualification claims, case law has generally required that claims be initially presented to the challenged judge. Some local rules suggest that motions under § 144 or § 455 be directed to another judge. See, e.g., Local Rule 205-3 of the United States District Court for the Northern District of California (1987). This rule requires that:
Under what theory of disengagement, disinterest, or lack of involvement might one believe that a judge is the appropriate person to assess his or her own possibly impermissible bias? How could Congress require disqualification whenever a judge has “personal knowledge of disputed evidentiary facts,” yet permit judges to decide both the facts and the law of their own relationship to a case? Presumably, the decision to direct applications of disqualification to the judges who are challenged is not animated by an untempered commitment to disengagement. Rather, other concerns are at work, most obviously deterrence of applications to disqualify judges. What a powerful disincentive to have to ask the very person whose fairness is in question to transfer the case to another judge. Of course, given that the procedural opportunity to challenge a judge exists in a context of realistic fears of strategic exploitation, an impulse to be protective of the judge is understandable, but that protection comes at the price of diminished disengagement.

Other reasons may also prompt the decision to require, as an initial matter, that the question of disqualification be heard by the challenged judge. That judge may have familiarity not only with the pending case but also with the information about his or her own background that gives rise to the question of bias or impropriety. Time and money is saved by eliminating the need to provide information to a second jurist. In addition, judges are spared what some consider to be the “unseemly” task of testifying. Also, appellate courts may rectify any errors that occur.

Whenever an affidavit of bias or prejudice directed at a judge... is filed pursuant to 28 U.S.C. § 144, and the judge has determined that the affidavit is neither frivolous nor intemposed for delay, the judge may refer the determination of the sufficiency of the affidavit to another judge selected at random. However, some circuits discourage routine reassignment. See Chitimacha Tribe v. Harry L. Laws Co., Inc., 690 F.2d 1157, 1162 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Occasionally, trial judges themselves request that another member of their court rule on motions for disqualification. See, e.g., Bradley v. Milliken, 426 F. Supp. 929, 943-44 (E.D. Mich. 1977), aff'd, 620 F.2d 1143 (6th Cir.), cert. denied on other issues, 449 U.S. 870 (1980).

33. The same conservationist impulse animates managerial judging in the context of an individual calendar system. In the federal courts, a specific judge is assigned a case at filing and supervises the progression of the case as well as adjudicates any contested issues. See Fed. R. Civ. P. 16.

34. The decision (now codified at 28 U.S.C. § 2255) to require federal prisoners to return to the judge who imposed sentence to challenge the conviction or sentence was justified, in part, by the desire to avoid having a trial judge testify “as an ordinary witness” before another judge. REPORT OF THE COMMITTEE ON HABEAS CORPUS PROCEDURE, SUBMITTED TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (June 7, 1943). The Committee’s Chair, Judge John Parker, objected to the “unseemly spectacle... of state trial judges appearing [in federal courts] as witnesses in defense of the proceedings” in their courts. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 172-73 (1949).

Judges can play two roles as witnesses, delineated in the law as “material” and “character” witnesses. If a judge knows that he or she will be called as a material witness, then a judge is
by determining whether a judgment rendered in violation of § 455 should be vacated upon consideration of "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." Further, the Supreme Court has been generally supposed to recuse him or herself. CODE OF JUDICIAL CONDUCT, Canon 3(C)(1)(d)(iv). See generally Nebraska v. Barker, 227 Neb. 842, 420 N.W.2d 695 (1988). Yet, many court procedures — including disqualification challenges and post-conviction attacks on verdicts — assign cases to judges who have had familiarity with the prior proceedings. As one court explained its reasoning, the "trial court, familiar with the prior proceedings, generally represents the better and more expeditious forum." Tyler v. Swenson, 427 F.2d 412, 417 (8th Cir. 1970). Tyler is a rare instance in which an appellate court held that, when a trial judge's "recollection was the only testimony which refuted" a litigant's claim and when the claim challenged the judge's conduct, another judge was required. Id. In general, trial judges' explicit testimony is not required, but their implicit recollections are permitted to affect the outcome. Again, in the words of the Tyler court, "a trial judge is not to be disqualified simply because he is familiar with the proceedings and supplements the record with observations." Id.

Canon 2(B) of the CODE OF JUDICIAL CONDUCT addresses the role of judges as character witnesses. The Canon states that a judge "should not testify voluntarily as a character witness." The commentary explains that judicial testimony "injects the prestige of his office . . . and may be misunderstood to be an official testimonial." American Bar Association, CODE OF JUDICIAL CONDUCT (1984). In 1949, the American Bar Association debated legislative and ethical proposals to immunize judges from responding to subpoenas. According to one member of the Special Committee formed to consider the issue, controversy arose when "two Justices of the Supreme Court [appeared] as witnesses to the good character of Alger Hiss . . . ." Statement of Kimbrough Stone, Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A. J. 630, 705 (1950). Stone argued that the appearance of a judge not only might be unduly protective of a litigant but might also "lessen respect for the courts." Id. at 705 n. 9. The Committee concluded that judges should not be protected from testifying but that "in any case counsel should refrain from calling judges as witnesses, unless convinced that justice requires it." Id. at 702.

35. The grant or denial of disqualification motions are interlocutory orders and are therefore not appealable as-of-right, see 28 U.S.C. § 1291, unless understood to fall within the so-called "Cohen" finality doctrine. Appellate courts have entertained appeals from judges who refuse to disqualify themselves under "Cohen" finality, by way of mandamus or by certification pursuant to 28 U.S.C. § 1292(b) (1982). See Karen Nelson Moore, Appellate Review of Judicial Disqualification Decisions in the Federal Courts, 35 HASTINGS L. REV. 829 (1984).

36. Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. at 2204. In Liljeberg, a six person majority upheld an appellate court that had vacated a district court judgment, issued by a judge who had stated that he had not recalled that a university, upon whose Board of Trustees he sat, was interested in a lawsuit which he had adjudicated. The Liljeberg majority opinion reviewed some of section 455's mandatory provisions that require disqualification and the other provisions, under which disqualification is required if a judge's "impartiality might reasonably be questioned." 28 U.S.C. section 455(a). The Court held that the case, which fell under the discretionary provisions, was one in which there was "ample basis in the record for concluding that an objective observer would have questioned" the trial judge's impartiality. Id. at 2203. The majority did not provide detailed guidance for appellate courts on the general standard of review for section 455 proceedings although the Court did hold that appellate court remedies of section 455 violations were entitled to deference from the Supreme Court. Id.

Section 144 mandates disqualification if an affidavit passes tests of specificity and timeliness. 28 U.S.C. § 144 (1982). Prior to Liljeberg, appellate courts have described themselves as applying an "abuse of discretion test" to the denial of a motion for disqualification under both § 144 and § 455.
reluctant to base the definition of impermissible partiality on the Constitution. As the Court has recently explained: "Certainly only in the most extreme of cases would disqualification [on the basis of bias or favor] be constitutionally required."37

However justifiable (in some respects) the case might be for the challenged judge to rule on his or her partiality, the practice does not sit comfortably with the image of the judge as disconnected, as having no personal connection with a lawsuit. As the Supreme Court has explained: "[N]o man is permitted to try cases where he has an interest in the outcome."38 While the standard explanation is that the word "interest" does not mean the kind of "interest" at stake in disqualification proceedings,39 challenges to impartiality go to a central aspect of a judge's reputation. The word "interest" is sapped of one of its meaning if we fail to acknowledge that judges are "interested" in at least some of the instances when their capacity to judge is challenged.40

2. The Rule of Necessity: In Theory, Not a Share of Stock; In Practice, One's Entire Salary

A second disjuncture between theory and practice comes under the rubric of the "Rule of Necessity." When invoking this rule, judges explain that, under ordinary rules of disqualification, they would be prohibited from sitting in judgment, but under ordinary rules of judgment, so would all other judges. Hence, because someone must judge, the


39. According to one commentator, the common law recognized only one ground for disqualification — financial "interest." Bias as a source of disqualification was a "complete departure from common law principles." Frank, supra note 1, at 618-19, (relying in part on Blackstone's statement that the "law will not suppose the possibility of bias or favor in a judge. . . .") 3 BLACKSTONE'S COMMENTARIES 361).

40. I am not suggesting that judges care about the reassignment of every case before them or about all of the grounds for disqualification. For instance, if a day after a case is assigned, a trial judge finds that he or she is a shareholder in a company that is one of the litigants, reassignment follows — presumably without much emotional investment. However, the case law demonstrates that, in many instances, disqualification motions challenge an individual judge because of behavior that he or she has engaged in and judgments respond in ways that illustrate the emotions tapped by such motions. See, e.g., Judge Higginbotham's eloquent discussion of racial discrimination in his denial of a disqualification motion based on the grounds that, as a black jurist active in the civil rights movement, he should not sit in judgment in a civil rights suit alleging racial discrimination. Pennsylvania v. Local Union 542, Int'l Union of Operating Eng's, 388 F. Supp. 155 (E.D. Pa. 1974). For the subsequent history, see 569 F. Supp. 582 (E.D. Pa. 1983); 648 F.2d 922 (3rd Cir. 1981), and 458 U.S. 375 (1982).
otherwise disqualified judges may sit. A classic example of the application of the Rule of Necessity is United States v. Will. At issue was the question of whether Congress had violated Article III's guarantee that federal judges' salaries not be diminished. Congress had enacted a formula for annual cost of living increases which Congress subsequently modified and repealed.

Of course, when deciding Will, federal judges had to take note of 28 U.S.C. section 455, which provides that federal judges may not sit on any case in which they have a financial interest. Under the statute, "'financial interest' means ownership of a legal or equitable interest, however small...." The statute has been understood (to the dismay of some judges and litigants) as mandating disqualification whenever a judge owns a single share of stock in a corporation that is party to a lawsuit.

In addition to this statutory interpretation, the question of judicial participation in Will was one of constitutional dimension. While the

41. Some trace the Rule of Necessity to an English case, Dimes v. Grand Junction Canal, 10 Eng. Rep. 301, III H.L. 759 (1852), in which Lord Chancellor Cottenham, who held shares in the company that was one of the litigants, justified his participation in a lawsuit "on the ground of necessity, saying that unless the cause could be heard as it had been there would be a failure of justice." Id. at 768. The Vice-Chancellor had decided the case, and the Lord Chancellor affirmed. The House of Lords concluded that the Lord Chancellor was disqualified from deciding the merits of the case but was, by necessity, qualified to "enrol the decree" and thereby enable the appeal. Id.

42. 449 U.S. 200 (1980). Justice Blackmun did not participate and, as is the custom, did not explain his recusal. Other examples of the invocation of the Rule of Necessity include Evans v. Gore, 235 U.S. 245 (1920) (constitutional question of whether federal judges' salaries could be taxed); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) (federal judges sued to enjoin enforcement of portions of the Ethics in Government Act that require federal judges to file personal financial reports), cert. denied, 449 U.S. 1076 (1981); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (consolidated cases brought by 140 federal judges suing for salary compensation), cert. denied, 434 U.S. 1009 (1978).

43. 449 U.S. at 202.

44. 28 U.S.C. § 455 (b), (d)(4).

45. The American Bar Association's House of Delegates has approved a proposed amendment to § 455. The recommendation is to provide that:

[a] judge need not disqualify himself because he or a member of his family is a member of a class in a class action unless they have a financial interest that could be substantially affected by the outcome of the litigation; and (ii) another judge may be appointed to determine whether the financial interest of the judge involved is so substantial that he should be disqualified.

Report No. 123D, recommended by the Antitrust Section, as amended (on file with the author). The proposal was accompanied by commentary citing, as one horror story, In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1076 (D. Ariz. 1981), aff'd, 688 F.2d 1297 (9th Cir. 1982), for want of a quorum, aff'd as if the Court were equally divided, sub nom. Arizona v. United States District Court, 459 U.S. 1191 (1983). In that case, a trial judge had presided over the litigation for years when it was discovered that the judge's wife was a shareholder in one corporation that was one member of several consolidated class actions. The judge then recused himself and noted that his potential benefit from the lawsuit was less than $30.
Supreme Court has not spoken often about the constitutional elements of judicial qualifications, the Court has heard several challenges to judges who have some monetary stake in an outcome. For example, a mayor of a town who also sat as a justice of the peace was disqualified from judging because traffic fines augmented the town's revenues. Members of a professional licensing board have been barred from judging that profession's competitors. More recently, in *Aetna Life Insurance Company v. Lavoie,* the Supreme Court held that a state court justice was constitutionally barred from participating in judging a bad-faith insurance claim because the justice was also a plaintiff against an insurance company in another bad faith refusal-to-pay case. While the Court was careful to distinguish the constitutional rule, applied in *Lavoie,* from the de minimis pecuniary interest rule represented in the federal disqualification statute, both the case and the statute point to the same concern: Judges' economic stakes in cases render suspect judicial abilities to "hold the balance nice, clear and true." If a share of stock represents the kind of personal stake prohibited by statute, and if the status of being a plaintiff in a lawsuit that would be affected by a ruling in another case represents a constitutional bar to adjudicating, how could any federal judge decide the question of whether Congress has impermissibly lowered the salaries of federal judges? How could federal judges be conceived of as "neutral and detached"? Why turn to a "Rule of Necessity"? Why not create rules of transfer to less interested judges? To state court judges? To Article I judges? To a special master, or to a specially created ad hoc court? Such delegation has been done in the federal courts, upon occasion, and has also been done

49. *Id.* at 824-25.
50. *Id.* at n 3. Cf. Connally v. Georgia, 429 U.S. 245, 250-51 (1977) (payment of $5 fee for issuance of search warrant to justice of peace violated the Fourth and Fourteenth Amendments; the de minimis character of the payment did not redeem it).
51. *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972), *quoted in Lavoie,* 475 U.S. at 822. The majority's ruling in *Lavoie* is quite narrow. The majority held that, because the case was 5-4 and the justice challenged had written the opinion, the judgment had to be vacated. The concurring opinions, one by Justice Brennan (475 U.S. at 829) and the other by Justice Blackmun (475 U.S. at 831) in which Justice Marshall joined, urged a broader ruling. They argued that, because the process in a multi-judge court is corrupted when one of the members of the court is biased, its judgments must be vacated.
53. See, e.g., Sup. Ct. R. 9.2 and Fed. R. Civ. P. 53 (special masters); *Ex Parte Quirin,* 317 U.S. 1 (1942) (Court approved the appointment of an ad hoc military tribunal to try alleged German saboteurs — even though the federal courts were functioning). In addition to the creation of ad hoc
in various state systems.\textsuperscript{54}

...the federal system has a mechanism for reconstituting the United States Supreme Court. 28 U.S.C. § 2109 provides that, when a quorum of six justices is unavailable and an appeal comes directly from a district court, the Supreme Court may "remit" the case to the circuit in which the case arose — to be heard either by the circuit court en banc or by a specially-constituted appellate court comprised of that circuit's three most senior judges. That court's decision is to be "final and conclusive". Section 2109's predecessor provided for appeals in equity cases but did not include any mechanism for replacing the Supreme Court if it could not sit. See Act of Feb. 11, 1903, ch. 544, 32 Stat. 823. That statute was amended in June of 1944 in response to the problems faced by the Court when it lacked a quorum to decide an anti-trust case. See Act of June 9, 1944, 58 Stat. 272, codified at 15 U.S.C. § 29. See also United States v. Aluminum Co. of America, 44 F.Supp 97 (S.D.N.Y. 1941), app'd, 320 U.S. 708 (1943) (held on special docket for lack of quorum), certified and transferred, 322 U.S. 716 (1944), aff'd in part and rev. in part, 148 F.2d 416 (2d Cir. 1945) (by Second Circuit judges Learned Hand, Thomas Swan and Augustus Hand), petition for mandamus dismissed for want of jurisdiction sub nom United States v. Caffey, 164 F.2d 159 (2d Cir. 1947), rev., sub nom United States v. United States District Court, 334 U.S. 258 (1948) (by which time the Court had sufficient members to hear the case).

