

# More than Just a Different Face? Judicial Diversity and Decision-making

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**Abstract:** This article addresses a key question in debates around judicial diversity: what evidence is there that a more diverse judiciary will make a difference to substantive decision-making? The article begins by outlining the range of arguments for a more diverse judiciary which include, but are not confined to, making a difference to substantive decision-making. It then turns to consider the considerable evidence which now exists both to refute and to support the existence of substantive differences in decision-making following the appointment to the judiciary of women and others from non-traditional backgrounds. On the basis of this evidence, it draws conclusions as to the kinds of differences in decision-making which might be expected, and the circumstances under which different approaches to decision-making are likely to flourish.

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## Introduction

There has been significant attention paid in England and Wales in recent years to the need for greater judicial diversity; in particular, the need to appoint more women judges. The judicial appointments system was changed in 2006, replacing the old system of ‘tap on the shoulder’ and ‘secret soundings’, which inevitably reproduced the profile of the existing incumbents, with a Judicial Appointments Commission whose mandate is to operate a transparent system based on applications and appointment on merit, and to increase the diversity of those applying for judicial office.<sup>1</sup> An Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, was appointed in 2009 and reported in 2010, making 53 recommendations for progressing the objective of achieving a more

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<sup>1</sup> Constitutional Reform Act 2005. See <<http://jac.judiciary.gov.uk/>> accessed 21 November 2014, and for extended discussion of changes to the appointment process, Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013) ch 3.

diverse judiciary.<sup>2</sup> A Judicial Diversity Taskforce was subsequently appointed to oversee implementation of the recommendations, which has published three annual progress reports.<sup>3</sup> In 2011, the House of Lords Constitution Committee held an inquiry into judicial appointments, which paid particular attention to the issue of judicial diversity.<sup>4</sup> In 2013, the Crime and Courts Act introduced a new statutory duty on the Lord Chancellor and the Lord Chief Justice to encourage judicial diversity.<sup>5</sup> And in 2014, a report commissioned by the Shadow Secretary of State for Justice made recommendations as to what a future Labour government could do to 'speed up moves to a more diverse judiciary'.<sup>6</sup>

An important question begged by all of this activity is why we should want a more diverse judiciary, and in particular, whether it would make any difference to judicial decision-making. This was a question floated by the President of the Supreme Court, Lord Neuberger, on BBC Radio 4's Law in Action programme in 2013. He professed to be unsure whether women judged differently from men, and wondered if it would be possible to tell, from reading a selection of anonymized judgments, which were written by women and which by men.<sup>7</sup> This challenge was taken up by Law in Action, which conducted an experiment in the terms proposed by Lord Neuberger with students at Durham Law School. The students were presented with 16 Court of Appeal judgments in the areas of family law, employment law, and criminal law, eight written by men and eight written by women, and asked to identify the gender of each judgment-writer.<sup>8</sup> The results were equivocal. The students correctly identified the

<sup>2</sup> Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010* (Ministry of Justice 2010).

<sup>3</sup> Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards the Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (Ministry of Justice 2011); Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards the Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (Ministry of Justice 2012); Judicial Diversity Taskforce, *Improving Judicial Diversity: Progress Towards the Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (Ministry of Justice 2013).

<sup>4</sup> House of Lords Select Committee on the Constitution, *Judicial Appointments* (HL 2012, 72).

<sup>5</sup> Crime and Courts Act 2013, sch 13, s 11, inserting new s 137A in the Constitutional Reform Act 2005.

<sup>6</sup> Sir Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity: Accelerating Change* (Labour Party 2014) 2.

<sup>7</sup> BBC Radio 4, Law in Action, 'The Neuberger Experiment' (20 June 2013) <<http://www.bbc.co.uk/programmes/b02x7t3w>> accessed 21 November 2014.

<sup>8</sup> *ibid.* This, of course, did not represent a random sample of Court of Appeal judgments, since at the time there were only five women on the Court of Appeal. To achieve a reasonable representation of judgments by women, it was necessary to focus on areas where judgments by more than one woman were available, resulting in the choice of areas noted.

gender of the judge about half the time, and were incorrect half the time. That is, they did no better than tossing a coin to determine the gender of each judicial author.<sup>9</sup> As Erika Rackley concluded, the experiment said more about the students' assumptions about gender performance than it did about any actual gender differences in decision-making.<sup>10</sup> The kind of gender stereotypes they employed—for example, expecting women to be more attentive to emotions and feelings and to emphasize gender equality, while expecting men to be less sensitive and more matter-of-fact—proved not to be reliable predictors of the sex of the judge.

A similar question about the impact of greater diversity on decision-making was broached by the House of Lords Constitution Committee when Lord Pannick asked Lady Hale, during her appearance before the Committee, whether she could provide any evidence that 'substantive decisions being taken would or may be different if the composition of the appeal courts were different'.<sup>11</sup> She replied:

I used to be quite sceptical about these arguments that it made a difference. The more I have thought and read about it and the more that I have experienced being in a collective court, the more I have thought that, yes, a difference can be made. I think it could be made on anything. You may be aware that there was a very interesting project recently, the Feminist Judgments Project, where some academic, feminist lawyers decided that they would rewrite from a feminist perspective the judgments in a range of mostly famous cases from areas all round the law. Sometimes they reached exactly the same conclusion but with a different reasoning and sometimes they reached a different conclusion, demonstrating with varying degrees of success that where you start from can have an effect on where you end up... that is the best answer I can give: go and read that book.<sup>12</sup>

This response might be taken to suggest that if not all women judges, then certainly feminist judges might make a difference to substantive decision-making, a point to which I shall return below. The questions asked by Lord Neuberger and Lord Pannick, however, demonstrate an ongoing concern, and a lack of clarity and certainty, as to whether a more diverse judiciary will make a difference to substantive decision-making, and if so, how and when such a difference might be made. This article addresses these questions. In doing so, it goes beyond well-established theoretical arguments to examine new and emerging empirical evidence on the

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> House of Lords Select Committee on the Constitution (n 4) 272.

<sup>12</sup> *ibid.*

subject, from a range of sources. I argue that non-traditional judges clearly *may* reach different decisions, but their willingness and ability to do so are constrained. I further argue that while some constraints are unavoidable, others are unnecessary and should be reversed in the interests of better decision-making. Before proceeding with my specific argument about substantive diversity, I shall first place it in context by reviewing the range of reasons for having a (more) diverse judiciary.

