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In

*REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION
AND PROPOSALS FOR REFORM*

*(Jaya Ramji-Nogales, Andrew I. Schoenholz & Philip G. Schrag,
eds., NYU Press 2009)*

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10 Asylum in a Different Voice?

Judging Immigration Claims and Gender

*Carrie Menkel-Meadow*¹

Perhaps the most interesting result of our cross-tabulation study was that the gender of the judge had a significant impact on the likelihood that asylum would be granted. Female immigration judges granted asylum at a rate of 53%, while male judges granted asylum at a rate of 37.3%. An asylum applicant assigned by chance to a female judge therefore had a 44% better chance of prevailing than an applicant assigned to a male judge.²

A. Introduction: Gender Difference in Theory and Practice

The extraordinary (and quite robust) findings of Professors Ramji-Nogales, Schoenholtz, and Schrag that gender matters in the outcomes of claims for asylum is not as surprising as it might seem (at least to some of us!). The idea that women judges and lawyers might behave differently from men has been debated in legal scholarship for several decades. The current study provides some of the most powerful and interesting evidence that such a claim about gender in judging in some contexts is valid. What we ought to do about this result as a policy matter remains a quite complicated and debatable issue.

As I will suggest in this essay, women may not only arrive at different outcomes in some kinds of cases, but they are likely to “reason” differently, or consider different facts, circumstances, and conditions as they consider what to decide in granting asylum or not (and perhaps in judging other matters, as well, including those beyond the scope of the present study). I will argue that women should not be the only repositories of those values, attitudes, or considerations that lead them to grant asylum more readily. What women do “differently” should perhaps be more the norm, so that denials, not grants, of asylum status would be more the outliers and departures from justice, or that, at least, a deeper contextual, relational, empathic credibility assessment and factual analysis of asylum cases might be appropriate, rather than the current set of assumptions, presumptions, and evidentiary considerations that seem to lead to arbitrary, or at least inconsistent, asylum denials.³ To the extent that women judges may be more likely to

preside over “conversational” or empathetic hearing processes, they may encourage fuller narratives from troubled asylum claimants. That women judges actually do behave differently in more formal court settings still needs empirical verification. Differences in judicial behavior may vary depending on the setting (formal or informal) and the nature of the claim (and legal rules and evidence rules that govern the proceedings).

Twenty-five years ago, in a book that ruptured the arguments of “equality” feminist theorists and activists in law⁴ and elsewhere, Carol Gilligan suggested that girls (and women) might engage in “different” patterns of moral reasoning and decision making. Her path-altering book, *In A Different Voice: Psychological Theory and Women’s Development* (1982), argued that girls were more concerned about “connection and relationships” than they were about solving algebraic questions of justice that forced them to solve problems by choosing one legal right (or one person) over another.

In her empirical studies of how adolescents made decisions about such matters as whether to have an abortion or resist the military, she noticed a pattern of difference, not always in actual decisions but frequently in modes of decision making and rationales used for particular choices. Gilligan used a hypothetical of moral reasoning (originally developed by her graduate-school colleague, friend, and noted psychologist Lawrence Kohlberg)⁵ to ask young people how they would reason to achieve justice. The hypothetical or moral fable was known as Heinz’s Dilemma. It asked whether Heinz, whose wife was suffering from a terminal and painful disease, would be morally wrong in stealing a drug to ease suffering, and, perhaps, prolong the life of his wife, from a pharmacist who was charging a price for the drug that was beyond Heinz’s means to pay. Carol Gilligan queried young boys and girls about what they thought about Heinz’s choices.

In her book Gilligan reported on two “typical” responses she received that marked different narratives of moral reasoning. Jake, consistent with many of the subjects of Kohlberg’s (mostly, if not exclusively male) subjects, used universalistic, legalistic, and “algebraic” reasoning. The drug belonged to the pharmacist—it was his property. Stealing property is both morally wrong and against the law, unless there is a more important right that trumps the right of property. Jake reasoned, by “balancing rights,” that since life was “worth” more than property, it was morally permissible for Heinz to steal the drug. Thus, Jake solved the “equation” of justice by declaring that Heinz was entitled to steal the drug because his was the “superior” and therefore morally “trumping” right.⁶

Amy, on the other hand, engaged in a different sort of reasoning, what I then described as “like a bad law student, fighting the hypo.” Amy tried to see the needs, rights, and interests of all the parties. Perhaps, she suggested, Heinz and the druggist could sit down and talk about the problem. They might arrange an

installment payment plan for the drug, thus holding constant the needs of Heinz's wife for the drug and the pharmacist's need to make a living. Maybe they should ask Heinz's wife (who is most affected by the decisions made) what she thinks should be done. For Amy the dilemma involved more people and had a wider and deeper context than a simple "yes or no."

On Kohlberg's scale of "universal" moral development, Amy scores lower than Jake because she equivocates, she focuses on the facts and personalistic aspects of the problem, and she does not adequately address the larger "universal" issues of justice, precedent, and the need to rank "clear" hierarchical moral choices.

Soon after Gilligan's book was published and a torrent of controversy was unleashed among feminists, lawyers, sociologists, psychologists, biologists, and anthropologists about whether men and women were more alike or more different in their attitudes, beliefs, and actions, I wrote an article provocatively titled, "Portia in a Different Voice: Speculations on a Woman's Lawyering Process,"⁸ in which I argued that Gilligan's work, joined by the work of other scholars of human behavior at that time,⁹ supported a notion that women might engage in "different" forms of legal reasoning, valuing highly human connection, relationships, not just rules, and especially the contexts in which legal and moral problems were situated.

Portia was chosen (both by me and by Carol Gilligan) as an evocative figure because she pleaded for mercy (not just cool justice) in Shakespeare's *Merchant of Venice*.¹⁰ Portia's plea for mercy facilitated the expansion of Carol Gilligan's original notion of "an ethic of care" to a wide variety of political and legal contexts.¹¹ While Jake displayed an "ethic of justice" of rights balancing and clear choices, Amy tried to keep the connections of parties in conflict in relationship to each other and to herself and worried a lot about everyone's (not just the legal winner's) well-being. Amy became a symbol of legal actors and scholars who saw care, human flourishing, and so-called positive rights as an equally, if not more, important part of the justice system than "negative" rights of freedom from (governmental restraint).¹² The kind of "care for the other" that Amy and Portia came to represent in this highly contested literature may hold some of the explanatory clues to the Ramji-Nogales, Schoenholtz, and Schrag findings of gender differences in asylum decisions (what I will from here on call "the gender judging findings").

Twenty-five years ago, I also argued that women were (more) likely to use different sorts of processes and modes in their legal and moral reasoning than relatively "simple," blunt-cut determinations made according to formal, bright-line legal rules. This argument included not only more contextual and relational reasoning (suggesting more mediational and negotiated, rather than decisional, processes) but also different outcomes (more "shared," contingent, or jointly managed

solutions to problems, both moral and legal). In the asylum context these claims would suggest that women judges might be more likely to facilitate less formal conversations in the hearing process, be less rigid with respect to evidentiary admissibility rulings, cabin or control extraordinarily harsh cross-examinations, and empathize with claimants. On the other hand, since the asylum decision is a binary one—yes or no—there is little room in this environment for “compromise” or intermediate rulings.