Section 2109 also provides for cases brought to the Supreme Court from the state or federal appellate courts; in those cases the Court may either put the case over for a term or affirm as if the Court were equally divided. See Prichard v. United States, 339 U.S. 974 (1950); Sloan v. Nixon, 419 U.S. 958 (1974); the related cases of Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983) and Arizona v. U.S. District Court, 459 U.S. 1191 (1983); Haig v. Bissonette, 800 F.2d 812 (8th Cir. 1986), aff'd without a quorum pursuant to 28 U.S.C. § 2109, 108 S. Ct. 1253 (1988). When the respondents in Bissonette requested a rehearing after that case was affirmed, they argued that the requirement of a quorum and the application of § 2109 to their case were unconstitutional. Respondents' Petition to Reconsider (Motion for Rehearing), Haig v. Bissonette, No. 86-987, at 17-25 (on file with the author). The Court denied the application for a rehearing; once again, the members that had recused themselves declined to participate. Once More, With Gusto, Legal Times of Washington, May 23, 1988 at 6, col. 2.

In a few lower federal court cases, in which federal judges have been named as defendants, one or more judges from outside the circuit or district have been designated, pursuant to 28 U.S.C. § 291, to hear the case. See, e.g., United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987) (prosecution of Walter L. Nixon, Chief Judge of the Southern District of Mississippi, cert. denied, 108 S.Ct. 749 (1988); Martinez v. Winner, 778 F.2d 424 (10th Cir. 1985), modified, 778 F.2d 553 (10 Cir. 1985) (prosecution of Fred M. Winuer, Chief Judge of the United States District Court for the District of Colorado, vacated and remanded, sub nom. Tyus v. Martinez, 475 U.S. 1138 (1986); United States v. Isaacs, 493 F.2d 1124 (7th Cir.) (prosecution of Otto Kerner, then a judge on the Court of Appeals for the Seventh Circuit), cert. denied, 417 U.S. 976 (1974).

In some of these designation cases, the designated judges invoke the Rule of Necessity to explain why, despite their otherwise impermissible "interest," they may nevertheless sit. See, e.g., In re Petition to Inspect & Copy Grand Jury Materials, 735 F.2d 1261, 1266 (11th Cir.) (judicial misconduct investigation of federal district judge Alcee Hastings; panel of appellate judges from the First, Second, and Seventh Circuits), cert. denied, 469 U.S. 884 (1984); Fila v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976) (claiming the right to be represented by lay counsel, plaintiffs sued the American Bar Association, the Chief Justice and four justices of the United States Supreme Court, all federal circuit judges, most of the district judges in the Eighth Circuit, the Minnesota Supreme Court, and others; appeal heard by one Eighth circuit judge and two designated judges, one from the Eastern District of Michigan and one from the United States Court of Custom and Patent Appeals). For a discussion of the powers of specially designated judges to hear petitions for rehearing, compare, Isaacs, 493 U.S. at 1138, and Martinez, 778 F.2d at 553, with Nixon, 827 F.2d at 1019.

\textsuperscript{54} See, e.g., Johnson v. Darr, 272 S.W. 1098 ("Special Supreme Court of Texas, May 24, 1925"), discussed infra notes 56, 234-35, and accompanying text.
In *Will* itself, the Court did not explore such alternatives. Reading congressional silence on the question of invoking "the ancient Rule" as affirming the validity of the Rule of Necessity, the Court proceeded to the merits. The Court justified its decision by invoking the public interest: "The public might be denied resolution of this crucial matter if . . . [the] Court [were to] . . . ignore the mandate of the Rule of Necessity and decline to answer the question presented."¹⁵

Note that the Court had another alternative: The justices could have commented that no one is truly disinterested, that judges must always separate themselves from their "interest" in the cases before them, and that a "Rule of Necessity" operates at some level in every case. But "Rule of Necessity" explanations are not invoked to demonstrate that we are all linked in a fashion that renders the notion of complete disinterest functionally impossible. Rather, when embracing the "Rule of Necessity", judges acknowledge that, under current standards, they are so situated that their judgments could fairly be questioned as biased and self-serving. Nonetheless, these judges give themselves the permission to judge.

Of course, one can find justifications for reliance on the Rule of Necessity. To judge is to exercise power. Judicial creation of the Rule of Necessity maintains judicial authority, while judicial exercise of doctrines of delegation recognizes — indeed confers — authority on others. For example, in 1925, all the members of the Supreme Court of Texas acknowledged that they were prevented, by reason of membership in a fraternal organization, Woodmen of the World, from deciding a lawsuit; the Texas governor then appointed an ad hoc court. For a moment, three women sat as "Special Associate Justices" and held the power of the Texas Supreme Court.⁶⁶ See Figure 1. The regular judges were displaced, albeit briefly, and others stood in their stead.

¹⁵. *United States v. Will*, 449 U.S. 200, 217. On the merits, the Court held that some of the salary decreases were permissible while others were not — in essence enabling both sides to win on some points. *Id.* at 229.

⁶⁶. *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925). According to the reporter's note: "All members of the Supreme Court were disqualified to sit in this case, and so certified their disqualification to the Governor of the state, whereupon [under statutory authority], the Governor appointed a Special Supreme Court, consisting of three women, Mrs. Hortense Ward, Special Chief Justice, and Miss Ruth Virginia Brazzil and Miss Hattie L. Henenberg, Special Associate Justices, to hear and determine the issues." *Id.* According to a contemporary report, the women took the oath of office, but none "of the women raised her right hand, as is customary among men taking an oath of office. They did not seem to be flurried by the experience." The Texas Law Student at 3 (April 1, 1925). Woodmen of the World is and was a mutual insurance company that grew out of Modern Woodmen of America, founded in 1882. Woodmen of the World gives "June 6, 1890 [as] the birth of the new order," Sovereign Camp of the World, Modern Woodmen of America. In some states,
Hortense Ward, Hattie L. Henenberg, Ruth Brazzill, as the "Special Supreme Court" of Texas. Photo reproduced with permission of the Texas Supreme Court.
Whether such a practice could be adopted in the federal system is questionable; one might make constitutional arguments for the Rule of Necessity. Can the federal courts be the final arbiters on the meaning of the Constitution if other bodies were to decide even a single aspect of constitutional law? Arguably, Article III itself forbids the conferring of such power on others, although the federal courts have sanctioned many delegations of Article III powers to non-Article III actors. But, such explorations of constitutional issues and alternative judges are not common in federal judicial discussions of the Rule of Necessity. Rather, when faced with situations such as Will, many judges simply invoke the Rule of Necessity and seem to rest upon it comfortably.

3. Timing is Critical

A formal description of the received tradition suggests that questions of impartiality, independence, and disengagement are eternal ones.

The organization is known as Omaha Woodmen. See A Brief History of Fraternalism and The Woodmen (pamphlet on file with the author). Woodmen of the World has affected judicial disqualification in other states as well. See Woodmen of the World v. Alford, 206 Ala. 18, 89 So. 528 (1921).


In the spring of 1988, the Texas Supreme Court requested a replacement judge to break a tie resulting from a split vote in the appeal of Houston Lighting & Power Co. v. Reynolds, 712 S.W.2d 761 (1986). Fred Bonavita, Clements Asked to Help in HL&P Case, Houston Post, June 4, 1988, at 14A. For discussion of disqualification law in general in Texas, see William W. Kilgarin & Jennifer Bruch, Disqualification and Recusal of Judges, 17 ST. MARY'S L. J. 599 (1986) and Rules 18a and 18b of the Texas Rules of Court (1988). My thanks to Pat Cain, for bringing the Texas practice to my attention, and to Chief Justice Thomas R. Phillips of the Texas Supreme Court and William Willis on the court's staff, for the provision of information on Texas cases.

Other states also have provisions for the appointment of special judges. See, e.g., Tenn. Const. art. 6, § 11; Del. Const. art. 4, § 12, and infra notes 234-35, and accompanying text.


58. As noted, lower federal courts do not always rely on the Rule of Necessity. The federal courts have used replacement judges — either from other circuits or districts or judges who have taken senior status — in instances when a member of a particular district or circuit is indicted. See, e.g., United States v. Claiborne, 727 F.2d 842 (judges from the Third, Sixth and Eighth Circuits sat by designation to hear the proceedings against Harry Claiborne, a judge on the United States District Court for the District of Nevada), cert. denied, 469 U.S. 829 (1984). See also the cases cited in note 53 supra.
that can always be asked — or, in the language of procedure, are "jurisdictional." In theory, the absence of these treasured attributes should lead to disqualification. Ideally, such disqualification would occur prior to judgment but, if the impermissible qualities are found subsequent to judgment, then the judgments would be nullified.

However, several pockets of disqualification law have rules that teach otherwise. For example, one of the federal disqualification statutes speaks of the requirement that litigants file a "timely" affidavit seeking recusal; some courts have barred attempts to obtain disqualification as belated. A second illustration comes from habeas corpus litigation, in which claims of biased judging are made, often in the context of challenges to a jury's verdict. While distinctions can be drawn between the societal expectations of judges and of jurors, cases involving jurors, who temporarily hold the power to judge, are an important source of information about the "law" of impartiality. Indeed, the Constitution's text imposes the obligation of impartiality upon jurors in criminal cases, but does not otherwise mention the term impartiality. The law developed in this area is highly protective of those who have rendered judgment. Once a verdict is entered, presumptions of finality insulate decision-makers from challenges to their fairness. Further, when state prisoners' claims of bias are raised by way of habeas corpus, presumptions of correctness attach to prior state court "findings" on the issue of bias, which is either viewed as a question of fact or as a mixed question of fact and law. Under this approach, a variety of challenges to the impartiality of juries have been rejected.

59. 28 U.S.C. § 144. In many instances, the timeliness requirement of § 144 has not functioned as an absolute bar; rather, courts note the failure to file in a timely manner and then proceed to discuss the merits of the claim as well. See, e.g., United States v. Branco, 798 F.2d 1302, 1304-05 (9th Cir. 1986); Franks v. Nimmo, 796 F.2d 1230, 1233-35 (10th Cir. 1986); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). See also Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978) (accommodation between competing interests of avoiding abuse and avoiding the appearance of impropriety require consideration of the motion for recusal).

60. For example, jurors work in groups and are not required to give reasons for their judgments.

61. The Sixth Amendment to the Constitution provides criminal defendants with a right to trial by an "impartial jury." According to the Supreme Court, the right to an impartial judge comes from the Fifth and Fourteenth Amendment guarantees of no deprivations of life, liberty or property without "due process of law." See Marshall v. Jerrico, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

62. See 28 U.S.C. § 2254(d) (state court findings entitled to a "presumption of correctness"); Wainwright v. Witt, 469 U.S. 412 (1985) (federal court must accord presumption of correctness to state court findings that prospective juror was not biased).

63. See also Patton v. Yount, 467 U.S. 1025 (1984) (presumption of correctness attached to state court findings of the propriety of permitting a juror to participate); Rushen v. Spain, 464 U.S. 114 (1983) (conviction upheld despite ex parte communication between juror and judge); Smith v.
Once again, one can understand the impulse for insulation of the judgments rendered. In a world in which all subsequent challenges to verdicts were permitted, cases could (at least in theory) go on and on. In fact, many people convicted of crimes do not challenge the verdicts rendered;\(^64\) we can only surmise about the impact of liberalization of the rules. But whatever the empirical validity for our psychological and political drives towards closure, the point is that the kind of disconnection claimed to be required in theory is not enforced in fact. We give the force of law to judgments rendered by individuals who have had connections to litigants or have had prior experiences relevant to the case at issue.

4. Sources of Knowledge

A final example of the tensions between rhetoric and practice comes from the rules about sources of taint. As is the case with the relationship between the timing of challenges to impartiality and the voiding of judgments, one might have assumed that prejudicial information is prejudicial information, that if judges learn facts that might lead them from dispassion to passion, from competent to incompetent judging, then disqualification must follow.

However, the law of disqualification has distinguished among sources of knowledge and has voided verdicts or disqualified judges only under limited circumstances. First, the courts have imposed requirements about the source and nature of a challenge; courts refuse to listen to complaints about incompetence to judge that come from certain people. Second, courts have drawn lines based upon the places in which the allegedly prejudicial information is learned. If judges learn prejudicial information "extrajudicially," disqualification may follow, while the same information, if obtained within the courtroom, is not the basis for disqualification.

The first problem — the wrong source — is illustrated by \textit{Tanner v. United States},\(^65\) a recent Supreme Court case involving a challenge to a jury's verdict. Anthony R. Tanner and William M. Conover were convicted of conspiracy to defraud the United States. Prior to sentencing, they sought an evidentiary hearing on the question of whether some of the jurors were so intoxicated and drugged that their verdict should be

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set aside. As the dissenters tell the story, two jurors accused the others of "rampant drug and alcohol abuse."\textsuperscript{66}

In a 5-4 decision, the Supreme Court upheld the denial of an inquiry into the validity of the verdict. As Justice O'Connor explained for the Court, the common law had a rule that permitted impeachment of a juror's verdict only by virtue of "extraneous influence"\textsuperscript{67} — that is, matters outside, rather than inside, the jury room. According to the Court, this "external/internal distinction" was not rigid in a "physical sense."\textsuperscript{68} A newspaper read inside the jury room could be an "external" source, while accusations of misunderstanding of a judge's charge, in the courtroom, was an "internal" challenge.\textsuperscript{69} The question turned "on the nature of the allegation."\textsuperscript{70}

The line drawing deteriorated as the Court tried to explain why it refused to hear co-jurors' claims that their colleagues had been drunk. The majority noted that many federal courts had treated allegations of physical or mental incompetence of a juror as an "internal" (ergo non-cognizable) rather than "external" claim.\textsuperscript{71} Thereafter, the Court described the importance of the finality of verdicts and the other means, such as the voir dire and direct judicial observation of jurors, to protect against juror impairment. The Court then rejected the defendants' challenge — under both the Federal Rules of Evidence and under the Sixth Amendment guarantee of an "impartial" and implicitly competent jury. Confusion comes, however, from the Court's comment that the defendants had "ample opportunity to produce nonjuror evidence" of jury impairment.\textsuperscript{72} If the critical touchstone is the "nature" of the allegation, and if drug impairment is an "internal" challenge, how could testimony by non-jurors about drug impairment render the challenge "external" and therefore cognizable? As the Court applied its own test, disallowance was based on the source of the challenge — co-jurors — rather than the nature of the challenge — the alleged drunkenness of some of the challenged jurors.

While the Court's articulation of its test is wanting, the Court's efforts to insulate jury verdicts reflect concerns about the need to protect both judgments and those who judge. The \textit{Tanner} case is one of several

\textsuperscript{66} Id. at 2755.
\textsuperscript{67} Id. at 2746 (quoting Mattox v. United States, 146 U.S. 140, 149 (1892)).
\textsuperscript{68} Tanner v. U.S., 107 S.Ct. at 2746.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 2751.
demonstrating the Court's commitment to finality in criminal cases — and elsewhere. Moreover, when the Court invoked the slippery slope of unhappy jurors' impeachment of verdicts, the Court relied upon oft-stated fears of chilling jury deliberations and of revealing the fallibility of human deliberative processes. One might agree with the dissenters that distinctions can be drawn between claims of drunken and drugged deliberations and those of divisive deliberations, but the majority's desire to protect verdicts has a long tradition of coexistence with a rhetoric that demands impartiality and deliberate judgment.

