

DO WOMEN JUDGES SPEAK "IN A DIFFERENT  
VOICE?"  
CAROL GILLIGAN, FEMINIST LEGAL THEORY, AND  
THE NINTH CIRCUIT

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INTRODUCTION

Feminist legal theory challenges the fundamental principles of American law by uncovering the profound implications of the fact that the legal system was constructed, and until recently, interpreted and administered by and for men. Feminists have not only criticized specific judicial decisions and proposed legal reforms,<sup>1</sup> they have gone further to question the fundamental concepts and methods of law.<sup>2</sup> Feminist jurisprudence reaffirms the conclusions of the legal realists and the Critical Legal Studies movement that law is neither neutral nor objective but serves to reinforce the dominant power structure. Feminist legal theory emphasizes the extent to which the patriarchal character of that power structure shapes the law and in so doing, makes the domination of women "seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group."<sup>3</sup> Is it possible that as increasing numbers of women

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1. See, e.g., CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights*, 63 *TEXAS L. REV.* 387 (1984); SUSAN ESTRICH, *REAL RAPE* (1987).

2. See, e.g., Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373 (1986); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); Katharine Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990).

3. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 238 (1989). Robin West posited that "all of our modern theory. . . is essentially and irretrievably masculine" insofar as it is based on the "separation thesis"—the claim that "we are each physically individuated from every other, the claim that we are individuals 'first,' and the claim that what separates us is epistemologically and morally prior to what connects us. . ." Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 2 (1988). Because that is fundamentally untrue of women's nature, such a construction of a human being excludes us—women cannot be human beings. Thus, neither the law nor jurisprudence takes women's humanity seriously. Martha Minow noted that law is just one of the fields in which feminists have exposed the dominance of the conception of human nature that takes the male as the reference point and treats women as other, different, deviant, exceptional or baffling. Minow notes that "(f)eminist work has thus named the power of

assume professional roles in the legal system they will begin to reshape the contours of American law? Much of feminist legal theory contends that lawyers and judges who are women are likely to bring a different perspective to the law, to employ a different set of methods, and to seek different results than the (male) legal tradition would seem to mandate. Will women change the nature of the law and legal processes? Or will they, instead, simply adapt to the inherently male norms and rules of the legal tradition and, thereby, assist in reinforcing the existing power structure? This paper explores such questions by comparing the opinions of male and female judges in an attempt to discover whether women judges speak in a voice that is different from their male counterparts.

### BACKGROUND

Research in fields other than law, most notably, the well-known work of psychologist Carol Gilligan<sup>4</sup> provides a framework for analysis as well as an empirical foundation for predictions that women judges will have a profound impact on the law. Gilligan discovered differences in the ways that males and females understand themselves and their environment and the way they resolve moral problems. She found that, although those differences do not reduce to a simple dichotomy, males tend to define themselves through separation, measure themselves against an abstract ideal of perfection, and equate adulthood with autonomy and individual achievement; they conceive morality in hierarchical terms: a ladder. Females often define themselves through connection with others and activities of care, and perceive morality in terms of a web. While women tend to perceive a moral conflict as a problem of care and responsibility in

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naming and has challenged both the use of male measures and the assumption that women fail by them." Minow, *supra* note 2, at 61. Scales argues that feminist jurisprudence must be an effort to resist abstraction and the myth of objective reality: "Feminism does not claim to be objective, because objectivity is the basis for inequality. Feminism is not abstract, because abstraction when institutionalized shields the status quo from critique. Feminism is result-oriented. It is vitally concerned with the oblivion fostered by lawyers' belief that process is what matters." Scales, *supra* note 2, at 1385. Suzanna Sherry developed a theoretical framework in which she connected the feminine perspective in jurisprudence to the classical republican tradition in political philosophy. In contrast to the modern paradigm, which is liberal, individualistic, atomistic, nonteleological, abstract and thus, rule-based, the classical paradigm is communitarian, holistic, and teleological; it is also contextual, rather than rule-based. She noted that women's emphasis on connection, subjectivity, and responsibility and men's focus on autonomy, objectivity, and rights bears strong similarities to the differences between the classical and modern paradigms. Sherry contended that the exclusion of women from the legal system had a profound impact. Indeed, the modern paradigm has dominated political and legal theory as a result of male domination of the public sphere. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). See also Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Diane Polan, *Towards a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294 (David Kairys ed., 1982); and ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW (1988).

4. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

relationships, men tend to emphasize rights and rules. Thus, when presented with a moral dilemma, men seek solutions in rules while women seek to expand the inquiry to find a solution that will preserve their relationships. In short, while males tend to proceed by the "ethic of rights," females tend to rely on an "ethic of care."<sup>5</sup>

Gilligan's work has sparked intense debate. It has been severely criticized on methodological grounds.<sup>6</sup> Moreover, questions about the existence and nature of sex-related differences are at the center of the debates among various versions of feminism.<sup>7</sup> Important as the challenges to Gilli-

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5. Gilligan by no means claimed to make generalizations about men and women. Her starting point was to challenge traditional psychological theory that claimed to summarize human development based on studies of male subjects. Thus, such theory was based on a model of male development and invariably assessed women to have failed to develop on measurement scales. Gilligan showed how an alternative perspective emerges when women are included in studies and when frameworks that were constructed with only males in mind are discarded. Her different voice actually refers not to a voice that differs from that of men but that differs from that posited by traditional theory. Moreover, it is important to emphasize that Gilligan has pointed out that most people in her studies (an average of sixty-five percent across six studies) represented both voices in defining moral problems. But there was a strong tendency to focus on one voice or the other. About seventy percent of people who use both orientations focus on one. Only three men from a total of sixty demonstrated a care focus. Among the women about sixty percent focused on care. Isabel Marcus, et al., The 1984 James McCormick Mitchell Lecture. *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFF. L. REV. 11, 47-49 (1985) (Carol Gilligan speaking).

6. See, e.g., CYNTHIA F. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER*, 81-83 (1988); Debra Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983); John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Linda Kerber et al., *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986); Judy Auerbach et al., *Commentary: On Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149 (1985); CAROL TAVRIS, *THE MISMEASURE OF WOMAN* 79-92 (1992).

7. It is important to note that feminist legal scholars do not agree that the different voice should constitute the basis of theory. See, Judith A. Baer's review of feminist jurisprudence, which concludes:

But difference jurisprudence has yet to produce either an adequate theory of gender differences or an explanation of the ways in which male legal thinking has excluded women. These gaps in theory might not be so troubling if difference jurisprudence worked out better in practice than it does in theory. Unfortunately, difference jurisprudence as practiced has a tendency to result in conclusions that embody uncritical acceptance of the status quo: a different voice perhaps, but the same words. . . . What is lacking, so far is an understanding of gender difference that incorporates an understanding of power, and that admits the possibility of contingent rather than universal differences.

Judith A. Baer, *Nasty Law or Nice Ladies? Jurisprudence, Feminism, and Gender Differences*, 11 WOMEN & POLITICS 1, 26-27 (1991).

Although there are tremendous variations in typologies, there are at least two varieties of feminist legal theory that contrast sharply with Gilligan's "different voice". See Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988). One, the "difference" approach, posits that the differences between women and men do not justify sex discrimination, and embraces the goal of gender neutrality. This approach primarily

gan's theory are, it is far beyond the scope of this paper to address them; it is not my intent to assess her theory but rather to discover whether it has any relevance to the decision-making of women judges. Thus, for present purposes it must suffice to note that, although it is clearly susceptible to criticism, the theory of women's different voice, nevertheless, provides a useful starting point for studying women judges.