I went on to speculate (as the article’s title honestly announced) on a variety of other gender differences that might play a role in the legal system, including more inclusive forms of evidence rules (what is “admissible” or “relevant” might vary more in different legal contexts), less draconian decision making, both in rules and outcomes, a generally less adversarial approach to both process (more open, inclusive, and conversational or “dialogic”) and outcomes (avoidance of binary outcomes), participation by more parties affected by legal decision making, and, most relevant to the present inquiry, different modes and outcomes of “judging.”¹³

Immediately following these claims, several things happened. First, some other legal analysts joined or expanded the argument, suggesting that women would reason in a different voice, change the legal rules and legal processes, practice law differently, treat their clients and opponents differently, use different qualities of “judgment” in deciding cases, or otherwise transform the legal system.¹⁴ Second, a few legal scholars applied these theories specifically to the acts of judging.¹⁵ Third, at both theoretical levels, and ultimately in a wide variety of empirical studies, scholars from many different fields argued about the validity of these claims and the alleged “sources” of gender difference (whether in biology, socialization, or political oppression and subordination).¹⁶

I will review some of those claims and empirical findings here, but it is also true that the issue of “gender difference” in legal work has more recently receded to a more quiescent period of simply documenting numbers of participants in the legal and judicial professions, without much speculation about or evidence to confirm gender differences in the structure or performance of legal and judicial work.¹⁷ The findings of the Refugee Roulette study¹⁸ change all that, and we are back to speculating on what it all means.

In this essay I will first provide some review of what we already know about gender differences in legal and judicial behavior, and then I will recap what Ramji-Nogales, Schoenholtz, and Schrag have uncovered about gender differences in decisions about whether to grant asylum in the immigration context. Finally, I will take up once again some speculations about what it all means, including why those differences in asylum grant rates exist, and offer some further thoughts about the policy implications of the present findings. I say “speculation” because although the data are clear and robust here, the present study does not include

qualitative data or interviews with the decision makers to test any of the hypotheses or speculations I (or Ramji-Nogales, Schoenholtz, or Schrag) offer here. Clearly, more empirical work is required. For example, to the extent that future researchers could get access to study hearings, they could code for differences in process behaviors and rulings. Simple interview studies could also at least let the judges speak for themselves about what they think they do in judging claims so that at least at the self-reporting level we could see if there are gender differences in beliefs about or conceptions of what judges are doing.

B. Empirical Findings on Gender Differences in Legal Decision Making

For decades political scientists have been studying the correlations of a variety of demographic and political factors with particular judicial outcomes. In short (more detail provided below), the results are quite mixed and, I would say, inconclusive, with many researchers proclaiming that there is little to no support for the claim that women judges behave differently than men judges.¹⁹ In addition to the empirical data, there is the claim, often made, that judging, by role definition, demands neutrality and so women don their judicial robes and roles to literally “disembody” themselves and assimilate to a “neutral” or male model of judging so as to draw the least amount of attention to their biological or “embodied” gender.²⁰ Judging is, after all, about being “neutral,” “impartial,” and unbiased, not letting personal characteristics or relationships interfere in any way with decision making. Consider the image of “Lady Justice” (yes, a woman representing justice) who is blindfolded so she weighs her scales of justice without “seeing” who the parties before her really are.²¹ Both the judge and the parties are “disembodied,” representing only their legal claims and not their personhood.

On the other hand, there is a growing body of empirical work that does find some gender differences in judicial behavior,²² noting that among other things, women judges may be more likely to find discrimination in employment (by both race and gender),²³ that women are both more and less harsh in criminal sentencing,²⁴ including in cases where criminal offenders have done great harm to women, as in rape or sexual assault cases,²⁵ but are also sometimes “harsher” on women in family law cases.²⁶ An early study found that women were more sympathetic to those seeking to avoid the draft,²⁷ supporting theoretical arguments that because women are mothers they are more inclined to disfavor war and military solutions and more likely to seek “peace” in a variety of different contexts.²⁸ Other studies have found that women were more likely to vote with claimants and mothers (in criminal-justice and family-law settings), while male judges were more likely to protect individual interests of accused persons.²⁹ In another study,

women judges on state courts were more likely to vote “liberally” on obscenity and death penalty issues. In such cases just the presence of one woman on a state supreme court could increase the probability that the rest of the court would follow a more “liberal” position.³⁰

Clearly, there is “conflict in the circuits” (and trial courts and appellate courts) and in the data on the issues of whether there are gender differences in judging and, if there are, in what direction they operate (“protectionist” of same-gender interests as in family and discrimination matters, or harsher for differential expectations of different genders, especially in criminal and family law matters).

As I will discuss more fully below, these complex, and sometimes contradictory, empirical findings on gender differences in judging track the contradictory and inconclusive literature on whether there are gender differences in legal practice generally.³¹ There is empirical work that supports claims that women perform certain lawyering tasks differently,³² or are more “ethical,”³³ or have different goals with respect to the purposes of their legal work, such as being more oriented to public interest work,³⁴ and other studies that claim that no significant differences in practice protocols can be observed.³⁵ For many years (indeed, one could say for centuries), it was widely assumed that women would practice and interpret law differently or at least disrupt the study of law, as is evidenced in the many successful efforts to exclude women from law schools for most of human (and American) history.³⁶

There is fairly consistent research on the continuing occupational segregation of women in the profession, women being disproportionately represented in the public sector and still not present in the upper reaches of the large corporate law firm partnership.³⁷ As studies of gender difference in the practice of law and judging continue, I suspect we may be in the middle of a generational shift. The way women are recruited and socialized to the profession in times of scarcity as opposed to times of “critical mass”³⁸ may determine the relative “freedom” that women (or other “minorities” in the workplace) have to express particular views, attitudes, or behaviors. Early gender-difference literature confirmed that early recruits to a male- (or white-) dominated profession were quite likely to “conform” or assimilate to traditional patterns of behavior. As the more recent studies of gender differences in judging are demonstrating, the numbers of findings of difference seem to be increasing, perhaps signaling larger samples from which to observe and study differences, as critical mass and representation of women increases in both the judiciary and the practice of law generally.³⁹ Since there are a relatively large number of women judges in the immigration system (32%), perhaps women judges in this system are within the “critical mass” range and feel “freer” to rule and decide on their own terms and interpretations of the law and facts. Or, it is also possible that since the immigration judiciary suffers

from being less “public” and is less “prestigious” than other court settings, women may feel “liberated” (without much scrutiny or because no one really “cares” about what they do) to decide cases in ways they think are appropriate and just, without needing to “conform” to a male “norm” of higher denial rates.

It is also quite important to observe that more recent studies of women as judges are focusing on differences where there are “mixed panels” of judges, as in various appellate courts, as opposed to the single trial judge making decisions on her/his own. The present study looks at judges at the trial and some appellate levels (Board of Immigration Appeals, circuit courts of appeals) but, due to lack of adequate data, has not looked closely at differences in the gender composition of multiple-judge panels.⁴⁰ A growing body of work on the paths of influence and collegiality in multiperson judging situations suggests that mere representation of women (or other nonmajority male judges) may alter the decisional processes and outcomes.⁴¹

C. The “Gender Gap” in Asylum Judging

In addition to the primary finding of a wide gap in asylum grant rates for women and male judges (53% rate of granting asylum for women, versus 37.3% for men, making it 44% more likely for a claim to result in a grant of asylum when brought before a woman immigration judge), other empirical findings of the present study illuminate the power of “gender plus.” When gender is combined with other variables, the “gender gap” in judging rates may be even more profound. Prior employment settings and reactions to the presence of claimants’ dependents and family members are among the factors that interact with “simple” gender differences.