The external/internal distinction drawn in Tanner bears some resemblance to a second distinction drawn — between impermissible "extrajudicial" knowledge and permissible information, gained during the course of a lawsuit. Illustrative here is the prohibition, in one of the federal disqualification statutes, against decision-making by judges with "personal knowledge" of the dispute. Personal knowledge, that which comes to a judge from any place other than the litigation, can be the basis for disqualification. Several arguments are offered in support of such disqualification — that the information gained may be incomplete or inaccurate, that litigants may not know that a judge possesses some knowledge that could be critical to judgment, and that the information may close a judge's mind to contrary data.

An example comes from a lawsuit filed under Title VII by Bernice Roberts. She alleged that her superior, Benjamin Bailar, had discriminated on the basis of sex and prevented her promotion in the post office. The trial judge stated that he knew the postmaster who was the defendant, and knew he was "an honorable man . . . [who] would never intentionally discriminate against anybody." Here was a judge who said that he drew upon extrajudicial knowledge. Perhaps his information was incomplete, perhaps not accurate, perhaps preclusive of equal treatment, perhaps limiting the judge's ability to hear contrary data. The trial judge refused to disqualify himself, but the Court of Appeals reversed.

73. See generally Resnik, Tiers, supra note 64, at 1005-28.
74. Tanner, 107 S. Ct. at 2748.
75. Id. at 2758.
76. See, e.g., McDonald v. Pless, 238 U.S. 264 (1915); Mattox v. United States, 146 U.S. 140 (1892). Both cases left open the possibility of revising jury verdicts while explaining presumptions against entertaining such challenges. "But cases might arise in which it would be impossible to refuse [juror impeachment] without violating the plainest principles of justice." Mattox, 146 U.S. at 148.
77. 28 U.S.C. § 455(b)(1).
78. Roberts v. Bailar, 625 F.2d 125, 127 (6th Cir. 1980).
79. Id. at 129-30.
Imagine a slight variation in the facts: Assume that the trial judge had made the same comments, but not based upon his "personal," "extrajudicial" knowledge of the individual. Instead, assume that the judge offered a casual comment after the postmaster had completed his direct testimony at trial. "Seems like an honorable man to me; hard to believe he would ever intentionally discriminate against anybody." Or alter the hypothetical once again. Imagine that the judge ruled: "I hereby find that the postmaster is an honorable fellow and that he did not intentionally discriminate against anyone."

The judgments made in the two hypotheticals may be as reliable or as faulty as that made "extrajudicially," but few challenges will be cognizable under either set of hypothetical facts. Extrajudicial sources of prejudice are sufficient to disqualify, but judicial sources of prejudice are generally not the basis for disqualification.\textsuperscript{80}[F]acts learned by a judge in his judicial capacity cannot be the basis for disqualification."\textsuperscript{81} Moreover, even if a plaintiff successfully challenged the hypothetical verdict, and, on appeal, the facts were found to have been "clearly erroneous,"\textsuperscript{82} the custom throughout most of the federal system is that an appellate court returns the case to the very judge who had made the "clearly erroneous" finding.\textsuperscript{83} Being wrong does not disqualify a judge from judging the same case again.

\textsuperscript{80} United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."). \textit{See also} Parker v. New England Oil Corp., 13 F.2d 497, 498 (D. Mass. 1926) (a judicial opinion of the defendant, based on evidence offered in a prior case to which defendant was not a party, does not constitute personal bias or prejudice).

\textsuperscript{81} United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976), \textit{cert. denied}, 430 U.S. 931 (1977). \textit{See also} United States v. Johnson, 658 F.2d 1176, 1179 (7th Cir. 1981) (trial court's in \textit{camera} inspection of documents, allegedly prejudicial to defendant, did not provide extrajudicial information).

\textsuperscript{82} Fed. R. Civ. P. 52(a); \textit{see also} Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

\textsuperscript{83} \textit{See} David L. Ratner, \textit{Disqualification of Judges for Prior Judicial Actions}, 3 Howard L. J. 228 (1957); \textit{In re} Federal Facilities Reality Trust, 140 F. Supp. 522, 524, 527 (N.D. Ill. 1956) (trial judge explained "that I was mistaken has been made painfully apparent" by the appellate court's reversal but refused to recuse himself). \textit{See also} United States v. Boffa, 513 F. Supp. 505 (D. Del. 1981) (judge declined to recuse himself even though he had ruled on the credibility of the defendant who had testified in an unrelated proceeding).

Local rules often govern these issues. Local Court Rule 42, "Remand by an Appellate Court," of the Southern District of New York provides for return of a matter remanded from the Court of Appeals to the judge "who heard the cause or matter below unless the appellate court otherwise directs." Rule 22(a) of the Local Rules for the Federal District of Connecticut states: remands in which "further proceedings not requiring the trial of an issue of fact are appropriate . . . shall be referred . . . to the Judge who heard the . . . matter below unless the Chief Judge or appellate court otherwise directs". Occasionally, remand is made to a different judge. \textit{See}, e.g., United States v. Alverson, 666 F.2d 341, 349 (9th Cir. 1982) (remand to a different judge for resentencing, in light of
As in the previous examples, several justifications can be offered for the current practice. Information is needed for decision; all information that leads to judgment is by definition prejudicial to one party or the other. The boundaries of a lawsuit create some means by which to screen information and to provide litigants with the ability to challenge, as flawed, the claims offered by an opponent. Judges should not be so hamstrung that they cannot respond to the information provided. Hence, judicial comments during proceedings can rarely be the basis for disqualification. Further, to require new judges for each reversal would be wasteful of court resources. Repeat adjudication (by judges, but not generally by jurors) is one way to economize. Moreover, at least in theory, evidence of judicial commentary that indicates impermissible bias can result in reversal if reviewed by an appellate court.


84. This rule has some texture. In addition to the exceptions listed in footnote 83, supra, judges are not supposed to preside in the appeal from cases they decided while on a lower court, see 28 U.S.C. § 47, although as mentioned, judges are often permitted to reconsider cases when reversed by a superior court. See William Cramp & Sons Ship and Engine Bldg Co. v. Int'l Curtiss Marine Turbine Co., 228 U.S. 645 (1913); Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339 (1913); Moran v. Dillingham, 174 U.S. 153 (1899). But note the view of Learned Hand, who wrote for a panel including Judges Swan and Chase, that:

[t]here is no inherent reason to deny power to a judicial officer to review his own judgments, even though they be final and decide the very merits of the cause; at common law this was permissible. . . . Rightly or wrongly, judges are credited pro tanto with enough detachment to be able to reexamine impartially what they have done . . . .


85. See, e.g., Leonard v. United States, 378 U.S. 544, 545 (1964) (per curiam opinion noted that "[p]rospective jurors [who] have . . . heard a verdict returned against a man charged with a crime in a similar case . . . should be automatically disqualified."); United States v. Franklin, 700 F.2d 1241, 1242 (10th Cir. 1983) ("Jurors who have served . . . on cases involving similar legal or factual issues . . . can be dismissed for cause."); Donovan v. Davis, 558 F.2d 201 (4th Cir. 1977) (fair trial denied if jurors serve on two cases involving the same defendant); Virgin Islands v. Parrott, 551 F. 2d 553 (3d Cir. 1977) (defendant has constitutional right not to be tried by jurors who sat on the previous panel). Cf. United States v. Loucas, 629 F.2d 989, 992 (4th Cir. 1980) (verdict upheld despite fact that four jurors had sat on other gambling prosecution cases), cert. denied, 450 U.S. 1030 (1981); United States v. Carranza, 583 F.2d 25, 29 (1st Cir. 1978) (defendant not deprived of his right to a fair trial, even though some of the jurors had participated in similar cases and heard some of the same witnesses).

86. United States v. Singer, 710 F.2d 431 (8th Cir. 1983), cert. denied, 107 S. Ct. 273 (1986) (although no actual bias was found, trial judge had become so much a participant in the proceedings that defendants were deprived of fair trial). But see Lassiter v. Department of Soc. Serv., 452 U.S. 18, 55 (1981) (trial judge's ruling upheld despite his statement that he did not like "to be in the same room" as the woman defending her parental rights).
The difficulty with the line drawing — "internal/external," "extra-judicial/judicial" — is that the arguments advanced for such lines clash with our understanding of human cognition. A judge who has listened to a trial, thought about the testimony, and written findings of fact and conclusions of law cannot comfortably be characterized as having no views about that case, when it is returned upon remand. Resort to role offers one possible explanation. As noted above, repeat adjudication by judges is tolerated far more than is repeat adjudication by jurors. The theory is that the judge, as a long term incumbent of the judicial role, has the capacity to think anew, while jurors, briefly in role, have a weaker socialization to guide their thoughts. But social scientists have taught us that our controls over cognitive capacities are limited. Vivid information may impress us greatly while more subtle data can be lost. We construct "schema" and "scripts" to aid us in digesting information, and it is not so clear that we can will away the views held. In short, while prejudgment is always a danger, the problem seems particularly acute when someone has already undertaken the responsibility to judge. Sometimes the law bans further participation by the original adjudicator while, in other instances, the law permits such an adjudicator to continue to render judgment.

B. ANOTHER LEVEL OF THE REALITY: INSTITUTIONAL DISCRIMINATION ABOUNDS

I have provided illustrations of the distance between stated aspirations for judges and application of those aspirations to factual situations. The disparity between rhetoric and reality extends beyond these specific instances and provides the basis for a structural critique. The requirement of fair judging is to treat individuals without regard to status, race, gender, or class. But social scientists have documented widespread institutional discrimination based upon race and sex.

For example, "[r]acial minorities receive disproportionately stiffer sentences for comparable crimes . . . ." The Supreme Court recently decided to ignore such disparity in the context of the death penalty; the

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88. RICHARD NISBETT AND LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OR SOCIAL JUDGMENT, 43-65 (1980).
89. Id. at 17-42.
90. Rose Matsui Ochi, Racial Discrimination in Criminal Sentencing, 24 JUDGES' J. 5, 6-7 (Winter 1985).
Court stated that, were it to acknowledge racial prejudice in death-sentence cases, the Court would be required to consider racism elsewhere in sentencing.91 Unwilling to think about institutional racism, the Court required challenges based upon prejudice to be founded on proof of specific racial prejudice against the individual sentenced to death.92

A second example is discrimination based on sex. Over the past few years, states have commissioned studies of how women fare in courts. The findings — across jurisdictional boundaries — have been notably uniform: Women are stereotyped and disadvantaged when they appear as litigants, witnesses, or lawyers.93 The Report of the New York Task Force on Women in the Courts is illustrative. The task force concluded that “gender bias against women . . . is a pervasive problem with grave consequences. . . . Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.”94 The documentation provided by New York, New Jersey, and the other states now considering the issue paints a picture of partiality, of prejudice, of judges ready to translate racial and sexist views into law.

C. IS THERE A PROBLEM?

I have provided just a few of the many examples of the tension between the formal expectations of judges and practice. While we demand impartiality, disengagement, dispassion, and lack of interest, we live with outcomes that have been rendered by those who do not — at least as currently understood — display these qualities. While one might have thought that this longstanding gulf between stated aspirations and reality would have transformed the statement of aspirations, the buzz words of judging have proven remarkably resilient. Courts and commentators continue to invoke the formal requirements while both condoning

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92. Id. at 1798-1803.
and bemoaning the departures from them.\textsuperscript{95}

Is our legal tradition impoverished by chanting incantations that we often do not and cannot expect to be fulfilled? One might argue that the formal requirements serve a valuable function even if not mirrored by practice.\textsuperscript{96} I find such responses inadequate. As Martha Minow has recently explained, what she terms the “assumption” (and what I would call the current definition) of impartiality is false, for it is based upon the idea of an “observer who (in fact) sees from an unacknowledged perspective. . . . This aspiration to impartiality . . . is just that — an aspiration rather than a description — because it may suppress the inevitability of the existence of a perspective . . . .”\textsuperscript{97} Once we understand that there is no “objective stance”\textsuperscript{98} but only a series of perspectives, we learn that “[t]here is no neutrality, no escape from choice.”\textsuperscript{99}

I began this essay with the question asked of then Justice, now Chief Justice, Malcolm Lucas. The issue was whether he had “any preconceived ideas about any issue” that might come before the Supreme Court of California, and the response was that he had none.\textsuperscript{100} Both the question and the answer make no sense at a factual level but must instead be understood as ritual. The ritual is that, to become a judge, Malcolm Lucas had to pretend to be other than human, to be an “observer without perspective.” As I noted at the outset, our tradition of judges evolved from a belief in a god who judged, and then a king who judged as the spokesman for a god — but over time, kings shed their godly claims and judges strove to obtain independence from kings. In a secular system, there is no escape from the fact that our judges are human, that we are our judges. As I hope to show in the following sections, not only is there no “escape from choice,” there is also comfort in choice. We serve our search for fair judgment better by embracing, rather than fleeing from, the obligation of judgment.

\textsuperscript{95} See Leubsdorf, \textit{supra} note 29, at 249-52, 279-80, 283-86 for discussion and criticism of these approaches.  
\textsuperscript{98} Id. at 14.  
\textsuperscript{99} Id. at 70.  
\textsuperscript{100} Dan Morain, \textit{Lucas Sworn in as High Court Justice}, \textit{L. A. Times}, April 7, 1984, Part 2, at 1, col. 1.
III. SOME FEMINIST APPROACHES

A. A QUESTION ABOUT THE QUESTION

A few introductory comments appropriately begin this section. While this is not the occasion upon which to attempt to answer the "what is feminism?" question, let me offer a bit of a framework for the feminist theorizing that follows. Feminist theories share a view that much of women's experiences of their lives has been omitted in the standard scholarly and popular descriptions of the world. A major shared premise is that knowledge of the world is constructed from one's viewpoint and that what has been assumed (by some) as a universal viewpoint is, in fact, a viewpoint of some men, who have articulated a vision of reality and claimed it to be true for us all.101 Women's viewpoints have been submerged, oppressed, invisible, and voiceless. A shared enterprise of feminism is to bring those viewpoints forward for exploration and consideration.

While feminists share an understanding of women's silence and a belief that, with voice, women will emerge with distinctive contributions, feminists do not have shared explanations of the sources of women's differences from men. Many analyses of feminist theory conceptualize feminist approaches in diverse ways.102 Those distinctions are not my enterprise here, but again, by means of introduction, let me offer a few examples. For some feminists with an anthropological or sociological orientation, division of labor is a critical factor. Women have shouldered most of the responsibility for caretaking and for the routine maintenance of our lives, but, until recently, those experiences have not been seen as


relevant to political and social theory. For other feminists, more psychodynamic in their concerns, women’s distinct visions and practices come from the unique relations of girls to their mothers, who have responsibility for raising children of both sexes. The assumption is that fundamentally differing processes of identity formation occur as girls and boys separate themselves from their mothers. Other feminist theorists see differences between women and men as emanating from the political structure of gender relations. Women’s distinctions lie in their subordination; it is the absence of power that defines “women’s ways.” Women of differing colors, class, and sexual orientation remind us that an assumed universality of women’s experiences is faulty. Class, race, ethnicity, sexual orientation, as well as gender, suggest that no one person has a single viewpoint. In Barrie Thorne’s words, there are “intersecting viewpoints” within an individual her or himself.