### Why Should We Want a More Diverse Judiciary?

At the outset of this discussion, it is necessary to acknowledge some unevenness in the available sources. While there is some literature on the importance of judicial diversity from the point of view of race, ethnicity, and sexuality,<sup>13</sup> there is, by contrast, an extensive feminist literature speculating or making claims about the difference women judges might make.<sup>14</sup> Madame Justice Bertha Wilson of the Canadian Supreme Court delivered her landmark lecture, 'Will Women Judges Really Make a Difference?',<sup>15</sup> at Osgoode Hall Law School in February 1990. Since then, dozens if not hundreds of articles and reports have been written on that topic. The following discussion therefore focuses on women judges and gender difference, although all of the arguments apply, *mutatis mutandis*, to other forms of diversity—not forgetting, of course, that gender and other forms of diversity are not mutually exclusive, so women judges may also be Black, Asian, lesbian and/or from a working class background—see, for example, US Supreme Court Justice Sonia Sotomayor, former England and Wales High Court judge Linda Dobbs,

<sup>13</sup> Eg Barbara Luck Graham, 'Judicial Recruitment and Racial Diversity on State Courts: An Overview' (1990) 74 *Judicature* 28; Susan Moloney Smith, 'Diversifying the Judiciary: The Influence of Gender and Race on Judging' (1994) 28 *U Richmond L Rev* 179; Linda Maria Wayner, 'The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench' (2010) 16 *Texas Wesleyan L Rev* 535; Pat K Chew and Robert E Kelley, 'The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race' (2012) 28 *Harvard J Race Ethnic Justice* 91; Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney L Rev* 565; Leslie J Moran, 'Sexual Diversity in the Judiciary in England and Wales: Research on Barriers to Judicial Careers' (2013) 2(4) *Laws* 512.

<sup>14</sup> Aside from numerous journal articles, see recent book-length studies by Rackley (n 1) and Sally J Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013); and the collection edited by Ulrike Schultz and Gisela Shaw, *Gender and Judging* (Hart Publishing 2013).

<sup>15</sup> Madam Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall LJ* 507.

and several of the current and former justices of the South African Constitutional Court, among others.

To summarize the literature in a short space, there are six basic arguments as to why and how women judges make a difference. The first three arguments are symbolic. Firstly, the presence of women judges increases the democratic legitimacy of the judiciary, because a bench including women is more representative of the wider society which it serves than a bench with no women.<sup>16</sup> Ideally, women should be represented on the judiciary in equal numbers with men, since this would reflect their proportions both in the general population and in the population of law graduates for at least the past 15 years.<sup>17</sup> Secondly, the presence of women judges signals equality of opportunity for women in the legal profession who aspire to judicial office,<sup>18</sup> and demonstrates that judicial appointment processes are what they claim to be—fair, meritocratic, and non-discriminatory. Thirdly, the presence of women judges provides encouragement and active mentoring for women in the legal profession, law students, and indeed younger women and girls, to aspire to, seek, and obtain judicial appointment, thus creating a virtuous circle enabling the gender balance in the judiciary to be improved.<sup>19</sup>

To the extent that women judges engage in active mentoring, this may be seen as a practical rather than merely symbolic effect of their presence. The fourth and fifth arguments as to why and how women judges make a difference are also practical. The fourth argument is that women judges are likely to have more empathy with women litigants and witnesses, including victims of crime, and thus may provide a better courtroom experience for these participants in the justice system, or at least one in which they (and women lawyers) are not subjected to sexist comments or other forms of gender bias from the bench, and in which overt sexism and gender bias by others in the courtroom in the course of proceedings is not

<sup>16</sup> This was the argument accepted and promoted by the House of Lords Constitution Committee (n 4). See also Kenney (n 14); Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Fem LS 1.

<sup>17</sup> See <<http://www.law.qmul.ac.uk/eji/>> accessed 21 November 2014.

<sup>18</sup> See eg Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' [2001] Public L 489. This is also part of Kenney's argument (n 14).

<sup>19</sup> This proposition is often expressed in the negative, ie that the absence of senior women judges discourages women in the legal profession from considering judicial office as a viable career option. See eg Hazel Genn, *The Attractiveness of Senior Judicial Appointment to Highly Qualified Practitioners: Report to the Judicial Executive Board* (Judicial Office for England and Wales 2008). For a positive version, see Ruth Cowan, 'Do Women in South Africa's Courts Make a Difference?' in Schultz and Shaw (n 14) 321; Eliane B Junqueira, 'Women in the Judiciary: A Perspective from Brazil' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (Hart Publishing 2003) 445.

tolerated.<sup>20</sup> The fifth argument is that women judges will exercise this same lack of toleration behind the scenes, and so operate to educate and civilize their male colleagues by not allowing sexist comments, stereotyping, and gender bias to go unquestioned.<sup>21</sup>

This putative approach by women judges leads on to the sixth, substantive, argument, that women judges will bring a gendered sensibility to the process of decision-making, and thus (at least sometimes) alter the outcomes of cases. There are, in turn, two main theories as to why and how women judges will bring a gendered sensibility to bear. One theory is that all judges bring their life experience to the process of judging, and women's life experiences—in particular, their experiences of pregnancy, child-birth, child-rearing, and juggling work and family responsibilities, as well as often of sexism and discrimination—are very different from men's. Thus, the inclusion of women's experiences will make law more representative of the variety of human experience.<sup>22</sup> To illustrate, there is an interesting throw-away observation in Penny Darbyshire's book, *Sitting in Judgment*, which is based on extensive observations of judges at work. Darbyshire says:

Judges used their own experiences as reference points. In one case, where I preferred the woman driver's account, the judge explained why he preferred the male lorry driver's account.<sup>23</sup>

Regrettably, Darbyshire makes no further comment on this anecdote, but it is implicit that had she been deciding the case, the woman driver would have won. Given the predominance of male judges, this suggests a systematic tendency for judgments based on male life experience to prevail. Homogeneity then becomes mistaken for neutrality,<sup>24</sup> but in fact there is

<sup>20</sup> See eg Brenda Hale, 'A Minority Opinion?' (2008) 154 P Brit Acad 319; Judith Resnik, 'On the Bias: Reconsideration of the Aspirations for our Judges' (1988) 61 S California L Rev 1877; Jason Schultz, 'Can Women Judges Help Make Civil Sexual Assault Trials More Therapeutic?' (2001) 16 Wisconsin Women's LJ 53.

<sup>21</sup> See eg Brenda Hale and Rosemary Hunter, 'A Conversation with Baroness Hale' (2008) 16 Fem LS 237; Elaine Martin, 'The Representative Role of Women Judges' (1993) 77 Judicature 166; Mary M Schroeder, 'Judging with a Difference' (2002) 14 Yale JL and Feminism 255.

<sup>22</sup> See eg Shirley S Abrahamson, 'Do Women Judges Really Make a Difference? The American Experience' in Shimon Shetreet (ed), *Women in Law* (Kluwer 1998); Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] Public L 727; Brenda Hale, 'Making a Difference: Why We Need a More Diverse Judiciary' (2005) 56 N Ireland LQ 281; Hale and Hunter (n 21); Rackley (n 1) ch 6; Wilson (n 15).