Paths to the traditional bench are quite different for women,⁴² as the findings of difference in pre-judicial employment of immigration judges in this study confirms. More women than men who ascend to the immigration bench work in nongovernmental organizations (29% for women to 9% for men), but, in contrast, many more men than women come from governmental enforcement agencies like the Department of Homeland Security or the previously named Immigration and Naturalization Service (56% of men compared to 51% for women). Men were more likely to come from governmental enforcement agencies potentially more sympathetic to enforcement and exclusionary practices and policies than women, who worked in settings more “sympathetic” to asylum seekers, including both government and private practice. On the trial bench generally women are more likely to come from government, legal education, and other public services than are male judges, who disproportionately come from large law firms and prosecutorial roles. Thus, differences in judicial behavior may simply be a further reflection of earlier gender differentiation in opportunities for socialization in different work

environments. Whether women “choose” or are “pulled” toward public service or are “pushed” toward it through exclusion from other work environments remains a much-studied question in occupational segregation and socialization studies.⁴³

Prior work experience clearly affects grant of asylum rates (according to the gender judging data here). Those with prior government service granted asylum in 39.6% of cases compared to 47.1% of those from NGOs or private practice, with prior DHS and INS experience explaining much of the variance (those without DHS and INS experience granted asylum 48.2% of the time, compared to 38.9% of those with DHS/INS experience). Judges with experience in academia, private law practice, and NGOs were all more likely to grant asylum than those with DHS/INS experience. A few female judges, who are beginning to write about their experiences as judges, have reported that their experiences as women jurists *qua* women, including both work and family roles (as mothers, academics, reformists, particular kinds of lawyers, such as family lawyers), and their needs to be sympathetic to differences, do and will affect how they perform as judges.⁴⁴ Thus, Baroness Hale, the highest judge in the United Kingdom, for example, has been studied as one who has used her experience in family law and as an academic to understand and write differently about some women’s issues, such as family (dis)connections and appropriate clothing for Muslims in public schools. Female immigration judges may understand from inside experience (through personal or professional and representational experience) some of the particularities of women’s asylum claims (such as those that are explicitly gendered, such as domestic violence or cultural practices like female circumcision).

Nevertheless, the gender judging findings here found a strong gender difference in asylum grant rates, independent of prior work experience, demonstrating just how profound and robust the “gender gap” findings in asylum grant rates are here. As the data demonstrate, female judges still have higher asylum grant rates regardless of work location. Gender differences in asylum grant rates persist and indeed get stronger when gender is combined with other variables such as whether applicants were represented by counsel (female judges granted asylum in 55.6% of cases with representation while male judges granted asylum in only 14.3% of cases where the applicants were unrepresented).

One additional finding of this study is relevant to the issue of gender differences in judging. Professors Ramji-Nogales, Schoenholtz, and Schrag found that the presence of dependents (usually children, but sometimes also spouses) also dramatically increased the likelihood of a grant of asylum. Those with no dependents had a 42.3% grant rate, whereas having one dependent increased that rate to 48.2%, a statistically significant difference. The existence of these family members may mark both increased credibility and increased sympathy for the claimant. Knowing that by denying the claim a judge may be sending a whole family to

their deaths or serious injury or to a parentless living situation may cause those who “care” about family and child well-being to increase their likelihood of granting asylum. As I discuss more fully below, this “family” effect is consistent with some of the theoretical claims made about what female judges may consider as relevant and appropriate in deciding such cases.

Thus, despite somewhat equivocal findings about gender differences in previous studies of judicial behavior in courts, gender differences in judging asylum cases noted in this study are quite pronounced.

D. What It Means: Why Are Women Judges More Likely to Grant Asylum?

The dramatic findings of this study demonstrating that women immigration judges are 44% more likely to grant asylum than male judges revitalizes the debates of gender differences in judging and legal behavior of the last few decades. The current study has probably a bigger database of cases and judges than most, if not all, of the prior studies of this phenomenon and so may provide a more rigorous test of gender-difference claims. On the other hand, immigration cases, and the asylum claim in particular, are located in a unique context, conjuring up terrible harms and suffering if asylum is not granted, relying on relatively vague legal standards, being very fact intensive in proof requirements, requiring a great deal of discretion, and, at the same time, are overshadowed by highly contentious immigration-policy concerns about how “open” to make our borders. Whether the strength and robustness of the gender-gap findings here would be replicated in other judicial settings is less clear. Consider, as one possible comparison, Social Security disability claims. These are also claims that rely on testimony about levels of pain and suffering; there may also be a “critical mass” of female judges in this system, but the legal regulations and definitions of disability are more delineated and more rigid. Studies of other judicial settings would provide an interesting test of the true extent of this “gender gap” in judging behavior.

In trying to understand why there are gender differences in judging asylum cases, it might be useful to revisit one of Carol Gilligan’s other moral fables, a more recent one that is remarkably close to the issues presented by asylum cases. In her work on “the two moralities,” Gilligan posed the following problem to young girls and boys:

Two industrious moles have worked all summer to build themselves a shelter for the winter. When winter arrives, a less forward-looking porcupine pleads with the moles to share their comfortable hole. In their concern, they take the porcupine into their close and small space and then are hurt by the sharpness of the porcupine’s quills.

What should the moles do?⁴⁵

In Gilligan's studies, adolescents with a "rights" or "justice" orientation (more often, but not exclusively, boys) suggest that the porcupine should be thrown out (or excluded from the comfortable hole) because the moles built the hole with their hard labor and earned moral desert. Indeed, if the porcupine refuses to leave "voluntarily," many young boys in the study said it would be morally permissible for the moles to shoot the porcupine. Sound familiar? Is this the brutal boundary defense with a theory of border-based moral desert that our immigration policy enacts? Why should those who have not participated in creating the American polity be allowed to enter, just because, like the porcupine, they have a "need" to get out of the cold (or more dangerous situations of persecution)?

Young girls in the study were much more likely to be sympathetic to the porcupine and looked for other ways to account for and satisfy the needs of both the moles and the porcupine. They were more likely to develop solutions like using a blanket to cover the porcupine, asking the porcupine to work with the moles to enlarge the living space, or creating a separate space for the porcupine to use. Those who responded by trying to find a solution for getting the porcupine out of the cold are labeled those who reason with an "ethic of care."

As studies using this fable have accumulated, data indicate that most men and about one-third of all women use the first, "rights"-based approach to the moral dilemma and about two-thirds of women and a smaller group of men use the latter approach.⁴⁶ In the first approach, like Jake's reasoning in the Heinz Dilemma, reasoning is from abstract, rational, and universal principles—land, holes, housing, and property belong to those who work for them—moral desert based on effort and boundaries. For those who seek to include the porcupine (even if he didn't contribute, initially, to making the hole) values of human need, care, connection, social responsibility, and sharing dominate concerns about efforts, boundaries, and rights. If you don't like to see suffering of any other sentient being, then it is hard to "exclude" the needy.

The Porcupine's Dilemma of moral desert or human need aptly represents some of the challenges faced by immigration judges, who, after all, have a statute to interpret. What is a "well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion" on account of which a person outside of his country is "unable or owing to such fear, unwilling to avail himself of the protection of that country" and therefore should be granted asylum as a refugee?⁴⁷ Is the porcupine's fear of the cold within a qualifying category? How much suffering must he endure? Is he excluded because his species/race/nationality of porcupine is disfavored by his native habitat and "country" or by those who rule in his native land, or because he is different from the moles? Judgments about how to characterize groups, categories, facts, and the relationship of individual harm(s) within collective entities (e.g., social groups,

religions, nationalities, political groups) require much discretion, as well as evidence, and interpretation. Like the porcupine who pleads for “mercy” and empathy, asylum applicants tell stories of suffering, fear, and serious physical harm. Whether they are allowed to crawl into the safe “hole” may depend on whether the deciding moles are male or female, whether they are considering rational and abstract principles, and precedent, or simply human need.