As is evident from this brief overview and as will be developed below, feminism (among other approaches) raises an obvious, and in some sense frightening challenge, to an ideology of judging that posits

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105. Catharine MacKinnon is, in Cass Sunstein’s words, “the most prominent and persistent advocate for the dominion strand of feminist theory”. Sunstein, supra note 102, at 829. See also Andrea Dworkin, Intercourse (1987).


the judge as occupying some archimedian viewpoint.\textsuperscript{109} The question asked of Justice Lucas — did he have any preconceived views? — is revealed not as a quaint, if perfunctory, ritual but as a deceit. The Judge, as Justitia, as Other, cannot be. A judge is either male or female and is of a particular race, class, and social position; the appearance of neutrality, of evenhandedness, of impartiality is false comfort.

When relying upon feminism as a mode of deconstruction, one might be tempted to take the position that there can be no judges in a feminist world. Feminist theorists might well reject the enterprise of linking their approaches to the issue of judicial aspirations — might, to borrow from Carrie Menkel-Meadow, "fight the hypothetical" \textsuperscript{110} in at least two ways. The first is to question directly the office of the judge. Catharine MacKinnon has been a provocative spokeswoman for an understanding that gender is itself constructed in a hierarchical world run by men seeking to maintain their power.\textsuperscript{111} The power invested in a single judge — even given judicial dependence upon others to execute his judgments — cannot be cabined by the niceties of seeking judges who are impartial or, for that matter, who possess any other particular set of characteristics. Rather than consider how to modify aspirations for judges in light of feminist theory, one could challenge the very institutions that create such hierarchical relationships. Governments depend upon judges to assist in the maintenance of the status quo, marked by exchanges between the powerful and the less powerful. Judges could be understood as the paradigmatic actors of an established structure of domination in which relationships are defined by one group holding power continually over others. Of course, implicit in this analysis are assumptions that hierarchy is intrinsic in adjudication and that hierarchy is undesirable, and both assumptions merit exploration in their own right.

Such a rejection of the office of the judge could lead to silencing feminist reconsiderations of the judicial, and my choice to write this paper demonstrates my view that bringing feminist voices to discussions of judicial aspirations is worthwhile. My reasons are several. In this

\textsuperscript{109} The feminist challenge to law is similar to that posed to science. See \textit{Harding, The Science Question}, supra note 7, 15-29.


world, judges have power, and I have joined with other feminists in seeking to enlist judicial assistance to obtain state recognition of the incursions women suffer at the hands of the state and of others. While such efforts may be temporary, pragmatic responses to the current power structure, that structure is likely to be in place for some time. Moreover, I am not convinced that adjudication and feminism are fundamentally incompatible. Adjudication is one instance of governmental deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is socially embedded, it can be fluid and responsive. If we are able to reconceive the judicial role, we may well help those empowered to judge to use their powers in a way which we respect. Finally, power seems to me to be part of human construction, and feminists must speak to power as well as demand its reconstruction.

A second feminist challenge to the linking of feminism and judicial aspirations is addressed not to the office of the judge but to the idea that one can speak coherently about a single set of qualities demanded for the vast array of roles and responsibilities that people called judges have. Because many feminist theories are committed to contextualism, the question of "what qualities are to be demanded of judges?" could be inappropriate because one ought not to be seeking generic qualities in judges. A judge who sits alone and decides criminal cases has a job different than that of a judge who sits as a member of a three-judge court, specially convened to determine the constitutionality of a federal statute. A judge who is a regular member of an appellate court of general jurisdiction does not have the same task as a trial judge with a delineated jurisdiction; a judge on the highest court of the state or federal system is


113. See Karst, supra note 22, at 496-97.

114. See Diane Rothbard Margolis, Considering Women's Experience: A Reformulation of Power Theory (manuscript on file with the author); and papers presented at the 1988 Feminism and Legal Theory Conference: Women and Power, University of Wisconsin Law School, Institute for Legal Studies (June 1988).
cast in a role quite different from that of those hierarchically inferior. Judicial tasks vary not only with the kind of court and number of judges, but also with the nature of the cases and the degree of contact between a judge and the community in which the court sits. Why should we assume that even a small set of generic qualities can be required of all of those who must undertake these varied tasks?

As I draw distinctions among kinds of judicial tasks, I note that they sound at once so obvious and yet not so obvious. Of course, the roles of the judges differ, and — one might be tempted to comment — one need not introduce any new approach (feminist or otherwise) to make that point. However, the literature on judging does not make much mention of the distinctions among the tasks of judges. Indeed, Ronald Dworkin's theories of adjudication posit a single judge, Hercules, as representative of all judges. Robert Cover's work is an antidote, reminding us that we need not assume forever that Hercules is a "he" (Cover's article speaks instead of Hercules as a "she") and that, for judicial interpretation to be transformed into action, judges must depend upon others. No judge acts alone. No judge stands outside a social context.

Thus, feminist theory may well clarify that to ask about judicial attributes is at some level misleading, since we must know more than the label "judge" before we can draw a list of qualifications. But while such a pull towards contextual particularity has much appeal, so does the urge for the universal — for the constraining demand that all judicial power be free of corruption, self-interest, and bias. Whether on family court or tax court, at the trial or appellate level, judges should not be self-serving. Moreover, perhaps the universal aspirations provide symbolic boundaries that have protected us from judicial corruption. The claim could be made that, whatever examples I provided above of the tensions between aspirations and practice, the examples would be multiplied many times over, were we to abandon the demands for universal judicial attributes of disengagement and disinterest.

I have mixed feelings about arguments based upon the symbolic function of such aspirations; our history is replete with the mouthing of


117. Cover, Violence, supra note 5, at 1626.

118. Id. at 1627-28.
words that are at stark variance from the behaviors sanctioned.\textsuperscript{119} But this paper need not resolve that debate.\textsuperscript{120} Feminism may help us see that what the universal aspirations are attempting to achieve may vary from context to context, from small community to large urban setting, from trial court to appellate court, from single judge to collective judges, from commercial to constitutional law. If we understand feminist skepticism not as rejecting all levels of generality but rather as reminding us of the limits and risks of such generalizing, we gain in our ability to press beyond the talisman-like phrases.

\section*{B. Judicial Aspirations and Feminist Theories}

Below, I discuss the work of four feminists: Carol Gilligan, Robin West, Sara Ruddick, and Rosemary Ruether. I have chosen feminists working in different academic disciplines — psychology, law, philosophy, and theology — to illustrate important convergences, as well as differences, among feminist theories. While none of these authors are the spokespersons for their respective disciplines, all provide insights that help this effort to understand whether we can conceive of the attributes of judges in any way other than that described above. While these authors do not directly address the question of the attributes of judges, each of the theorists considers the implications of feminism for those who hold power. As in the first section of the paper, when I assumed that not all readers were familiar with the law of judging, in this section I assume some unfamiliarity with this feminist literature, and once again, I provide brief summaries. My necessarily limited descriptions are just that — sketches of much more nuanced and richer contributions.

\subsection*{1. Carol Gilligan and the Ethic of Caring}

In 1982, Carol Gilligan wrote \textit{In a Different Voice}, a book that has struck a chord with many readers. Gilligan argues that discernible differences exist in the ways in which females and males approach and resolve situations of moral conflict.\textsuperscript{121} Gilligan responded to a literature

\begin{itemize}
\item \textsuperscript{119} See, \textit{e.g.}, Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans). \textit{See generally} Matsuda, \textit{Minority Critique, Looking to the Bottom, supra note 112}.
\item \textsuperscript{120} \textit{Cf.} M. H. Hoeflich \& Jan G. Deutsch, \textit{Judicial Legitimacy and the Disinterested Judge}, 6 HOFSTRA L. REV. 749, 750 (1978) ("the role of the disinterested judge, blind and to that extent impartial with respect to differences that distinguish persons from each other, is a crucial component of our societal stock of myths, and . . . it is social acceptance of this notion of blind judging that legitimates and therefore maintains the judicial process.").
\item \textsuperscript{121} Gilligan, \textit{supra} note 2, at 24-63, 128-174. As Carol Weisb罗d points out, claims of differences in women's and men's approaches and attitudes have a long history. Women's exclusion from
on theories of developmental psychology that was dominated by tests and observations of boys and of men. Gilligan looked instead at the comparison between girls and boys and between women and men. Gilligan asked those whom she interviewed about their responses to moral dilemmas, and she found that females dealt differently with conflictual situations than did males. According to Gilligan, women tend to strive to preserve relationships, to empathize with a potential adversary, to have an ethic of caring that influences decisions about the justice of an outcome. Women's "identity is defined in a context of relationship and judged by a standard of responsibility and care." Rather than occupying a rung on a ladder of hierarchy, women take their place in a web of relationships and seek to preserve the connections.

An obvious issue is the source of the differences uncovered, and Gilligan is not always clear on her theory of etiology. At times, she appears to adopt Nancy Chodorow's psychoanalytic account that, because women are the primary child caretakers, boys and girls have different experiences in reaching adulthood. Oversimplified, the theory is that, because their gender identity is not the same as their mothers, boys distance and separate themselves while girls, identifying with their mothers, can achieve adulthood in a context of continuation and connection. At other points, Gilligan appears to relate the ethic of care to women's roles as currently structured. Gilligan's findings may thus be culturally and time dependent in that if roles change, the moral approaches of

and inclusion on juries were explained by assumed differences between women's and men's judgments. See Weisbrod, Images of the Woman Juror, 9 Harv. Women's L.J. 59 (1986); Ballard v. United States, 329 U.S. 187 (1946) (indictment dismissed under supervisory powers because the exclusion of women from petit and grand jury panels was prejudicial); R. Justin Miller, The Woman Juror, 2 Oregon L. Rev. 30 (1922) (discussing a 1921 Oregon statute which required that at least one half of the jurors be women when a minor was tried). The exclusion of women from juries was eventually understood as violative of a defendant's Sixth Amendment constitutional right to a jury comprised of a cross-section of the community. See Taylor v. Louisiana, 419 U.S. 522 (1975).

122. The central works that Gilligan criticized were a series of articles and books by Lawrence Kohlberg, including The Development of Modes of Thinking and Choices in Years 10 to 16, Ph.D. Dissertation, University of Chicago, 1958, and The Philosophy of Moral Development (1981). For work before Gilligan's on gender differences, see Eleanor Emmons Maccoby & Carol Nagy Jacklin, The Psychology of Sex Differences (1974).

123. Gilligan, supra note 2, at 28-32.
124. Id. at 50-63. See also Mary Field Bealenky, Blythe McVicker Clinchy, Nancy Rule Goldberger, Jill Mattuck Tarule, Women's Ways of Knowing 116-118 (1986).
125. Gilligan, supra note 2, at 151-174.
126. Id. at 160.
127. Id. at 169-174.
128. Id. at 7-10. See Chodorow, supra note 104.
129. Gilligan, supra note 2, at 158.
women and men may also be altered. Moreover, to the extent women's and men's differing ethics are interdependent, changes in one would beget changes in the other.

Gilligan's work has sparked much comment, some of it critical. Some have disputed the empirical validity of the conclusions drawn from the data. Other theorists, including Catharine MacKinnon, have criticized the interpretations offered. MacKinnon has argued that Gilligan failed to recognize that ethics of caring and reliance upon relationships (instead of upon rules) are artifacts of power. Those who have no power have no capacity to make rule-based claims and instead are supplicants to the empowered.

The importance of Gilligan's work stems, in part, from the power of her metaphor. Women's "voices" have not been much heard in the law. While initial feminist approaches were assimilationist and sought access to and inclusion in a world that had been closed to women, more recent feminist work has raised questions about the structure of that world. Rather than simply being men in skirts, women have begun to think that they can still be women in roles that were, in the past, the sole province of men. As a consequence, definitions of the roles themselves


131. For a thoughtful exploration of many of the issues raised by Gilligan, see Joan C. Tronto, Beyond Gender Difference to a Theory of Care, 12 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 644 (1987).


134. Feminist Discourse, Moral Values, and the Law — A Conversation; Isabel Marcus and Paul J. Spiegelman, Moderators, Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, Carrie J. Menkel-Meadow, Conversants, 34 BUFFALO L. REV. 11, 25-30 (1985); see also Judy Auerbach, Linda Blum, Vicki Smith, and Christine Williams, Commentary on Gilligan's In a Different Voice, 11 FEMINIST STUD. 149, 155-160 (1985) (Gilligan provides no information on class, race, religion or ethnicity and attributes all differences to gender; the "problem with her book . . . is that it lacks a politics altogether.").

may change. While Gilligan and MacKinnon provide divergent explanations both of the sources of what we understand today to be “women’s ways” and of how feminism will be transformative, Gilligan, MacKinnon, and others ask how women’s voices might be taken into account.

2. Robin West and the Differences of Gender

Carol Gilligan’s claims of women’s sense of relatedness are paralleled by Robin West’s analysis of legal and political theory. West, from a different intellectual and academic discipline, describes a world of “feminist theory” based upon the premise of connection. According to West, contemporary male moral and political philosophers adhere to what she terms the “separation thesis” — that theorists assume, as a first premise, that individuals are separate and cut off from one another. In contrast, “women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings . . .” West points to the experiences of pregnancy, heterosexual intercourse, and nursing as vivid moments of connection. But connection is not greeted unambivalently, for these moments of connection can also be understood as moments of intrusion. Because women are constantly in danger of being invaded physically without even any semblance of consent, women’s experience is constantly one of potential connection and/or invasion.

Strong currents run between Gilligan and West. When studying development, Gilligan saw both girls and boys facing the same dilemma: “[a] conflict between integrity and care” — resolved by young females with an “ethic of care” and by males with an “ethic of rights.” Gilligan, like West, understands the relationship of self to other as critical: “[W]omen replace the bias of men toward separation with a representation of the interdependence of self and other.”

But West has not simply taken Gilligan’s insights and applied them to jurisprudence. In addition to an enriching analysis of major trends in political thought, West offers another theory about the sources of the differences between women and men. While Gilligan’s work is based upon a mixture of the psychoanalytic and cultural experiences of women, West’s claim of difference is based upon enduring conditions of many

136. West, supra note 2, at 1, 4-12.
137. Id. at 2.
138. Id. at 15, 28-29, 34-36; see also DWORKIN, supra note 105.
139. GILLIGAN, supra note 2, at 160.
140. Id. at 170.
women's lives: The physical experiences of being entered and of being attached to other human beings. These gendered experiences would not disappear if women and men were to share nurturing roles.

With her emphasis upon women's distinct physical experiences, West could be characterized as a "radical," rather than a "cultural," feminist. As West describes the distinction between the two: "cultural feminists" are those for whom "the important difference between men and women is that women raise children and men don't," while "radical feminists" are those for whom "the important difference between men and women is that women get fucked and men fuck." West attempts to bridge (and refute) this "traditional characterization" of the kinds of feminist theories with two claims. First, in her view, both strands of feminism understand the central concerns of women's powerlessness and women's lives as physically different from those of men. As a consequence, for West, all feminism is based upon the "connection thesis" — that "[w]omen are actually or potentially materially connected to other human life. Men aren't." Second, West challenges the distinction between cultural and radical feminists as overdrawn because, at an experiential level, all women live with the contradiction of fearing and valuing intimacy and of decrying and rejoicing in connection. Thus, West argues that, whether acknowledged or not, feminists are always both cultural and radical feminists, in that we are drawn simultaneously to celebrate women's capacity for connection and to search for separation as a protection against invasion. "The potentiality for physical connection with others that uniquely characterizes women's lives has within it the seeds of both intimacy and invasion, and therefore, women rightly value the former while we dread and fear the latter. . . ."

