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FEMALE JUDGING

*Theresa M. Beiner**

As judicial watchers have argued for a more gender diverse bench,[1] political scientists have been keeping a scorecard on the women who are actually appointed. Do they judge differently than men?[2] Do they favor women in sex discrimination cases or reproductive rights cases?[3] Do they favor criminal defendants?[4] Do they have a broader understanding of civil rights?[5] Do they judge in a "different voice"?[6] Many studies have attempted to chart differences between male and female judges. Some have successfully shown such differences,[7] while others have shown no perceptible differences in the decision making between male and female judges.[8] Indeed, some studies have found that in certain cases, male judges may actually be more sympathetic to liberal causes than their female colleagues.[9]

This article canvases some of these studies to paint an overall picture of how women judges are deciding certain kinds of cases. In section II of this article, I

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1. *See, e.g.*, Sheldon Goldman, *Should there be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 489-94 (1979); Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 307, 307-09 (1982); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 171-72 (1990).

2. *See, e.g.*, Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1215 (2000).

3. *See, e.g., id.* at 1219.

4. *See, e.g.*, John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 314-17 (1981); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77, 83 (1977) (both finding no differences based on gender of judge in criminal cases).

5. *See, e.g.*, David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 165 (1993) [hereinafter Allen & Wall, *Role Orientations*]; Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 751 (2000) (both finding that women vote more liberally than men). *But see* Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613-15 (1985) (study of federal district court judges finding no effects based on gender of judge in civil rights cases).

6. *See, e.g.*, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 613-16 (1986).

7. *See, e.g.*, Allen & Wall, *supra* note 5, at 165; Songer & Crews-Meyer, *supra* note 5, at 759-61.

8. *See, e.g.*, Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 142-44, 145 & tbl. 2, 146 tbl. 3 (2000) [hereinafter Segal, *Clinton's Appointees*] (finding few difference in voting behavior between Clinton's traditional and nontraditional district court appointees).

9. *See, e.g., id.* at 144-45, 146 tbl. 3 (finding a gender difference in women's cases (gender discrimination, sexual harassment, abortion rights and related issues), but it was not women who were more supportive of these claims, but instead the men who were more supportive of women's issues cases).

eschew empirical descriptions of how female judges are doing their jobs, taking a more anecdotal approach. While I have done this before in an effort to provide a more nuanced picture of how female judges might make a difference in the conduct of court proceedings beyond simply how they ultimately decide a case,[10] section II looks specifically at the decisions and careers of the judges who are participating in this symposium to provide a sense of how they approach judging and their roles as leaders in the legal community. While it has become fashionable in legal academic circles for scholars to rely on or even conduct empirical research, there is much to be gained by other forms of knowledge.[11] Cases tell stories. How judges reason their way to a conclusion is one form a story can take; this form is particularly relevant to the development of legal rules. I also consider the backgrounds of these judges, including their career and family histories. While political scientists have looked at gender as a discrete category that may or may not influence decision making, I hope to provide a broader view of what it means to have a diverse judiciary as well as a less essentialized approach to considering the perspectives of these judges.

I. WHAT POLITICAL SCIENCE TELLS US ABOUT FEMALE JUDGING

Political scientists only recently have begun to study whether gender affects judicial decision making. This more recent focus is a result of finally having a statistically significant number of women on the bench.[12] Generally, studies by political scientists regarding decision making by judges have focused primarily on the political affiliation of the judge or his or her appointing president. This focus is key to the attitudinal model of judicial decision making. The attitudinal model "posits that the explanatory power of background characteristics derives from their contribution to the formation of political attitudes and values, the most proximate influences on judicial decision making."[13] Thus, background influences political beliefs and those beliefs in turn influence decision making by judges. To the extent that gender influences a judge's political attitudes, the attitudinal model would posit that it would have an effect on the outcomes of cases.

This is not, however, the only theory that addresses the implications of women on the bench. Women judges also have significance in the context of symbolic or descriptive representation. Symbolically, having women on the bench provides a group of people with access to positions of influence so that all members of the community will come to believe in the fairness of the judicial system.[14] Another

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10. *See* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610-15 (2003).

11. *See generally* MARY POOVEY, A HISTORY OF THE MODERN FACT 1-28 (1998) (discussing how what constitutes "facts" has changed over time).

12. For example, when President Jimmy Carter took office, there had only been six women appointed to lifetime federal judgeships in the history of the United States. Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 15 (2002).

13. Segal, *Clinton's Appointees*, *supra* note 8, at 140 (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 231-33 (1993)).

14. *See* Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 597 (1985); Sean Farhang & Gregory Wawro,

reason to appoint women to the bench is the assumption that they will advocate for those who are under-represented in the system itself, sometimes referred to as substantive representation.[15] In other words, women will advocate for women and, perhaps, other groups who have been relegated to similar less powerful positions in government.[16] Thus, elected or appointed female judges may play many roles in the judicial system that could well add legitimacy and diversity of perspective to judicial decision making.

There are other ways, less tangible than actual decision making, in which women judges might make a difference. Interpreting the results of a survey of judges, political scientist Elaine Martin, who is also a participant in this symposium, summed up well the differences in perspective that women judges might bring to the bench:

> Their differences might influence such things as decisional output, especially in cases involving sex discrimination; conduct of courtroom business, especially as regards sexist behavior by litigators; influence on sex-role attitudes held by their male colleagues, especially on appellate courts where decisions are collegial; administrative behavior, for example, in hiring women law clerks; and as noted in the introduction, collective actions, through formal organizations, undertaken to heighten the judicial system's response to gender bias problems in both law and process.[17]

Martin posited these conclusions after surveying Carter-appointed federal judges to determine whether there were differences between the perspectives of male and female appointees. She analyzed issues such as career and parenting role conflicts, household responsibilities, and perceptions of sex discrimination at their jobs.[18] One interesting finding from Martin's research is that 81% of women judges she surveyed identified sex discrimination as a major problem in the legal profession, whereas none of the male respondents mentioned it as a problem and only 18.5% of men referred to racial or class discrimination as a problem.[19] One can see how such differences in attitude might be reflected in courtroom demeanor or decision making.

While Professor Martin relied on perception data, other political scientists have looked at actual case outcomes in an effort to assess whether gender makes a difference in decision making. Early studies showed little difference in case outcomes based on the gender of the judge.[20] For example, in 1985, Thomas

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Institutional Dynamics on the U.S. Courts of Appeals: Minority Representation under Panel Decision Making, 20 J.L. ECON. & ORG. 299, 301 (2004).

15. *See* Farhang & Wawro, *supra* note 14, at 301.

16. *See* Walker & Barrow, *supra* note 14, at 597.

17. Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990).

18. *See id.* at 205-07.

19. *See id.* at 207.

20. *See id.* at 208 (detailing studies prior to 1990). *See also* Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279, 279 (1997) [hereinafter Segal, *Clinton's Nontraditional Appointees*]; Martin & Pyle, *supra* note 2, at 1215 (noting that early

Walker and Deborah Barrow published a study showing very little difference between voting behaviors of male and female judges who were appointed by President Jimmy Carter.[21] They surprisingly found that in some instances—cases involving personal rights issues and regulatory disputes involving the government—women judges were less liberal than their male counterparts.[22] Political scientists Elaine Martin and Barry Pyle suggest that the lack of gender differences in these early cases may be a result of tokenism—the theory that women will conform to male norms in male-dominated settings like the judiciary.[23]

Likewise, in a study of federal appellate decision making in cases between 1981 and 1990, Songer, Davis and Haire found that gender did not appear to play a role in obscenity and search and seizures cases.[24] Instead, the type of litigant and the nature of the facts of the case played a more important role in predicting the outcome in obscenity cases.[25] The existence of a warrant, a finding of probable cause by the trial court, or the trial court's finding of an exception to the warrant requirement were predictive in search and seizure cases.[26]

However, the gender of the judge did play a part in employment discrimination cases.[27] In this area, differences in outcomes based on the gender of the judge are fairly well documented. One of the earliest studies on this issue was conducted by John Gottschall and published in 1983. Gottschall studied the voting behavior of Carter appointees to the courts of appeals. Gottschall found that women favored claimants in race and sex discrimination cases more than their male colleagues, although, similar to other studies, there was no meaningful differences in their voting behaviors in criminal cases.[28]

Recent studies have supported Gottschall's findings with respect to sex discrimination cases. A study by Sue Davis and her colleagues found a statistically significant difference in the manner in which male and female appellate judges evaluated discrimination cases. This 1993 study found that "[m]ore than 63 percent of the votes cast by women judges supported the plaintiff's claim of discrimination. In contrast, male judges supported the plaintiff 46 percent of the time."[29] These differences were constant even when the researchers controlled for the political party of the judge's appointing president. For example, 68% of Democrat-

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studies showed no gender differences).