Since there are no settled quotas on successful asylum applicants, individual judges must determine in each individual case, with the aid of whatever precedent exists from past decisions, BIA decisions, and the appellate cases from the relevant circuit court of appeals, whether to let a particular candidate “in” or not. The fact-dependent nature of these cases and their individuality makes it relatively easy to treat each case almost *sui generis*. Thus, unlike many other settings in which the effects of gender in judging have been studied, immigration cases may provide an arena of greater discretion, greater fact specificity, and broader relevance, and a site where particular stories of human need and suffering may, at least for some decision makers, “trump” the more broad, vague, and abstract legal standards. It would be useful to study more rigorously whether gender differences in judging vary with respect to the confines or specifics of the law being applied. For example, Rand and Dana Jack found in their studies of lawyers’ ethical behavior that men and women acted or opined about ethical matters quite similarly when the ethical rules were clear (e.g., applying confidentiality rules) but were quite different when there was little specific direction or more discretion in a particular rule interpretation (such as when to disclose information to the other side in a contested matter).⁴⁸

If Amy, Portia, and female moles reason with an “ethic of care” rather than an “ethic of rules and justice,” then female immigration judges may be more likely to listen to stories of human need and suffering with a more empathic, or sympathetic, ear. If, as the data above show, women judges are more likely to be sympathetic to (or rule in favor of) claimants in discrimination and family law cases, perhaps the combination of persecution for ethnic, national, religious, or even political affiliations, coupled with concerns about the harms visited upon possibly abandoned dependents, makes asylum claims more likely to be validated by women judges.

To the extent that immigration cases combine intensive fact determinations with a relatively vague and broad statutory standard, they are precisely the kind of case in which appeals to need, emotional elements, and nonlegal factors may be particularly salient. Thus, like the studies that demonstrate that men and women do not differ much in their judging behavior unless gender itself is salient (as in discrimination, family law, and a variety of other case types), immigration may fall on the side of personal or human need (rather than commercial or other civil

claims) that may be, in some cases, gendered.⁴⁹ Where determinations of cases are more dependent on human considerations, both in terms of evidence (credibility, storytelling, degree of personal fear, suffering, and harm) and in terms of directly observable outcomes (if asylum is not granted, the losing claimant is automatically “removed” and may be detained, if not already in detention), the tearing or breaking of human connections and lives may be salient by gender (in a disproportionate number of, if not in all, cases). As Robin West has eloquently argued, the law needs to take account of women’s hedonic needs, including claims (like relationship and familial [dis]connection) that have previously been under-protected in the law.⁵⁰

In another context, I have reported on my own experience as a judge (arbitrator) in a gender-salient set of cases.⁵¹ For some years I was an arbitrator in some of the thousands of hearings attended by victims of a mass tort, involving a defective product, the birth control device Dalkon Shield, which caused injuries ranging from death to infertility, unwanted pregnancies, excessive bleeding, infections, and pain to exclusively female claimants.⁵² The Dalkon Shield Claimants Trust (which managed the arbitration hearings from inside the bankruptcy proceedings of the manufacturer, the A.H. Robins Company, and was administered by Duke University’s Private Adjudication Center) initially sought to use as decision makers labor arbitrators, who turned out to be more or less exclusively male. I was recruited as the first woman, followed by many others, to begin to hear these cases, as the program’s managers realized that all the claimants were women who were to testify about very intimate details of their lives. While both I and other researchers had hoped to formally study this claims process as an excellent study of gender differences in judging, among other things, formal data analysis was never completed (the outcomes of the arbitration awards were confidential). Nevertheless, in many informal meetings of the arbitrators and the management of the program, gender differences in judging were revealed (not always in a predictable direction). In some cases male judges were more likely to grant higher amounts of damages (there was a monetary cap on all cases) because they were moved by the pain and suffering they heard about; in other cases male judges admitted an inability to assess the “female” pain of bleeding and reproductive organ pain and malfunction. In many cases women arbitrators had first-hand knowledge and experience of the symptoms and injuries and thus could both empathize with, but also discount, the claims made by injured claimants. Though we have no formal data on outcome differentials, it was clear to us that there were some (in both directions of harshness and generosity of awards, even within a relatively small range of awards within the cap). Nevertheless, during the hearings and afterward, I, and many of the other women arbitrators, received tearful acknowledgments and letters of gratitude for the processes we had presided over

with care (providing tissues, among other things), and for providing some relief to the claimants who had to testify about intimate “female” problems and their sexual history to a female, rather than male, judge.

This is not to say that some male arbitrators did not also provide fair and caring processes (as some of the males responding to Gilligan’s Porcupine Dilemma did), but my own experience in the Dalkon Shield hearings confirms what much of the empirical data on judging is now suggesting: the gender of judges may matter if the issue being decided is *gender salient*. What is gender salient (biological concerns, family issues, discrimination claims) of course remains highly contested. Here it is important to note several different issues—where a contested issue in a case does involve gender, there may be gender differentials (and those gender differentials can operate in contradictory directions, such as more harsh or lenient treatment of female criminal offenders, less credibility attached to particular kinds of claims and injuries) in outcomes. This is consistent with some of the findings of studies of individual judges and justices such as Sandra Day O’Connor and Baroness Brenda Hale, on the highest courts of the United States and United Kingdom.⁵³ Second, gender behavior in the court or hearing room (judicial temperament, process, rulings on what is relevant, salient, admissible) may be “different,” irrespective of final outcome. To the extent that we know from the literature of procedural justice that process matters for participants’ valuation of legal processes,⁵⁴ the way judges behave during the hearing may be extremely important to claimants and participants in legal processes, irrespective (or unrelated to separate assessment) of outcomes. Thus, the role of gender in judicial processes is complex.

While many have argued that because judging requires “neutrality” there will be little evidence of difference in either process or outcome, several legal scholars have suggested a variety of characteristics that women judges might bring to the bench, including compassion, a broader sense of relevance and admissibility, patience, a greater sense of “connection” to the litigants, a broader sense of context, more generous conclusions about credibility (especially in cases of pain and suffering), more attention to storytelling and narrative than crisper, leaner, more legalistic testimonial evidence, and more sympathy for particular kinds of claimants (the helpless, children, other oppressed or subordinated people).⁵⁵ Imagine how the descriptions of the “rational” judge of Ronald Dworkin’s Hercules⁵⁶ would have to be broadened to include some of these characteristics. While many descriptions of appropriate judicial characteristics include such abstractions as detachment, impartiality, disengagement, neutrality, independence, discernment, analytic ability, strength, clarity, decisiveness, freedom from bias, open-mindedness, and commitment to equal justice,⁵⁷ those arguing that women judges will bring more of their “gendered” experiences, in both personal and professional

roles, to the bench suggest that other and appropriate characteristics should be added to any description of judging, including the values of compassion, Portia's empathy and mercy, connection to (not disengagement from) litigants, courtesy, sensitivity, and a deeper sense of context. Such authors (and I am among them) have argued that to add these qualities of judging is not to challenge or change the values of neutrality and lack of bias—indeed, they add to the justice and fairness of decision making by adding human and appropriately affective (emotional)⁵⁸ considerations to what are not always totally rational or rule-/law-based decisions. Thus, while often protesting that women will not “do justice” differently, many commentators still argue for representativeness of judicial bodies, suggesting that in order to represent all the values that make up “just” decisions, women (as well as other underrepresented groups) should be on the bench to reflect the full range of values that exist in a society that defines justice democratically.