<sup>23</sup> Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2012) 237. Darbyshire's research methods included 'shadowing' judges, sitting with them on the bench and discussing their cases.

<sup>24</sup> See Rackley (n 1) 164.

a persistent bias which the presence of more women judges is needed to correct.

The second theory is that women judge 'in a different voice', that is, they apply a feminine 'ethic of care' as opposed to the masculine 'ethic of justice'.<sup>25</sup> This theory is based on the work of Carol Gilligan and her followers, who posit gender differences in moral reasoning, with the feminine voice acknowledging and being concerned to preserve social relationships, while the masculine voice tends to see individuals as atomistic and to make judgments according to a hierarchy of rights.<sup>26</sup> To the extent that both of these theories assume that all women share some essential characteristics, they have been subject to sustained critique.<sup>27</sup> Indeed, the results of Law in Action's 'Neuberger Experiment' indicate that it is impossible to 'read off' judicial gender from simple heuristics based on either female life experience or the ethic of care. At the same time, both theories appear to contain some grains of truth. In the remainder of this article, I shall investigate in more detail and in a more nuanced way the argument that the identity of the judge might make a substantive difference to judicial reasoning and decision-making.

### The Impossibility of Substantive Diversity

To begin with the counter arguments, the contention that women might theoretically judge differently is countered from several angles by arguments that they do not and in fact cannot do so in practice. First, there is the quantitative empirical literature which has sought to establish whether or not women judges make a difference. Much of this literature has been generated within the political science discipline in the USA, and has usually involved large-scale databases of decisions made by State or Federal benches, with statistical tests for the significance of judicial gender

<sup>25</sup> See eg Sue Davis, 'Do Women Judges Speak "In a Different Voice?": Carol Gilligan, Feminist Legal Theory and the Ninth Circuit' (1993) 8 Wisconsin Women's LJ 143; Carrie Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24 Osgoode Hall LJ 897; Susanna Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 Virginia L Rev 543; Wilson (n 15).

<sup>26</sup> Carol Gilligan, *In a Different Voice* (Harvard UP 1982). See also eg Ellen C Du Bois and others, 'Feminist Discourse, Moral Values and the Law: A Conversation' (1985) 34 Buffalo L Rev 11; Robin West, 'Jurisprudence and Gender' (1988) 55 U Chicago L Rev 1.

<sup>27</sup> See eg Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 Australian Fem LJ 135; Rosemary Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 Int J Legal Profession 7, 13.

as an independent variable explaining the outcomes of cases. The results of these quantitative studies are equivocal, with many producing no gender difference or finding that gender difference disappears when other factors are controlled for, particularly judicial political affiliation (that is, whether judges were appointed by a Democratic or Republican President or Governor).<sup>28</sup>

There are, in turn, a number of possible explanations for this lack of gender difference. One is common law judicial ideology—the notion that whatever a judge’s background or beliefs may be, they are trumped by a deeply acculturated set of norms and traditions of judicial decision-making to which all judges tend to adhere. These norms include deference to the separation of powers and a limited judicial role, adherence to precedent, incrementalism, and the upholding of ‘fundamental principles’ of the common law, which may give rise to resistance to legislative reforms that are perceived to contravene those principles.<sup>29</sup> Thus, for example, judges might resist giving full effect to mandatory sentencing legislation because it encroaches on a traditional area of judicial discretion.<sup>30</sup> But they might also find ways to limit the scope of progressive reforms designed to produce greater gender justice, such as rape shield legislation<sup>31</sup> and occupation orders in domestic violence cases,<sup>32</sup> because these appear to undermine fundamental rights (the right to a fair trial and property rights, respectively). Indeed, Fielding cites one of the women

<sup>28</sup> For overviews of the research evidence, see Dermot Feenan, ‘Editorial Introduction: Women and Judging’ (2009) 17 *Fem LS* 1; Kenney (n 14) 28–39 (also critiquing the assumptions and approach of many of these studies). Those finding no difference include: Thomas G Walker and Deborah J Barrow, ‘The Diversification of the Federal Bench: Policy and Process Ramifications’ (1985) 47 *J Politics* 596; John Gruhl, Cassia Spohn and Susan Welch, ‘Women as Policy-Makers: The Case of Trial Judges’ (1989) 25 *Am J Polit Sci* 308; Sarah Westergren, ‘Note: Gender Effects in the Courts of Appeals Revisited: The Data Since 1994’ (2004) 92 *Georgetown LJ* 689; Susan W Johnson and Donald R Songer, ‘Judge Gender and the Voting Behaviour of Justices on Two North American Supreme Courts’ (2009) 30 *Justice System J* 265 (in relation to US but not Canadian judges).

<sup>29</sup> See eg Lord Bingham of Cornhill, ‘The Judges: Active or Passive?’ (2007) 139 *P Brit Acad* 55; Nigel G Fielding, ‘Judges and Their Work’ (2011) 20 *Social L S* 97; Harry Annison, ‘Interpreting the Politics of the Judiciary: The British Senior Judicial Tradition and the Pre-emptive Turn in Criminal Justice’ (2014) 41 *JL Soc* 339.

<sup>30</sup> The example given by both Fielding, *ibid* and Annison, *ibid*.

<sup>31</sup> *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45. For a feminist alternative, see Clare McGlynn, ‘*R v A (No 2)*’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 211.

<sup>32</sup> Eg *Chalmers v Johns* [1999] 1 FLR 392; *Re Y (Children) (Occupation Order)* [2000] 2 FCR 470; see also Felicity Kaganas, ‘Occupation Orders Under the Family Law Act 1996’ (1999) 11 *Child and Family LQ* 193. On judicial obstruction of domestic violence laws more generally, see Rosemary Hunter, *Domestic Violence Law Reform and Women’s Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press 2008).



judges he interviewed referring to s 41 of the Youth Justice and Criminal Evidence Act 1999—the rape shield provision which was read down by the House of Lords in *R v A (No 2)*<sup>33</sup>—as ‘that ludicrous stuff about rape, previous sexual experience of the complainant, completely unjust, which the House of Lords happily found their way around with the help of the European Convention’.<sup>34</sup>

A related point, and arguably another element of judicial ideology, is the invidiousness of difference—that is, the notion that exhibiting difference of any kind is inimical to the judicial role. In other words, women have been ‘let in’ to the judiciary on condition of conformity to the prevailing (masculine) ethos,<sup>35</sup> and any hint of failure to conform would call into question their qualification to be a judge. This is what Erika Rackley has termed the Little Mermaid syndrome:

Like Anderson’s mermaid, [the woman judge] is induced to sell her voice in order to walk on land (or enter the court room) with her prince; her dangerous siren call is silenced, and in the silence, difference is lost.<sup>36</sup>

Several studies of women and other non-traditional judges have demonstrated their unwillingness to step out of line, and a feeling that they must distance themselves from any notion of difference in order to establish their judicial authority and to be taken seriously by their peers and the judicial hierarchy.<sup>37</sup> This performance of ‘neutrality’ may even become exaggerated, as a South Asian immigration judge interviewed by Hilary Sommerlad stated:

The feeling of being an outsider did extend to how I behaved as a judge at first. I felt terribly self-conscious, on guard, needing to make sure I was right

<sup>33</sup> See n 31.