21. Walker & Barrow, *supra* note 14, at 596.

22. *Id.* at 608 (noting that women were more likely than men to rule in the government's favor in regulatory cases).

23. *See* Martin & Pyle, *supra* note 2, at 1215.

24. Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 433 (1994).

25. *Id.* at 432.

26. *Id.* at 433.

27. *Id.* at 434.

28. John Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 171-72 (1983). Gottschall did find that the race of the judge appeared to affect decisions in criminal cases, in which African American males favored criminal accuseds and prisoners as well as sex discrimination plaintiffs at a higher rate than their white male colleagues. *Id.* at 172.

29. Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993) (footnote omitted).

appointed female judges supported plaintiffs' claims, whereas 54.3% of Democrat-appointed male judges supported plaintiffs' claims.[30] The differences between male and female Republican-appointed judges were not statistically significant. The authors of the study opined that "women may tend to support the claimant in employment discrimination cases simply because they are likely to have experienced such discrimination directly, or have encountered gender-related obstacles in their professional lives, or feel a close affinity with those who have."[31] Thus, having experienced sex discrimination firsthand or other stumbling blocks in their careers based on gender, female judges may be better at spotting discrimination when it is an issue in cases.

A recent study of federal appellate judges conducted by political scientist Nancy Crowe likewise shows differences in voting behaviors between male and female judges. Professor Crowe studied nonconsensual cases in the courts of appeals between 1981 and 1996. In particular, she studied race and sex discrimination cases.[32] Nonconsensual cases are those in which there is not a unanimous decision.[33] Thus, these are cases in which there was some room for disagreement among the judges. Like Gottschall, Crowe found that the gender of the judge appeared to play a role in sex discrimination cases. She factored in race and political affiliation as well as gender. In particular, she found that Republican white women appointees voted for the plaintiff 53% of the time, whereas Democrat-appointed white women judges voted for the plaintiff 90% of the time.[34] For males, there was likewise a political party effect, with white male Republican judges voting for the plaintiff only 28% of the time, while white male Democratic judges voted for the plaintiff 76% of the time.[35] Race factored in as well, with African American Republican judges voting for the plaintiff 61% of the time and Democratic African American judges voting for the plaintiff 93% of the time.[36] Perhaps the best way to understand these differences is by viewing them overall. The voting patterns are set out below in Table 1.

Table 1: Chance of a vote for a sex discrimination plaintiff based on race, gender, and political affiliation[37]

	White Male Judge	White Female Judge	Black Male Judge
Republican	28%	53%	61%
Democrat	76%	90%	93%

30. *Id.* at 132 & tbl. 5.

31. *Id.* at 133.

32. *See generally* Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

33. *Id.* at 56.

34. *Id.* at 83 fig. 3.1.

35. *Id.*

36. *Id.*

37. *Id.* at 83.

Interestingly, these patterns did not remain the same for race discrimination cases, wherein African American judges—both Republican and Democrat appointees—were more likely to vote for the race discrimination claimant than either white male or white female judges, regardless of the judges' political affiliation.[38] However, Democratic white male and female judges were more likely to vote for a race discrimination plaintiff than white male or female Republican judges.[39] The differences between white males and white females of the same political party, however, was not statistically significant.[40] Thus, while political affiliation and race correlated with outcomes in the race discrimination cases studied, gender did not.

Professor Crowe's findings with respect to political affiliation were supported by Haire, Humphries, and Songer, who studied published decisions by the United States Courts of Appeals from 1993 to 1999. In this study of 12,275 cases, the authors examined civil rights, criminal law, and labor/economic cases.[41] They did find that Clinton's appointees, overall, were more supportive of the liberal position in civil rights cases than were Republican-appointed judges.[42] Interestingly, they found no statistically significant differences between the voting behavior of Clinton's traditional judges (i.e., white male) and non-traditional judges (i.e., women and judges of color).[43] However, they did believe that such a difference would emerge in criminal and labor/economic cases once more votes were available for study.[44]

Political scientist Jennifer Segal has conducted two studies of decision making by Clinton appointees.[45] In her first study, she examined decisions by twenty-four Clinton appointees to the federal district courts. That study found that female judges favor the claims of African American plaintiffs half of the time as compared to their male counterparts, who find for African American plaintiffs only one-third of the time. However, there were no significant differences in cases involving women's issues between male and female judges in her sample.[46]

In a second study, using cases published in the *Federal Supplement*, Segal paired up judges appointed during Clinton's first term and found a gender difference in women's cases (gender discrimination, sexual harassment, abortion rights and other related issues), but found that it was not women who were more supportive of these claims; rather, it was men who were more supportive of women's issues cases.[47] Women were more supportive of claims involving issues of race and personal liberties.[48] In other cases, any differences based on gender did not reach statistical

38. *Id.* at 114 fig. 4.1.
39. *Id.*
40. *Id.*
41. Susan B. Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274, 277-78 (2001).
42. *Id.*
43. *Id.* at 279-80.
44. *Id.* at 280.
45. Segal, *Clinton's Nontraditional Appointees*, *supra* note 20, at 279.
46. *Id.*
47. *See* Segal, *Clinton's Appointees*, *supra* note 8, at 144-45, 146 tbl. 3.
48. *Id.* at 146 tbl. 3. These two findings were only statistically significant with $p < .10$. *Id.*

significance. According to Segal, this data "demonstrates clearly that Clinton's judges, regardless of gender, have ruled consistently against the out-group position in each of these sets of sensitive and controversial issues."[49] Thus, simply appointing a woman judge may not provide differences in outcomes.

While these studies focus on federal courts, studies of state court judges might reveal a different pattern, as many of these judges are elected, rather than appointed, which may affect their rulings. Indeed, in a study of state supreme court justices, Allen and Wall found that the majority of the women justices they studied exhibited "pro-women" voting behavior on "women's issues."[50] They summed up their study, explaining:

> [T]he data in this study indicate that women justices perceive a broad spectrum of women's issues as a single issue dimension. Sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and the relationship between child and parent all appear to be viewed as integral parts of an agenda. And while one study demonstrates that the presence of a woman justice on a state supreme court increases the number of pro-women sex discrimination rulings, the research in the present study indicates that even when the majority of the court opposes an expansion of women's rights, female justices still hold to their beliefs.[51]

Unlike studies of federal judges, state female judges' voting records did not appear to be the result of political affiliation. As Allen and Wall explain, "while a majority of women Democratic justices serve on courts dominated by Democratic males, they still vote in a manner substantially different from their same-party male colleagues."[52] For example, while female Republican judges voted more conservatively on criminal and economic cases, all female justices (regardless of party) tended to vote liberally on "women's issues."[53]

A more recent study by Martin and Pyle looked at voting behavior on the Minnesota Supreme Court. In particular, they examined the votes of male and female judges in non-unanimous cases covering three legal areas: (1) discrimination cases (including age, religion, disability, race, and gender discrimination cases); (2) domestic relations cases (including divorce, marital rape, child support, etc.); and, (3) feminist issues (including reproductive rights, sex discrimination in employment, and sexual harassment).[54] While the party affiliation of the judge had a statistically significant effect in discrimination and feminist issues cases, gender played a role in divorce cases. Specifically, "[r]egardless of partisanship or race, women are almost 16% more likely to make a liberal Divorce decision when compared to men."[55] Thus, at the state court level, women may have

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49. *Id.* at 145.

50. *See* David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232, 239 (1987). *See also* Allen & Wall, *Role Orientation*, *supra* note 5, at 165.

51. Allen & Wall, *Role Orientations*, *supra* note 5, at 161 (footnote omitted).

52. *Id.* at 162.

53. *See id.* at 164.

54. *See* Martin & Pyle, *supra* note 2, at 1223.

55. *Id.* at 1231.

influence on decision making in cases that have real effects on women's lives. Divorce is quite common, and both the economic prospect of many women and their continued relationships with their children depend on favorable outcomes in divorce proceedings.[56]

Many of the judges who are writing for this symposium are or have been judges in the state court systems. Perhaps women judges in state courts feel more comfortable in expressing their views on issues of importance to women than federal women judges because they are elected to office. As elected judges, they may believe they have a mandate from the people. While not all female elected judges have emphasized their gender as a plus-factor on the campaign trail, some have.[57]

While gender appears to have a mixed influence on case outcomes, enough studies have shown a gender effect in civil rights cases for one group of researchers to sum up the results of these studies as follows:

> While studies of the influence of race and gender on judicial behavior have not produced broadly consistent results, a number of the studies have found systematic differences in decision making by judges along racial and gender lines in the area of civil rights. Moreover, while these differences ranged from modest to substantial in substantive magnitude, all of the positive findings were in the ideological direction anticipated by the advocates of diversification of the bench. That is, women and racial minority judges appear, on average, to be somewhat more sympathetic than majority group judges to complaints of civil rights violations. The findings further indicate that race and gender are complex and distinct categories whose effects vary across issue areas and do not necessarily move in tandem.[58]

Thus, while there is no typical "female" approach, the trend in civil rights cases in particular is for women to judge more pro-civil rights than their male colleagues.