Several literary and cultural sources provide stark representations of these empirical findings and arguments (if not through rigorous social science). In Susan Glaspell's famous play and short story, *A Jury of Her Peers*,⁵⁹ the wives of the legal investigators and prosecutors of a murder of a local farmer in a remote region of the Midwest consider “evidence” of the crime that is outside the “view” or literal understanding of the male professionals. While the men look at conventional sources of proof for determining who committed the murder, the wives discover that the wife of the farmer (the main suspect) has had her pet bird's neck broken, cruelly. They infer from this “evidence” that she has been the subject of her husband's brutality and probably killed in “self-defense.” They, without words, “judge” her nongUILTY by virtue of excuse or justification and quietly remove the evidence their legalistic and conventional husbands could neither “see” nor interpret properly. This story illustrates what has been called by feminist analysts a “women's way of knowing”—deeply contextual thinking, looking at facts or “evidence” that would not necessarily or conventionally be considered legal, and understanding motivations and facts that might not be formally considered relevant. The women in this story act as judge and jury and “acquit” their “fellow” wife from a place of empathetic understanding of what and how hard her life was. This story evokes complex reactions. To those who think the wives have “violated” formal law by collaborating in the destruction of evidence, they are “lawless.” To a large number of commentators, they are performing a higher justice (especially in an era when women could not serve as actual judges or jurors) in considering the facts outside the murder scene and seeing the wife's action in the context of her life of terrible suffering. Glaspell based her play and story on a real case, which she covered as a journalist, and she has been read as criticizing the formality and limitedness of conventional (male) legal systems, which, with their formal and narrow rules, do not do justice.

More recently, the film *Frozen River*⁶⁰ demonstrated a similar “women’s justice” on the U.S.–Canadian border as two women, one Native and the other Anglo-White, become reluctant partners in an unlawful human smuggling operation across the border. They know that what they are doing is unlawful, but both of them are working to make money to provide for their children—a home for the white children and an attempt to regain custody of her lost child for the Native woman. In the course of their work they discover they have almost killed an innocent baby belonging to one of their smugglees and they return at great danger to themselves to rescue and resuscitate the baby. (Many viewers of the film in the commercial theater at which I viewed it openly discussed whether male human traffickers would have done the same!) Eventually, despite their initial distrust of each other, these women care for each other and each other’s children. The white woman (Ray Eddy) helps the Native Woman (Lila) recapture her own child and then Lila becomes the caretaker for all their children as Ray Eddy takes the “rap” for their activities and is incarcerated. The film is a searing look at one of the least-known sites of border crossings (the Mohawk region on the New York-Quebec border) and its brutal honesty and frigid landscape all the more dramatically reveal the little bit of human warmth provided by the female characters as they attempt to raise their families alone and facilitate the desire of illegal border crossers to find a better life.

True, another recent film about immigration, *The Visitor*,⁶¹ depicts the growing human connections between a male widower college professor, Walter Vale, and the Syrian and Senegalese immigrants who are squatting in his New York apartment. But this film also demonstrates the futility of individual stories and narratives to achieve immigration justice in the period of post-9/11 immigration rules and practices. In this film the connections are ultimately severed as Tarek (the young Syrian musician) is deported back to Syria, separating him from his girlfriend, his mother (Mouna, who lives in the Midwest,) and Professor Vale. All are helpless at changing the legal turns of events and Tarek’s mother (yet another female heroine marked by her connection to family) returns (at great risk to herself) to Syria to be with her son, sacrificing many things, including a budding romance with the now rehumanized professor, who, perhaps because he is so law-abiding and timid, is less efficacious than the “lawless” women of *Frozen River*. In juxtaposition these films demonstrate how a man (Professor Vale), slavishly following the law and passively obeying it, may do greater injustice (at a deeper moral, not legal, level) than women (Lila and Ray Eddy), challenging the law and living as “outlaws” on the “edge” of countries and lives.

Certainly, these are only fictional, if powerful depictions of the modern world of immigration, from both sides of legality and lawless borders,⁶² but the filmmaker storytellers, like asylum applicants, are trying to demonstrate the indi-

vidual pain and suffering that occurs with vague and harsh rules and arbitrary and often brutal enforcement, and in their different ways, they also appeal to our emotional and human, as well as legal, sense of (in)justice.

Thus, in a system of judging asylum claims that requires claimants to tell their stories of persecution, harm, and suffering and not only to satisfy the statutory standards but also to persuade a judge that a particular case has merit, both for the individual and for the political issues implicated in refugee law, it should not be surprising that emotional appeals, good storytelling, affidavits, and narratives from family members and others who have been persecuted might draw greater responsiveness from (at least some) women judges, especially those who have worked within the immigration legal system.

The findings of this study are consistent with my claims of twenty-five years ago that women judges might encourage more participatory, less adversarial-like, more “conversation-like” proceedings within formal evidence rules and, therefore, might be more likely to elicit a stronger, longer, and more detailed narrative from a traumatized asylum claimant.⁶³

Finally, as both quantitative and more qualitative studies of gender judicial behavior demonstrate, women judges themselves have suffered disproportionately from discrimination⁶⁴ (at work and in other aspects of their lives) and thus may be more inclined to believe (credibility assessments) and empathize with asylum claimants. Perhaps, at least for some, this experience of discrimination permits them, literally, to “hear” better the “different” voices in their courtrooms, including the literally hundreds of different languages represented in asylum hearings.

The particular findings of gender differentials in asylum grant rates here do continue to raise some interesting, and as yet unstudied, questions, calling for more research. First, and most importantly here, how do these judges describe their own judicial behavior? How would both male and female immigration judges react or respond to the findings here? Would they be surprised? Would they offer illustrations of their own motivations or explanations about why they might differ in their rulings from each other by gender? Second, are asylum cases *gender salient* as I have described that concept here—does freedom from persecution, connection to family members, or other aspects of this claim make it more like a discrimination, subordination, or family claim than other kinds of cases in which there appear to be little or no gender disparities in outcomes?

The gendered nature of asylum claims has been most pronounced in a variety of contested cases involving genital mutilation⁶⁵ and domestic violence⁶⁶ as “persecutions” on the basis of membership in a “social or political” group, that of persecuted women, not yet recognized by most courts as a qualifying category. And, to measure another possible influence of gender, it would be interesting to compare grant and denial rates by gender of the asylum applicant (and to look at

interactions of the gender of the applicant and the judge).⁶⁷ Unfortunately, such data were not provided in the current study.

Third, can we test empirically some of the claims I have made here about more inclusive evidence, more conversational, less adversarial hearings—both the existence of these possibly differential processes and their effects? (Not likely, given the lack of transcripts in most cases, especially those that are not appealed.)

Fourth, how should we account for the fact that asylum cases call for binary (yes or no) decisions? This is not an environment in which, like Amy, we can search to meet the needs of all the parties. Either asylum is granted or it is not—no negotiation, mediated process, or intermediate outcome is permitted under the rules. Are women more likely to resolve a doubt or use a different standard of proof if the evidence is not totally clear on one side in favor of granting asylum while male judges exercise their blunt cuts more often in the other direction? Does the gender disparity in outcomes hold true for other kinds of immigration claims (removal, etc.)?

Finally, what might the consequences be for the asylum judicial system of knowledge of these findings? How will represented claimants try to “game” the system to be assigned to female judges, despite the clerk’s random assignments? How will unrepresented claimants fare in an environment where experienced or well-educated lawyers know of these results but unrepresented parties will not? (Badly, we can assume, since their grant rates are already much lower than those who have counsel [45.6% of those who are represented are successful in seeking asylum, compared to 16.3 % who do not have counsel].) All of these unanswered questions call for more research and make the policy implications of the present study difficult to assess.