<sup>34</sup> Fielding (n 29) 110.

<sup>35</sup> Helena Kennedy, quoted in Rackley (n 1) 137. See also Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (OUP 1996).

<sup>36</sup> Rackley (n 1) 137–38.

<sup>37</sup> Eg Bryna Bogoch, ‘Lawyers in the Courtroom: Gender, Trials and Professional Performance in Israel’ in Schultz and Shaw (n 19) 247; Hilary Sommerlad, ‘Let History Judge? Gender, Race, Class and Performative Identity: A Study of Women Judges in England and Wales’ in Schultz and Shaw (n 14) 355. This issue is possibly even more acute in civil law systems: see eg Junquiera (n 19); Ulrike Schultz, ‘Women Lawyers in Germany: Perception and Construction of Femininity’ in Schultz and Shaw (n 19); Andrea L Gaston, M Angela Amante and Ruben Rodriguez, ‘Gender Arguments and Gender Perspective in Legal Judgments in Argentina’ in Schultz and Shaw (n 14) 303; Beatriz Kohen, ‘What’s in a Label? Argentine Judges’ Reluctance to Call Themselves Feminists’ in Schultz and Shaw (n 14) 419.

and also be seen to be doing it ‘properly’. So I may even have been harsher than white judges.<sup>38</sup>

Moreover, conformity arises not merely from a subjective desire to ‘fit in’, but is also objectively enforced. According to another of Sommerlad’s interviewees, a regional tribunal judge of the social entitlement chamber, if one of her decisions is appealed:

There are more males in the Upper Tier – it’s probably worse than the officers’ mess. I know as a woman that if I’m seen to be particularly lenient it will be seen as a negative thing so I’ve always tried to administer the law directly, within the law.<sup>39</sup>

Even a feminist judge, who might be expected to take a more robust approach to the issue of difference, may find it impossible to insert a different perspective because the disciplinary techniques through which lawyers and judges are constituted induce and enforce conformity to established legal norms. In accordance with this view, some feminist legal theorists have argued that law is impervious to a feminist approach, that it is in the business of disqualifying rather than embracing feminist knowledge,<sup>40</sup> and that it provides no space for a judgment which is at once informed by a feminist perspective *and* legally plausible.<sup>41</sup> In a 1986 article, for example, Mary Jane Mossman contended that legal method— involving characterization of the issues, choice of precedent, and the canons of statutory interpretation—is a closed method of reasoning which enforces the status quo and does not allow for the introduction of feminist theory or concerns about gender justice.<sup>42</sup> Thus, for instance, a family judge interviewed as part of the Australian Feminist Judgments Project<sup>43</sup> regretted that she ‘not infrequently’ had to make decisions ‘that I know are the right decision in terms of the legal framework in which I have to operate, but don’t actually sit well within my feminist heart and soul’ (Judge 35: Circuit Court equivalent). Another

<sup>38</sup> Sommerlad, *ibid* 367. The judge does not appear to be suggesting that harshness is a particular characteristic of white judges, but rather that she went out of her way to be unsympathetic to (presumptively non-white) applicants to avoid any notion that she might have identified with them.

<sup>39</sup> *ibid* 366.

<sup>40</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

<sup>41</sup> Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate 1999).

<sup>42</sup> Mary Jane Mossman, ‘Feminism and Legal Method: The Difference it Makes’ (1987) 3 *Wisconsin Women’s LJ* 147.

<sup>43</sup> Details of the various feminist judgment projects are provided below.

interviewee went further in embracing a strict separation between law and feminism:

*Facilitator:* Do you think there's scope for a feminist approach to judging?

*Respondent:* Judging is judging. You judge on the criteria that you are supposed to judge [on]. There is a religious approach. I don't think there's room for religion. I don't think there's room for feminism . . . . I think you judge on the criteria you're supposed to judge [on]. Those extraneous things are extraneous things and they shouldn't be brought to bear on a judgment. (Judge 28: Magistrates Court)<sup>44</sup>

## The Contingency of Substantive Diversity

Against these pessimistic views and accounts lies the growing empirical evidence that women judges do *sometimes*—or as Erika Rackley puts it 'on occasion'<sup>45</sup>—judge differently from men. I set out the empirical evidence through the following section, but at this point, I pause to note that if we accept that non-traditional judges will 'on occasion' judge differently from the traditional incumbents of the judicial role, the key question then becomes: 'on what occasion/s?'. *When* might we expect those judges to judge differently?

### Conviction

One answer which I and others have previously given in relation to women judges is: when they are feminists.<sup>46</sup> As Sally Kenney has argued:

We need more feminist judges: judges who understand women's experiences and take seriously harm to women and girls, who ask the gender question, 'How might this law, statute, or holding affect men and women differently?'; who interpret equal protection and discrimination law in light of those provisions' broad social change purposes; who value women's lives and women's work; who do not believe women to be liars, whores, or deserving of violence by nature; who question their own stereotypes and predilections and listen to evidence; and who, simply put, believe in equal justice for all.<sup>47</sup>

<sup>44</sup> Note that Australian Magistrates are full-time, professional, salaried, judicial officers who sit alone.

<sup>45</sup> Rackley (n 1) 201.

<sup>46</sup> See especially Hunter, 'Can Feminist Judges Make a Difference?' (n 27).

<sup>47</sup> Kenney (n 14) 15–16.

The various feminist judgment projects now in existence seek to demonstrate precisely the difference that feminist judges might make.<sup>48</sup> In these projects, participants rewrite selected legal decisions, imagining they were a feminist judge sitting on the court alongside the original judges, and writing the judgment a feminist judge might have written. In her evidence to the House of Lords Constitution Committee mentioned at the beginning of this article, and in subsequent lectures, Lady Hale has invoked the UK *Feminist Judgments* book<sup>49</sup> as the best objective evidence 'that a different perspective can indeed make a difference' to the reasoning and outcome of appellate cases.<sup>50</sup> Other judgment rewriting projects working from minority rights,<sup>51</sup> children's rights,<sup>52</sup> and 'earth-centred'<sup>53</sup> perspectives similarly demonstrate that other kinds of knowledge and philosophical commitments can have a substantive effect on decision-making.