Gilligan's findings dovetail with the assertion made by many feminist legal scholars that because the law has been so thoroughly infused with the masculine perspective, an approach to legal decision-making that is based on separation, rights, and abstract rules has come to represent the "correct" legal method; any departure is viewed as illegitimate and as fall-

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targets laws that treat women and men differently, and thereby disadvantage women in the public sphere. The term "difference" is misleading because the focus is on "sameness"—the approach essentially posits that women should be treated the same as men to the extent that differences between them are either nonexistent or irrelevant. The goals of the National Organization for Women beginning in its early years and the unsuccessful movement for the Equal Rights Amendment, that sought to give women equal opportunities in education and employment with the non-discrimination model of formal legal equality, exemplify the basic difference approach. Those who subscribe to the difference approach disagree on whether different treatment is justified, even necessary to take sex-based differences into account. For example, should workers be given special leave for pregnancy and childbirth? Or should all workers be treated as though they are the same even where such treatment will serve to disadvantage women? See Leslie Goldstein, *Can This Marriage Be Saved? Feminist Public Policy and Feminist Jurisprudence*, in *FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE* 5-6 (L. Goldstein, ed., 1992). Still, the difference approach is united in its rejection of Gilligan's different voice. See, Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). Williams demonstrates how the different voice approach can be used as a weapon against women, perpetuating gender stereotypes that severely disadvantage them in the workplace and result in their economic marginalization. She explains that women also use the different voice against themselves, "every time a woman 'chooses' to subordinate her career 'for the good of the family' and congratulates herself on that choice as a mature assessment of her own 'priorities.'" *Id.* at 830.

Another variety of feminist theory, the "dominance" approach, views the problem of inequality between men and women in terms of the social subordination of women. That subordination, exemplified by rape, prostitution, pornography, and the denial of women's reproductive freedom is untouched by legal remedies to discrimination. The most prominent proponent of the dominance approach, Catharine MacKinnon, contends that if women speak in a different voice it is simply a manifestation of their lack of power:

I think that the voice that we have been said to speak in is in fact in large part the "feminine" voice, the voice of the victim speaking without consciousness. But when we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way. . . . It makes a lot of sense that women should claim our identity in relationships because we have not been allowed to have a social identity on our own terms.

Marcus, *supra* note 5, at 27.

In short, there is considerable disagreement among feminist legal theorists regarding both the existence of and normative implications of the different voice.

ing outside the framework of law. Thus, the female perspective is excluded. As Kenneth Karst put it: "It takes no sophistication. . .to recognize that American law is predominantly a system of the ladder, by the ladder, and for the ladder."<sup>8</sup>

In her work on women in the legal profession,<sup>9</sup> and on methods of dispute resolution<sup>10</sup> Carrie Menkel-Meadow has dramatically illustrated the connection between women's different voice in moral development and women's different voice in legal processes to explain the ways in which the increasing presence of women might transform the legal system. She formulated a number of questions that need to be addressed in the process of assessing women's impact. Do women lawyers perform specific professional tasks in ways different from men? How has the exclusion, or at least the devaluation, of women's voices affected the choices made in the values underlying our current legal structures? When we value "objectivity," or a "right" answer, or a single winner, are we valuing male goals of victory, exclusion, clarity and predictability? What would our legal system look like if women had not been excluded from participating in its creation? What values would women express in creating the laws and institutions of a legal system? How would those values differ from what we see now? How might the different male and female voices join together to create an integrated legal system? She speculated that the growing strength of women's voice in the legal profession will change the adversarial system into a more cooperative, less war-like system of communication.<sup>11</sup> The same questions need to be asked in regard to women judges.

The feminist legal theory that provides the foundation for the present work has thus far treated the question of whether women judges speak in a different voice in speculative and normative ways.<sup>12</sup> The task of this

8. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 462 (1984).

9. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession*, 24 OSGOOD HALL L.J. 897 (1986); Carrie 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) [hereinafter Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession*].

10. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

11. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 9, at 54-55. For an examination of results of research on women in the legal profession and new questions raised by those results see Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession*, *supra* note 9.

12. Although Menkel-Meadow and others have made contributions of enormous importance by examining the impact of women lawyers on the legal profession, little empirical work has been done on the impact of women judges. Judicial behavior research has examined women's voting behavior. See Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. Q. 77 (1977); Thomas G. Walker and Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); Jon

paper is to begin to address the question empirically by analyzing judicial opinions.

Until quite recently women judges were simply too scarce to study in any meaningful way. Only eight women had served on the federal bench when President Jimmy Carter instituted a series of reforms in the judicial selection process in 1977.<sup>13</sup> Those reforms resulted in the appointment of eleven women to the United States Courts of Appeals and twenty-nine to the federal district courts. Subsequently, President Ronald Reagan nominated four women to the federal appellate bench and President George Bush appointed seven. Thus, a minimally sufficient number of women now hold positions on the federal bench to make it feasible to begin to study their decision-making.

It is well-known that Carter chose liberals for the bench and that Reagan carefully selected jurists who embraced conservative values. Thus, the women on the federal courts vary widely in their political views and embrace different political agendas. Consequently, an examination of their opinions may reveal a different approach to legal decision-making that is attributable to sex-related differences rather than to different political values.

#### METHODOLOGICAL ISSUES AND FRAMEWORK

In this paper I examine the decision-making of both male and female judges on the United States Courts of Appeals for the Ninth Circuit in order to test the theory that women judges speak in a different voice. While my plan is to study all of the circuits, I began with the Ninth Circuit simply because it has the largest number of women. At the time I conducted this study a total of five women had served on the Ninth Circuit. All five are included in the analysis. The women judges currently serving are: Cynthia Holcomb Hall (appointed in 1984 and the only woman nominated to the federal intermediate appellate bench during President Reagan's first term in office); Betty Fletcher, Dorothy Nelson and Mary Schroeder (all appointed by President Carter in 1979); Shirley

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Gottschall, *Carter's Judicial Appointments: the Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165 (1983); Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328 (1986); David W. Allen and Diane E. Wall, *The Behavior of Women State Supreme Court Justices: An Update* (1990) (unpublished manuscript on file with author); David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987). I do not discuss this work here because I have focused on the processes of decision-making rather than voting patterns.

13. See Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136 (1987); Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982)[hereinafter Martin, *Women on the Federal Bench*]. For documentation of the underrepresentation of women on the bench as a percentage of women lawyers, see, Beverly Blair Cook, *Women as Judges*, in WOMEN IN THE JUDICIAL PROCESS (1988).

Hufstедler (appointed by President Johnson in 1968 and served until 1979).<sup>14</sup>

The theory that women judges speak in a different voice raises methodological issues that need to be addressed in constructing a framework for analysis. Those issues are primarily concerned with techniques of comparing opinions of different judges and with operationalizing the concept of a different voice. First, the voice is different, but different from what? Gilligan made clear that the voices of her female subjects contrasted sharply with the expectations of traditional theories—the different voice did not refer to a simple dichotomy between men and women.<sup>15</sup> Thus, it might be possible to examine the opinions written by women and compare them with the qualities of law found in traditional legal theory. Those qualities would include, at the very least, a standard of objectivity and abstraction based on the application of the established principles of legal reasoning, and a concept of fairness that is associated with reliance on established rules of procedure. Such an approach would be seriously flawed because it would preclude consideration of the question of whether male judges speak in the traditional voice of law. The traditional voice may, indeed, speak only in theory.<sup>16</sup> Consequently, it is imperative to compare the opinions of women judges with those of their male colleagues if we are to discover the extent to which—if at all—women judges are going to change the law in the ways predicted by feminist theory. I have, therefore, included seven male judges in the analysis in order to make comparison possible. A second set of methodological issues concerns techniques of comparison. In a perfectly constructed world (for the purposes of this study), the Courts of Appeals would hear cases in panels of two judges—one male and one female—and each would write an opinion. In the real world, however, the federal intermediate appellate courts sit in panels of three and, in the overwhelming majority of cases, agree on a decision and one judge writes an opinion. Thus, within a given case, there is no opportunity to compare the reasoning of women and men. In a very few cases the three-judge panel consists of a woman and two men (or, more rarely, a man and two women); a woman writes an opinion for the majority and a man writes a dissenting opinion, or a man may write the opinion for the majority and a woman writes a dissenting opinion. In either of those situations there is a clear basis for comparing the voices of women and men judges within a given case. Because there is very little dissent on the Courts of Appeals, however, such cases occur too infrequently to provide an adequate basis for analysis. The analysis must, in-

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14. Although district judges sit on the three judge panels of the Court of Appeals in a number of cases and sometimes write opinions, I have not included any of the women from the district courts in my study for the reason that I have chosen to study the women judges on the United States Courts of Appeals rather than the district courts.