West's efforts to acknowledge contradictory premises of feminist theories while simultaneously linking those theories are both admirable

141. West, supra note 2, at 13.
142. Id. For parallel analyses of the different modes of feminism, see DONOVAN, supra note 102; and JAGGAR, supra note 7.
143. West, supra note 2, at 13.
144. Id.; see also Catharine Hantzs, Is Gender Justice a Completed Agenda?, 100 HARV. L. REV. 690, 700 (1987) (reviewing LENZ AND MYERHOFF, THE FEMINIZATION OF AMERICA: HOW WOMEN'S VALUES ARE CHANGING OUR PUBLIC AND PRIVATE LIVES) ("Powerlessness is the central fact of female experience.").
145. West, supra note 2, at 14.
146. Id. at 53-61.
147. Id. at 53. West also explores the dualities in the points of views of men; she describes and analyzes what she terms the "official" liberal story and the "unofficial" critical legal studies' account of male jurisprudence.
and appealing. Of course, questions remain. As she notes in her concluding comments, men like women are physically connected to other lives — in utero and if engaging in intercourse. And not all women bear children, nurse, or have physically penetrating sex.\textsuperscript{148} Intercourse is an act of physical connection, but it is the social context that describes that act as one of "penetration" rather than "engulfment."\textsuperscript{149} Physical connections per se have insufficient explanatory power.

3. \textit{Sara Ruddick and Maternal Thinking}

A central topic for Sara Ruddick is mothering, a conflictual status of "power and powerlessness."\textsuperscript{150} The power stems from the utter dependence of child on caretaker; for a child, "a mother is the primary, uncontrollable source of the world's goods."\textsuperscript{151} While mothers hold enormous, lifegiving powers, mothers are also powerless — powerless to protect their children from war, from social and economic violence, and from disease.

The experience of women as mothers has, until recently, been a private experience in the sense that women have been relegated to a position outside that of societal decision-making. The fact that (at least some) women may now participate in a larger arena provides Ruddick with a question: "Do women, who now rightfully claim the instruments of public power, have cultures, traditions, and inquiries which we should insist upon bringing to the public world?"\textsuperscript{152} With some hesitation,\textsuperscript{153} Ruddick responds with the concept of "maternal thinking," developed from "features of mothering experience which are invariant and nearly unchangeable, and others which, though changeable, are nearly universal."\textsuperscript{154}

For Ruddick, all theory arises from social practice, and hence maternal thinking must be understood in light of the social state of mothering. "Children 'demand' that their lives be preserved and their growth be fostered."\textsuperscript{155} Three requirements emerge: A mother must preserve

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 70-72.
\item \textsuperscript{149} Conversations with Barbara Herman and Dennis Curtis.
\item \textsuperscript{150} Ruddick, \textit{Maternal Thinking}, supra note 6, at 343; see also Ruddick, \textit{Preservative Love}, supra note 6.
\item \textsuperscript{151} Ruddick, \textit{Maternal Thinking}, supra note 6, at 343.
\item \textsuperscript{152} \textit{Id.} at 345.
\item \textsuperscript{153} \textit{Id.} at 346. Ruddick notes, with concern, the "oppressive uses to which any identification of the 'womanly' can be put . . . Despite these doubts, I am increasingly convinced that there are female traditions and practices out of which a distinctive kind of thinking has developed." \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 346-47.
\item \textsuperscript{155} \textit{Id.} at 348.
\end{itemize}
the child, foster growth, and shape her child to be an acceptable adult. Maternal competence is developed by the capacity to provide for and to protect a child, but the very acts of providing and protecting may also inhibit children's growth. Thus, "the interest in preservation, growth, and acceptability of the child are frequently and unavoidably in conflict."^{156}

Mothering exists constantly in a fragile milieu, in the "face of danger, disappointment, and unpredictability."^{157} Fears for a child's well-being may lead a mother to exercise "excessive control,"^{158} but mothering also demands that mothers recognize such control as excessive, as a "liability." Such recognition distinguishes mothering from many other activities which acknowledge no limits to the desirability of control.^{159} Mothering also forces one to confront the reality that demands and needs change daily and, thus, that "attentive love" and "humility" are required.^{160} For Ruddick, attentive love requires a parent "[t]o love a child without seizing or using it, to see the child's reality with the patient, loving eye of attention — such loving and attending might well describe the separation of mother and child from the mother's point of view."^{161} Maternal behavior likewise generates humility, which "implies a profound sense of the limits of one's actions and of the unpredictability of the consequences of one's work."^{162}

Mothering thus emerges from a complex and constantly changing interaction between mother and child. Mothering may provide a model of acceptance of a position of power, coupled with humility derived from a keen awareness of the limits of one's powers. Another aspect of mothering, which makes it intriguing as a model of power, is that the relationship of mother to child changes over time. While Ruddick does not explore the question of the mother as child, an aged parent can become the responsibility of the grown child, who must also respond with attentive love and humility. If one experiences the full cycle of being mothered and of mothering, one moves in and out of power.

Ruddick is not wedded to mothering as a condition dependent upon gender. For her, "'maternal' is a social category," and there can be

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156. *Id.* at 349.
157. *Id.* at 350-51.
158. *Id.* at 349-50.
159. *Id.* at 350.
160. *Id.* at 351, 358-59.
161. *Id.* at 358 (emphasis in original).
162. *Id.* at 351.
"mothers of both sexes," but the essential experience of mothering must not be lost in the translation. Moreover, the lesson of maternal thinking is not simply how to care for children on an individual basis; rather the primary goal is to "bring a transformed maternal thought into the public realm, to make the preservation and growth of all children a work of public conscience . . . [and to] join in articulating a theory of justice shaped by and incorporating maternal thinking."  

This vision of transformation is somewhat problematic. Not all of us are parents. If social practice is the basis of theory, and some of us lack the social practice, it is difficult to understand how the theory can emerge. However, if the critical social practice is not limited to mothering (as defined by being the parent of a helpless child) but also encompasses caretaking (as defined by providing for a needy person for whom one has a deeply-felt attachment), then more members of the society can share the experiential predicates. For example, if Ruddick were to develop her theory to include the experiences of mothering one's parents, as described above, then more of us partake of the necessary social practice. Yet problems still remain. Children's "demands" may not be universal but rather artifacts of social context and point of view. Moreover, not all mothers do well by their children. Further, it is not obvious how one translates the intimate connections developed out of caretaking into modes of expression and senses of relationship appropriate to those who are not intimate, or how, given the enormous disparity of power held by mothers and children, one uses mothering as a model for relationships of reciprocity.

4. Rosemary Ruether and Feminist Theology  

The problems faced by Jewish and Christian feminist theologians are exceedingly difficult. As Gerta Lerner reminds us:

\[M\]onotheism conceptualized a universe created by a single force—God's will. . . . God . . . covenanted and contracted only with males. . . . Only males could mediate between God and humans. . . . God's blessing of man's seed which would be planted in the passive receptacle of woman's womb symbolically defined gender relations

163. Id. at 346. "Although maternal thinking arises out of actual child-caring practices, biological parenting is neither necessary nor sufficient." Id. at 346.  
164. Id. at 361 (emphasis in original).  
166. See GRIMSHAW, supra note 7, at 240-253 (analysis of Maternal Thinking).
under patriarchy. And in the story of the Fall, woman and more specifically, female sexuality become the symbol of human weakness and the source of evil.\textsuperscript{167}

That is the legacy that feminist theologians address: How to find a place for women in a world in which God was male and women were not permitted to be counted in the community of prayer. Yet feminist theologians have been in the forefront of articulating alternative visions, of learning to speak in other voices.\textsuperscript{168}

Rosemary Ruether begins with the perception that:

Male monotheism has been so taken for granted in Judeo-Christian culture that the peculiarity of imaging God solely through one gender has not been recognized. . . . Male monotheism reinforces the social hierarchy of patriarchal rule through its religious system. . . . A symbolic hierarchy is set up: God-male-female.\textsuperscript{169}

Her response is to begin by retrieving "the older world of Gods and Goddesses"\textsuperscript{170} and the "mixture of male and female imagery for God."\textsuperscript{171} In Judaism, "Shekhinah," the sense of presence, of God's immanence, is invoked each Sabbath,\textsuperscript{172} while in Christianity, the "figure of the Holy spirit picks up many of the Hebraic traditions of the female Sophia and Hokmah (spirit)."\textsuperscript{173}

\begin{itemize}
\item \textsuperscript{167} GERTA LERNER, THE CREATION OF PATRIARCHY 200-01 (1986).
\item \textsuperscript{168} In addition to RUETHER'S SEXISM AND GOD-TALK, discussed \textit{infra} text accompanying notes 169-178, see generally ELISABETH SCHUSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS (1983); WOMANSPRINT RISING: A FEMINIST READER IN RELIGION (Carol P. Christ & Judith Plaskow eds. 1979); PHYLLIS TRIBLE, GOD AND THE RHETORIC OF SEXUALITY (1978); RELIGION AND SEXISM: IMAGES OF WOMEN IN THE JEWISH AND CHRISTIAN TRADITION (Rosemary Radford Ruether ed. 1974) [hereinafter R. RUETHER, RELIGION AND SEXISM]; and MARY DALY, BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION (1973).
\item \textsuperscript{169} RUETHER, SEXISM AND GOD-TALK, supra note 6, at 53.
\item \textsuperscript{170} Id. at 54; see also RAFAEL PATAI, THE HEBREW GODDESS (1978); RITA M. GROSS, STEPS TOWARD FEMININE IMAGERY OF DEITY IN JEWISH THEOLOGY, in ON BEING A JEWISH FEMINIST 234 (Susannah Herschel ed. 1983).
\item \textsuperscript{171} RUETHER, SEXISM AND GOD-TALK, supra note 6, at 56.
\item \textsuperscript{172} PATAI, THE HEBREW GODDESS, supra note 170, at 99-118. According to Patai, Shekhinah derives from the Hebrew verb "shakhan," meaning the "act of dwelling." When first appearing, Shekhinah referred to "that aspect of the deity which can be apprehended by the senses." \textit{Id.} at 102-03. Subsequently, as the feminine identity of the Shekhina developed, the issue became whether two aspects of one deity or two deities existed. \textit{Id.} at 110-118. Patai concludes that "[f]rom about 400 B.C. to 1100 A.D. the God of Judaism was a lone and lofty father-figure, and whatever female divinity was allowed to exist in his shadow was either relegated to a lower plane, or her femininity was masked and reduced to a grammatical gender. . . ." \textit{Id.} at 120. However, "contrary to the generally held view, the religion of the Hebrews and the Jews was never without at least a hint of the feminine in its God-concept." \textit{Id.} at 258.
\item \textsuperscript{173} RUETHER, SEXISM AND GOD-TALK, supra note 6, at 59. Patai translates Hokhma as "wisdom," described, for example, in the Book of Proverbs as "God's playmate." PATAI, THE HEBREW
\end{itemize}
But Ruether rejects
divine androgyny [as a solution, for in] such a concept, the feminine
side of God, as a secondary or mediating principle, would act in the
same subordinate and limited roles in which females are allowed to act
in the patriarchal social order. The feminine can be mediator or recipi-
etent of divine power .... [S]he can be God’s daughter, the bride of the
(male) soul. But she can never represent divine transcendence in all
fullness .... We need to go beyond the idea of a “feminine side” of
God ... and question the assumption that the highest symbol of divine
sovereignty still remains exclusively male.174

How does one get beyond that point? Ruether argues that Biblical
reinterpretation brings one to a God/ess who “is not the creator and
validator of the existing hierarchical social order, but rather the one
who liberates us from it, who opens up a new community of equals.”175
As a consequence, “language about God/ess drawn from kingship and hierar-
chical power must lose its privileged place. Images of God/ess must
include female roles and experiences. Images of God/ess must be drawn
from the activities of ... people at the bottom of society .... Adding an
image of God/ess as loving, nurturing mother, mediating the power of
the strong, sovereign father, is insufficient.”176 The God/ess is not only
transcendent, and all powerful but is also immanent, a presence inti-
mately connected with one’s sense of oneself.177

I do not know whether Ruether would directly challenge Sara Rud-
dick’s views on maternal thinking, but Ruether does argue against a
parenting model for the divine. Ruddick focuses upon the experiences of
the mother and finds much there that is instructive for spheres of rela-
tionships beyond the parental. Ruether focuses upon the experiences of
the child and argues that identification of oneself as a child of God is

GODDESS, supra note 170, at 100-01, citing Proverbs 8:22-31. See also Elisabeth Schussler Fiorenza, 
Feminist Spirituality, Christian Identity, and Catholic Vision, 136, 138-40, in WOMANSPRIT RISING, 
supra note 168; and E. FIORENZA, IN MEMORY OF HER, supra note 168, at 130-140.

174. R. RUETHER, SEXISM AND GOD-TALK, supra note 6, at 61; see also Judith Plaskow, The
Right Question is Theological in ON BEING A JEWISH FEMINIST, supra note 170, at 223, 227 (“The
God at the surface of Jewish consciousness is a God with a voice of thunder .... The female images
that exist in the Bible .... form an underground stream that reminds us of the inadequacy of our
imagery without, however, transforming its overwhelmingly male nature.”).

175. R. RUETHER, SEXISM AND GOD-TALK, supra note 6, at 69. For further discussion of
spirituality, with and without hierarchy, see the exchange between Gloria Z. Greenfield, Does Hierarchy Have a Place in Women’s Spirituality?, and Z. Budapest, The Vows, Wows, and Joys of the
High Priestess or What Do You People Do Anyway? in THE POLITICS OF WOMEN'S SPIRITUALITY
531-540 (Charlene Spretnak ed. 1982).

176. RUETHER, SEXISM AND GOD-TALK, supra note 6, at 69.

177. Plaskow, supra note 174, at 246-47.
harmful. "Patriarchal theology uses the parent image for God to pro-
long spiritual infantilism as virtue and to make autonomy and assertion
of free will a sin." Rather, "[w]e need to start with language for the
Divine as redeemer, as liberator, as one who fosters full personhood, and,
in that context, speak of God/ess as creator, as source of being." 

How can a God/ess be a "source of being" but not a parent? Ruether challenges us to acknowledge that the ways we conceive of rela-
tionships are themselves products of patriarchal conceptions that are dif-
ficult to escape. Ruether refuses to accept that the current categories are
the only ones available. The lines between "nature and spirit," between
mind and body, between this world and the other, all are suspect. "The God/ess who is the foundation (at one and the same time) of our
being and our new being embraces both the roots of the material substrat-
tum of our existence (matter) and also the endlessly new creative poten-
tial (spirit). . . . We have no adequate name for the true God/ess, the 'I
am who I shall become'."

5. The Basic Thesis of Connection

A first point is obvious. The language of the law of judges and the
language of feminism have virtually no convergences. My summaries of
feminist theories might not be sufficient to convey the experience of sus-
tained reading in the area, but I hope that the summaries are adequate to
demonstrate both the feminist interdisciplinary continuities and the
absence of an overlap between feminist theories and the traditional aspi-
ration for our judges. A touchstone of feminism is connection; over and
over again, feminist theories speak about our interrelatedness, our inter-
dependencies, ourselves and others as impossible of comprehension in
isolation. Even those addressing quintessential holders of power —
mothers and gods — speak of power in light of connection. Sara Rud-
dick writes about attentive love and humility, the absence of control, and
the difficulties engendered by the concurrency of being powerful and

178. R. RuetheR, SEXISM AND GOD-TALK, supra note 6, at 69.
179. Id. at 70.
180. Id. See also Fran Olson, The Family and the Market: A Study in Ideology and Legal
182. Let me add one caveat. I am not claiming that these insights are unique to feminism.
Other traditions demand understanding of individuals in the context of the communities of which
they are a part. For examples of analysis of legal materials that stress the humanity of litigants and
that criticize the depersonalization and decontextualization of much legal work, see Milner S. Ball,
Constitution, Court, Indian Tribe, 1987 AM. B. F. RES. J. 1; JOSEPH VINING, LEGAL IDENTITY
powerless. Rosemary Ruether envisions a yet-to-be comprehended state of power without oppression, of a God/ess without hierarchy.