Space does not permit a thorough exposition of how a feminist perspective makes a difference to judicial decisions, although I have discussed this at greater length elsewhere.<sup>54</sup> Briefly, feminist judging does not simply involve deciding for the woman (especially when there are

<sup>48</sup> See Women's Court of Canada: <<http://womenscourt.ca>> accessed 23 February 2015; UK Feminist Judgments Project: <<http://www.feministjudgments.org.uk>> accessed 23 February 2015; Australian Feminist Judgments Project: <<http://www.law.uq.edu.au/the-australian-feminist-judgments-project>> accessed 23 February 2015; Northern/Irish Feminist Judgments Project: <<http://www.feministjudging.ie/>> accessed 23 February 2015; Feminist Judgments: US Supreme Court Edition: <<http://sites.temple.edu/usfeministjudgments/>> accessed 23 February 2015; Feminist International Judgments Project: <<http://ilg2.org/2014/01/16/invitation-to-participate-in-the-feminist-international-judgments-project/>> accessed 23 February 2015.

<sup>49</sup> Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

<sup>50</sup> Lady Hale, 'Kuttan Menon Memorial Lecture: Equality in the Judiciary' (13 February 2013) 20; Lady Hale, 'Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society: Women in the Judiciary' (27 June 2014) 21–22.

<sup>51</sup> Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP 2013).

<sup>52</sup> A Children's Rights Judgments Project led by Helen Stalford (Liverpool) and Katherine Hollingsworth (Newcastle) was launched in the UK in January 2015; see <<http://www.liv.ac.uk/law/research/european-childrens-rights-unit/childrens-rights-judgments/>> accessed 25 February 2015.

<sup>53</sup> A Wild Law Judgment Project sponsored by the Australian Earth Laws Alliance and Southern Cross University was launched in November 2014. See <<http://www.earthlaws.org.au/events/wild-law-judgment-project/>> accessed 25 February 2015.

<sup>54</sup> See Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Hunter and others (n 49) 3; Rosemary Hunter, 'An Account of Feminist Judging' in Hunter and others (n 49) 30; Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Schultz and Shaw (n 14) 399; Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter, 'Reflections on Rewriting the Law' in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing 2014) 19.

women on both sides,<sup>55</sup> or no women in the case<sup>56</sup>), nor does it constitute a singular programme. It is informed by feminist theories and an understanding of gendered experience, but this may result, as indicated in the quote from Kenney above, in a range of approaches, including noticing the gender implications of apparently neutral rules and practices, challenging gender bias in legal doctrine and judicial reasoning, or promoting substantive equality. Particular characteristics of feminist judging include paying attention to previously excluded or marginalized voices and experiences and construing the facts of the case from that perspective; being alert to intersectional experiences of gender and race/ethnicity, religion, sexuality, age, and disability; placing facts and issues within their broader social and legal context, often drawing upon relevant social science research and legislative background materials; and reasoning from context and the reality of lived experience rather than in abstract, categorical terms.<sup>57</sup> A feminist understanding of the issues may inform the characterization of the facts, the interpretation of statute and precedent, the development of doctrine, and/or the exercise of discretion.

It must be conceded, however, that the evidence provided by the feminist judgment projects is restricted. The outcomes of the projects do, I think, demonstrate that a feminist judgment can be a perfectly legitimate and plausible legal judgment; that legal method is not impervious to a feminist approach; and that law can be used to qualify as well as disqualify feminist knowledge.<sup>58</sup> But there is an important limitation on the realism of the feminist judgments. Part of the strength of these judgments is that the feminist judges operate under the same constraints as the original judges deciding the relevant cases, in that they are decided as at the same time, with the same materials as would have been available at that time, on the state of the law as it existed at that time, and in accordance with the relevant legislation and precedents. That is why they demonstrate so

<sup>55</sup> Eg Alison Diduck, '*Re G (Children) (Residence: Same-Sex Partner)*' in Hunter and others (n 49) 102; Geraldine Hastings, '*Re A (Children) (Conjoined Twins: Surgical Separation)*' in Hunter and others (n 49) 139; Lois Bibbings, '*R v Stone and Dobinson*' in Hunter and others (n 49) 234; Maleiha Malik, '*R (Begum) v Governors of Denbigh High School*' in Hunter and others (n 49) 336.

<sup>56</sup> Eg, Linda Mulcahy and Cathy Andrews, '*Baird Textile Holdings v Marks & Spencer Plc*' in Hunter and others (n 49) 189; Robin Mackenzie, '*R v Brown*' in Hunter and others (n 49) 247; Reg Graycar and Jenny Morgan, '*Dietrich v R*' in Douglas and others (n 54) 75; Nan Seuffert, '*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*' in Douglas and others (n 54) 120; Lee Godden, '*Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage*' in Douglas and others (n 54) 138.

<sup>57</sup> See, in particular, Hunter, 'An Account of Feminist Judging' (n 54).

<sup>58</sup> See Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20 Fem LS 135.

powerfully that the cases could have been reasoned and/or decided differently. But the feminist judges were not bound by the full force of judicial ideology, nor by the disciplining effects of having to establish and maintain their credibility as judges in a male-dominated work environment. Thus, the achievements of these imagined feminist judges can only take us so far, and it is necessary to turn to the practices of real judges who are subject to the full range of constraints identified above.

In addition to rewriting judgments from a feminist perspective, one of the aims of the Australian Feminist Judgments Project was to track the influence of feminist legal theory on Australian jurisprudence. As part of the project, therefore, my colleagues Heather Douglas, Francesca Bartlett, and Trish Luker conducted 41 interviews with judges around the country and at different court levels who either identified as feminists or were prepared to be interviewed about their approach to judging by something calling itself the Australian Feminist Judgments Project. All but one of the interviewees were women.

Some of these women judges said they were feminists but not feminist judges. One could not see the point of the feminist judgments project because, she maintained, 'there's nothing in the law that requires an anti-feminist approach to anything' (Judge 07: High Court equivalent). Around two-thirds of the judges interviewed, however, thought that they did judge differently as feminists, either because they had a knowledge and understanding of women's life experiences which they brought to their judicial role, or because they were concerned to promote equality and justice and apply feminist principles in individual cases. At the opposite end of the spectrum from the judge who saw no need for feminism in law was the judge who carefully and consciously juggled precedent, judicial ideology and the need to maintain her credibility with her feminism:

So you're really doing a double act. You're working out what the black letter is... [b]ut you're also trying to apply these feminist principles in the gaps wherever you can. So it's a double exercise. So you have to do this and then you have to do this, and then you have to put [them] together. So it's an exhausting exercise... You have to be so careful, because if anything comes through they'll... lop you off, appeal it, or some little barrister will bob up and down in court. (Judge 10: Crown Court equivalent)

So how can we tell which feminist judges might make a difference and which might not? One of the interview questions in the Australian project asked about the meaning of feminism to the interviewee. The responses to this question fell into three broad categories. The first group said feminism means women are equal and should be treated equally; the second

group said feminism means ‘working to ensure equal opportunity and equal recognition for women’ (Judge 03: Circuit Court equivalent); and the third group described ways in which they had been feminist activists in their pre-judicial lives and/or supported and mentored women and/or engaged in social justice-related committee work in their judicial roles. Perhaps unsurprisingly, it was the more active feminists in the second and third groups who were more likely to describe themselves as more activist feminist judges.<sup>59</sup> For good or ill, this observation has clear implications for the judicial appointment process.