E. Policy Implications of the “Gender Gap” in Asylum Judging

Though the findings are clear, strong, and relatively robust (even when tested against and combined with other important variables) that women immigration judges are much more likely to grant asylum than their male colleagues, what we should do about these findings is much less clear. The danger, of course, is that such findings will be used to proclaim women judges too “soft” or “lenient” in an era of immigration phobia, especially after September 11, 2001, has hardened our immigration policies and, in principle, if not in actuality, hardened our borders. This could cause a serious backlash against women judges, both in appointing them and in monitoring their behavior. Even worse, those already serving as immigration judges might see these results and decide to “overcompensate” by increasing denial rates to prove their even-handedness and neutrality. Worse yet,

these findings could “infect” judicial appointments generally, not just to the immigration courts, by providing fodder for those who want to argue about women judges being too “soft.”

On the other hand, we could look at what makes women judges more likely to grant asylum as a sign that our system needs redirection. Perhaps the “ethic of justice” (and rules and formality) should, in Portia’s words, “be tempered with mercy.” Perhaps women judges encourage more respectful courtrooms with active listening that allows traumatized victims of persecution to tell a more complete and accurate story. Perhaps a little compassion is appropriate in a potentially life-ending judicial proceeding. We know we cannot admit everyone who wants to come to the United States, but do we know what an “optimal” or “appropriate” number of refugees is, given both world conditions and our capacity to offer safety and shelter to those who need it from outside of our well-constructed “hole” of warmth in winter? Perhaps two sorts of heads and hearts (both male and female) can give us better answers when they work additively and together.

Like the principal authors of this book, I do not think we should deal with gender disparities by issuing quotas or numbers for immigration judges to measure themselves against. I do think we should pay some attention to who our immigration judges are and how they are selected, trained, and evaluated.⁶⁸ Most state and federal judges are accountable, in some cases by election, in others by appellate review or publication of decisions, opinions, and reversal rates. Just learning what we have from this study should demonstrate the importance of seeing and understanding those “social facts” that we learn from statistical analysis—the patterns in the aggregate that are often not readily apparent to the “naked” human eye. Clearly we need to study more the *why* and the *how* of the differences in gender judging in immigration.

In the meantime, however, I would suggest that we reorder what we think the “norm” ought to be. Perhaps in a world that is brutish and getting ever “smaller” and at the same time continues to have its share of cruelty, we might consider how appropriate it might be in a system of refugee protection to consider other factors and different processes—including more inclusive, less formal hearings, consideration of family connections and emotions, and a generous benefit of the doubt in credibility determinations, rather than overly harsh cross-examinations—for those who have usually undergone enormous hardship just to get here and make an asylum claim in the first place.⁶⁹ Perhaps the processes that produced a higher grant rate for women judges should be the processes and decision rules for all. Perhaps asylum in a “different” voice might be asylum in a “better” voice as well.

NOTES

1. Carrie Menkel-Meadow is A. B. Chettle Jr. Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center, and Professor of Law, University of California, Irvine. I thank my colleague and friend Philip Schrag for the invitation to reflect on these important issues and for the opportunities he has provided over the years for me to participate in the supervision of clinical students undertaking representation of asylum seekers. I come from a family of those who were persecuted for their "ethnicity and religion" (though they were, in fact, not practitioners of any religion) and who would have faced sure death in the Holocaust's concentration camps, but for their perseverance, bravery, hard work, luck, and social connections. I have learned from personal and professional experience how random justice in this arena (or any other) can be and dedicate this essay to the hope that if we understand better the human roulette we are playing we can increase the chances for true justice to be done. Thanks to Bert Kritzer, Tranh Nyugen, and Timothy Moore for substantive and bibliographic assistance and support.
2. See chapter 3, page 47.
3. As the data here show, grant rates vary enormously by region, ranging from a low of 26% (Region H) to a high of 62% for Region D, see chapter 2, page 22, table 2.1. In addition, grant and denial rates vary by nation of origin of the asylum applicant. In some regions, there is relative uniformity about the level of "persecution" in a particular nation, such as China or Colombia; in other regions there may be wide disparity among decision makers within a region about how to treat the conditions of particular countries, see chapter 2, pages 22–28.
4. Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rep.* 175 (1982).
5. Lawrence Kohlberg, *THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES* (1984); id., *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981).
6. Carol Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) at 25–31.
7. E. Dubois, Mary Dunlap, C. Gilligan, C. MacKinnon, C. Menkel-Meadow et al., *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buffalo L. Rev.* 11, 36 (1985).
8. 1 *Berkeley Women's Law Journal* 39–63.
9. Such as N. Chodorow, *THE REPRODUCTION OF MOTHERING* (1978); J. Miller, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976); N. Noddings, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1974); A. Schaeff, *WOMEN'S REALITY* (1981). Cf. E. Maccoby & C. Jacklin, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974).
10. Shakespeare, *MERCHANT OF VENICE*. Of course, it is also true, as I argued later, see *infra* note 31, that Portia was quite an effective traditional lawyer in arguing her case, disguised as she was, as a male jurist.
11. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 *Vt. L. Rev.* 1 (1990); Joan Tronto, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993); Eva Feder Kittay, *WOMEN AND MORAL THEORY* (1987); C. Menkel-Meadow, *What's Gender Got to Do with It? Morality and the Ethic of Care*, 22 *N.Y.U. Rev. of Law and Social Change* (1995); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 *Geo. L. J.* 2665 (1993); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 *Seton Hall L. Rev.* 288 (1993).

12. See e.g. Robin West, *CARING FOR JUSTICE* (1997); Robin West, Unenumerated Duties, 9 *Univ. of Penn. J. Constitutional Law* 221 (2006).
13. Portia in a Different Voice, *supra* note 8 at 49–55.
14. 38 *Journal of Legal Education* 1, Symposium on Women in Legal Education (1988); 25 *Law and Society Review* 221, Symposium on Gender and Sociological Studies (1991); C. Menkel-Meadow, Mainstreaming Feminist Legal Theory, 23 *Pacific L. Rev.* 1493 (1992); C. Menkel-Meadow, *Women's Ways of Knowing Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence*, in *KNOWLEDGE, DIFFERENCE, AND POWER* (Bilenky, Clinchy, Goldberger, Tarule, eds. 1996).
15. J. Resnik, On the Bias: Feminist Reconsideration of the Aspirations for Our Judges, 61 *S. Cal. L. Rev.* 1877 (1988); *id.*, Feminism and the Language of Judging, 22 *Arizona St. L. J.* 31 (1990); S. Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 *Virginia Law Review* 543 (1986) (focusing on the gendered jurisprudence of Supreme Court Justice Sandra Day O'Connor); C. Menkel-Meadow, Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process, 31 *Loyola-Los Angeles L. Rev.* 513 (1997–98).
16. See e.g. Linda Kerber, Catherine G. Greeno, Eleanor Maccoby, Zella Luria, Carol B. Stack, and Carol Gilligan, On *In a Different Voice: An Interdisciplinary Forum*, 11 *SIGNS* 304 (1986); Women and Morality, 50 *Social Res.* 487 (1983) (methodological, sociological, and epistemological critiques of Gilligan's claims); Lawrence Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, in *AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES* 49 (Mary J. Larrabee, ed. 1993).
17. Edward Laumann, John Heinz, & Robert Nelson, *URBAN LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (2005); J. Hagan & F. Kay, *GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES* (1996); Clare MS McGlynn, *The Status of Women Lawyers in the United Kingdom*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* (U. Schultz and G. Shaw, eds. 2003); C. Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (R. Abel and P. Lewis, eds. 1989); C. Menkel-Meadow, Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change, 14 *Law & Social Inquiry* 289 (1989). Cf. *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* (U. Schultz and G. Shaw, 2003).
18. Introduction, chapters 1 through 6, and the Methodological Appendix of this book (hereinafter *Refugee Roulette* study).
19. See e.g., David W. Allen and Diane Wall, Role Orientation and Women State Supreme Court Justices, 77 *Judicature* 156 (1993) and Orley Ashenfelter, Theodore Eisenberg, and Stewart Schwab, Politics and the Judiciary: The Influences of Judicial Background on Case Outcome, 24 *J. Legal Studies* 257 (1995) (finding gender played no role [with a small sample] in explaining outcome differences among federal judges); Jon Gottwchall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 *Judicature* 165 (1984). This research is now extending into other countries, see e.g. Erika Rackley, Difference in the House of Lords, 15 *Social Legal Studies* 163 (2006) (U.K.); Guy Seidman, *Women as the Court: The Israeli Experience* (2005), available at SSRN, <http://ssrn.com/abstract=743944>; Ulrike Schultz, *Empathy and Emotions: Do Women Judge Better?* (2006) (Germany), available at SSRN, <http://ssrn.com/paper=910043>; Elaine Botelho Junqueira, *Women in the Judiciary: A Perspective from Brazil*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* (U. Schultz and G. Shaw, eds. 2003); Bertha Wilson, Will Women Judges