The case law and commentary on the role of the judge have none of these qualities. Instead, one finds the fiat: “No man is permitted to try cases where he has an interest in the outcome.” Such a statement is not accompanied by an acknowledgement that we are all interested, that not all interests are equal nor equally bad, and that the kind of interest intended to be banned is a particular form of self-aggrandizement. Rather, the traditional aspirations for judges assume a single kind of undesirable interest, a connection linked to corruption. The terms of the world of the judge — disinterest, disengagement, impartiality, independence — are words that are deeply suspicious of relationship. As my earlier discussion of the “law” of impartiality showed, we do not really require those qualities in their absolute terms, but we do continue to speak as if we did. Thus one can see that the legal tradition for judges may be impoverished by the absence of feminist insights.

At one level, what is missing is evident: We do not, but we could, demand that those who hold power do so with attentive love, with care, with nurturance, with a responsible sense of one’s self as connected to and dependent upon those who are being judged. Let me offer a personal experience to underscore this point. I testified before the Senate Judiciary Committee that held hearings on the nomination of Robert Bork to be an associate justice of the United States Supreme Court. To prepare, I read Judge Bork’s opinions, articles, and speeches in the area of my expertise, procedure. I was struck by how infrequently his commentary and opinions discussed the facts of the cases, the people, the lives and the pain of the litigants. My distress at the modes of analysis led me to criticize the nominee on several grounds, including the failure to speak with the requisite particularity and compassion. In my written statement, I provided no citation for that requirement, for I had no learned legal opinion upon which to rely. A modification of the official dogma of

183. See supra notes 150-164 and accompanying text.
184. See supra notes 167-181 and accompanying text.
186. For a moving exploration of how “interests” vary depending upon one’s closeness and distance to a profoundly disabled child, see Martha Minow, Beyond State Intervention in the Family: For Baby Jane Doe, 18 U. Mich. J. L. Reform 933, 974-989 (1985).
187. See supra notes 29-89 and accompanying text.
188. Justice Brennan’s Cardoza lecture was published after the Bork hearings. Justice Brennan discussed the impact of “human stories” on the Supreme Court decision in Goldberg v. Kelly, was published. Brennan, supra note 108, at 972. Also subsequent to the Bork hearings, Anthony Kennedy, in a written response to a Senate Judiciary Committee questionnaire, identified the qualities of
judging would be required to add the traits of compassion, care, concern, nurturance, identification, and sympathetic attention to the list of aspirations for our judges.189

But there are (at least) three difficulties. The first is one of domination. Assuming that we could alter the aspirations for judging,190 what would happen if the list of judicial qualifications were simply enlarged by adding the qualities feminist theories have helped us learn to value? Here, we must heed Rosemary Ruether’s warning to reject an androgynous Judg/ess because, under conditions of patriarchy, the addition of traits associated with the female only ratifies their second class status. In addition to religious and literary traditions, visual imagery demonstrates this problem. Ruether’s point is illustrated in several paintings of the Last Judgment. Jesus is portrayed as the judge, elevating some to heaven and condemning others to hell. Mary is at his side, intervening to plead for mercy.191 Ruether’s point may also be echoed in legal doctrine about the relationship between law and equity. Law is the starting place. Equity is the cabined, secondary response — appended, ad hoc, supplementary and suspect.192 Stirring a bit of connection and responsible nurturance in the pot of powerful disengagement of our judges is hardly the kind of transformative response that feminist insights demand. A revised, rather than an expanded, list of attributes, is required.

A second problem is one of enthusiasm. How sure can we be that connection and care are qualities we want for our judges? Women’s...
experience of connection and care have not been uniformly uplifting. As Robin West so well summarizes, radical feminists remind us that with connection can come debasement, the experience of intimacy as paralysis, of interdependence as moments when one loses a sense of self, all accompanied by what Sara Ruddick describes as “cheery denial.” Judges, like women, may well fear intimacy. Isolating judges by calls for distance and disengagement and by fragmentation of responsibility could, in one sense, have been understood as enabling. How, one might ask, could an empathetic judge sentence another-in-whom-one-sees-one-self to years of incarceration? How could judges impose economic burdens on struggling individuals or entities? For those of us who might applaud a possible reduction in criminal penalties which such intimacy and empathy might foster, we must recognize that our empathic judges would not simply experience connection with defendants, but also with victims. Might such judges respond with too harsh condemnations? Or with paralysis from being torn in many directions?

I think paralysis-by-connection to be no more likely than paralysis-by-intellectualization. In our current world, in which we do not ask judges to recognize their connectedness to those before them, some judges impose harsh sentences and some more lenient ones; some judges impose obligations upon litigants without much apparent stress while others appear reluctant to sanction. The length of judicial opinions and the energy of some dissents bear testimony to the tugs and pulls of contemporary judging, complete with its claims of dispassion and disinterest.

But then, one might ask if feminist revision is needed, and (not surprisingly), my answer is yes. Recognition of the tugs, the pulls, and the burdens of judging would be beneficial. A Nigerian sculpture of what one art historian describes as a “lord of jurisprudence” is pierced by many knives, reflecting (according to one interpretation) “a spirit so strong he can wear upon his stalwart chest the painful, intricate issues of his peoples symbolized by inserted blades.” See Figure 2. Perhaps if we learned to speak of judging as a terrible and terrifying job, as a burden of inflicting pain by virtue of judgment, we might develop modes of resolution different from those so readily accepted today. We might seek more communal modes of decision-making, insisting upon groups of two, three, or four judges to share the honor, the obligation, and the pain of

193. West, supra note 2, at 32-36; see also Dworkin, supra note 105, at 63-79.
194. Ruddick, Maternal Thinking, supra note 5, at 351.
195. Robert Farris Thompson, Kongo Power Figure, in Perspectives: Angles on African Art 180 (1987), and discussed in Roberta Smith, Multiple Viewpoints in African Sculptures, N.Y. Times, Oct. 23, 1987, at C38, col. 3.
Anonymous, Kongo Nail Figure, circa 1875–1900. Reprinted with permission of the Detroit Institute of Arts, Founders Society, Eleanor Clay Ford Fund for African Art.
decision. When we recognize the burden and the pain of judging, we might uncover one element of adjudication that exists but is relatively unacknowledged: Much “adjudication” is not a win/lose proposition but an effort at accommodation, with judges and juries responding to both sides but currently without vocabulary or permission to express empathy with competing claims. Many verdicts allocate victory to both sides, but our tradition is to mask that allocation rather than to endorse the practice of seeing multiple claims of right. Feminism may help bolster our trust in practice and permit us to remove the facades of total victory and defeat.

A third problem with revising the list of aspirations for our judges is one of meaning and application. Care, connection, nurturance, identification are distinct qualities, each in need of contextual examination. If we simply stipulate to an expanded list of qualities for judges, we slip back into the universalism that feminist vantage points have taught us to suspect. Moreover, courts have claimed to be nurturant in the past; the juvenile court and indeterminate sentencing were both based upon arguments of an obligation to be responsive to the needs of the populations presumably being served. Maternal thinking is appealing as a model, but many accounts of juvenile court and indeterminate sentencing suggest that parenting modes are profoundly disabling to those parented. Where does “attentive love” come from in a society as heterogeneous as ours? Communitarianism is a popular word in legal academe today, but the word is used without much attention paid to the fact of a multitude of extant communities, with competing modes of being. While communities may be (to borrow Robert Cover’s phrase) “jurisgenerative,” judges are often “jurispathic.” Many of us cheer when the “juris” being killed is law that is sexist and racist.

196. Even when compromising, juries and judges must announce winners and losers, as decision-makers allocate wins and losses. For discussion of how remedies might develop differently see Carrie Menkel-Meadow, For and Against Settlement, Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485 (1985).


198. See, e.g., ELLEN RYERSON, THE BEST-LAIRED PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978). “Simply put, the lesson of the psychotherapeutic approach to delinquency seemed to be that the juvenile court was fundamentally unsuited to the task of rehabilitation because it was inescapably a court of law.” Id. at 140. On sentencing, see Sanford Kadish’s introduction to Determinate Sentencing: Reform or Regression? IX (National Institute of Law Enforcement and Criminal Justice, 1978) (“Individualization, rehabilitation, sentence indeterminacy all seem on their way down, if not on their way out”).

One possible response is that this history cannot teach us much about the future. The creation of juvenile courts and the imposition of indeterminate sentences were not authentic exercises in nurture but were ill-conceived, class-based impositions of self on others. While such a description is at least partially true, it fails to answer the question of how one can, with claims of connection and ethics of care and nurturance, impose — by virtue of the power of the state — sanctions on people adjudged to have acted illegally. One might then return to the argument made in the introductory comments to this section: That exploration of feminism and adjudication demonstrates that the two (like feminism and monotheism\(^{200}\)) may simply be incompatible. Both adjudication and monotheism presuppose hierarchy, and a central tenet of some of feminist theories is that hierarchy is the core of a patriarchal system.

At one level, the rejection of hierarchy, adjudication, and monotheism has appeal. But I believe this approach is also incomplete. A first problem is that each of these terms is being used at a level of generality too sweeping to permit analysis. There are many forms of hierarchy, of adjudication, and of monotheism. For example, some feminist groups have developed modes of rotating decision-making, of routinely revising authoritative and hierarchical relationships. Another part of my dissatisfaction with such a rejection comes from the “other world” quality of the claim. Those of us moved by feminist insights should not simply abdicate responsibility for all current political processes nor fragment our lives to avoid struggling with the tensions. We live here, in a world steeped in diverse forms of hierarchy, adjudication, and monotheism. Finally, I am suspicious of a response, in the name of feminism, that declines to accept power, authority, and responsibility. Sara Ruddick is instructive here; maternal thinking is predicated upon the practice of adults caring for children. The fact of power, and an acceptance of the obligation to exercise it, comes from the social practice of caretaking. Because current social practice demands ongoing relationships between mother and child, the power is tempered with compassion, the authority with affection. Because the parenting exists in a context of a dangerous world, the mother holds her power with the painful self-consciousness of the limits of her powers.

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200. See, e.g., Emily Erwin Culpepper, Contemporary Goddess Theology: A Sympathetic Critique, in Shaping New Visions: Gender and Values in American Culture 65 (Clarissa W. Atkinson, Constance H. Buchanan, & Margaret R. Miles eds. 1987) (“Starkly put, The One is basically a hostile term for feminists.”).
A great gulf lies between mothering and judging, but judging may well have much to learn from maternal thinking. I think that there can be feminist approaches to the act of judging and to the role of judge, and that feminism can and must address the central problems of power and constraint. How can we empower judges to understand their connections to and separation from those before them but simultaneously constrain judges who are, by and large, strangers employed by a state and charged with the responsibility of exercising power over others? How, in Richard Sennett’s terms, might judges both “judge and reassure,” exercising a power that is “nurturing and restrained.” And, to borrow from Pat Cain’s wonderful words, “how can we tell the good bias from the bad?”

IV. A DESCENT FROM THE HEIGHTS

Feminist theories of judges must build from the practice of judging. I cannot — should not — impose, top down, a set of prescriptions. I can, instead, develop observations from the work of feminist judges, who can lead the way to perceptions of alternative modes.

A. THE VOICES OF WOMEN

In addition to quoting comments by Malcolm Lucas, of the California Supreme Court, I began this essay by quoting Shirley Abrahamson, a Wisconsin Supreme Court Justice, who has written a good deal about the act of judging. “‘What does my being a woman specially bring to the bench?’ It brings me and my special background. All my life experiences — including being a woman — affect me and influence me. . . .” Notice that her comments are “in a different voice,” for, unlike the tradition of distance, Shirley Abrahamson accepts her history and rejoices that her life informs her work. But, just as Carol Gilligan has been accused of a selection bias, so can I be challenged. A few phrases out of context. Those of one woman, compared to those of one man.

201. I join in Robin West’s call for a “reconstructive jurisprudence,” supra note 2, at 68. To paraphrase Sandra Harding, our task is to answer the adjudication question in feminism — and not simply to answer the feminist question in adjudication.

202. SENNETT, supra note 23, at 154, 197.


But listen to more from Justice Abrahamson. In an address to the National Association of Women Judges (NAWJ), Abrahamson urged judges to visit — essentially incognito — courtrôoms in other cities. She described her experience in one courtroom, where she arrived, “dressed in my t-shirt, wrap-around jean skirt, and sandals.” The clerk was abrasive and “unfriendly,” the lawyers condescending, the legal activity taking place in chambers, outside the public purview. Justice Abrahamson’s request that judges enter into the world of litigants and the public was, in essence, a plea that judges attempt not only to understand the perspective of another, but to be an other (when possible), to experience the meaning of being a person in a courtroom who lacks the first name “Judge.” By going to the courtroom urobed, and therefore temporarily powerless, Shirley Abrahamson was able to understand more clearly how much her position of power affects her own construction of courtroom reality.

Justice Abrahamson also exhorted her sibling jurists to speak to the public and to participate in community organizations. Contrast this view with the Code of Judicial Conduct, whichl worries about extrajudicial activities that will “detract from the dignity” of the judicial office. The judicial canons have been used as the basis for criticism of judges who have participated in too many public activities. Felix Frankfurter made statements about judicial distance from the fray, all the while engaging in backroom politicking. Unlike Frankfurter, Shirley Abrahamson’s views unify theory and practice and provide a very different conception of the judicial role.

Listen also to Judge Patricia Wald, now Chief Judge of the United States Court of Appeals for the District of Columbia. Judge Wald joined Justice Abrahamson and Deans John Ely and Jesse Choper on a panel

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205. Id. at 497.
206. Id. at 497-98.
207. See infra notes 231-35 and accompanying text for discussion of other ways in which judges self-consciously relinquish power.
208. The Code of Judicial Conduct provides that a judge may engage in what it terms “avocational activities” if they “do not detract from the dignity of his office or interfere with the performance of his judicial duties”. CODE OF JUDICIAL CONDUCT Canon 5(A) (1984).
209. See generally LUBET, supra note 11.
210. See Felix Frankfurter, Personal Ambitions of Judges: Should a Judge “Think Beyond the Judicial”? 34 A.B.A. J. 656 (1948). Many male judges have engaged in a range of extrajudicial activity, some of which is chronicled by Frankfurter. See also Alan F. Westin, Out-of-Court Commentary by United States Supreme Court Justices, 1790-62: Of Free Speech and Judicial Lockjaw, 62 COLUM. L. REV. 633 (1962) (discussing the views judges have held about speaking in public).
entitled "Judicial Review and Constitutional Limitations." Judge Wald commented on the academic vogue of considering the question of judging in the context of constitutional jurisprudence. "I am not at all sure that the debate among the judicial review jurisprudentialists is really aimed at affecting the behavior of ordinary judges at all. . . . The point is simple: constitutional cases for most federal judges are a rarity — gourmet fare, definitely not the bread and butter of our everyday worklives." Her criticism was deeper than the problem of irrelevance. Judge Wald argued that the academics failed to take into account the experienced reality of judging:

[F]ew judges I know reach out for or even want to decide constitutional issues. Such reticence does not stem from innate humility alone; but from a weary recognition that anytime you reverse some governmental action on constitutional grounds, it almost inevitably means en banc review, or certiorari granted and probable reversal. The prognosis, of course, is quite different if you decide that challenged action is constitutional. I suggest there is institutionally and experientially a very strong built-in bias in the lower courts against holding laws or actions violative of the federal constitution.