## Opportunity

But even for judges who are willing to be feminist activists, opportunities to do so might be few and far between. Two kinds of limitations arise here. First, there may be little scope for any form of judicial activism at the court level or within the jurisdiction in which the judge is sitting. One Australian industrial tribunal judge, for example, contrasted the workers’ compensation jurisdiction, where decision-making was highly constrained by precedent and the prospects of being appealed, with the industrial jurisdiction, where decisions are made according to equity and good conscience and the substantial merits of the case, and the tribunal is not bound by legal forms and technicalities. ‘So if you think that there’s an avenue that you can pursue which is going to make it more equitable and that you might be able to imbue with some feminist principles, you can probably do that’ (Judge 06). A Magistrate noted that she was limited by the quality of the evidence put before the court, and was sometimes frustrated by the fact that in domestic violence cases the police had not brought all the evidence needed for someone’s protection (Judge 31). Another judge sitting in the equivalent of the Crown Court referred to the fact that:

In a trial you’ve got very little ability or power to do anything about that, you’re not the trier of fact. So all you can do is ensure that your directions—well first of all they’ve got to comply with the law, you’ve got to put it all in. We know that the directions we have to give to juries in rape cases are so prescribed, and so cautious. In other words they provide many, many protections for the accused person, as they should. So many protections for the

<sup>59</sup> See also Sean Rehaag, ‘Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations’ (2011) 23 *Canadian J Women L* 627, who found that female refugee adjudicators with prior experience in women’s rights had higher average grant rates overall, in cases involving female claimants; and in cases involving claims of gender-based persecution.

accused person it's very hard to get a conviction. I haven't had a conviction in a rape case for ages. (Judge 24)

Some mentioned sentencing as an area of greater discretion and latitude, although here too there might be statutory mandatory sentences for some offences, or an appeal court exercising a high degree of scrutiny and laying down many technical requirements (Judges 11, 12, 17, 24, 37: Magistrates and Crown Court equivalents).

Further, it appears that the majority of cases at all court levels and in all jurisdictions (other, perhaps, than in family law) simply do not raise any gender or feminist issues. This became evident when I conducted a systematic study of all the judgments of a particular Australian judge during the first three years of her appointment to a State Court of Appeal.<sup>60</sup> Justice Marcia Neave had a background as a feminist academic and law reformer, so I was interested to see how she acted as a judge. But of the 204 cases on which she sat during her first three years on the Court, try as I might, I could only find a feminist or gender issue in 66 (32 per cent) of them. The great majority of these were criminal matters—appeals against conviction and/or appeals against sentence. The court's civil jurisdiction appeared to consist mainly of dry, technical matters of statutory, or contractual interpretation, to which a gender-sensitive approach had no relevance.

Subsequently, Erika Rackley and I have begun a similar systematic analysis of Lady Hale's judgments on the UK Supreme Court. The Supreme Court's caseload is very different from that of the Victorian Court of Appeal—much more heavily weighted towards civil than criminal matters—and the figures are even lower: of the 326 cases decided by the Supreme Court from its inception in October 2009 until July 2014, only 85 (26 per cent) raised any kind of actual or potential feminist, or gender issues. These cases have tended to arise in areas concerning human beings, such as discrimination law, employment law, family law, housing law, human rights, immigration/asylum law, and welfare law; whereas Justice Neave's cases tended to be concentrated in areas of sexual assault against women and children, domestic violence, and property division between former cohabitants.

These observations explain some others. First, where the US political science studies have found a gender difference in judging, they have found it in cases concerning 'women's issues', such as sex discrimination and the

<sup>60</sup> Hunter, 'Justice Marcia Neave' (n 54).



award of spousal maintenance on divorce.<sup>61</sup> In light of the foregoing analysis, it seems entirely plausible that these quantitative studies should find no gender difference in outcomes in the preponderance of cases, but find it in particular kinds of cases. Secondly, the famous feminist decisions by judges such as Justices Wilson<sup>62</sup> and L'Heureux-Dubé<sup>63</sup> on the Canadian Supreme Court, Justice Ginsburg on the US Supreme Court,<sup>64</sup> Justice Gaudron on the Australian High Court,<sup>65</sup> and indeed Lady Hale,<sup>66</sup> have all (or almost all) been in cases raising fairly

<sup>61</sup> Eg Elaine Martin, 'Differences in Men and Women Judges: Perspectives on Gender' (1989) 17 J Polit Sci 74; Sue Davis, Susan Haire, and Donald R Songer, 'Voting Behaviour and Gender in the US Court of Appeals' (1993) 77 Judicature 129; David W Allen and Diane E Wall, 'Role Orientations and Women State Supreme Court Justices' (1993) 77 Judicature 156; Elaine Martin and Barry Pyle, 'Gender, Race and Partisanship on the Michigan Supreme Court' (2000) 63 Albany L Rev 1205; Donald R Songer and Kelley A Crews-Myer, 'Does Judge Gender Matter: Decision-Making in State Supreme Courts' (2000) 81 Social Science Q 750; Jennifer L Peresie, 'Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts' (2004-05) 114 Yale LJ 1759; Elaine Martin and Barry Pyle, 'State High Courts and Divorce: The Impact of Judicial Gender' (2005) 36 U Toledo L Rev 923; Christina L Boyd, Lee Epstein, and Andrew D Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 Am J Polit Sci 389; Susan W Johnson, Donald R Songer and NA Jilani, 'Judge Gender, Critical Mass, and Decision-Making in the Appellate Courts of Canada' (2011) 32(3) J Women Polit Policy 237; David Terpstra, 'The Influence of the Gender and Race of the Judge and the Type of Discrimination Charge on Court Case Outcomes' (2013) 55(4) Int JLM 318.

<sup>62</sup> Eg *R v Morgentaler* [1988] 1 SCR 30 (access to abortion); *R v Lavallee* [1990] 1 SCR 852 (admission of evidence of battered woman syndrome).

<sup>63</sup> Eg *R v Seaboyer* [1991] 2 SCR 577 (admissibility of sexual history evidence); *Moge v Moge* [1992] 3 SCR 813 (spousal support); *Symes v Canada* [1993] 4 SCR 695 (tax deductibility of childcare expenses); *R v Osolin* [1993] 4 SCR 595, *R v Carosella* [1997] 1 SCR 80 (admissibility of rape victim's counselling records); *R v RDS* [1997] 3 SCR 484 (judicial bias); *R v Ewanhuck* [1999] 1 SCR 330 (consent in rape).