15. See Gilligan, *supra* note 4; Marcus, *supra* note 5.

16. See Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

stead, be based primarily on a comparison of men's and women's opinions in different cases that involve the same types of issues.

Additionally, men and women judges cannot be compared without reference to differences in their political values. For example, a woman judge who is very liberal would be quite likely to write a much different opinion than a man judge who is conservative. The difference would not necessarily be attributable to the different voice of the woman. In an attempt to take into account differences that are not related to the sex of the judge, I "paired" each woman judge with a man whose background was as similar to hers as possible. The members of each pair were appointed by the same president and thus, have the same general political orientation. I then matched female and male judges insofar as possible according to legal education, occupation prior to appointment, and whether they had prior judicial or prosecutorial experience.

The pairs of judges are as follows: 1) Shirley Hufstedler and Walter Ely. Both were appointed by President Johnson. 2) Dorothy Nelson and William Canby. Both were appointed by President Carter and both practiced law only briefly before moving to academic positions. Canby served in the Peace Corps and then taught law at Arizona State University; Nelson moved from private practice to a faculty position at the University of Southern California Law Center and served as Dean from 1969 until she was appointed to the Ninth Circuit. Both Nelson and Canby have written extensively on the law. He authored a book, *American Indian Law*; she has written about alternative dispute resolution. Both were rated by lawyers as liberal in criminal cases.<sup>17</sup> 3) Mary Schroeder and Harry Pregerson. Both were appointed by President Carter and both had prior judicial experience—he was on the Superior Court, County of Los Angeles, she was on the Arizona Court of Appeals. Both were described by lawyers as liberal judges.<sup>18</sup> 4) Betty Fletcher and Proctor Hug. Also appointed by Carter, both were in private practice for about twenty years before their judicial appointments. Both were evaluated by lawyers as liberal in criminal cases.<sup>19</sup> 5) There was no clear match for Cynthia Holcomb Hall. She had a career in tax law before her appointment to the United States Tax Court in 1972 and the United States District Court in 1981. I compared her opinions to those of three men appointed by Reagan: Charles E. Wiggins, David R. Thompson, and Robert R. Beezer. As one would expect with Reagan appointees, all were described by lawyers as conservative.<sup>20</sup> Table 1 provides a summary of background information for each judge. While my method of comparison is by no means perfect in that some apparent similarities in backgrounds may mask important differences, it has the advantage of providing a basis for a systematic comparison of the decision-making of women and men across cases and in a way that is

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17. ALMANAC OF THE FEDERAL JUDICIARY 9, 19 (1992).

18. *Id.* at 26, 30.

19. *Id.* at 11, 13.

20. *Id.* at 32, 12, 5, 31.

likely to reveal differences that transcend those based on political outlook and judicial values.

The third set of methodological issues, probably the most difficult to resolve, is concerned with how best to operationalize the concept of a different voice. In order to avoid a simplistic application of Gilligan's framework, it is essential to keep in mind that the different voices do not represent a rigid dichotomy either between men and women or between traditional and non-traditional legal decision-making. The differences must not be expected to fit neatly into clearly defined categories.<sup>21</sup> As Gilligan was careful to point out, most people speak in both voices but tend to emphasize one over the other.<sup>22</sup> Moreover, there are numerous institutional factors that shape judicial decision-making in such a way as to discourage the expression of different approaches. All federal judges received similar legal training. Although there are some substantial differences in the career patterns of male and female federal judges,<sup>23</sup> once they reach the federal appellate bench, the socialization process would seem to push them closer together. Additionally, judges are constrained by the formal rules of adjudication. All judges use tools of legal reasoning—they examine the facts of a legal dispute, identify the essential features of those facts, determine what legal principles should apply, and apply those principles to the facts. Thus, women's decision-making should not be expected to exhibit dramatic and obvious differences from men's. If differences are revealed, they may be quite subtle and may even emerge only in particular types of cases or without any consistent pattern. Paradoxically, although judges' voices tend to converge in certain respects, women's voices should not be expected to speak in unison; the women in this study vary greatly in their political ideologies and, most likely, in their responses to the traditional legal system. It is also important to consider the relationship between reasoning and results. While a woman judge may well articulate values such as caring and connection, and may emphasize context over abstract rules she may, nevertheless, reach the same result as her male colleagues. Consequently, the difference in women's voice may not be readily quantifiable in terms of voting behavior. The analysis must,

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21. Just as Gilligan's work has the potential to inspire us in historic ways, it could also become the Uncle Tom's Cabin of our century. Lawyers are tempted to use Gilligan's work in a shallow way, to distill it into a neat formula. Her thesis is memorable, handy, and easy to oversimplify. Rightly or wrongly, many people feel that such an oversimplified version comports with their experience of the sexes. Moreover, generalizations taken from Gilligan provide accessible analogues to the law/equity split, and to the ethical positions competing in any legal dispute. All in all, Gilligan's work tempts one to suggest that the different voices of women can somehow be grafted onto our right-and rule-based legal system.

Scales, *supra* note 2, at 1381.

22. Marcus, *supra* note 5, at 47.

23. See Martin, *Women on the Federal Bench*, *supra* note 13. For example, among the judges Carter appointed to the federal bench fewer women than men had either prior experience on the judiciary or a record of political party activism.

therefore, focus at least as much on judges' methods of reasoning as it does on the way they vote.

### DISCOVERING THE DIFFERENT VOICE IN JUDICIAL OPINIONS

Despite the difficulties, it is possible to identify ways that the different voice may manifest itself in judicial decision-making. Once criteria are identified, opinions can be examined to determine whether those criteria are present. Several legal scholars have utilized Gilligan's framework to consider how the different voice would appear in judicial decision-making.

Kenneth Karst posited that women's voice would alter the male conception of freedom that shaped the values of the Constitution.<sup>24</sup> Principles of liberty, property, due process, and equality all represent guarantees of protection from interference by others; they express a desire for separation from government as individual liberties rather than as collective rights. But more attention to the different voice could transform those principles by integrating such values as connection, caring, and responsibility. Thus, the state would have an affirmative duty to ensure that each of its members has the ability to participate fully in the community. More specifically, the different voice, according to Karst, would take the doctrine of Equal Protection far beyond the traditional view that it is limited to prohibiting the state from discrimination toward the more expansive requirement that the state has an affirmative constitutional responsibility to all of its members to prevent harms that are dehumanizing. The Constitution would offer more protection against discrimination and against interference with voting rights, reflecting the value of the "web"—of community and connection—and the citizen as a valued participant in the community.

Gayle Binion argued that women's voice would discard the intent rule in discrimination cases and look at the consequences of governmental actions to judge the extent to which they are in compliance with the Equal Protection Clause.<sup>25</sup> Additionally, she contended that the emphasis on connection and care would lead feminists to support affirmative action programs against the claim that they are discriminatory. Binion asserted, on a more general level, that integrating women's experience into constitutional analysis is likely to result in a reformulation—but not a rejection—of rights analysis. The different voice may bring a redefinition of liberty as more than protection from government, a reconceptualization of the nature of community, a rejection of the hierarchical power of the state, and more of a focus on responsibility for the consequences of private and public actions.<sup>26</sup>

Suzanna Sherry identified characteristics of a "feminine" jurispru-

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24. Karst, *supra* note 8.