In short, Judge Wald argued that the "big" academic questions — the creation of new rights and the judicial usurpation of legislative and executive roles — are uninformed by, and irrelevant to, the reality of judging. Judge Wald argued for an appreciation of the daily experiences of judging and for a jurisprudence of judging built upon the experience of judges, rather than imposed from theory.

Compare Judge Wald's voice to that of Antonin Scalia, Associate Justice of the United States Supreme Court. Like Judge Wald, Justice Scalia has commented on the everyday work of judges. In a recent speech, he deplored the drudgery of a federal judge, "processing many . . . less significant cases," such as "many routine tort and employment disputes." Justice Scalia spoke of his understanding, in 1960, when he graduated from law school, of the task of federal judges. "[W]hen I had the unrealistic ambition of being a federal judge, back in 1960, I did not


213. Id. at 650.

want to dispose of predominantly routine cases....” Justice Scalia suggested that “trivial cases” — explicitly defined as many social security claims and implicitly defined as those of little dollar value — be removed from the federal courts. Note that the commentary of Judge Wald and Justice Scalia have a similar basis — the experience of being a judge. Both Wald and Scalia remark on the distance between the reality of judges and the rhetoric of judging. Judge Wald seeks to have the reality inform the rhetoric, while Justice Scalia wants to change the reality to conform to his view of what judges “should” do; important men do not engage in routine tasks.

In addition to individual voices, there is a bit of information about how women judges speak in the aggregate. The National Association of Women Judges (NAWJ) provides some data. “As a large national organization, we can speak out on those issues — often controversial ones such as discriminatory clubs or federal judicial appointments — that individual judges, with all their ethical restrictions, do not feel they can appropriately address.” The NAWJ addressed the issue of discriminatory clubs because of a perceived link between behavior in the world at large and the task of judging; the NAWJ opposes membership by judges in clubs that practice invidious discrimination. The NAWJ argues for an appreciation of the connection between what a judge does “on the bench from 9:00 a.m. to 12:30 p.m. [supposedly] making decisions without regard to race or sex” and what the judge does at lunch “at a social club which excludes women and blacks from its dining room.”

I do not want to overstate the distance between female judges and the National Association of Women Judges, on the one hand, and male judges and the canons of judicial ethics, on the other. Like the NAWJ, the American Bar Association’s Code of Judicial Conduct acknowledges that a relationship exists between the person on the bench and the person off the bench. The Code is replete with prohibitions on certain kinds of “extrajudicial activities” and with acknowledgements that, while a judge

215. Id. at 7(emphasis in original). Compare the statistical analysis offered by Professor Marc Galanter, in The Life and Times of the Big Six; or The Federal Courts Since the Good Old Days, 5-6, (paper prepared for the Symposium on the Role of the Federal Courts, NYU Law School, Nov. 14-15, 1987) (tort cases, recalled by Justice Scalia to be exceptional in 1960, were “the predominant category in 1960—38.4% of all filings”) (on file with the author).
216. See Scalia, supra note 214, at 3-8.
218. Id. at 478.
219. Id.
can engage in civic activities, a judge must not do so in a manner that "detracts from the dignity" of the judicial office. Moreover, the American Bar Association recently adopted a change in the commentary to the Code to recognize that membership in discriminatory clubs was problematic. However, unlike the National Association of Women Judges, the ABA was unwilling to add commentary insisting that individuals withdraw from such institutions. And, unlike Justice Shirley Abrahamson, the Code does not embrace the obligations of judges to leave their protected role and attempt to experience the judicial system as do those without robes.

I also do not want to leave the impression that the few female voices on the bench all exemplify what could be seen as the "upside" of feminism. Another bit of collective information, provided by a statistical analysis of decisions made by federal judges, reminds us that some traditions of women—subservience and deference to a patriarchal culture—may also come with women to the bench. Thomas Walker and Deborah Barrow wanted to learn whether black and female federal judges appointed by the Carter administration decided cases differently from their white, male colleagues. Using a "pairing" device, the researchers

220. Canons 4, 5, 6, and 7 of the CODE OF JUDICIAL CONDUCT address extrajudicial activity. The canons recognize roles for judges off the bench. For example, the commentary to Canon 5 (requiring judges to regulate extrajudicial activities) notes that "complete separation" of a judge is unwise because a judge "should not become isolated from the society in which he lives." See also American Bar Association, Subcommittee on Unjust Criticism of the Bench, Unjust Criticism of Judges at 1 (1986) ("undesirable for a judge to answer criticism" directly in the media).

221. In 1984, the American Bar Association's House of Delegates voted to amend the commentary to Canon 2 of the CODE OF JUDICIAL CONDUCT, which provides that judges "should avoid impropriety and the appearance of impropriety". The commentary states that it is "inappropriate" for judges to belong to discriminatory clubs but leaves the decision about membership to individuals. According to LUBET, supra note 11, at 42, a proposal to bar membership in such clubs was "soundly defeated" by the House of Delegates.

The Judicial Conference of the United States also concluded that membership in clubs that practice "invidious discrimination" was "inappropriate," but that the "conscience of the individual judge" must determine "whether membership in a particular organization is incompatible with the duties of judicial office." Director of the Administrative Office of the United States Courts, 1981 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES at 27. See generally Derrick A. Bell, Jr., Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols, 59 Tex. L. Rev. 733 (1981) (criticizing the Judicial Conference's recommendation because it evaded the central issue of what constitutes a discriminatory club and declined to bar participation in institutional discrimination).


compared opinions of twelve female/male pairs and ten black/white pairs.\textsuperscript{224} One of the study's findings was that "female judges were . . . more prone to rule in favor of the government in federal regulatory disputes. . . . Female judges exhibit a much greater tendency to defer to positions taken by government than do male judges."\textsuperscript{225}

How are we to interpret this information? Putting aside possible methodological complaints such as sample size, a first problem is that the researchers' analysis assumed that appropriate behavior was displayed by the male judges. Women were compared to men, and women were found wanting — found to be more deferential than were men. Perhaps the women's behavior was appropriate and the male judges were simply displaying male arrogance and a lack of humility.\textsuperscript{226} Alternatively, if the women were, in Sara Ruddick's terms, engaging in a learned but undesirable behavior, obedience to the "actual control and preferences of dominant people,"\textsuperscript{227} then how do we explain the women judges who rise above such obedience? The real difficulty is thinking about how, over time, a person could hold the position of judge, retain humility and yet be able, when necessary, to challenge the powers of government. Responses to this problem must come in part from learning how judges experience their power and whether those experiences of power change over time. Learning from the practice of judging will teach us lessons about ourselves, as well as lessons about how we might transform our understanding of judging.

\textbf{B. THE REALITIES OF THE RULES REVISITED}

In an earlier section of this paper, I provided four examples of the tensions between the theory of disengagement and the practices of judges. I return, briefly, to each of these problems to see whether feminist insights might provide some clarity. Note that I did not pick the four examples because feminism could "solve" the problems exposed; as I discuss below, feminist insights have helped me articulate criticism of some aspects of disqualification law but not others. I also am not

\textit{of Trial Judges, 25 AM. I. POL. SCI. 308, 314 (1981)} (while finding "some differences in the convicting and sentencing behavior of male and female judges, these differences are not large . . . ." ); \textit{Herbert M. Kritzer & Thomas M. Uhlman, Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Dispositions, 14 SOC. SCI. J. 77, 86 (April 1977)} (female and male judges behave "no differently"); \textit{Id. at 608.}\


\textit{227. Ruddick, Maternal Thinking, supra note 6, at 355.}
attempting an exhaustive feminist reinterpretation of the law of disqualification. Rather, I want to explore what kinds of insights might emerge from a dialogue between feminism and the law of judges.

My first example was the federal practice of requiring litigants to bring disqualification motions to judges who are being asked to recuse themselves. This practice becomes incoherent when we simultaneously ask judges to decide about themselves as judges and claim that they are disengaged and disinterested. When one's own capacity to judge fairly is in question, it is difficult to believe one has no “interest.” To the extent that feminism can free us from false claims of disengagement, the tension between rhetoric and practice might lessen.228 That is, once we acknowledge that there is no state of absolute disinterest, we need not deny the reliance upon interested individuals to make judgments about their capacity to judge.

But liberation from “cheery denial” is short of endorsement of the practice. Surely, in the name of feminism, I would not want to embrace the view that because we are all “interested” at some level, no kinds of interest are disqualifying.229 Many disqualification motions are aimed at the person of the judge, at his or her relations to others, and the impact of those relations upon the litigants.230 Unlike a feminist aspiration that a judge be “interested” in the sense of identifying some aspects of the self in others, in a motion for disqualification the judge is asked to rule upon the self as if the judge could be an other.231

Why should we tolerate such a practice? Feminist insights may again help to read the social context. One of the stated rationales for having the challenged judge adjudicate his or her capacity to act fairly is to protect the dignity of the judge from the challenge itself and from

228. Once again, these insights are not the exclusive domain of feminism. When litigants sought to disqualify a black jurist, Judge Leon Higginbotham, from a case involving racial discrimination, he eloquently reminded us that we all have races. Pennsylvania v. Local Union 542, Int'l Union of Operating Eng's, 388 F. Supp. 155 (E.D. Pa. 1974).
229. See Cain, supra note 203.
230. For two cases in which allegations of friendship with litigants or with their attorneys were the bases of disqualification motions and both judges held that friendship itself was not disqualifying, see United States v. Meyerson, 677 F.Supp 1309 (S.D.N.Y. 1988) (Judge Duffy stated he did not have impermissible ties to Hortense Gabel, but recused himself voluntarily); and Liberty Lobby, Inc. v. Dow Jones & Co., Inc., No. 86-7017 (D.C. Cir. Dec. 7, 1987) (order and memorandum denying motion for disqualification; Judge Bork declined to recuse himself in light of his relationship with Suzanne Garment). Subsequently Judge Bork wrote the opinion on the merits affirming the trial court. See Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287 (D.C. Cir. 1987).
231. Judicial over-involvement is one element of the Supreme Court's ruling that requires the judge who witnessed (and often, was the brunt of) the contemptuous conduct to recuse him or herself in a subsequent criminal contempt trial. See Mayberry v. Pennsylvania, 400 U.S. 455 (1971).
having to explain him or herself to other judges. In other words, self-evaluation saves a judge from having to testify before another judge about the grounds for disqualification. Why has the tradition of judging seen a judge on the witness stand as somewhat "unseemly" and created practices to avoid such an event? The judge as a "mere" witness or as a partisan is reduced to being one of us, a supplicant before another individual who has assumed the mantle of power.232

Rather than bemoan such a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathic, to adopt the perspective of an other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded. Informed by feminism, I can better articulate why judges should not hear challenges to their own capacities to judge. I want my judges to have the experience of explanation before another who holds power. I want litigants to see judges unrobed as well as robed. I want the dialogic experience to inform us about what qualities lead us to fear unfair judgment.233

My second example of the odd state of disqualification law was the "Rule of Necessity," which leads judges to adjudicate matters in which their personal stake is obvious. Once again, feminism would revise the rhetoric. The Rule of Necessity is spoken of as the extraordinary exception to the ordinary state of disinterest. Feminism helps us see that the ordinary state is always one of interest. The issue is thus sharpened: What kinds of involvement make judging impermissible and demand the creation of alternatives to those currently empowered as judges? Once again, feminism also lays bare the protective hierarchical nature of the

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232. Another part of the answer may lie in the history of federal disqualification practices (or lack thereof), which developed during an era when it was truly difficult to have replacements. Federal judges were few, and distances great. See, e.g., the comments of William S. Bennett, of the House of Representatives, during debates on revision of a former version of the disqualification statute (physical difficulties in getting another federal judge cause delays and make disqualification undesirable). 46 CONG. REC. 2606, 2627-2629 (1911).

233. As John Leubsdorf notes, the current custom is for judges to provide no explanation when they voluntarily recuse themselves — insulating themselves from the obligation of interaction and limiting information about judicial views on when recusal is appropriate. All the disqualification cases emerge from litigant requests for recusal that are denied. Leubsdorf, supra note 29, at 244-45. See also Tony Mauro, How the Reporters got the Dope, Legal Times of Washington, Nov. 16, 1987 at 15, col. 2 (reporter attempted to see a recusal motion filed at the Supreme Court and was told that such a motion “was not part of the public record . . . . The bottom line then, is that under Court practice the existence of a recusal motion . . . is unknowable by the public, unless a lawyer happens to mention it.”).
current rules of judging. The Rule of Necessity shields judges from fac-
ing moments when their claim to authority should yield, when others should be empowered to act. Feminist theory also helps reveal how the Rule of Necessity functions to protect judges in their status as “Other.” By definition, all Rule of Necessity cases are those in which judges have stakes. By inventing the Necessity, the patriarchal judiciary has saved itself from appearing as litigant/supplicant before others. At the same time, the Rule of Necessity promotes the myth that, unlike the rest of us, judges can somehow rise above plebeian self-interest. With a clearer sense of the harm of employing the Rule of Necessity, we can have the energy to search for alternatives. At least seven states, relying upon constitutional or statutory provisions, have employed ad hoc courts in situations when other jurisdictions would have invoked the Rule of Necessity. These are the stories of judging that we must reclaim and

234. See Texas Code § 22.005, discussed supra at note 56. See also constitutional provisions: Ark. Const. art. 7, § 9 (when all or any of the judges are disqualified the Governor appoints “the requisite number of men learned in the law . . . ”), relied upon in Ferrill v. Keel, 105 Ark. 380, 151 S.W. 269 (1912) (validity of legislative enactment), and in Brickhouse v. Hill, 167 Ark. 268 S.W. 865, 869 (1925) (judicial salaries); N.D. Const. art. 6 sect. 3 (disqualified judges replaced by appointment of the chief justice), relied upon in State ex rel. Linde v Robinson, 35 N.D. 410, 160 N.W. 512 (1916) (timing of assumption of elected judicial office); Tenn. Const. art. 6 § 11 (if “all or any of the Judges of the Supreme Court . . . [are] disqualified . . . the Governor . . . shall . . . commission the requisite number of men, of law knowledge . . . ”), relied upon in State ex rel. Inman v. Brock, 622 S.W.2d 36, 38 (Tenn. 1981) (defendant justices accused of illegally holding office), cert. denied, 454 U.S. 941 (1981); Wash. Const. Amend. 38 art. IV § 2(a) (supreme court to authorize judges or retired judges as judges pro tempore), relied upon in Yelle v. Kramer, 83 Wash. 2d 464, 520 P.2d 927, 928 (1974) (judicial salaries; court drew names for replacement judges out of envelope).

Statutes: Ala. Code § 12-2-14 (1986) (Governor appoints members of the bar of the Supreme Court to preside if court falls below six members, all are disqualified or court splits), relied upon in Ex parte Alabama Power Co., 280 Ala. 586, 196 So. 2d 702 (1967) (justice was a party to the case); Tex. Govt't. Code Ann. § 22.005 (Vernon pamphlet 1988) (Governor to appoint “persons” with supreme court justice qualifications if five or more justices are disqualified or court splits), relied upon in Johnson v. Darr 272 S.W. 1098, 114 Tex. 516 (1925) (panel of women appointed); Va. Code Ann. § 17-7(2) (1982) (chief justice designates a judge to preside if all the judges of any court of record are disqualified), relied upon in Blue v. Virginia State Bar ex rel. First District Committee, 222 Va. 357, 282 S.E.2d 6 (1981) (disciplinary proceedings against local attorney; panel of substitute judges appointed).