This conclusion prompted these researchers to examine the group dynamic involved in appellate decision making to determine whether having a woman or a member of a minority group on a panel might influence a group of judges to take a pro-civil rights position. Using 400 randomly selected published employment discrimination cases decided by the federal courts of appeals in 1998 and 1999,[59] the researchers sought to determine whether the presence of a nontraditional judge (i.e., women or judges of color) increased the probability of a pro-plaintiff decision.[60] They found that the gender composition of the panel influences the way male judges on a panel vote. The marginal effect of the presence of one woman on the panel was to increase the probability that a male judge would vote for the

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56. *See generally* Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1288-89 (2004) (noting high divorce rates).

57. *See* Megan McCarthy, *Judicial Campaigns: What Can they Tell us about Gender on the Bench?*, 16 WIS. WOMEN'S L.J. 87, 104-09 (2001).

58. Farhang & Wawro, *supra* note 14, at 303.

59. *See id.* at 310.

60. *See id.* at 312.

plaintiff by 19 percentage points.[61] However, having two women judges on a panel did not further increase the probability that either male or female judges on a panel would vote for the plaintiff beyond the effects for one female judge.[62] As they put it, "the effects of gender and ideology on individual judges' votes are not driven solely by a judge's own gender or general ideological position; the gender composition of the panel influences the behavior of male judges and the general ideological composition of the panel influences the way all judges on a panel vote."[63]

These researchers argue that their findings support a combination of judicial decision making models, which they call the deliberation and bargaining models. The deliberation model posits that panel decision making is a collegial activity whereby members of the panel take each others' views seriously in reaching decisions.[64] The bargaining model relies on the "norm of consensus" (that most appellate panel decisions are unanimous) to posit that judges "confer 'in a spirit of "give-and-take" (or accommodation) in an effort to reach decisional consensus and thus avoid public dissension.'"[65] Judges who would dissent use that threat "'to gain concessions from the majority.'"[66] Thus, women may influence panel decisions in more ways than are reflected in their individual votes.[67]

Interestingly, in her study of nonconsensual federal court of appeals cases, Crowe found no statistically significant effect on the voting behavior of white male judges based on the presence of a female judge on the panel in either sex discrimination cases or in a combination of race and sex discrimination cases.[68] While this may be a result of the study's consideration of only cases that involved nonunanimous decisions, it does show that more research needs to be done on the effects of panel composition on case outcomes before the effects of a judge's presence and gender on her co-panelists can be accurately assessed.

II. THIS SYMPOSIUM'S WOMEN JUDGES

Aside from what political scientists have noted about the effect that gender does or does not have on judicial decision making, legal scholars and the occasional political scientist have sought to discover these effects using methodologies other than statistical studies of case outcomes. For example, law professor Suzanna Sherry examined the opinions of Justice Sandra Day O'Connor in an effort to map

61. *See id.* at 320.

62. *See id.*

63. *Id.* at 321.

64. *See id.* at 308.

65. *Id.* at 308 (quoting Sheldon Goldman, *Conflict and Consensus in the United States Court of Appeals*, 1968 WIS. L. REV. 461, 479-80 (1968)).

66. *Id.* at 308 (quoting Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 418 (1981)).

67. *Id.* at 321.

68. *See* Crowe, *supra* note 32, at 146. She did, however, find a statistically significant effect for race, with a white male judge less likely to vote for an employment discrimination plaintiff if there was an African American judge on the panel.

out a feminine paradigm of judging.[69] While others have disagreed that Justice O'Connor speaks with a "different voice,"[70] the idea that something can be learned from reading the opinions of women judges is not new. In addition to examining some of their cases, I outline the career tracks and backgrounds of the judges (to the extent I could find this information) participating in this symposium in an effort to determine how gender might impact their decisions.

In this section, I describe some decisions and the background of the judges participating in this symposium in an effort to get a sense of whether these particular women judges are the proponents of women's issues that seems possible based on the studies. I do so in the context of the particular decisions chosen. I have made no effort to track all their decisions on a particular issue in an effort to find a pattern. Instead, I searched out cases in which one would, based on studies, think women might have a distinct perspective. Such cases include sex discrimination, sexual harassment, domestic relations, and civil rights cases. In some cases, these women are writing for majorities; sometimes they have joined an opinion; and sometimes they are in dissent. This snapshot of their decision making is not an attempt to sum up these judges' approaches to these issues; instead, it is an attempt to get a general sense of their approach in a non-numerical manner. I discuss each judge or justice individually, in alphabetical order.

There are several themes that emerge from examining the decisions of these judges in this anecdotal manner. With respect to their backgrounds, many of them have been active on gender-related issues, such as gender bias task forces, or in gender-related organizations, such as the National Association of Women Judges. Others have written opinions that are pro-woman on issues that are of great concern to women or other outsiders to the legal system. These judges are a varied group in some respects, and, as might be expected, no single, typical female judge emerges from this exercise.

A. Justice Deborah A. Agosti

Justice Deborah A. Agosti is a Supreme Court Justice on the Nevada Supreme Court.[71] Prior to sitting on the bench, Justice Agosti was an assistant public defender and a senior staff attorney with the Senior Citizens Legal Assistance Program. She eventually practiced as a deputy district attorney and was a trial court judge.[72] As a judge, she became and still is a member of the Gender Bias Task Force of her state.[73] One would expect Justice Agosti to be sympathetic to women's issues. As a state supreme court justice, her interest in women's issues is reflected in several domestic relations opinions.

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69. *See* Sherry, *supra* note 6, at 544.

70. *See* Songer et al., *supra* note 24, at 436 ("[A]nalysis suggests that women judges will speak in a 'different voice' when dealing with claims of discrimination."); Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134, 139 (1993) ("O'Connor does not appear to speak in 'a different voice.'").

71. THE AMERICAN BENCH, JUDGES OF THE NATION 1581 (14th ed. 2003/2004).

72. *Id.*

73. *See id.*

In *Rodriguez v. Rodriguez*, Justice Agosti wrote an opinion overturning a trial court's ruling that an ex-wife could be denied alimony largely based on an extramarital affair.[74] The Supreme Court of Nevada held that it was improper for the trial court to consider a party's fault in determining an award of alimony.[75] Instead, the Court, through Justice Agosti, explained that the trial court should have relied on guidelines established in an earlier case—guidelines which made the ex-wife in this case a likely candidate for alimony.[76] As Justice Agosti wrote:

> In this case, the trial judge abused his discretion when he considered Glenda's [the wife] extra-marital affair in determining that she should not receive alimony. Given the gross disparity between the parties' incomes, Glenda was obviously being punished for her affair. Alimony is not a prize to reward virtue. Alimony is financial support paid from one spouse to the other whenever justice and equity require it. Alimony may not be awarded or denied in an arbitrary or uncontrolled abuse of discretion.[77]

In *Rodriguez*, the ex-wife made $14,000/year, while her ex-husband had an income of $75,000/year. Additionally, the ex-wife had health problems, whereas the ex-husband had none.[78]

In her *Rodriguez* opinion, Justice Agosti understood the difficult position that Glenda, the ex-wife, was left in as a result of her divorce:

> Glenda, a middle-aged woman with health problems, was forced to survive on a meager income after enjoying a comfortable lifestyle within a marriage of lengthy duration. It is not anticipated that she will ever be able to earn more. In contrast, Antonio maintains the financial ability to continue to live comfortably. He has risen steadily to a management position in the casino industry. There is no justice or equity in denying alimony to a woman who, because of her physical condition, will likely never earn more than the small amount she now earns. Glenda has been impoverished as a result of the divorce, while Antonio's financial security is assured because of his far superior earning power. The trial judge should have analyzed the merits of Glenda's request for alimony with reference to these factors. The trial judge abused his discretion in failing to award alimony in a just and equitable sum.[79]

Justice Agosti's opinion highlighted the differences in the incomes between the ex-wife and her ex-husband and consequently what that meant to the ex-wife's future economic welfare.