<sup>64</sup> Eg her dissents in *Gonzales v Carhart* 550 US 124 (2007) (abortion) and *Ledbetter v Goodyear Tire & Rubber Co* 550 US 618 (2007) (pay equity).

<sup>65</sup> Eg *Australian Iron & Steel v Banovic* (1989) 168 CLR 165 (indirect sex discrimination); *Street v Queensland Bar Association* (1989) 168 CLR 461 (on the concept of discrimination); *Van Gervan v Fenton* (1992) 175 CLR 327 (torts: damages for domestic services provided by the plaintiff's wife).

<sup>66</sup> Eg *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1 (CA) (domestic violence and child contact); *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 (CA) (torts: wrongful conception); *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412 (asylum claim based on threat of female genital mutilation); *R v G* [2008] UKHL 37, [2008] 1 WLR 1379 (child sexual offences); *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 (pre-nuptial contracts); *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433 (domestic violence); *R (on the application of McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] 4 All ER 881 (disabled woman's care needs). The exception may be *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356, which concerned claims by the mothers of two servicemen killed in Iraq that a public inquiry should be held into the lawfulness of the UK's invasion of Iraq. While denying the claim, Hale expressed empathy for the claimants as mothers.

classic gender issues concerning violence against women, reproduction, and the valuation of women's work, including unpaid care work. Again, these high-profile cases are likely to represent only a small minority of the relevant judge's decisions overall. Thirdly, the examples of feminist judgments given by the Australian judges in their interviews generally fell within similar categories: domestic violence; rape, sexual assault, and child sexual assault; post-divorce property division and spousal maintenance; issues around sentencing mothers of young children to prison; and the question of discounting tort damages because of a widow's prospects of remarriage.

The feminist judgment projects have demonstrated that 'feminist' issues and approaches can incorporate a wider range of cases than simply 'gender' issues. For example, the English project includes cases on property law concepts,<sup>67</sup> commercial contracts,<sup>68</sup> adult social care,<sup>69</sup> minority sexual practices,<sup>70</sup> and medical decision-making<sup>71</sup> which apply feminist theory to less obvious subject matters. Likewise, the Australian project includes cases on voting rights,<sup>72</sup> the right to a fair trial for indigent defendants,<sup>73</sup> environmental law,<sup>74</sup> and consumer protection.<sup>75</sup> Feminist legal scholars have analysed just about every area of law,<sup>76</sup> and have also pointed out the fundamentally gendered nature of legal discourse in general.<sup>77</sup> Thus, feminist judgments may be found in cases going well beyond the 'typical' areas identified.

Nevertheless, it appears that the opportunity for judging in a substantively different way is likely to arise in only a minority of cases. This might offer some comfort to those who fear the notion that a more diverse

See also Hale, 'Fiona Woolf Lecture' (n 50) 21, referring to particular judgments of hers where she has brought in a different experience and perceptions of life.

<sup>67</sup> Anna Gear, 'Porter v Commissioner of Police for the Metropolis' in Hunter and others (n 49) 174.

<sup>68</sup> Mulcahy and Andrews (n 56).

<sup>69</sup> Bibbings (n 55); Helen Carr and Caroline Hunter, 'YL v Birmingham City Council and Others' in Hunter and others (n 49) 318.

<sup>70</sup> Mackenzie (n 56).

<sup>71</sup> Hastings (n 55).

<sup>72</sup> Kim Rubenstein, 'R v Pearson, ex parte Sipka' in Douglas and others (n 54) 61.

<sup>73</sup> Graycar and Morgan (n 56).

<sup>74</sup> Godden (n 56).

<sup>75</sup> Heron Loban, 'ACCC v Kesbow' in Douglas and others (n 54) 180.

<sup>76</sup> The 'Feminist Perspectives...' book series, for example, includes Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Press 2001); Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Cavendish Press 2005); and Hilary Lim and Anne Bottomley (eds), *Feminist Perspectives on Land Law* (Routledge-Cavendish 2007).

<sup>77</sup> Eg Smart (n 40); Ngairé Naffine, *Law and the Sexes* (Allen & Unwin 1990); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press 1990).

judiciary will have substantive implications. At the same time, it also seems clear that the kinds of cases in which non-traditional judges might make a substantive difference are precisely those cases in which we would want the full range of human experience and understanding to be brought to bear. It is in these cases that judicial diversity, by enabling the issues to be examined through the lens of previously excluded perspectives, is likely to produce better justice.

It might be argued that this is all very well on an appellate court, where different perspectives can be included in the process of collegial decision-making,<sup>78</sup> but it does not work for a trial court where there is a single judge presiding and no way of guaranteeing that, say, a case raising racial issues will get an ethnic minority judge, or one of the right ethnic minority. In response, first, this makes it even more crucial that our appellate courts, which are currently the least diverse, rapidly become much more so. Secondly, a quote from one of the Australian judicial interviewees is illuminating:

... because judging is so extremely subjective, the more people you get from various backgrounds and experiences the more fair your judging is going to be. I mean ... at the end of the day the individual person is stuck with the individual judge that they get. But overall it's going to be more fair because you have different people, I think they influence each other. I mean, we talk to each other about the sort of sentences we give and approaches ... You influence each other by your general approaches to things. (Judge 36: Circuit Court equivalent)

In other words, judicial conversations are not confined to appellate courts, and the potential influence of non-traditional judges may extend to the judgments of other judges in other cases as well as their own.

There may remain a concern that substantive differences in decision-making might not result in greater fairness but will somehow corrupt the law. It is therefore worth considering carefully what it is that a non-traditional judge can actually do. If she sits on a first instance court and makes an error of law, she can be overturned on appeal. If she sits on an appellate court, she can, at worst, dissent. That is an entirely legitimate option within our judicial system. Much has been written about the value of dissents,<sup>79</sup> and a little has been written on the dangers of too much

<sup>78</sup> See Peresie (n 61); Etherton (n 22).

<sup>79</sup> Eg Claire L'Heureux-Dubé, 'The Dissenting Opinion: Voice of the Future?' (2000) 38 *Osgoode Hall LJ* 495; Erika Rackley, 'Difference in the House of Lords' (2006) 15 *Social L S* 153; Hale (n 20).

unanimity.<sup>80</sup> The statistical analysis Erika Rackley and I have undertaken shows that some of the judges on the UK Supreme Court had never (up to July 2014) expressed a minority opinion. That might raise questions as to what it is they contribute to the court. Alternatively, a non-traditional appellate judge may write a concurring opinion, agreeing with the result but for different reasons. Again, this is a legitimate option and the reasoning of the concurrence is open to public evaluation. Lastly, she may write a joint judgment or leading judgment with which other members of the court agree, because her reasoning is persuasive. Introducing a different perspective into the judicial conversation is likely, at least sometimes, to result in the value of that perspective being recognized by others. This points to one of the strengths of the way the UK Supreme Court operates compared to other countries, where the highest appellate court always sits en banc. In such a system, the viewpoints and alignments on the court become predictable and somewhat solidified. Madame Justice L'Heureux-Dubé in Canada and Justice Kirby in Australia, for example, became known as great dissenters because their views and approaches were often at odds with those of their judicial colleagues. But the UK Supreme Court sits in constantly changing groups of five, seven, or nine of the 12 justices, which creates the possibility for many different conversations depending on the particular combination of justices hearing each case, and hence differences of views and approaches can play out differently in different contexts.