Similarly, other states have relied upon special appointments of one or a few judges either to fill the seats of disqualified judges or to break ties when a court, operating at less than its full membership, splits. See, e.g., Minn. Const. art. 6 § 2 and Minn. Stats. Ann. § 2.724 sub.2 (West Supp. 1988) (supreme court may temporarily assign a retired justice or district court judge), relied upon in Peterson v. Knutson, 305 Minn. 53, 233 N.W.2d 716 (1975) (six of nine justices specially appointed); Miss. Const. art. 6 § 165 (governor to appoint “others of law knowledge”), relied upon in DeMoe v. McLeod, 228 Miss. 481, 89 So.2d 730, 731 (1956) (constitution interpreted to allow Governor to appoint a lawyer to preside with power to sign orders); Utah Const. art. VIII § 2 (remaining justices shall call another judge to sit to constitute a quorum), relied upon in Critchlow v. Monson, 102 Utah 378, 131 P.2d 794 (1942) (justice's induction into military service constituted disqualification under
My third example was the relationship between timing and challenges to the legitimacy of judgment; post-verdict attacks on the judgments rendered by allegedly incompetent judges and jurors are frowned upon. Feminism might not offer much help in weighing the tradeoffs between closure and revisionism, but feminism might remind us of the need for contextualization of rules of closure and revisionism. Not all judgments have the same effects, and we might want to be more self-conscious about reconsidering the legitimacy of judgments when their effects are the most harsh. Such a view was exemplified by the Warren Court, which developed a jurisprudence of habeas corpus that was sympathetic to revisionism. Thus, while it must be noted that feminism is not an essential prerequisite to a sensitivity about the demands for reconsideration, feminist approaches might be a useful antidote in an era when pressures for closure are mounting.


235. Tales of judicial innovation are actually hard to find; many courts do not have a tradition of documenting their disqualifications, their special appointments, and their designations. No single computer search discovered all of the cases cited supra notes 56 and 234. Sometimes, particularly in an official reporter, a footnote explains why a special court was needed. Often, however, the text will identify individual judges as special or pro tempore judges, but will neither note the original judges’ reasons for recusal nor describe how the replacement judges were selected.

A final example was the legal line drawing between "internal" and "external" sources of prejudice. I do not think one needs feminism to make plain that the line drawing is incoherent. Drugged and drunken jurors are incompetent to judge, no matter who attests to their states of intoxication. My criticism of Justice O'Connor's reticence to entertain the challenge in the *Tanner* case is not based upon feminist insight. Feminist theory does support my objection to one of the rationales offered in *Tanner* — that of maintaining public confidence by precluding attacks on jury verdicts. Implicit in the "public confidence" rationale is the need for the myth of the judge as Other. Feminism helps us accept the judge as one of us. Maternal thinking reminds us that it is essential to experience power and powerlessness. Jurors, like the rest of us, may err. Once we free ourselves from the pretense of judicial infallibility, we can gain comfort in the capacity of human beings to structure means by which to reconsider and to change outcomes in light of claims of error.

In addition, feminist theory makes me increasingly uncomfortable with the law's willingness to permit judges to be repeat adjudicators while denying that role to jurors. Given feminist suspicions about rules that reinforce hierarchy, treating jurors and judges differently is cause for concern. The practice of prohibiting jurors to sit on the same or related cases demonstrates unease with individuals' capacity to see anew that which they have already decided. Given that concern, the practice of returning a case, on remand after reversal, to the very judge who rendered the initial verdict can be understood not only as a technique to conserve resources but also as a vehicle to preserve judicial power. Remand to the judge provides insulation and is an act of deference. An appellate court will rarely subject a judge to the kind of intensive review that might occur if, upon remand, a case file were transferred to another trial judge, who would then have to confront, and perhaps disagree with, the decisions of the first trial judge.

In short, feminist insight enables understanding of an agenda of the rules of disqualification not often addressed; the rules protect the office of

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238. *Id.* at 2747-48.
239. The battles between Judge Manuel L. Real, Chief Judge of the United States District Court for the Central District of California, and the Ninth Circuit are illustrative. In an unusual move, the Court of Appeals refused to remand a case to Judge Real and ordered that a substitute judge be selected at random. Judge Real objected and argued — via an unsuccessful mandamus petition — that he had a "right" to keep the case. *See* David Savage & Kim Murphy, *U.S. Judge Real Loses Appeal in Yagman Case*, L. A. Times, Dec. 1, 1987, Part 2, p. 1, col. 4.
the judge in an effort to maintain the judge’s hierarchically superior position. Once understood in this light, we can confront the desirability of the practices. Does a stable, unchanging position of hierarchy enable better judgment? This is a serious and difficult question, not often openly addressed by the law of judges. One possible response is that the such a hierarchy is protective in an enabling manner.

Let me explore this possibility in the context of Rose Bird’s experiences as Chief Justice of the California Supreme Court. As other articles in this symposium reflect, there are many histories to be written about what factors contributed to the upheaval on the California Supreme Court in 1986.¹⁴⁰ In my view, one element in the flood of criticism of the California Court and particularly of Chief Justice Bird is that she was a woman playing in what had previously been an all male game. Bird was the first woman to hold such a powerful job in the California judiciary. Her femaleness left her extremely vulnerable, for she was not a prototypical “Other.” Because Rose Bird did not fit the stereotype of the most powerful justice in a court system, she could not rely upon the protection of the role to buffer her from criticism.¹⁴¹ Bird’s inability to hide in the role of judge¹⁴² was responsible, in part, for her being fired, and the vulnerability that she engendered harmed her colleagues, Joseph Grodin and Cruz Reynoso, who also lost their jobs. Extrapolating from Rose Bird’s experience, it is plausible that, were our judges continually to reveal themselves as humans (females, the ordinary) and not “Others” (males, the sacred), their special, privileged place would likewise be diminished. Without their stable hierarchy, would judges still be able to “speak truth to power”?¹⁴³

Perhaps we can develop other mechanisms of protection, perhaps we can reconceive hierarchies, perhaps one need not choose between

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¹⁴¹ Catharine Hantzis, supra note 226, makes the parallel point about women who teach law.

¹⁴² The word “judge” has some power. In the June 1988 election in Los Angeles:

Regardless of ratings by the Los Angeles County Bar Assn., newspaper endorsements or expensive slate mailings, only one trend ran true through the county judicial contests Tuesday: Every candidate whose occupational designation on the ballot mentioned “judge” won his or her election.

Indeed the only judge to be defeated, the Superior Court’s Roberta Ralph, who lost to attorney Harvey A. Schneider, had made the mistake of listing herself merely as ‘incumbent’ rather than “Judge of the Superior Court” as the other Superior Court judges had done.


¹⁴³ Cover, Folktales of Justice, supra note 13.
hierarchy and diminution of power. Is Shirley Abrahamson less powerfully a justice in her courtroom because she appears in another courtroom without her judicial robes? With maternal thinking to help us, we can understand that human beings may simultaneously be all powerful and yet powerless. And rather than rush from that insight and seek to deny the seeming contradiction, we might embrace that aspect of the human condition. Relief may come from the understanding that in fact we do not have total control.

C. FROM FEMINISM TO ALTERNATIVE DISPUTE RESOLUTION?

Another way in which feminism can inform the role of judge is to raise questions about the current modes of judging. Today, many challenge adjudication as inadequate and have argued for alternative dispute resolution (ADR). Some commentators, and most eloquently Carrie Menkel-Meadow, have argued that feminism is one of the strands that supports a movement towards ADR.244

I must address the particularities of my own “interested” position about this issue at the outset. I have written, critically, about the development of managerial judges and the use of ADR. My concerns have focused upon fears that alternative procedures do not provide much by way of constraint. Judges acting as managers and judges acting as mediators have substantial power but little visibility and few rules to guide them. While far from perfect, adjudication is a form with some boundaries.245 I have also argued that many modes of alternative dispute resolution represent efforts at privatization of public conflicts and are, like managerial judging, unbounded and unaccountable.246 Further, I believe that the interaction, over time, between the adjudicatory process and the public assists in the development of norms about both the merits of disputes and about how disputes should be handled. As I noted in the introductory pages of this essay, my writings have relied upon the traditional statements of our aspirations for judges.247


247. See, e.g., Resnik, Managerial Judges, supra note 10, at 376.
Given my previously stated views, I have three choices. I could retract what I have said in some of my other essays, on the grounds that feminism has helped me see the light and understand that managerial judges are simply trying to build “networks of care.” Not surprisingly, I decline to take that route because feminism has not assuaged my concern that judges — albeit often well meaning — are ill-equipped and poorly-situated to shape the lawsuits that they must decide. Were I to write today, I might choose different modes of explication, but my fears of judicial overreaching would remain. While I find calls for a “judiciary of nurturance” appealing, I remain unconvinced that judges in this society have much capacity, currently, to be nurturant. The United States provides shockingly little by way of care for families, for children, for the needy. I am not confident that courts, the arenas of conflict, can be the vehicle of transformation to a culture of nurturance without structural changes in other aspects of our governance. At least until we commit ourselves to social services that evidence concerns for the needs of the powerless, I want judges who speak before the public, who make their rulings in disputes revealed to the public, and whose interactions with litigants are bounded.

A second alternative is for me to reiterate some of my criticisms in the language of feminism. Hence, objections to managerial judging can be based upon claims that managerial judging is an effort by already powerful judges to expand the arena in which they exercise power over others. In addition to judging, managerial judges direct the behavior of litigants in less visible — and virtually unchallengeable — ways. Managerial judges may describe their role as engaging in dialogue with litigants and as developing more flexible modes of interaction. However, in practice the judges are the ones with power, their time is limited, and they impose their views without authentic inquiry into the needs of those before them. Managerial judges do not diminish patriarchal hierarchy; they simply expand opportunities for control.

Let me turn to the third option and ask forthrightly: Does feminism demand alteration of the act of judging itself? Imposition of one’s truth upon another, coercion, insistence upon compliance — these are hallmarks of adjudication, as currently understood. It is tempting to turn to other modes and claim them as more feminist, and hence to be preferred by feminists. Mediation, for example, seeks to lead the participants to create their own outcomes. Why not place our energies

248. See generally Lon L. Fuller, Mediation — Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971). According to one study, women mediators approach their roles differently than male
behind efforts to escape adjudication and espouse other methods — those aimed at settling, arbitrating, conciliating — so that we can meet our alleged adversaries and find our commonality?

Several responses are possible. First, I cannot share the assumption, implicit in some forms of ADR, that all outcomes are equally good, as long as the parties agree to them. This essay is not the occasion for an exposition of the problems with interest validation and/or consent, but many political and moral theorists have pointed to the enormous difficulties in assuming either as sufficient. Second, in this world we meet our adversaries not as equals, but often as unequals. In this world, the mediators, the arbitrators, the conciliators come with the values of the society. Earlier, I discussed the emerging documentation of institutional sexism, racism, and class biases in the courthouse. For me, the time when we expose the institutional weaknesses of our courts is not the time to abandon courts in preference for other institutions whose sexism and racism may not yet be known. We must try to define feminist modes of adjudication before we conclude that adjudication must be abandoned.

Further, the pressures for alternatives come not only from those who seek to humanize adjudication but also from those who want to escape from the victories that the poor and disenfranchised have won in courts. So soon after claims of right on behalf of the formerly silent have begun to be heard in courts, interest in restricting access is strong. Many examples of court closings are available; of particular concern to me are proposals to abolish appeal as of right. In 1891, Congress created an appeal as of right in the federal courts. Today, some are urging that we abandon the premise that every litigant has a right to be heard by more than one judge. Feminism helps illuminate the weaknesses of this proposal. How patriarchal, how lacking in humility, to think that a single individual should have unquestioned power. A single-judge approach is indicative of a way of working that many women do not

mediators. Women tend to see their roles as more transformative, and they ask more questions, work more collaboratively, and described themselves less as neutrals than do male mediators. Helen R. Weingarten & Elizabeth Douvan, *Male and Female Visions of Mediation* (Center for Research on Social Organization, Working Paper No. 334, Ann Arbor, Michigan, April 1986).


embrace. As Adrienne Rich reminds us, women come with traditions of sharing work;\textsuperscript{252} we understand that responsibility for tasks can be joint and the work improved by collaboration. Thus, feminism can inform the structures of adjudication, can object to an effort to concentrate power in one judge, while still accepting some concentration of power in judges.

In short, I do not question the search — in the name of feminism as well as other ideologies — for alternative processes and remedies, but I do question sustained hostility to adjudication. Feminist theory underscores the need to look hard at current modes of adjudication. For the first time in this country's history, feminists are beginning to be able to participate in courtroom processes in more than a tokenistic fashion. I want to explore a world in which we become self-conscious about the necessity of empowerment of the previously powerless. I want to see if we can create institutions in which the participants need not be infantilized by the elevation of judges — and lawyers\textsuperscript{253} — to the status of Other. I am reminded of Virginia Woolf. "Anything may happen when womanhood has ceased to be a protected occupation, I thought, opening the door."

I want to accept and redefine the experience of empowerment, rather than reject it as unfeminist.

\textbf{CONCLUSION: A CELEBRATION OF THE PROBLEM OF JUDGMENT}

Feminism leads me to demand revision of the conception of the task of judging. The heretofore male law of judges has made impossible demands. Impartiality and disengagement can never be achieved, hence all judgment is (sub rosa) suspect, hence we are always living in a second best world in which we cover our tracks with doctrines of insulation. Judges are in a permanent state of apology, for judges can never completely fulfill the aspirations of otherness. Listen to the voice of Learned Hand:

\begin{quote}
You must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible to
\end{quote}

\textsuperscript{252} Adrienne Rich, \textit{Foreword} to \textit{Working It Out} at xviii-xxiv (Sara Ruddick and Pamela Daniels eds. 1977).

\textsuperscript{253} This essay has focused upon judges as Others. Lawyers potentially play a similar role — infantilizing and dominating clients. Reconsideration of adjudication, from a feminist vantage point, requires attention to and reconstruction of the roles of both lawyers and judges. \textit{See generally} William H. Simon, \textit{The Ideology of Advocacy: Procedural Justice and Professional Ethics}, 1978 \textit{Wisc. L. Rev.} 29.

\textsuperscript{254} \textit{Virginia Woolf}, \textit{A Room of One's Own} 41 (1957).
human beings to do so absolutely, but just so far as you can, not to interject your own personal interests, even your own preconceived assumptions and beliefs.\textsuperscript{255}

It appears that Judge Hand thought there were two possibilities, to cease to be in order to hear another's claims, or to be, and then to be impermissibly interested. Feminism rejects the choice between being a blank slate and imposing oneself on another, between having no interest and being corrupted by self-interest.

Carol Gilligan, Robin West, Sara Ruddick, Rosemary Ruether, and many other feminist theorists offer another tradition. The ethic of caring, the tension of connection and separation, the maternal state of power and powerlessness, the theology of God/ess as creator and liberator all suggest that we can inhabit a world that need not apologize for its humanity. Dignity and honor can become intrinsic to the task of responding to the conflicting claims of individuals, and the ordinariness of much that is judging need not be obscured in an effort to privilege the impersonal. With the help of feminist insights, we can increase the "folktales of jurisdiction" and cherish tales of judicial relinquishment of power. We must tell the stories of specially-appointed ad hoc courts and of changing hierarchical arrangements.

Judgment is a problem. Judgment is a burden. Judgment does engender pain. But judgment is also an act of obligation, of responsibility, of connection of self to others. Judgment may be empowering for those judged as well as for those who hold the office of judge. If we can learn to conceive of the judges as ourselves, we may learn how better to render judgments.