25. Gayle Binion, *Toward a Feminist Regrounding of Constitutional Law*, 72 Soc. Sci. Q. 207 (1991).

26. *Id.* at 212, 218.

dence.<sup>27</sup> A jurisprudence that emphasized connection (in contrast to autonomy), context (as opposed to fixed rules), and responsibility (in contrast to rights) would be feminine but not necessarily feminist. Nor would it necessarily be liberal, but would “encompass aspects of personality and relationship to the world that have nothing to do with one’s political preferences.”<sup>28</sup> Sherry argued that Justice Sandra Day O’Connor’s decision-making reflected the concerns of a feminine jurisprudence. Although we may take issue with Sherry’s assessment of O’Connor’s opinions, her analysis is useful because it provides suggestions for identifying the different voice in legal analysis. O’Connor, Sherry found, has not been as willing as the other conservatives on the Court to permit violations of the right to full membership in the community and she has tended to support individual rights only when they implicate membership in the community. O’Connor’s decision-making, according to Sherry, not only emphasizes membership in the community but also reflects a view that shaping the values of the community through governmental processes is an important function of members of the community.<sup>29</sup> Moreover, Sherry discerned a contextual approach in O’Connor’s decision-making and a tendency to reject bright-line rules.

Katharine T. Bartlett identified and critically examined three feminist legal methods: asking “the woman question,” feminist practical reasoning, and consciousness-raising.<sup>30</sup> The first two are useful in constructing a framework for analyzing the decision-making of judges.<sup>31</sup> The first, asking “the woman question,” examines how the law fails to take into account the experiences and values that seem more typical of women than of men or how existing legal standards and concepts might disadvantage women.<sup>32</sup> As Bartlett explained, asking “the woman question” reveals the ways in which political choice and institutional arrangements contribute to women’s subordination. “The woman question” is fundamentally important because it allows the person engaged in legal reasoning to look,

beneath the surface of the law to identify the gender implications of rules

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27. Sherry, *supra* note 3.

28. *Id.* at 583.

29. *Id.* at 603.

30. Bartlett, *supra* note 2.

31. Consciousness-raising is extremely important. Women judges get together (e.g., the National Association of Women Judges addressed the issue of discriminatory clubs. *See* Resnik, *supra* note 16, at 1931.) to talk about issues that concern them and it may well affect their decision-making. But the effects of consciousness-raising are not discernible in judicial opinions.

32. Some examples of “the woman question” are: In rape cases, why does the defense of consent focus on the perspective of the defendant and what he “reasonably” thought the woman wanted, rather than the perspective of the woman and the intentions she “reasonably” thought she conveyed to the defendant? Why is the conflict between work and family responsibilities in women’s lives seen as a private matter for women to resolve within the family rather than a public matter involving restructuring of the workplace? Bartlett, *supra* note 2, at 842.

and the assumptions underlying them and insist[s] upon applications of rules that do not perpetuate women's subordination. [Feminist legal analysis] means recognizing that the woman question always has potential relevance and that "tight" legal analysis never assumes gender neutrality.<sup>33</sup>

Bartlett's second method is feminist practical reasoning. While she was careful to point out that practical reasoning is not the polar opposite of the male model of abstract thinking, she allows that feminist practical reasoning, when combined with "the woman question," may make more facts relevant to the resolution of a legal case and give rationality new meanings. Feminist practical reasoning acknowledges greater diversity in human experiences, takes into account competing or inconsistent claims, and reveals its lack of neutrality by making its moral and political choices explicit. It also strives to integrate emotive and intellectual elements and to expand possibilities for new types of analysis.<sup>34</sup>

#### SELECTING CRITERIA OF THE DIFFERENT VOICE

Insofar as Karst, Binion, Sherry, and Bartlett suggest ways in which the different voice can manifest itself in judicial opinions, their work provides a basis for selecting criteria for analyzing the judges of the Ninth Circuit.<sup>35</sup> In resolving cases that involve discrimination, a judge might em-

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33. Bartlett, *supra* note 2, at 843.

34. Bartlett, *supra* note 2, at 857-858. An example of conventional practical reasoning that Bartlett provides is the New Jersey Supreme Court's rejection of a defendant's marital-exemption defense in a criminal prosecution for rape. *State v. Smith*, 426 A.2d 38 (N.J. Sup. Ct. 1981). In that case the court examined the history of the exemption, the strength and evolution of the common law authority, the various justifications offered by the state for the exemption, the surrounding social and legal context in which the defendant asserted the defense, and the particular actions of the defendant in this case that gave rise to the prosecution. *Id.* at 858. Feminist practical reasoning would take some elements of that opinion further. It would, for example, more explicitly identify the perspective of the woman whose interest a marital rape exemption entirely subordinates to that of her estranged husband. Also, feminist practical reasoning would have looked more closely at the due process interests of the defendant.

35. See also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 213 (1990). Minow, addressing the usefulness of relational approaches in resolving conflicts over "differences," explains that in using such approaches a judge would:

*Notice* the mutual dependence of people. *Investigate* the construction of difference in light of the norms and patterns of interpersonal and institutional relationships which make some traits matter. *Question* the relationship between the observer and observed in order to situate judgments in the perspective of the actual judge. *Seek out* and *consider* competing perspectives, especially those of people defined as the problem. *Locate* theory within context; *criticize* practice in light of theoretical commitments; and *challenge* abstract theories in light of their practical effects. *Connect* the parts and the whole of a situation; *see* how the frame of analysis influences what is assumed to be given. (emphasis in original).

See also Resnik, *supra* note 16. Resnik explored ways that feminism might inform the role of the judge and modify the formal expectations of judges—to be neutral, impartial, and

phasize the importance of full membership in a community and the unacceptability of exclusion. In other words, a judge might treat equality as connection. A judge might also ask "the woman question" by considering the impact of the challenged practices on the plaintiff and others who are similar to the plaintiff. Alternatively, a judge might view the problem of discrimination in terms of denial of personal autonomy of the victims, and thereby, treat equality as autonomy. Or a judge might, instead, focus on the importance of governmental non-interference and give the benefit of the doubt to the defendant. The first and second approaches would reflect a different voice while the third could be characterized as liberal, and the fourth as conservative.

In order to resolve a case in which a plaintiff alleges that a government official deprived him or her of rights protected by the federal law or the Constitution, an opinion that focuses on the responsibility of the state or local government to protect members of the community would reflect the different voice. A judge might ask "the woman question" by examining aspects of the situation that had a detrimental effect on the plaintiff or others who are similar to the plaintiff. An opinion that emphasizes an individual's right not to be the victim of abuse at the hands of public officials would reflect a liberal perspective, but not a different voice. A conservative approach would be clear in an opinion that shifts the focus away from both the state's duty to protect and the rights of individuals to the authority of the states in the federal system and the importance of minimizing federal intervention in the actions of state officials.

In cases involving discrimination as well as those involving governmental deprivation of rights, a judge's opinion that emphasizes context over abstract rules would reflect a different voice. That is, a judge might decline to apply seemingly appropriate precedent and/or procedural rules and look for a more creative solution by carefully examining the context of the dispute. A judge may perhaps broaden the perspective by bringing in additional facts or remanding the case for further facts. Where a procedural rule would present an obstacle, a judge would be likely to minimize the importance of the rule and emphasize the importance of reaching a fair resolution. A judge who clearly did not speak in a different voice would apply established rules and would be likely to find rules of procedure to prevent a plaintiff from proceeding. A judge who speaks in a different voice would be likely to treat a decision as a resolution of a particular dispute and, consequently, would not articulate general principles to apply in future cases. Moreover, the different voice would emerge in attempts to resolve a dispute by balancing the concerns of all those likely to be affected as opposed to focusing on the rights of the particular individuals involved in the case.