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74. 13 P.3d 415 (Nev. 2000).
75. *Id.* at 418.
76. *Id.* at 418-19. Included in the considerations were "'the financial condition of the parties; the nature and value of [the parties'] respective property; the contribution of each to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living.'" *Id.* (quoting Buchanan v. Buchanan, 523 P.2d 1, 5 (Nev. 1974)).
77. *Id.* at 419.
78. *Id.* at 420.
79. *Id.*

In an interesting dissent, Justice Agosti considered the issue of whether a father had a due process interest that was violated by court approval of his underaged daughter's marriage, when the father was without notice and not given an opportunity to be heard.[80] Justice Agosti dissented from the majority opinion because she found "the *only* issue raised on rehearing is whether the district court should be required to conduct a new hearing."[81] The factual circumstances of the case involved a fifteen-year-old girl, SierraDawn, who wished to marry her forty-eight-year-old guitar teacher.[82] Justice Agosti distinguished the case from cases the majority relied upon that involved minor reproductive rights, arguing that "[t]he privacy and time concerns present in any abortion decision are absent in a decision to marry. A minor's desire to marry implicates contracts, parental control and the adult responsibilities that arise in a marital relationship."[83] Justice Agosti acknowledged the father's interest in parenting his daughter was a fundamental liberty interest, stating that such a parenting right "includes participating in her important life decisions."[84] Justice Agosti argued that the interest of the daughter in marrying her forty-eight-year-old guitar teacher had to be balanced with the father's interest in raising his child—an interest the majority downplayed, in her opinion.[85] She was particularly disturbed by the summary affidavit submitted by SierraDawn's mother in support of the petition for marriage. The mother was not present at the hearing; therefore, the judge could not question her motives. As Justice Agosti noted, "although there is an approximate thirty-year disparity between SierraDawn and Crow [her guitar teacher], and SierraDawn was only fifteen years old at the time, the district court failed to ask Karay [her mother] more specifically why it was in SierraDawn's best interests to marry Crow."[86] Justice Agosti acknowledged the potential for abuse in these situations, citing the recent conviction of a thirteen-year-old's father who purportedly "married" his daughter to a forty-eight-year-old friend.[87] Unlike the majority, Justice Agosti exhibited concern with the reality of this child's situation and showed an understanding of the potential for abuse in a case such as this.

Justice Agosti also showed her concern for the welfare of children in a case in which she held that a trial court had abused its discretion in ordering the psychological examination of a child victim under fourteen years of age in a sexual assault case brought against her father.[88] State court judges, unlike federal judges, have the unique opportunity to hear issues of family law—issues that involve the welfare of both women and children. In these cases, Justice Agosti was willing to

80. Kirkpatrick v. Eighth Judicial Dist. Ct., 64 P.3d 1056, 1064 (Nev. 2003) (Agosti, J., dissenting).

81. *Id.* at 1064 (emphasis added). Justice Agosti authored the court's earlier decision in *Kirkpatrick* that is reported at 43 P.3d 998, 1012 (Nev. 2002) (concluding that the marriage between SierraDawn and Crow was void and ordering the district court to annul the marriage).

82. *Kirkpatrick*, 64 P.3d at 1058.

83. *Id.* at 1065 (Agosti, J., dissenting).

84. *Id.* at 1066.

85. *Id.*

86. *Id.* at 1068.

87. *Id.* at 1069.

88. State v. Eighth Judicial Dist. Ct., 97 P.3d 594, 594 (Nev. 2004).

consider the reality of the lives of these children and advocate on their behalf, even if it meant dissenting.

B. *Justice Jean Dubofsky*

Justice Jean Dubofsky was a Colorado Supreme Court Justice from 1979 through 1987. Starting her career as a legal services attorney, she was the first woman appointed to the Colorado Supreme Court.[89] Justice Dubofsky's career on and off the court has been exceptional. As an advocate for minority group interests, she argued before the United States Supreme Court for the plaintiff in the landmark case *Romer v. Evans*.[90] However, well before she took on this case, she had marked herself as a judge of distinction, who had a broad understanding of equal protection cases, as is reflected in the cases she decided as a Colorado Supreme Court Justice.

In particular, Judge Dubofsky was the rare judge who found government actions irrational even under the lesser rational basis standard applicable to most governmental classifications under the Equal Protection Clause. In *Branson v. City and County of Denver*,[91] Judge Dubofsky held that a classification that denied widow's benefits to fire fighters' widows in cities of over 100,000 if the marriage occurred after the fire fighter's retirement while allowing such benefits to widows who lived in cities of under 100,000 and to all police officer's widows was not rationally related to the state's legitimate state interest of maintaining fiscal certainty.[92] As she explained, "[t]he statutory scheme arbitrarily deprives these widows of equal protection of the laws, and therefore violates the guarantees of the [F]ourteenth [A]mendment of the United States Constitution and section 25 of article II of the Colorado Constitution."[93] This was due in part to gaps in the "fiscal certainty" argument.[94] For example, the exclusion did not include surviving dependent benefits for children who were born after the retirement. Three judges dissented from her conclusion.[95] She similarly found a classification related to inmates unconstitutional under a rational basis analysis under the Equal Protection Clause in a case that involved whether an inmate should be given good-time credit for presentence incarceration.[96]

In an interesting case involving child support, Judge Dubofsky held that neither the Due Process nor Equal Protection Clauses were violated by imposing a duty on a father to pay child support even though the father argued that he had offered to pay for an abortion during the first trimester. The case involved a challenge to the Uniform Parentage Act, which obligates both parents pay to support children, without giving the father the right to decide whether the pregnancy should be

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89. The Bell Policy Center, *FAQ: Board Members*, *at* www.thebell.org/board.html (last visited May 2, 2005).

90. 517 U.S. 620 (1996).

91. 707 P.2d 338 (Colo. 1985).

92. *Id.* at 340-41.

93. *Id.* at 341.

94. *Id.* at 340.

95. *Id.* at 341 (Rovira, J., dissenting).

96. People v. Turman, 659 P.2d 1368, 1372 (Colo. 1983) (Dubofsky, J., concurring in part and dissenting in part).

terminated or, in the alternative, refuse to pay child support because he would have paid for an abortion.[97] This case forced Judge Dubofsky to consider competing rights and interests—the right of the father to be free from gender discrimination, a woman's right to privacy in procreation decisions, and the "state's interest in promoting the welfare of the child."[98] While characterizing this as a case that involved discrimination based on sex, Judge Dubofsky recognized that "the equal treatment which [the father] seeks could only be achieved by according a father the right to compel the mother of his child to procure an abortion."[99] This result, however, was improper under U.S. Supreme Court precedent governing the right to privacy in a woman's decision to terminate a pregnancy.[100] This led Judge Dubofsky to conclude that "at no stage does the [father]'s right to be free from gender-based classifications outweigh the substantial and legitimate competing interest."[101]

Judge Dubofsky's legacy, however, extends well beyond the courtroom and into her practice after her time on the bench. She has represented minority rights in cases of national significance. As the lawyer who argued on behalf of Richard Evans in *Romer v. Evans*,[102] she was instrumental in protecting gay men and lesbian women from government discrimination. One commentator described her novel argument:

> Jean Dubofsky's brief for the challengers focused on the functional consequences of the amendment from the perspective of lesbigays: by preempting local antidiscrimination protections, the amendment undermined their ability to participate in the political process; moreover, the amendment's broad denial of state "protection" to lesbigay people threatened their access to state services and protections of all sorts. Her conclusion was that the amendment was animated by antigay "antipathy" and not by the nice values in the state's brief.[103]

The Court ultimately agreed with Dubofsky's client's position, holding the Colorado Amendment unconstitutional, and even acknowledged that the law was likely motivated by antigay sentiment[104]—an argument made by Judge Dubofsky on behalf of her client.

C. *Judge Betty Weinberg Ellerin*

Judge Betty Weinberg Ellerin was appointed to the New York Supreme Court Appellate Division by Governor Mario Cuomo. She is a former member of the committee to implement the recommendations of the New York Task Force on

97. People in the Interest of S.P.B., 651 P.2d 1213, 1214 (Colo. 1982).
98. *Id.* at 1215.
99. *Id.* at 1216.
100. *Id.* at 1217.
101. *Id.* at 1216.
102. 517 U.S. 620 (1996).
103. William K. Eskridge, Jr., *Some Effects of Identity-Based Social Movement on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2189-90 (2002) (footnotes omitted).
104. *Romer*, 517 U.S. at 632, 634-35.