Really Make a Difference? 28 *Osgoode Hall L. J.* 507–22 (1990) (Canada); and to international bodies, see e.g. Kimi Lynn King and Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 *Soc. Sci. Q.* 1049–71 (2007) (finding that women judges sentence male offenders of sexual assaults against women more harshly than do male judges); S. Kutnjak Ivkovic, *Does Gender Matter: The Role of Gender in Legal Decision Making by Croatian Mixed Tribunals*, 22 *Int'l. J. of Soc. of Law* 131–56 (1995).

20. Anne Boigeol, *Male Strategies in the Face of the Feminization of a Profession: The Case of the French Judiciary*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, supra note 17 at 416.

21. Dennis Curtis and Judith Resnik, *Images of Justice*, 96 *Yale L. J.* 1727 (1987).

22. J. Gruhl, C. Spohn, and S. Welch, *Women as Policy Makers: The Case of Trial Judges*, 25 *Am. J. of Political Science* 308 (1981); Elaine Martin, *Men and Women on the Bench: Vive la difference?* 73 *Judicature* 204 (1990).

23. S. Davis, S. Haire, and D. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 *Judicature* 129 (1993) (finding women judges were much more likely to find in favor of discrimination claimants and also to support the claims of criminal defendants, especially in search and seizure motions); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 *Judicature* 279 (1997); Elaine Martin and Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 *Alb. L. Rev.* 1205 (2000).

24. Madhavi McCall, *Structuring Gender's Impact: Judicial Voting across Criminal Justice Cases*, 36 *American Politics Res.* 264 (2008) (finding that women judges were more likely to find on behalf of criminal justice defendants); Todd Collins and Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 (2) *Political Res. Q.* 219–27 (2008) (finding that minority women judges were more likely to support criminal defendants' claims); Darrell Steffensmeier and Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?* 77 (3) *Social Forces* 1163–96 (1999) (finding women judges generally harsher on sentencing but more contextual in weighing effects of defendant characteristics).

25. Interestingly, while more recent studies show women's sometimes leniency in sentencing, an early study (perhaps one of the first) on gender differences in judging found that women trial judges were more likely to convict for certain criminal offenses and were harsher sentencers. The explanation offered is that these early women judges who had "made it in a man's world" had to demonstrate their toughness, see Herbert Kritzer and Thomas Uhlman, *Sisterhood in the Courtroom: Sex of the Judge and Defendant in Criminal Case Disposition*, 14 *Soc. Sci. J.* 77–88 (1977). More salient for differences in sentencing rates was the gender of the defendant; male judges were more likely to sentence more lightly female defendants. See also K. King and M. Greening, *Gender Justice or Just Gender: The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 *Soc. Sci. Q.* 1049–71 (2007) (finding that female jurists more severely sanctioned defendants who assault women, while all-male panels of judges do the same for male victims).

26. Demanding that women go to work and receive less spousal support, see e.g. Junqueira, supra note 19.

27. Beverly Cook, *Sentencing Behavior of Federal Judges: Draft Cases*, 42 *University of Cincinnati L. Rev.* 597 (1979).

28. Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (1989) (arguing that maternal "caring" behavior translates into greater concerns for caring, connection, and the desire for peaceful relations in the political as well as personal spheres).

29. Moin Yahya and James Stribopoulos, Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario, *available at SSRN*, <http://ssrn.com/abstract=981300>.
30. Donald Songer and Kelley Crews-Meyer, Does Judge Gender Matter? Decision Making in State Supreme Courts, 81 *Soc. Sci. Q.* 750–62 (2000).
31. See studies collected in Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 *Va. J. Soc. Pol'y & L.* 75 (1994–95); Rand Jack & Dana Jack, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989); Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 *Law & Soc. Inquiry* 373 (1991); see also Charles Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 *Ohio St. J. Disp. Res.* 1 (1990); Naomi Cahn, *Styles of Lawyering*, 43 *Hastings L. J.* 1039 (1992); Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 *Law & Soc'y Rev.* 677 (1997).
32. See e.g. Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 *Ohio St. J. on Disp. Resol.* 337 (1990); Ann Shalleck, *The Feminist Transformation of Lawyering*, 43 *Hastings L. J.* 1071 (1992); Eve Spangler, Marsha Gordon, and Ronald Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 *Am J. of Soc.* 160 (1978).
33. Rand Jack & Dana Jack, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).
34. Women are disproportionately represented among those seeking public interest fellowships of various kinds, including those of my own institution—Georgetown's Public Interest Law Scholars (<http://law.georgetown.edu/clinics/pils>)—and the Skadden Fellowships in the public interest (source: Judith Areen, former dean of Georgetown and selection committee, Skadden Fellows, see <http://www.skaddenfellowships.org/sitecontent.cfm?page=recentFellows>).
35. Cynthia Fuchs Epstein, *DECEPTIVE DISTINCTIONS* (1988) (suggesting that “differences” are in the eyes of the perceiver); W. L. F. Felstiner, B. Pettit, E. A. Lind, and N. Olsen, *The Effect of Lawyer Gender on Client Perceptions of Lawyer Behavior*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* (U. Schultz and G. Shaw, eds. 2003) (finding clients did not find gender differences in how lawyers related to them, finding so-called women's behaviors in both men and women and valuing those qualities of listening, being informed of case progress, willingness to deal with the emotional aspects of the representation, returning calls or other communications, treating a case as important, and willingness to consider client's desires, needs, and suggestions for representation choices).
36. As Harvard Law School Professor J. B. Thayer said in 1876, “Imagine women on the bench. Would not their peculiarities of sentiment, and difference in degree and measure and intensity with which they hold them, show itself in determining what is law” (as an argument that women should not be admitted to Harvard Law School for fear they would change the meaning of law). James B. Thayer Papers, Special Collections 1 and 3, *Criminal Law Teaching Notebook* (Oct. 30, 1876), Harvard Law School Library, quoted in Bruce Kimball and Brian S. Shull, *The Ironic Exclusion of Women from Harvard Law School, 1870–1900*, 58 (1) *Journal of Legal Educ.* (2008). Dean Erwin Griswold several decades later (early 1950s) very reluctantly admitted women and queried them about what they would do with their degrees, see Karen Morello, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* (1986).
37. See Laumann et al.; and Hagan and Kay, *supra* note 17.
38. See Rosabeth Kanter, *MEN AND WOMEN OF THE CORPORATION* (1977), demonstrating that it takes a “critical mass” of women or minorities in any occupational setting to be “free” to act, either in conformity or contrary to gender expectations. When women are below the

critical mass (which can differ in different contexts), the pressures to conform or assimilate to the “male” patterns of work are quite strong and it is virtually impossible to see any “gendered” effects on the workplace.