The voting behavior of a judge who speaks in a different voice would often coincide with that of a liberal judge. Both would be likely to support

the claimant in cases involving discrimination and deprivation of rights. The differences, however, would be perceptible in the opinions. As noted above, a liberal would treat the issue as one involving a violation of personal autonomy while the judge who speaks in a different voice would perceive the problem as one of exclusion. Likewise, some congruence is likely between conservative judges and those who speak in a different voice. When there is a conflict between an individual and the government, a conservative will usually resolve that conflict in favor of the latter. But in certain contexts a judge who speaks in a different voice is also likely to support the government. For example, in cases that involve the rights of the criminally accused, a vote in favor of the government could reflect a concern for the interests of the community. In the area of the First Amendment, a judge who speaks in a different voice may well vote to restrict certain types of expression on the grounds that the expression is detrimental to the moral quality of the community and causes harm to certain members of it (obscenity) or that some forms of expression serve to perpetuate the exclusion of minority groups from the community (hate speech).

The present study includes cases involving the following legal provisions: the Equal Protection Clause of the Fourteenth Amendment, the anti-discrimination provisions of the Civil Rights Act of 1964, and actions under 42 U.S.C. § 1983 for deprivation of rights protected by the Constitution and the federal law.<sup>36</sup> I chose those areas because complaints alleging discrimination and deprivation of rights raise issues that involve connection. The rights not to be subjected to discrimination and to be protected by governmental officials may be viewed as rights that are interdependent insofar as they concern one's right to belong to the community rather than an assertion of a right against the community. Alternatively, those rights may be perceived in terms of individual autonomy and governmental power. Thus, the opinions are likely to reflect either the presence or absence of a different voice.

A search was conducted using Westlaw, to identify all cases decided by the Ninth Circuit, through June of 1990, in which either Equal Protection, a claim of discrimination in violation of Title VII of the Civil Rights Act of 1964, or deprivation of rights in violation of 42 U.S.C. § 1983 was the primary issue, and in which an opinion was written by one or more of the judges included in this study.<sup>37</sup> The search yielded 128

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36. 42 U.S.C. § 1983 (1981) provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress."

37. The search was conducted in June of 1990. The author wishes to thank Reginald Sheehan for conducting the searches on Westlaw.

majority opinions<sup>38</sup> and 28 dissenting opinions written by women, 158 majority opinions<sup>39</sup> and 21 dissenting opinions written by men. In an overwhelming majority of these cases, the judges simply followed the law provided by a statute or by precedent, and thus did not express a different voice. The discussion that follows focuses on the opinions in which the author engaged in sufficient discussion to allow for analysis. Thus, the opinions that I discuss exemplify the approach taken by each judge.

I have noted that no judge can be expected to fit neatly into any category. It is likely that the judges in the present study speak in both voices but emphasize one voice over the other just as most of Gilligan's subjects did.<sup>40</sup> Thus, while I did not expect to discover that women judges invariably write opinions that focus on connection, caring, and context in the ways that I have explained, the work of Gilligan and feminist legal theorists led me to hypothesize that the opinions written by women judges will reflect such concerns discernibly more than the opinions of their male colleagues.

#### DIFFERENT VOICES I: EQUALITY AS CONNECTION V. EQUALITY AS AUTONOMY

The hypothesis that women judges speak in a different voice would be supported if, in cases involving discrimination, women judges focus on the importance of membership and full participation and the problem of exclusion while men judges tend to treat discrimination more as a problem of individual autonomy. The hypothesis would also be supported if women judges but not men judges ask "the woman question" in resolving claims of discrimination by examining factors that could serve to disadvantage women or members of other groups.

Because Shirley Hufstедler and Walter Ely both supported the claimant in all of the discrimination cases in which they wrote opinions, they may be characterized as liberals. Hufstедler, however, did not articulate the basis of her decisions in a way that distinguished her approach from Ely's. For example, she wrote the opinion when the court held that the Los Angeles Police Department's hiring policies violated Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.<sup>41</sup> Focusing on legal standards, she held that the only possible defense of the height requirement and physical abilities test, because they had a disproportionate impact on female applicants, would

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38. 42 opinions were written by Fletcher, 19 by Hall, 17 by Hufstедler, 26 by Nelson, and 24 by Schroeder.

39. 13 opinions were written by Ely, 36 by Canby, 19 by Wiggins, 21 by Thompson, 18 by Beezer, 27 by Pregerson, and 24 by Hug.

40. Gilligan, *supra* note 4; Marcus, *supra* note 5.

41. *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980). In March of 1972, Title VII became applicable to governmental agencies. Thus, the plaintiffs based their claim on the Equal Protection Clause for the alleged discrimination before that date.

be that they constituted a "business necessity". She concluded that the police department had failed to comply with that standard and she demonstrated that the district court had misconstrued the business necessity defense as it had been defined in prior cases. Likewise, she found that the district court had misapplied the legal standard in rejecting the claim that the police department's earlier use of gender-based job classifications violated the Equal Protection Clause. The district court reasoned that because the classifications were substantially related to and served the important governmental objective of providing an effective police force, it did not violate Equal Protection—the qualities of disposition, and physical size and strength are substantially related to the important governmental objective of providing an effective police force. Hufstedler contended that even if size, strength, and disposition are substantially related to the objective of maintaining an effective police force, not all women lack these traits and cannot be constitutionally excluded from serving as police officers.<sup>42</sup> Thus, she grounded her opinion firmly in principles of established law although she did articulate the problem of discrimination on the police force as one of unacceptable exclusion of women rather than as a violation of the rights of women.

Hufstedler used essentially the same approach when she dissented from the court's decision that a school district's policy regarding maternity leave for teachers did not violate either Title VII or the Equal Protection Clause of the Fourteenth Amendment.<sup>43</sup> The policy required pregnant teachers to leave work at the beginning of the ninth month of pregnancy, forbade the use of sick leave benefits during that time, and offered no guarantee that a teacher who took maternity leave would be restored to her former teaching position. While the majority found that the discriminatory policy was justified by a business necessity, Hufstedler disagreed. Alleging that the majority's conclusion was based on a misreading of controlling principles, she articulated a tougher set of criteria for establishing a business necessity defense that would be more closely tied to the job relatedness of the termination date. For example, if there is a business necessity, it would have to be based on evidence proving that the ninth month of pregnancy presents problems that are not presented in any of the earlier stages of pregnancy or in any other type of temporary disability, and that the safe and efficient operation of the school system requires that all teachers who are nine months pregnant be kept out of the schools. She underlined the discriminatory nature of the maternity leave policy, noting that it imposed a special burden on pregnant women by placing restrictions on their employment opportunities which did not apply to any other class of teachers taking leaves of absence.<sup>44</sup>

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42. *Id.* at 1385.

43. *deLaurier v. San Diego Unified Sch. Dist.*, 588 F.2d 674 (9th Cir. 1978).

44. In a number of other employment discrimination cases, Hufstedler based her opinions solidly on legal standards established in prior cases. See *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978) (holding that employee's refusal to pay union

In short, although she consistently supported the claimant in discrimination cases, Hufstedler relied primarily on what she conceived as clearly established principles of law to reach her decisions. And, with the exception of one opinion, she did not explore either connection or autonomy as a basis for the value she placed on equality.<sup>45</sup> In that opinion, she alluded to equality as connection. Interestingly, Ely joined her. In a class action to compel the San Francisco School District to provide all non-English speaking Chinese students with compensatory instruction in English, the majority ruled in favor of the school district. Hufstedler, disagreeing with that holding, pointed out that, “[a]ccess to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute.”<sup>46</sup> She went on to emphasize the exclusionary effect of declining to help Chinese speaking children with English:

the language barrier, which the state helps to maintain, insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated blacks in *Brown*; these children cannot communicate at all with their classmates or their teachers.<sup>47</sup>

Thus, she framed the issue of access to equal educational opportunity in terms of connection and membership.