Women in the Courts and a member of the New York Judicial Committee on Women in the Courts.[105] As the Vice President of the National Association of Women Judges, she was Chair of the National Task Force on Gender Bias in the Courts.[106] Like Justice Agosti, one would expect Judge Ellerin to have an understanding of the difficulties women face in the legal system. Judge Ellerin's participation in pro-plaintiff majorities in a variety of contexts suggests that she understands the difficulties that working women (and sometimes men) face. Although her court does not always identify the name of a judge who authored each opinion, in the cases described below, Judge Ellerin voted in the majority.

In *D'Amico v. Commodities Exchange, Inc.*, Judge Ellerin and her colleagues held that the Commodities Exchange floor was a place of public accommodation that could be sued under New York's anti-discrimination in public accommodations laws for what amounted to sexual harassment.[107] As the court observed:

> [T]o accept defendants' position would, in effect, enable the COMEX [Commodities Exchange] to prevent, at will, any woman, or anyone else its members disapproved of, from trading in commodities simply by discriminating against and/or harassing that individual sufficiently to discourage her or him from remaining in the profession, and there would be no recourse under the Human Rights Law (Executive Law § 296) or its almost identical Federal counterpart.[108]

The court ultimately affirmed the trial court's denial of summary judgment for the defendant.[109] In other cases, Judge Ellerin has joined judges holding that employment discrimination plaintiffs had alleged sufficient facts to support a hostile environment claim,[110] supported the claim of a male whistleblower who encouraged his co-workers to bring a sexual harassment claim,[111] upheld the denial of a motion to dismiss under the *Ellerth/Faragher* affirmative defense applicable to sexual harassment claims, finding an issue of fact existed as to whether the harasser was a corporate proxy,[112] and joined a majority that recognized a continuing violation theory in sexual harassment cases, which permitted the plaintiff to include incidents that predated the effective date of the private cause of action for sexual harassment.[113]

In one decision that Judge Ellerin did author, she supported the claims of a plaintiff who alleged failure to promote and termination based on sex, age and

105. THE AMERICAN BENCH, *supra* note 71, at 1765.

106. *Id.*

107. 652 N.Y.S.2d 294, 295 (N.Y. App. Div. 1997).

108. *Id.*

109. *Id.*

110. *See* Espaillat v. Breli Originals, Inc., 642 N.Y.S.2d 875, 877 (N.Y. App. Div. 1996). The plaintiff was also given leave to amend her constructive discharge claim, although she did not allege sufficient facts to support a "racially hostile environment" claim. *Id.*

111. *See* Sorrentino v. Bohbot Entm't & Media, Inc., 697 N.Y.S.2d 263, 264 (N.Y. App. Div. 1999) (holding that such conduct "constituted 'opposition' to practices" and therefore was protected from retaliation).

112. Randall v. Tod-Nik Audiology, Inc., 704 N.Y.S.2d 228, 229 (N.Y. App. Div. 2000).

113. Batchelor v. Nynex Telesector Res. Group, 623 N.Y.S.2d 235, 236 (N.Y. App. Div. 1995).

disability.[114] In this case, the jury found for the plaintiff.[115] On appeal, the defendant argued that there was insufficient evidence to support the jury's finding of discriminatory intent.[116] In considering this argument, Judge Ellerin explained that "[o]bviously, plaintiff could not be expected to establish that the defendants actually expressed their discriminatory intent, and the record must therefore be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent."[117] Judge Ellerin concluded that the "record overwhelmingly support[ed]" the plaintiff's claim.[118] Judge Ellerin acknowledged the difficulties employment discrimination plaintiffs face on the crucial issue of intent, and the reality that most employers are savvy enough not to make overtly discriminatory statements.

Another interesting facet of this decision was Judge Ellerin's handling of the multiple claims involved in the case. The defendants argued that the plaintiff was limited to arguing disability discrimination because she had been replaced by a woman.[119] The court upheld the jury's rejection of this position, explaining:

> What both the defendants and the dissent ignore is the fact that under the circumstances here present the jury was not required to view the denial of promotion to plaintiff and her subsequent termination as two completely separate and discrete incidents of discrimination, but, rather, was entitled to view them as an unbroken continuum, with discriminatory denial of the promotion serving as the direct consequential catalyst of the ultimate termination of plaintiff's employment.... Fortunately, the law recognizes that the forms and guises of discriminatory conduct do not always fall neatly into readily identifiable packages and affords relief so long as the victim can establish that the conduct occurred "under circumstances which give rise to an inference of unlawful discrimination."[120]

The contextual nature of Judge Ellerin's approach is striking. She acknowledges that the various forms of discrimination involved in this case do not occur in a vacuum, but have a relationship one to the other. It is not uncommon for judges to ignore the interrelated nature of various forms of discrimination.[121] All in all, this series of pro-plaintiff employment discrimination opinions show Judge Ellerin's understanding of the difficulties plaintiffs face in proving discrimination and the complexities of workplace discrimination.

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114. Sogg v. Am. Airlines, Inc., 603 N.Y.S.2d 21, 22-27 (N.Y. App. Div. 1993).
115. *Id.* at 22.
116. *Id.* at 24-25.
117. *Id.* at 26 (citation omitted).
118. *Id.*
119. *Id.* at 26-27.
120. *Id.* at 27 (citations omitted).
121. *See* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 26-29 (2005).

D. *Judith S. Kaye*

Judge Judith S. Kaye is the Chief Judge of the State of New York. She was appointed by Governor Mario Cuomo to the New York State Court of Appeals in 1983. A trailblazer, Judge Kaye was the first woman to sit on the court of appeals and the first woman to hold New York's highest judicial office.[122] She was one of ten women in the class of 1962 at New York University School of Law—a class that numbered 300 total.[123] An outspoken advocate for women, upon appointment to the bench in 1983, Judge Kaye explained, "I take my gender with me wherever I go."[124] She is active in various law-related organizations, including serving as the Chair of the Permanent Judicial Commission on Justice for Children and on the board of editors of the New York State Bar Journal. She is a prolific author, writing on issues as diverse as legal process and ethics to the role of women in the law.[125] She has been honored by the Cardozo Women's Law Journal and awarded their "most influential woman in the law" award[126] and by Seton Hall Law School with the Sandra Day O'Connor Medal of Honor.[127] Looking at her judicial record, her career and her scholarly writing, it is easy to see why she was so honored.

When asked if her gender played a role in her judging, Judge Kaye was forthcoming:

> I have read, heard and seen Justice O'Connor answer that question flatly and decisively, "absolutely not," often followed by quoting Minnesota Justice Jeanne Coyne: "a wise old man and a wise old woman reach the same conclusion."
>
> In one sense, I agree 100 percent with that observation. Women bring the same skills to judging—diligence, preparation, impartiality, wisdom. We sweat and struggle every bit as hard as our male counterparts to reach the right result, to do justice, to apply and honor the law.
>
> But there's another aspect to all of this—the reason, for example, that it's desirable on our Court of Appeals to draw its seven members from different parts of the State, different backgrounds, different life experiences. A person cannot help bringing something of one's own background and experience to everything we do, and that includes judges.
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> There is no question that we have seen changes in the law in the last quarter of the twentieth century, whether the result of the arrival of large numbers of women in the courts, or inspired by it—or both. The presence of women in the legal profession has

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122. State of New York Court of Appeals, *Chief Judge Judith S. Kaye*, *available at* www.courts.state.ny.us/ctapps/jkaye.htm (last visited May 2, 2005).

123. Judith S. Kaye, *Acceptance of "Most Influential Woman in the Law" Award*, 9 CARDOZO WOMEN'S L.J. 673, 675 (2003).

124. *Id.* at 676.

125. State of New York Court of Appeals, *Chief Judge Judith S. Kaye*, *available at* www.courts.state.ny.us/ctapps/jkaye.htm (last visited May 2, 2005). *See, e.g.*, Judith S. Kaye, *Moving Mountains: A Comment on the Glass Ceilings and Open Doors Report*, 65 FORDHAM L. REV. 573 (1996); Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125 (2004).

126. *See* Kaye, *supra* note 123, at 673.

127. *See generally* Judith S. Kaye, *A Life in the Law*, 30 SETON HALL L. REV. 752 (2000).

played a key role in the development of the law in the last quarter of the twentieth century—pressures for parity in the workplace, access to all manner of restricted establishments, meaningful laws on rape and abuse, the recognition of domestic violence not as a right but as crime, effective child support and child care mechanisms are but a few examples.

To be specific about the Chief Judge of the State of New York, I spent 21 years of my life as a commercial lawyer, but for the past 15 years or so years my interests quite frankly have focused on families—domestic violence, dysfunctional families, the fate of children in our society and how we can improve it.