39. Other studies continue to document lower pay for women, fewer promotional opportunities, and differential satisfaction rates with the profession, see e.g. F. Kay and J. Hagan, *Raising the Bar: The Gender Stratification of Law Firm Capitalization*, 63 (5) *Am. Soc. Rev.* 728 (1998); F. Kay and J. Brockman, *Barriers to Gender Equality in the Canadian Legal Establishment*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS* (U. Schultz and G. Shaw, eds. 2003).

40. In 2002, policy changes made by Attorney General John Ashcroft made single-member BIA panels and decisions more or less the norm, thereby reducing the possibilities of more collegial processes and decision making in appeals from immigration court cases, see p. 000. In any event, the data provided by the BIA for this study did not permit analysis of how individual judges (or multiperson panels) ruled on cases by individual. Similarly, data were insufficient for analysis of individual judges on the federal circuit courts of appeals.

41. See e.g. Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decision-Making in the Federal Appellate Courts*, 114 *Yale L. J.* 1759 (2005); Songer and Crews-Meyer, *infra* note 30; Seidman, *supra* note 19; Ivkovic, *supra* note 19.

42. E. Slotnick, *The Paths to the Federal Bench: Gender, Race, and Judicial Recruitment Variation*, 67 *Judicature* 370 (1984).

43. See e.g. Martha Blaxall & Barbara Reagan, eds., *WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION* (1976); Barbara Reskin & Heidi Hartmann, eds., *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* (1986); see also C. Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The Feminization of the Legal Profession*, 24 *Osgoode Hall L. J.* 897 (1986).

44. See e.g. The Hon. Lady Brenda Hale, *Why Should We Want More Women Judges?*, *Public Law*, 489–504 (Autumn 2001).

45. This is my paraphrase of the moral fable, see Menkel-Meadow, *Portia Redux*, *supra* note 31 at 79; see discussion of Gilligan's use of this fable (derived from an Aesop's fable) in Diana T. Meyers, *The Socialized Individual and Individual Autonomy*, in *WOMEN AND MORAL THEORY* (Eva Kittay and Diana Meyers, eds. 1987).

46. Menkel-Meadow, *Portia Redux*, *supra* note 31 at 80; Meyers, *supra* note 45 at 141–42.

47. This language, adapted from the UN Charter creating the Office of the UN High Commissioner for Refugees (UNHCR), moved into the 1951 Convention Relating to the Status of Refugees (not ratified by the United States but imported through the United States's ratification of the related Protocol Relating to the Status of Refugees almost two decades after the Convention was written), and ultimately into American law in the Refugee Act of 1980, see Philip G. Schrag, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* (2000).

48. Jack and Jack, *supra* note 33.

49. Several scholars have noted after studying the decisions of the highest-ranking woman in the British judiciary, the Honorable Baroness Brenda Hale, that her decisions in particular cases (involving familial [dis]connection, unwanted parenthood, indecent assault, and the contentious issue of Muslim dress for girls in public education) may differ not just in outcome but in mode of reasoning—what is considered relevant and salient to decisions and how litigants are connected to other family members or those who harm or control them. This does not compromise “neutrality” or justice, argue these scholars, but instead broadens what is legally salient and relevant from the perspective of one (a woman) who understands something about women's roles

- in society. See e.g. Erika Rackley, *Difference in the House of Lords*, 15 (2) *Social & Legal Studies* 163 (2006); John Mikhail, *Cultural Legality and Orientalism: A Comment on Roger Cotterrell's Struggle for Law and a Criticism of the House of Lords' Opinion in Begum*, 5 *International J. of Law in Context* (2009) (commenting favorably on the concurrence of Baroness Hale in her discussion of brotherly domination of a young female Muslim student in appropriate dress litigation in the British courts, in which she suggests that a young Muslim "woman might indeed choose a veil or garment as an act of her defiant political identity," see *R on the application of Begum, by her litigation friend, Rahman v. Headteacher and Governors of Denbigh High School* (2006) UKHL 15, 50. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *Wisconsin Women's L. J.* 149 (2000).
51. C. Menkel-Meadow, *supra* note 15, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator*.
52. See Richard Sobol, *BENDING THE LAW; THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).
53. See Sherry, *supra* note 15, and Rackley and Mikhail, *supra* note 49.
54. E. Allan Lind & Tom Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).
55. See e.g. Resnik, *supra* note 15; West, *supra* note 12.
56. Ronald Dworkin, *LAW'S EMPIRE* (2003).
57. See e.g. Resnik, *supra* note 15; ABA Code of Judicial Conduct, 2006; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 *NYU L. Rev.* 237 (1987).
58. Susan Bandes, *THE PASSIONS OF LAW* (2001).
59. Susan Glaspell, *A JURY OF HER PEERS* (2005), play version, *Trifles*, published in *THE PLAYS OF SUSAN GLASPELL* (2008); see also C. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education*; or, *The Fem-Crits Go to Law School*, 38 *J. Legal Educ.* 61 (1988); Marina Angel, *Teaching Susan Glaspell's Jury of Her Peers and Trifles*, 53 *J. Legal Educ.* 548 (2003).
60. *FROZEN RIVER*, Courtney Hunt (writer and director) (2008).
61. *THE VISITOR* (2008), Thomas McCarthy (writer and director).
62. There is also the recent *Babel* (Alejandro Gonzalez Inarritu, dir. 2006) for the depiction of a cruel deportation as a long-time nanny returns, with her American charges, to visit her hometown for the wedding of her son and is captured recrossing in the desert, putting herself and her charges at risk. She is depicted in the film as a more concerned caretaker than the children's biological mother.
63. See Menkel-Meadow, *supra* note 17 and this volume, p. 000.
64. Elaine Martin, *Men and Women on the Bench: Vive la difference?* 73 *Judicature* 204 (1990).
65. Fauziya Kassindja, *DO THEY HEAR YOU WHEN YOU CRY?* (1999).
66. Haley Schaffer, *Domestic Violence and Asylum in the United States: In Re R- A-*, 95 *Northwestern L. Rev.* 775 (2000-01) (discussing denial of asylum of domestic violence victim, Rodi Alvarado Pena, a case involving a Guatemalan woman who claimed that her husband's domestic violence was essentially government [in]action; her case remains caught up in political reversals at the Board of Immigration Appeals, see <http://www.nilc.org/immlawpolicy/asylrefs/ar106.htm>); Karen Musalo and Stephen Knight, *Unequal Protection: When Women Are Persecuted They Call It a Cultural Norm Rather Than a Reason to Grant Asylum*, in *THE UPROOTED, BULLETIN OF THE ATOMIC SCIENTISTS* (2005).
67. For example, one excellent and rigorous study of race and ethnicity differences in judges and mediators by claims was able to analyze the outcome variations by race, ethnicity, and gender

“matching” of disputants in court and mediation settings to test differences in outcomes (and perceptions of differential satisfaction rates of the participants), see Gary LaFree and Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *Law & Soc’y Rev.* 767 (1996).

68. They have long protested their inadequate working conditions and resources, see Dana Leigh Marks, *A System at Its Breaking Point*, *Los Angeles Daily Journal*, August 29, 2008 at 6 (appointment of immigration lawyers in the Department of Justice has increased exponentially while the number of judges has been stagnant or decreasing; caseloads are staggeringly high, few law clerks, no court reporters or bailiffs). Thus, the author of this piece, the president of the National Association of Immigration Judges, has argued for independence from the Justice Department and the creation of an independent and better-funded agency.

69. See e.g. David Ngaruri Kenney & Philip G. Schrag, *ASYLUM DENIED: A REFUGEE’S STRUGGLE FOR SAFETY IN AMERICA* (2008); Kassindja, *supra* note 65.