Ely's opinions were similar to Hufstedler's insofar as he did not probe issues of connection or autonomy, but merely suggested that he found discrimination to be unacceptable because it is prohibited by the law. He wrote the opinion for the court in a case in which a woman

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dues because of his religious beliefs did not constitute an undue hardship on the employer), *cert. denied*, 442 U.S. 921 (1979); *Ramirez v. National Distillers & Chem. Corp.*, 586 F.2d 1315 (9th Cir. 1978) (holding that the district court violated the rules concerning granting of summary judgment by resolving factual issues. Hufstedler stated: “Despite our sympathy with district courts struggling with seriously overcrowded dockets, we must remind ourselves that we cannot let our concern about calendar congestion interfere with the rights of the litigants to trials on the merits when there are real issues to try.” *Id.* at 1321.); *Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403 (9th Cir. 1978) (holding that the employer had not met the burden of showing that it had made good faith efforts reasonably to accommodate employee's religious beliefs or that no accommodation could be made without undue hardship), *cert. denied*, 439 U.S. 1072 (1979); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975) (affirming district court's finding that employer engaged in racial discrimination); *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974) (holding that federal district court had jurisdiction in action charging federal officials with racial discrimination and that court must consider the final agency determination in light of the procedural fairness that was accorded to the claimant during the administrative proceedings and of the adequacy of the record in all other respects bearing upon the discrimination issues).

45. *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973) (Hufstedler, joined by Ely, dissented from the rejection of an en banc consideration), *cert. granted*, 412 U.S. 938 (1973), *rev'd* 414 U.S. 563 (1974).

46. *Id.* at 805.

47. *Id.* at 806.

brought an action under Title VII against a corporation that refused to hire her or any other woman as a bartender pursuant to a provision of the California Alcoholic Beverage Control Act.<sup>48</sup> The district court held that the Twenty-first Amendment insulated that provision from attack under the Civil Rights Act. Pending the appeal of that decision to the court of appeals, however, the California Supreme Court invalidated the state legal provision on constitutional grounds.<sup>49</sup> Ely, who could have simply remanded the case to the district court, went further to hold that the employment policy was a patent violation of Title VII.

He did consider the conception of equality as connection, if only implicitly, in his opinion in *Seattle School District No. 1 v. State of Washington*,<sup>50</sup> however. In 1978, Washington voters adopted Initiative 350 which forbade the school boards from requiring students to attend a school other than the one nearest the student's home. Three school districts, all of which had implemented a series of desegregation programs including some assignment of students to schools other than those closest to their homes, filed suit in federal district court alleging that the Initiative was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The district court concluded that Initiative 350 was unconstitutional on the grounds that a racially discriminatory purpose was one of the factors leading to the adoption of the initiative. Ely found that the district court correctly invalidated the initiative but declined to address the issue of legislative purpose. Instead, he held that the Initiative was an impermissible legislative classification based on racial criteria because it differentiated student assignments for purposes of achieving a racial balance from student assignments for any other reason. Moreover, he pointed out that the effect of the initiative was to restructure the state's political process so as to remove from local school boards their existing authority, and in large part their capability to enact programs designed to desegregate the schools. Thus, the Initiative effectively disenfranchised the voters of the local school districts with respect to local educational matters. In short, possibly the most serious evil of the Initiative was that it excluded members of the community from participating in the decisions that needed to be made regarding ways to achieve a racial balance in the schools.

While considerations of equality as connection or as autonomy were slightly discernible in the opinions of Hufstедler and Ely, such issues were absent from the opinions written by Betty Fletcher and Proctor Hug. That may be due to the fact that most of the discrimination cases in which they wrote opinions were dominated by procedural issues. For example, a plaintiff lost in the district court on the grounds that she failed to file a complaint with the Equal Employment Opportunity Commission

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48. *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973), *aff'd*, 458 U.S. 457 (1982).

49. *Id.*

50. 633 F.2d 1338 (9th Cir. 1980).

within the 300 days of the allegedly discriminatory action;<sup>51</sup> a complainant failed to give notice to the appropriate defendant within the statutory limitations period;<sup>52</sup> and a complainant, proceeding *pro se*, filed suit before he received a "right-to-sue" letter.<sup>53</sup> Consequently, the opinions did not focus on the substantive issue of discrimination but rather upon questions concerning whether procedural rules should be relaxed in order to allow a plaintiff to proceed.

Still, an examination of four opinions written by Fletcher and three by Hug, in which they addressed the substantive issues, suggests potentially important differences in the way the two judges framed those issues. Although not all of the cases involved allegations of discrimination based on sex, Fletcher, in effect, asked "the woman question" while Hug tended to emphasize and accept the employer's justification for the challenged behavior.

In one case, Fletcher wrote an opinion in an action brought under Title VII against the Army Corps of Engineers alleging discrimination in promotions.<sup>54</sup> The district court dismissed the action. On appeal, Fletcher applied the disparate impact analysis and demonstrated that the district court had mistakenly applied a disparate treatment analysis and imposed an inappropriately heavy burden on the plaintiff to prove that he would have been promoted in the absence of discrimination.<sup>55</sup> She remanded the case to the district court to consider the disparate impact claim. In another case, two women, who had been employed as directors of Berlitz schools, contended that they were paid less than either their male predecessors or male directors of other Berlitz schools.<sup>56</sup> The district court rejected the claim partly on the grounds that a sex-based wage discrimination claim may be brought under Title VII only if the evidence supporting the charge would establish a violation of the Equal Pay Act. The Equal Pay Act requires that an employee show that the employer discriminated in the payment of wages to employees within a single establishment. Fletcher wrote the majority opinion in which she relied on a decision of the United States Supreme Court<sup>57</sup> to hold that Title VII's statutory scheme is much

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51. *Bartelt v. Berlitz Sch. of Languages*, 698 F.2d 1003 (9th Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

52. *Mahoney v. United States Postal Serv.*, 884 F.2d 1194 (9th Cir. 1989).

53. *Jones v. Bechtel*, 788 F.2d 571 (9th Cir. 1986).

54. *Hung Ping Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982).

55. Under disparate impact analysis the plaintiff need only show that employment practices had a discriminatory result and the employer must then show a business necessity to defend the practice. Under disparate treatment analysis, the plaintiff must show discriminatory purpose; if the plaintiff establishes a *prima facie* case of discrimination, the defenses available to the employer are 1) that there were legitimate reasons for the disparate treatment—that they were not a pretext for discrimination or 2) that certain characteristics limited to one group are essential to the performance of the job (a *bona fide* occupational qualification).

56. *Bartelt v. Berlitz Sch. of Languages*, 698 F.2d 1003 (9th Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

57. *County of Washington v. Gunther*, 452 U.S. 161 (9th Cir. 1981).

broader than the Equal Pay Act. In a third case, Fletcher found that a female applicant for the police department was rejected because of intentional discrimination in violation of Title VII.<sup>58</sup> The discrimination consisted of a sex-stereotyped view of her physical abilities and the application of a standard of moral integrity that was not applied equally to men. Finally, in *Johnson v. Transportation Agency*,<sup>59</sup> Fletcher found the Agency's decision to promote a woman to the position of road dispatcher over an equally qualified man to be an appropriate remedy for the non-representation of women in skilled craft positions.

In each of those opinions Fletcher asked "the woman question" by focusing on ways in which employment practices disadvantaged members of certain groups. Hug, in contrast, found that it was not the employer but the employee who was responsible for the alleged discriminatory treatment.