Now, is this chromosomal, or is it coincidental? You be the judge.[128]

That Judge Kaye brings an array of life experiences—life experiences that have some unique facets because of her gender—is reflected in her judicial decision making.

Judge Kaye has revealed a sensitivity to discrimination plaintiffs. For example, in *New York City Transit Authority v. State Division of Human Rights*, Judge Kaye reversed a decision by the New York Supreme Court that remitted damages in a case involving blatant pregnancy discrimination.[129] In that case, the plaintiff bus driver had requested restricted duty after becoming pregnant. The plaintiff had had fertility problems for a long time and had previously miscarried. Therefore, her doctor had recommended her for less onerous duties than driving a bus. In spite of granting similar requests to men who had temporary physical problems, the Transit Authority, without explanation, put her back on road service after only one week on restricted duties. Eventually, the plaintiff miscarried.[130] Three other instances of discrimination occurred involving pregnancies of the plaintiff, with the Transit Authority's doctor eventually classifying her in a "no work" status (without justification) until she delivered a child in a subsequent pregnancy.[131]

The administrative law judge found she was entitled to a total $450,000 in damages for mental anguish and aggravation for the various instances of discrimination she experienced. The appellate division, however, concluded that the award was too high, and reversed, recommending a new award that would not exceed $75,000.[132]

The New York Court of Appeals, via Judge Kaye, reversed. The court was much more deferential to the Commissioner in this case—who was the initial fact-finder. As Judge Kaye explained:

Here, there were extensive findings by the Administrative Law Judge, confirmed by the Commissioner, of four separate episodes of discriminatory conduct by the Transit Authority, and mental anguish and aggravation associated with each, supported by complainant's testimony, her doctor's testimony, the Transit Authority's own medical findings, and the evaluation that, compared to the other Division proceedings, the level

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128. Kaye, *supra* note 123, at 676-77.
129. 577 N.E.2d 40, 41 (N.Y. 1991).
130. *Id.* at 42.
131. *Id.* at 43.
132. *Id.* at 44.

> of abuse was "shocking." For example, in the June-July 1981 period—for which the sum of $250,000 was assessed—there are findings that the Transit Authority's refusal to allow restricted duty compelled complainant's decision to continue driving a bus, the consequence of which caused and likely will continue to cause her feelings of guilt, resentment and other anguish over her lost child. The Appellate Division statement that complainant's feelings of depression after suffering the miscarriage "were not unequivocally attributable to NYCTA" is a mischaracterization of the Commissioner's finding that, while there was insufficient proof the Transit Authority's wrongdoing *caused the miscarriage*, there was a sufficient link between the Transit Authority's conduct and complainant's mental anguish *after the miscarriage*, persisting to the time of her testimony.[133]

Judge Kaye understood the difficult position that the Transit Authority placed the plaintiff in (a choice between earning a living and risking her unborn child's life) and the link to her mental anguish.

Judge Kaye also held that lesbian and unmarried heterosexual partners had standing to become adoptive parents of their partners' biological children.[134] Acknowledging that the primary concern of the adoption statute is the "best interests of the child," Judge Kaye reasoned that "[t]his policy would certainly be advanced in situations like those presented here by allowing the two adults who actually function as a child's parents to become the child's legal parents."[135] While alluding to the financial benefits to the child (including life insurance, social security, etc.) resulting from such adoptions, Judge Kaye also understood the emotional aspect of parenting that is furthered by such adoptions:

> Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the coparents separate. Indeed, viewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *Matter of Alison D. v. Virginia M.*[136]

Judge Kaye looked at the situation from the child's perspective—consistent with her overarching concerns for children. The lack of clarity in New York's adoption laws, some would argue, would have permitted the court to rule either way in this case.[137] Judge Kaye's careful sensitivity to the underlying purpose behind adoption law—the best interests of the children—and how children would feel in these circumstances informed her decision making.

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133. *Id.* at 46 (citation omitted).
134. *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).
135. *Id.* at 399.
136. *Id.* (citation omitted).
137. *See id.* at 405 (acknowledging ambiguity in the law).

As one commentator summed up: "Kaye is a somewhat 'liberal' judge."[138] "Other court watchers have noted her 'activist role on matters of social change' and sympathetic stance towards defendants' rights."[139] Ultimately deemed "progressive," Judge "Kaye argues for adapting a statute to situations unimagined by the legislature."[140] Perhaps as someone who has juggled a busy legal career, raising three children, and marriage, Judge Kaye simply has extended her creativity to another aspect of her life—her judicial decision making.

E. Justice Joan Dempsey Klein

Justice Joan Dempsey Klein is the Presiding Justice for the California Court of Appeal, Second Appellate District, Division Three. She was appointed to the court in 1978 by Governor Jerry Brown.[141] Prior to that, she served as a deputy attorney general for the State of California and as a Los Angeles Municipal and Superior Court Judge.[142] She was the co-founder and first president of the National Association of Women Judges and founding president of California Women Lawyers. She served as a member of the advisory committee of the National Judicial Education Program to Promote Equality for women and men in the courts.[143] She has received numerous awards for her contributions. The Los Angeles Trial Lawyers Association selected her as Appellate Justice of the Year for 1990 and the *Los Angeles Times* named her "Woman of the Year."[144] Indeed, the California Woman Lawyers named its Distinguished Jurist Award in honor of Justice Klein, who was its first recipient.[145] Perhaps most impressive, Justice Klein accomplished this while being the mother of five children.[146]

Through her decisions, Justice Klein reveals herself as a devoted advocate of the rule of law, while at the same time reading civil rights and other laws expansively to increase their effectuality. For example, in *Swink v. County of Los Angeles*, Justice Klein upheld a jury verdict in favor of a sexual harassment plaintiff, emphasizing that a reversal would amount to the court reweighing evidence on the sufficiently severe or pervasive standard, something that was inappropriate for a court considering the case on appeal.[147] Justice Klein summed up the factual support for the plaintiff in this case:

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138. Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1199 (1994).

139. Marcia B. Smith, *Judith S. Kaye: Progressive Decisionmaking Rooted in the Common Law*, 59 ALB. L. REV. 1763, 1763 (1996) (footnotes omitted).

140. *Id.* at 1764.

141. Appellate Counselor Profiles, *Profile of Justice Joan Dempsey Klein, available at* http://www.appellate-counsellor.com/profiles/kleinjd.htm (last revised Apr. 29, 2002).

142. California Courts, *Division Three: Presiding Justice Joan Dempsey Klein* (Sept. 12, 2002), *available at* http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/justices/klein.htm.

143. *See id.*

144. *Id.*

145. California Women Lawyers, *Joan Dempsey Klein Distinguished Jurist Award, at* http://www.cwl.org/klein.html (last visited June 20, 2005).

146. *Id.*

147. No. B144259, 2002 WL 805255 at *4 (Cal. Ct. App. Apr. 30, 2002).

> The evidence at trial established that beginning in late 1995, Swink's co-workers engaged in a course of conduct which included joking about rape, bringing sexual lubricant and woman's panties to work, telling Swink to go [to] a strip club, and spelling plaintiff's first name "Cunthia."[148]

Similarly, in *Kelly-Zurian v. Wohl Shoe Co., Inc.*, Justice Klein was asked to overturn a verdict in a sexual harassment victim's favor.[149] The plaintiff in this case was harassed both verbally and physically (including having her crotch grabbed, her buttocks pinched, and hands place on her breasts) for three years.[150] In this case, the harasser took the position that he and the plaintiff were involved in a consensual relationship. The plaintiff denied this.[151] Considered with her duties as an a appellate justice, Justice Klein refused to reweigh evidence or reassess credibility of witnesses on appeal.[152]

In addition, the defendant argued that the trial court has improperly refused to admit evidence of: (1) plaintiff's viewing of adult films with her spouse at home; (2) her abortions; and, (3) her prior sexual history and sexual history with employees other than the harasser.[153] Justice Klein held that there was no abuse of discretion on the trial court's part in refusing to admit this evidence. In particular, she argued that the video viewing was "irrelevant;" "[s]uch evidence could not logically lead to prove or disprove any of the disputed issues in the case. Further, any marginal relevance of the videotape viewing would have been substantially outweighed by the probability of undue prejudice to Zurian."[154]

In this case, Justice Klein also read the California Fair Employment and Housing Act expansively, stating that employers are strictly liable for acts of supervisor harassment, contrary to the argument made by the employer that it should only be liable if it had notice of the harassment.[155] Further, that the harasser's conduct arguably deviated from company policy did not save the employer from liability. As long as the jury found that the supervisor acted within the scope of his employment, the company was liable.[156]

Justice Klein has read other laws expansively in an effort to protect employment discrimination victims, even when her position may not always prevail. For example, in *Herr v. Nestle U.S.A., Inc.*, she held that an age discrimination claim could be pursued under both the California Fair Employment and Housing Act as well as California's Unfair Competition Law.[157] Similarly, although ultimately vacated, Justice Klein held that FEHA did not preempt common law causes of action that might cover sexual harassment.[158]

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148. *Id.*
149. 27 Cal. Rptr. 2d 457 (Cal. Ct. App. 1994).
150. *Id.* at 461.
151. *Id.* at 461 n.1, 462.
152. *Id.* at 463.
153. *Id.*
154. *Id.* (citing CAL. EVID. CODE § 352).
155. *Id.* at 466.
156. *Id.* at 467.
157. 135 Cal. Rptr. 2d 477, 479 (Cal. Ct. App. 2003).
158. Rojo v. Kliger, 257 Cal. Rptr. 158 (Cal Ct. App. 1989), *vacated* 252 Cal. Rptr. 605.