A further observation arising from the Australian Feminist Judgments Project is that feminist judgments may be remarkably legally orthodox, formalist, and even conservative.<sup>81</sup> In some of the common law cases in that project, the feminist judge closely followed precedent when the original court had struck out into new doctrinal territory,<sup>82</sup> or exercised judicial restraint when the original court had in fact departed from fundamental principles such as the separation of powers and the non-retroactivity of criminal offences.<sup>83</sup> For these feminist judges, the more conservative approach was actually the better approach from a feminist perspective. In statute-based cases, some of the feminist judgments paid closer attention to the canons of statutory interpretation than the original

<sup>80</sup> Eg Alan Paterson, 'A Scarcity of Dissents?', *UKSC Blog* (6 March 2014) <<http://uksblog.com/scarcity-dissent/>> accessed 20 March 2015.

<sup>81</sup> For full discussion of this point, see Douglas and others (n 54) 32–34.

<sup>82</sup> Eg Adrian Howe, '*Parker v R*' in Douglas and others (n 54) 234; Lisa Sarmas, '*Trustees of the Property of John Daniel Cummins, a Bankrupt v Cummins*' in Douglas and others (n 54) 212.

<sup>83</sup> Eg, Graycar and Morgan (n 56); Wendy Larcombe and Mary Heath, '*PGA v R*' in Douglas and others (n 54) 262.

court had shown.<sup>84</sup> Illustrating the point that feminist judging is not a singular programme, these cases demonstrate that a feminist judge will not necessarily wish to push the boundaries of legal method. In some instances, a feminist approach may in fact be a traditionally black-letter approach.

Furthermore, there is some evidence that feminist judges may be more prepared than their judicial brethren to give full effect to socially progressive legislation. As suggested in the earlier quote from Sally Kenney, feminist judges might be relied upon to ‘interpret equal protection and discrimination law in light of those provisions’ broad social change purposes’.<sup>85</sup> Similarly, there are several instances in the Australian Feminist Judgments Project in which the feminist judge is concerned properly to implement the legislature’s intention in enacting anti-discrimination laws, compared to the original judgments which engaged in narrow and hostile readings of the legislation which nullified its remedial purposes.<sup>86</sup> The practice of giving effect to rather than resisting or undermining law reforms also arose in the interviews with Australian feminist judges. One of these judges recalled a committal hearing in which a 14-year-old girl who had allegedly been abducted, drugged, and sexually assaulted, was subjected to a lengthy and aggressive cross-examination by the defence barrister to an extent which, in the judge’s view, was not permitted by the Evidence Act:

It occurred to me then that my task was to protect the witness to get the [best] evidence, as well as protect [the defendant’s] rights which he certainly had and I was very clear about that, but in the legislation this was how it works. So when I came out and spoke to my colleagues they went, ‘oh, don’t bother, it’s too hard’ . . .

So sadly, after she gave great evidence, I think I did a moderately good job. I don’t think I did enough . . . but . . . it sets the boundaries for what you think about, particularly as a feminist. You think this is just not fair, the legislation’s here. It’s about my bravery in applying the law and being solid. (Judge 18: Magistrates Court)

<sup>84</sup> Eg Zoe Rathus and Renata Alexander, ‘*Goode and Goode*’ in Douglas and others (n 54) 379; Anita Stuhmcke, ‘*JM v QFG and GK*’ in Douglas and others (n 54) 397; Jennifer Nielsen, ‘*McLeod v Power*’ in Douglas and others (n 54) 409.

<sup>85</sup> Kenney (n 14) 15–16.

<sup>86</sup> Stuhmcke (n 84); Beth Gaze, ‘*The State of New South Wales v Amery*’ in Douglas and others (n 54) 424. The same may also be said of the first instance decision in *JM v QFG and GK* [1997] QADT 5 (31 January 1997), which Stuhmcke upholds in her feminist judgment (n 84).

The notion of applying the law bravely is not one which is often spoken about in our legal culture. Bravery is not on the Judicial Appointments Commission's list of judicial qualities and abilities. Perhaps, it ought to be.

### Expectations

A third factor which might influence when non-traditional judges may make a substantive difference in decision-making is the expectations attaching to their role. We have seen how judicial ideology discourages performances of difference, but the situation could equally be reversed. For example, Ruth Cowan has observed that:

In contrast to the assertions in the United States that judges function like baseball umpires, in South Africa a frequently expressed and undisputed justification for the appointment of those previously excluded by racism and sexism is precisely so that they would and should provide perspectives previously absent; that they would therefore be essential to advancing the Constitution's promises. African, Coloured, Asian and women judges were and are expected to add value – they were and are expected to make a difference in the decisions rendered...<sup>87</sup>

The same could be said about the feminist judgment projects, that they precisely reverse the usual expectations, encouraging the provision of 'perspectives previously absent'. Such expectations may, indeed, mitigate (if not entirely obviate) the need for bravery on the part of non-traditional judges in coming out as different and adding the substantive value of which they are capable at the points where it matters. Of course, as Rackley has argued, one would hope to get to a stage where we no longer think in terms of 'difference' from a 'norm', but rather we just have diversity.

### Conclusion

To conclude, will a more diverse judiciary necessarily or even possibly result in substantively different decision-making? The evidence suggests that this may but will not inevitably occur. And it will only occur under certain conditions. Those conditions are a combination of opportunity (in terms of both subject matter and legal space), plus personal commitment and/or external encouragement. Opportunities for most judges are

<sup>87</sup> Cowan (n 19) 320–21.

likely to occur relatively infrequently. That is not, of course, a reason for soft pedalling on judicial diversity. As discussed at the outset, there are many other good reasons for having a more diverse judiciary—in terms of what the presence of non-traditional judges represents symbolically, how they manage their courtrooms, and the contributions they make behind the scenes and extrajudicially. But if we want a more diverse judiciary to result in fairer decision-making for *all* members of the community, to achieve ‘equal justice for all’,<sup>88</sup> the opportunities must be grasped when they do arise. This will require a shift from discouragement or at best toleration of judicial difference to positively supporting and encouraging substantive diversity. And it will require the appointment of judges who have the commitment and courage to make a difference.

<sup>88</sup> Kenney (n 14) 16.