F. Judge Arline Pacht

Judge Arline Pacht was an administrative law judge with the U.S. Department of Labor and later at the National Labor Relations Board. Her career as an ALJ spanned from 1979 to 1998. Judge Pacht retired from the NLRB in 1998.[159]

Her decisions as a judge for the NLRB reflect a fair and balanced approach to union activities as well as the rights of management. In one case, Judge Pacht found wrongdoing on the part of Sam's Club, a division of the mega-company Wal-Mart, who is known for its anti-union activities.[160] In particular, Judge Pacht found that Sam's Club management improperly had threatened to close the store if there was a positive union vote.[161] In addition, Sam's Club used pay raises and promotion promises to garner anti-union votes and loyalty. Particularly ingenious, Sam's Club awarded promotions prior to the union vote, but did not fill the positions until after the election, arguing that it wanted to avoid prejudicing the outcome of the election. Judge Pacht characterized this argument as "disingenuous."[162] As she explained:

> To announce the openings shortly before the election, and then delay filling them, while attributing the delay to the union election, constitutes the most devious, albeit subtle, course Respondent could have chosen—it was tantamount to dangling a prize just beyond the bidder's reach until the desired outcome was achieved. This is the same carrot and stick approach condemned by the Board in DTR, supra, for it surely sends a message to would-be candidates for promotion to refrain from any sort of union activity.[163]

Judge Pacht's reasonable approach to the facts in this case led to a finding against Sam's Club with respect to these allegations.[164]

In another interesting decision, Judge Pacht found employees' work stoppage protected under Section 502 of the Labor Management Relations Act where employees stopped working to protest dangerous conditions at their workplace.[165] The facts of the case are fairly outrageous. The workers were employed by TNS,

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159. International Judicial Academy, *Academy Directors and Officers*, *at* http://www.ija-dc.org/directoff.html (last visited May 2, 2005).

160. *See* Chris Ford, *What Are "Friends" For? In NAFTA Chapter 11 Disputes, Accepting Amici Would Help Lift the Curtain of Secrecy Surrounding Investor-State Arbitrations*, 11 SW. J.L. & TRADE AM. 207, 220 (2005); Scott L. Cummings, *Beyond the Beltway: The New Politics of Poverty*, 13 ABA J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 159, 161 (2004); Rita Bhatnager, *Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 250 (2004) (all acknowledging Wal-Mart as "anti-union").

161. Sam's Club, 325 NLRB 124, 1997 WL 724902, at *15 (Nov. 8, 1997). This portion of Judge Pacht's decision was ultimately reversed by the Fourth Circuit. *See* Sam's Club v. NLRB, 173 F.3d 233, 239 (4th Cir. 1999).

162. *Sam's Club*, 1997 WL 724902, at *21.

163. *Id.* at *22.

164. Sam's Club did not lose as to all allegations against it. Instead, Judge Pacht carefully evaluated the facts relevant to each allegations, bringing a common sense approach to her judgements.

165. *See* John W. McKendree, *TNS Inc. and Oil, Chemical and Atomic Workers: Labor Section 502 and Workplace Safety*, 17 N. KY. L. REV. 195, 200 (1989) (describing the case and Judge Pacht's decision).

a Tennessee corporation that manufactured armor-piercing projectiles. Depleted uranium was used in the manufacture of its products.[166] The employees were represented by a union up to the date that they started their work stoppage. As one commentator described:

> The production process that caused the work stoppage conjures up images of environmental horror: Dust and smoke were omnipresent and came from a variety of sources. It all began in the weighing and blending areas, where 55-gallon drums of radioactive uranium tetrafloride, known as "greensalt," were unloaded. This powder was often accidentally spread on the floor, the result of spillage and barrels being pierced by forklifts with crab-like pinchers. The spills were not immediately cleaned up. In violation of federal regulations and the plant's own internal operating procedures, the radioactive material was trailed throughout the plant by machines and workers alike. The greensalt was then loaded into pots, called "retorts," prior to delivery to the furnace. During the loading process, employees were required to tamp the greensalt into the retorts. This action caused more radioactive dust emissions. Inadequate safety precautions and overfilling often caused greensalt to spill over the sides of the retorts and onto the floor. The plant had horse-collar-shaped safety devices that fit over the top of the retorts that could have prevented some of this spillage. However, these devices were often unused because they cut down on the rate of production and were only partially effective.[167]

Employees stopped working only after repeated complaints to management with no results and after a trip to another plant in California revealed to employees that working conditions could be made much safer. Judge Pacht's decision protected the worker's right to strike under these circumstances, and she further held that TNS, "by assuring its workforce that the former strikers would not be reinstated with their seniority rights intact, interfered with, coerced, and restrained its employees in the exercise of their § 7 rights, thereby independently violating § 8(a)(1) of the Act."[168] Judge Pacht's decision in this case was ultimately overturned by the NLRB, which decided that the conditions were not abnormally dangerous and therefore did not warrant the work stoppage.[169] While ultimately her position did not prevail, Judge Pacht showed her understanding of the difficulties faced by these workers.

Judge Pacht's presence as an influential female judge continued after she stepped down from the bench to become the executive director of the International Association of Women Judges. The IAWJ is a non-profit organization of over 4,000 judges representing eighty-six countries. The organization is committed to "equal justice and the rule of law."[170] Judge Pacht was also its founding president. One of the organization's programs, the Jurisprudence of Equality Program, seeks

166. *See id.* at 196.

167. *Id.* at 197.

168. *Id.* at 200.

169. TNS, Inc. and Oil, Chemical & Atomic Workers Int'l Union, 309 NLRB 1348, 1459 (Dec. 23, 1992).

170. International Association of Women Judges, *Welcome*, *at* http://www.iawj.org (last visited May 2, 2005).

to "build a true 'jurisprudence of equality'—one based on universal principles of human rights and nondiscrimination."[171] In her various roles within this organization, Judge Pacht was instrumental in creating the organization's human rights education program for judges. Since 1993, the Women Judges Foundation, which is the "educational arm" of the IAWJ, has provided educational and public services programs aimed at legal issues affecting women and children. One facet of the Jurisprudence of Equality Program targets judicial training, whereby the organization trains teams who lead human rights seminars for judicial officers and conduct seminars for judges and related professionals.[172] Thus, Judge Pacht's influence on human rights extends beyond the borders of the United States into other countries.

G. *Judge Dolores K. Sloviter*

Judge Dolores K. Sloviter was appointed to the Third Circuit Court of Appeals by President Carter. Initially in private practice, Judge Sloviter was also a law professor at Temple University.[173] In several interesting decisions, Judge Sloviter has upheld the rights of employment discrimination victims and women.

In *Bianchi v. City of Philadelphia*, writing for the panel, Judge Sloviter upheld admission of evidence of plaintiff's sexual harassment in a case involving a etaliation claim even though the plaintiff's Title VII claims had been dismissed.[174] The plaintiff was a male who was harassed because he was perceived as being gay.[175] Although his Title VII claims were dismissed, he claimed that he was retaliated against based on the exercise of his First Amendment rights and that his procedural due process rights were violated.[176] The court, via Judge Sloviter, held that the sexual harassment evidence was probative on the issue of whether the adverse employment action was caused by protected activity—in this case, his complaining about the harassment.[177]

Judge Sloviter wrote a very important appellate opinion on state regulation of abortion. In *American College of Obstetricians and Gynecologists v. Thornburgh*,[178] Judge Sloviter considered the constitutionality of a variety of provisions of the Pennsylvania Abortion Control Act.[179] Among the provisions challenged was the minor parental consent portion of the statute, which Judge Sloviter enjoined because the state had not yet provided the details of the judicial bypass mechanism whereby a minor seeking an abortion could avoid obtaining parental consent.[180] Various other portions of the act were struck as well. In

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171. International Association of Women Judges, *What We Do*, *at* http://www.iawj.org/what/jep.asp (last visited May 2, 2005).
172. *See id.*
173. 2 ALMANAC OF THE FEDERAL JUDICIARY, 3d Cir., at 13 (Christine Housen et al. eds. 1998).
174. 80 Fed. Appx. 232, 235-36 (3d Cir. 2003) (unpublished decision).
175. *Id.* at 234.
176. *Id.* at 235.
177. *Id.* at 235-36.
178. 737 F.2d 283 (3d Cir. 1984).
179. 18 PA. CONS. STAT. ANN. §§ 3201-3220 (West 2000).
180. *Thornburgh*, 737 F.2d at 297.

another case, Judge Sloviter held that anti-abortion activists could be held liable under civil RICO for intimidating and harassing a women's health clinic, which resulted in property damage.[181] In these decisions, Judge Sloviter was protective of those trying to exercise their reproductive rights.

H. Judge Patricia M. Wald

Judge Patricia M. Wald sat on the federal appellate court for the District of Columbia Court of Appeals. Prior to her appointment by President Carter, Judge Wald worked for legal services-oriented organizations and the Department of Justice.[182] Judge Wald is also the mother of five children. The author of several great dissents that were ultimately (and least temporarily) held correct by the U.S. Supreme Court,[183] Judge Wald was frequently mentioned for a U.S. Supreme Court appointment.[184] In her decisions, and perhaps especially in her dissents, she revealed herself as an advocate for civil rights and the interests of members of minority groups.

Judge Wald dissented in *Shurberg Broadcasting of Hartford v. FCC*,[185] a District of Columbia Circuit Court case that ultimately struck down on equal protection grounds an FCC preference for minority-owned businesses in distress sales of television stations. Disagreeing with the majority, Judge Wald found the government's interest in broadcast diversity—the objective of the FCC's program—to be compelling and consistent with Supreme Court precedent on affirmative action programs.[186] Reviewing the reasons the FCC provided for implementing this program, Judge Wald reasoned that the program provided opportunities for members of minority groups to buy stations, which would lead to broadcast diversity, or, at least, it was the best method that the government had at its disposal for such purposes.[187] While she acknowledged "[t]he evidence supporting these findings has typically been anecdotal rather than statistical," she also understood the difficulty in proving something like diversity in broadcasting statistically, especially when there was a "dearth of minority broadcasters," making "it quite difficult to draw empirical conclusions concerning the programming offered by minority-owned stations."[188] Instead, she was more deferent to Congress' and the FCC's judgment that this program was the most effective means available for "significant minority participation in programming."[189]

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181. Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1346-50 (3d Cir. 1989).

182. 2 ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 173, D.C. Cir., at 18.

183. *See, e.g.*, Finzer v. Barry, 798 F.2d 1450, 1478-1500 (D.C. Cir. 1986) (Wald, J., dissenting), *aff'd in part and rev'd n part sub nom.*, Boos v. Barry, 485 U.S. 312 (1988); Shurberg Broad. of Hartford, Inc. v. FCC, 876 F.2d 902, 934-58 (D.C. Cir. 1989) (Wald, J., dissenting), *rev'd by* Metro Broad. v. FCC, 497 U.S. 547 (1990).

184. 2 ALMANAC OF THE FEDERAL JUDICIARY, D.C. Cir., *supra* note 173, at 20-21.

185. 876 F.2d 902 (D.C. Cir. 1989) (per curiam), *rev'd sub nom.* Metro Broad. v. FCC, 497 U.S. 547 (1990).

186. *Id.* at 935 (Wald, J., dissenting).

187. *See id.* at 936-38, 944-48.

188. *Id.* at 946.

189. *Id.* at 947.

In an interesting footnote, Judge Wald acknowledged the importance of television in the lives of Americans. While Judge Silberman, one of the judges who voted to strike the policy, argued that there were other media outlets available to minority group members that lessened the need for this set-aside,[190] Judge Wald instead explained:

> Underrepresentation of minority views in television is particularly troubling. The impact of television on our daily lives, and those of our children, is unquestionably greater than that of print media.
>
> "Unlike print, television does not require literacy. Unlike the movies, television is 'free' ... and it is always running. Unlike the theater, concerts, movies, and even churches, television does not require mobility. It comes into the home and reaches individuals directly. With its virtually unlimited access from cradle to grave, television both precedes reading and, increasingly, preempts it."[191]

Judge Wald broadly interpreted the concept of remedying past discrimination, arguing that it does not apply only to individuals who have experienced discrimination, but also "seeks to address the lasting effects of our nation's long history of racial discrimination."[192] Further, Congress can go beyond remedying its own past discrimination in creating affirmative action plans.[193] While Judge Wald was unsuccessful in convincing her colleagues that the program could withstand constitutional scrutiny, her position ultimately prevailed, if only for a short time, and the U.S. Supreme Court upheld the program, using intermediate scrutiny.[194] In acknowledging the government's compelling interest in broadcast diversity, Judge Wald sought to broaden access to an important avenue of communication to members of minority groups. With a sympathetic understanding of the importance of diversity in this all-important media outlet, she wrote a well-reasoned and thorough dissent, advocating for opportunities for minority-owned businesses.

Judge Wald has likewise authored important opinions on the First Amendment. In *Finzer v. Barry*, she dissented in a case involving the validity of a ban on picketing within 500 feet of a foreign embassy.[195] Judge Wald saw the case as involving discrimination, whereby some demonstrators were subject to the ban, while others were not.[196] Placing this case in the context of conflicts between the United States' international obligations/security interests and the First Amendment, Judge Wald eloquently stated that "even within the shadow of treachery and terrorism, we must not too hastily surrender our free speech birthright to phantom

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190. *Id.* at 917.

191. *Id.* at 948 n.35 (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: AN UPDATE 44 (1979) (quoting Gerber & Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173, 176 (Spring 1976))).

192. *Id.* at 952.

193. *Id.* at 953.

194. Metro Broad., Inc. v. FCC, 497 U.S. 547, 568-73 (1990). *Metro Broadcasting* was ultimately overruled in *Adarand Constructors, Inc. v. Penal*, 515 U.S. 200, 227 (1995).

195. Finzer v. Barry, 798 F.2d 1450, 1477 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom.* Boos v. Barry, 485 U.S. 312 (1988).

196. *Id.* (Wald, C.J., dissenting).

national security interests and international obligations. We must at least demand reasonable proof that genuine issues of security or treaty obligations are implicated."[197]

Judge Wald has furthered the interests of employment discrimination victims in a variety of ways. In *United States v. Young*, she upheld a criminal contempt sanction directed against a District of Columbia Department of Corrections employee who retaliated against sexual harassment victims in contravention of an injunction issued in a civil class action.[198] She also argued that reinstatement may not be an appropriate remedy where there were allegations that the plaintiff sexually harassed his co-workers.[199] Judge Wald's service to the legal profession extends well beyond her service to the court and other organizations. She has provided extensive commentary on a variety of issues, such as the role of the courts,[200] and the situation of women in the legal profession and society.[201]

III. CONCLUSION

While political scientists' studies have not always shown women judges to be "pro-woman," the judges who have participated in this symposium have been advocates of employment discrimination plaintiffs, civil rights plaintiffs, and the interests of children. While these judges have not always taken pro-woman positions,[202] they have provided opportunities to members of groups underrepresented in the judiciary. In some cases, their analyses considered the realities of the difficulties in the lives of women and children. In other instances, they appealed to higher principals—such as the importance of civil liberties and public debate. While there may be no distinctive "feminine voice" in these opinions, these judges, through their careers and the body of law they have created, have made the courts more hospitable to those who are outsiders to the system.

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197. *Id.*

198. 107 F.3d 903, 905 (D.C. Cir. 1997).

199. Webb v. District of Columbia, 146 F.3d 964, 976 (D.C. Cir. 1998).

200. *See, e.g.*, Patricia Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621 (1994); Patricia Wald, *Collegiality on a Court*, 40 FED. B. NEWS & J. 521 (Sept. 1993); Patricia Wald, *The Role of the Judiciary in Environmental Protection*, 191 B.C. ENVTL. AFF. L. REV. 519 (1992).

201. *See, e.g.*, Patricia Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 FORDHAM L. REV. 603 (1996).

202. *See, e.g.*, Elmore v. Cleary, 399 F.3d 279 (11th Cir. 2005) (Sloviter, J.).