In one case Hug found that, although the plaintiff established a prima facie case of age discrimination, the employer had succeeded in providing legitimate reasons for his discharge.<sup>60</sup> Hug also found that an employer who had allegedly discriminated against a female employee in compensating her, evaluating her job performance, and in discharging her, had provided legitimate reasons for its actions and that a preponderance of the evidence demonstrated that those reasons were not pretexts for discrimination.<sup>61</sup> The employee was paid less than men in comparable positions for legitimate reasons: her sales orders were below the quota set by her supervisor, she was placed on probation, suspended, and then terminated when she was unable to make the quotas. The plaintiff also brought a class action, relying on statistical evidence to show that her employer engaged in a pattern of discrimination against female applicants and employees. Hug agreed with the trial court that there was substantial evidence of an insignificant number of female applicants<sup>62</sup> and held that the prima facie case of discrimination had been rebutted because the lack of applicants accounted for the small number of women in the sales force.<sup>63</sup> In both of these cases, Hug might have removed the analysis from the existing framework to ask "the woman question". He might, for example, have remanded the case to the district court with instructions to examine the question of whether women in sales face special disadvantages because of male domination in the workforce which employers might be required to take into account.<sup>64</sup> The opinions written by Dorothy Nelson and Wil-

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58. *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983).

59. 770 F.2d 752 (9th Cir. 1984), *cert. granted*, 478 U.S. 1019 (1986), *aff'd*, 480 U.S. 616 (1987).

60. *Douglas v. Anderson* 656 F.2d 528 (9th Cir. 1981).

61. *Piva v. Xerox*, 654 F.2d 591 (9th Cir. 1981).

62. *Id.* at 595.

63. *Id.*

64. *See also* *Zaslavsky v. Bd. of Educ. of Los Angeles City Unified Sch. Dist.*, 610 F.2d 661 (9th Cir. 1979) (Hug J.) (affirming the finding of the district court that a faculty integration plan requiring reassignment of teachers to achieve a racial balance did not

liam Canby failed to reveal any discernible differences.<sup>65</sup> Likewise, no differences emerged in the comparison of the opinions written by Mary Schroeder and Harry Pregerson.<sup>66</sup> All relied on precedent and usually held in favor of an individual who claimed to have been the victim of discrimination.

Cynthia Holcomb Hall authored only three opinions in cases involving discrimination during the time considered in the present study. All three of those opinions are marked by meticulous legal analysis and ad-

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violate constitutional or statutory rights of teachers).

65. See *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987) (Nelson remanding to district court for consideration of retaliation claims), *cert. denied*, 498 U.S. 939 (1990); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360 (9th Cir. 1987) (Nelson remanding to district court for consideration of allegation that white employee was constructively discharged because of marriage to a black man); *Williams v. Apfels Coffee Co.*, 792 F.2d 1482 (9th Cir. 1986) (Nelson reversing district court's grant of summary judgment for defendant in employment discrimination action); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288 (9th Cir. 1982) (Nelson remanding to district court to consider merits of claim that exclusion of blind from juries amounts to a constitutional violation); *Rathgeb v. Air-Cal, Inc.*, 812 F.2d 567 (9th Cir. 1987) (Canby holding that district court's judgment in favor of defendant was clearly erroneous and remanding to determine whether the employer discriminated on basis of sex, race, and national origin); *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103 (9th Cir. 1987) (Canby reversing in part, district court in action challenging county's decision not to provide sign language interpreters to enable deaf individuals to serve as jurors); *Clark v. Arizona Interscholastic Assoc.*, 695 F.2d 1126 (9th Cir. 1982) (Nelson rejecting Equal Protection challenge to policy of prohibiting boys from participating on girls' interscholastic volleyball teams), *cert. denied*, 464 U.S. 818 (1983); *Clark v. Arizona Interscholastic Assoc.*, 886 F.2d 1191 (9th Cir. 1989) (Canby upholding rule restricting interscholastic volleyball competition to single sex teams). Both Canby and Nelson concluded that the rule was substantially related to the goal of redressing past discrimination and promoting equality of athletic opportunity between the sexes.

66. See *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (Schroeder affirming district court's finding of prima facie case of race discrimination in violation of Fair Housing Act of 1968, turned on procedural issue of whether district court had discretion to permit plaintiffs to file supplemental complaint), *cert. denied*, 493 U.S. 813 (1989); *Gerdorn v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (Schroeder, en banc with five dissenters, holding that airlines' policy of requiring female flight attendants to comply with strict weight requirements was facially discriminatory in violation of Title VII remanded to district court for consideration of appropriate relief), *cert. denied*, 460 U.S. 1074 (1983); *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987) (Pregerson upholding affirmative action plan for promotion of firefighters), *cert. denied*, 489 U.S. 1051 (1989); *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (Pregerson holding government employee who had been discharged must be given opportunity to establish prima facie case of discrimination based on handicap (epilepsy), if she established that then employer would be required to show good faith effort to accommodate her); *Breneman v. Kennecott Corp.*, 799 F.2d 470 (9th Cir. 1986) (Pregerson affirming district court's holding that discharge of employee not based on gender nor in retaliation for previous charge of sex discrimination); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984) (Pregerson finding constructive discharge, noting that constructive discharge is a subjective term and turns on facts of each case); *EEOC v. Inland Marine Indust.*, 729 F.2d 1229 (9th Cir. 1984) (Pregerson affirming district court's finding of intentional racial discrimination in compensation), *cert. denied*, 469 U.S. 855 (1984).

herence to precedent. She affirmed the decision of the district court in each case; and only one resulted in a decision in favor of the claimant.<sup>67</sup> Moreover, like her more liberal female colleagues, Schroeder and Nelson, Hall wrote her opinions in such a way that they were indistinguishable from those of her male counterparts.

#### DIFFERENT VOICES II: THE DUTY TO PROTECT V. FREEDOM FROM ABUSE

In actions brought under 42 U.S.C. § 1983 did the women judges discuss the government's responsibility to protect members of the community? Did they ask "the woman question"? Did the men, on the other hand, emphasize personal autonomy—the right not to be a victim of governmental neglect or abuse? Affirmative answers to such questions would lend support to the hypothesis that women judges speak in a different voice.

Although four of the five pairs of judges may be classified as liberal insofar as they usually supported the claimant, the opinions of the men and women were virtually indistinguishable.<sup>68</sup> Neither articulated the is-

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67. *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (Hall holding that the employer violated Title VII and the Pregnancy Discrimination Act in its treatment of hotel maids by terminating them when they became pregnant, by failing to accommodate religious beliefs, and retaliating against them for opposing discriminatory practices); *Rios v. Regents of Univ. of Arizona*, 811 F.2d 1248 (9th Cir. 1987) (She affirmed the district court's decision that denial of tenure to faculty member in College of Nursing did not violate Title VII. The court rejected the claim that discrimination occurred as a result of the fact that the members of the all female College of Nursing were not given opportunities to satisfy the tenure requirements (fifty hours per week were devoted to non-research work) while the all male College of Pharmacy had sixty percent of their time available for research. The district court found the differences between the two colleges were not related to sex.); *Canfield v. Sullivan*, 774 F.2d 1466 (9th Cir. 1985) (Hall affirming the district court's finding that a municipal employee's dismissal did not constitute a denial of Equal Protection).

68. See, e.g., *Bernasconi v. Tempe Elementary Sch. Dist. #3*, 548 F.2d 857 (9th Cir. 1977) (Ely held that elementary school counselor transferred in retaliation for exercise of constitutionally protected speech was entitled to relief under Section 1983.), *cert. denied*, 434 U.S. 825 (1977); *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974) (Ely held that transfer of prisoners not per se violative of due process rights but allegations of prisoners that their transfers were ordered to penalize them for religious activities state a claim under Section 1983.); *Hansen v. May*, 502 F.2d 728 (9th Cir. 1974) (Ely reversed district court's denial of prisoner's claim that property, confiscated when he was placed in maximum security confinement, was not returned upon his release from that confinement.); *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965) (Ely reversed district court's grant of summary judgment for defendants in Section 1983 action against police officers for unlawful search.).

*Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) (Fletcher reversed the district court's dismissal of a Section 1983 action filed by an inmate in a state prison. The inmate filed a complaint alleging that he had been wrongfully reassigned out of a prison vocational course and transferred to another prison. He claimed that the actions by the prison authorities were in retaliation against his role as "jailhouse lawyer." Fletcher held that he was engaging in activities that are protected by the First Amendment and, although his rights

sues in terms of either responsibility to protect or personal autonomy. In-

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were limited by legitimate policies and goals of the prison in the preservation of internal order and discipline, security, and rehabilitation of the prisoners, the limitation must be no greater than necessary. Because he had alleged that the prison administration's actions were not only retaliatory but arbitrary and capricious, he had stated a cause of action and dismissal by the district court was improper.); *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986) (Fletcher reversed the district court's dismissal of claim against city and county jail and officials by pre-trial detainee alleging deliberate indifference to his medical needs.); *Harding v. Galceran*, 889 F.2d 906 (9th Cir. 1989) (Hug reversed decision of the district court to allow plaintiff to proceed with 1983 action alleging excessive force.), *cert. denied*, 489 U.S. 1082 (1991); *Lai v. City and County of Honolulu*, 749 F.2d 588 (9th Cir. 1984) (Hug held 1983 action was not time-barred, district court had applied the incorrect statute of limitations.).

*Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985) (Nelson reversed the district court's grant of summary judgment in favor of the defendants, holding that a man who had been dismissed from the position of Chief of Professional Education at Napa State Hospital had an expectation of privacy in his office, therefore, a search was not reasonable under the Fourth Amendment.), *cert. granted in part* 474 U.S. 1018 (1985), *rev'd*, 480 U.S. 709 (1987); *Quick v. Jones*, 754 F.2d 1521 (9th Cir. 1984) (Nelson reversed grant of summary judgment holding prison inmate had property interest in his prison account, thus, had made a claim of deprivation of property without due process of law.); *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981) (Canby held that Hawaiian prison regulations created a liberty interest in not being transferred to another facility and that the prisoner had stated a 1983 claim against officials who transferred him.), *cert. granted*, 456 U.S. 1005 (1982), *rev'd*, 461 U.S. 238 (1983); *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989) (Canby held former firefighter, dismissed for making critical comments about other officers' conduct, had 1983 claim).

*Hernandez v. Denton*, 861 F.2d 1421 (9th Cir. 1988) (Schroeder held that a prison inmate whose Section 1983 action was dismissed by the district court as frivolous, should be allowed to amend his complaint to support his allegations that prison officials had subjected him to cruel and unusual punishment in violation of the Eighth Amendment.), *cert. granted & vacated*, 493 U.S. 801 (1989); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (Pregerson held that absolute immunity does not apply to prosecutor who commits acts that are usually related to routine police activity; plaintiffs had stated a claim under Section 1983 because they alleged that the false statements were made in connection with illegal arrest.); *Valindingahm v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989) (Pregerson reversed summary judgment for defendants in action by prisoner against prison officials.); *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987) (rejecting Section 1983 claim of probationary police officer terminated for sexual relations with a minor), *cert. denied*, 485 U.S. 961 (1988); *Ostlund v. Bobb*, 825 F.2d 1371 (9th Cir. 1987) (Pregerson held that police officer did not waive his right to a hearing simply because he did not demand a hearing after the city determined that he was not incapacitated; city officials who denied him due process were not entitled to qualified immunity as they violated clearly established constitutional rights.), *cert. denied*, 486 U.S. 1033 (1988); *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986) (Pregerson held that prison guards' intentional failure to protect prisoner from assault by other prisoners constituted a claim under Section 1983.), *cert. denied*, 484 U.S. 870 (1987); *Shah v. County of Los Angeles*, 797 F.2d 743 (9th Cir. 1986) (Pregerson held that state tort law remedies available to pre-trial detainee not grounds for dismissal of Section 1983 claim.).

In several cases, Hall wrote opinions affirming the district court's holding that a plaintiff had failed to establish that he/she had been deprived of a constitutional right; thus, the plaintiff had failed to establish a claim under Section 1983. *See Gross v. Hammer*, 884 F.2d 1200 (9th Cir. 1989), *cert. denied*, 112 S.Ct. 582 (1991); *Thomas v. Douglas*, 877 F.2d 1428 (9th Cir. 1989); *Canfield v. Sullivan*, 774 F.2d 1466 (9th Cir. 1985). *Beezer*,

stead, the judges simply decided the cases by applying procedural rules and precedent. There were only three exceptions and they were limited to one pair of the judges—Fletcher and Hug.

In one case, Fletcher wrote an opinion reversing the district court's dismissal of a complaint under Section 1983.<sup>69</sup> The complainant, a victim of domestic abuse, alleged that the police breached their duty to protect her from her husband, violating her rights to Due Process and Equal Protection. On one occasion, the police removed the husband from the house but declined to arrest him after he had beaten her. One of the officers told her that she deserved the beating because of the way she was "carrying on".<sup>70</sup> Subsequently, she separated from her husband and obtained a restraining order against him; nevertheless, he continued to harass her, repeatedly phoning her, threatening her, and vandalizing her home—on one occasion he allegedly threw a fire bomb through the window. Another time, the police responded to her call for help by hanging up on her, and, in one instance, told her that she could solve her problem by moving away.

In order to decide whether the district court was correct in dismissing the complaint, Fletcher examined the Due Process and Equal Protection claims separately. First, she noted that although under Section 1983 the police have no constitutional duty to protect members of the public at large from crime, Balistreri could establish that the police had a duty to protect her if she could show that she had a "special relationship" with them.<sup>71</sup> Fletcher held that the district court should have considered whether the state had affirmatively undertaken a duty to protect her; the court should have considered whether the restraining order constituted an affirmative commitment to protect her from her husband's harassment and whether that commitment plus an awareness of her complaints constituted a special relationship. The restraining order and the repeated notification to the police of the problem were sufficient to state a claim of duty.

Second, turning to the Equal Protection issue, Fletcher noted that several district courts have held that police failure to respond to com-

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Wiggins, and Thompson each decided a number of Section 1983 cases in favor of the complainant but their opinions did not evidence an emphasis on protection as opposed to autonomy. *See, e.g.,* Finkelstein v. Bergna, 881 F.2d 702 (9th Cir. 1989) (Beezer, J.), *cert. denied*, 112 S.Ct. 75 (1991); Bunyan v. Camacho, 770 F.2d 773 (9th Cir. 1985) (Beezer, J.), *cert. denied*, 447 U.S. 903 (1986); Swift v. Lewis, 901 F.2d 730 (9th Cir. 1990) (Wiggins, J.); Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989) (Wiggins, J.), *cert. denied*, 494 U.S. 1028 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (Thompson, J.), *cert. denied*, 498 U.S. 938 (1990); Hunt v. Dental Dep't., 865 F.2d 198 (9th Cir. 1989) (Thompson, J.); Berg v. Kincheloe, 794 F.2d 457 (1986) (Thompson, J.). *But see* Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989) (Thompson, J.), *cert. denied*, 493 U.S. 1072 (1990).

69. Balistreri v. Pacifica Police Dep't., 855 F.2d 1421 (9th Cir. 1988) (Schroeder, J., agreeing).

70. *Id.* at 1427.

71. *Id.* at 1425.

plaints by women in domestic violence cases may violate Equal Protection.<sup>72</sup> The complainant's claim was not well-pleaded as she had no lawyer; there was no specific claim that the officials' conduct reflected discrimination based on her status as a female victim of domestic violence. Fletcher found that in spite of the poor drafting, there were sufficient facts alleged to suggest animus against her because of her sex. For example, the officer's remarks that she deserved to be beaten suggested an intention to treat domestic abuse cases less seriously than other assaults; his remarks also suggested an animus against women.

In a second case, Fletcher agreed with an opinion by David R. Thompson that enabled a plaintiff to proceed with a Section 1983 action against a state trooper who, after arresting a man for drunk driving and impounding the car, left the passenger by the side of the road at 2:00 A.M. in a high crime area; the passenger accepted a ride with a strange man who raped her.<sup>73</sup>

In the third case, it was Hug who wrote the majority opinion implying that there is a duty to protect.<sup>74</sup> The case arose out of a search of Irma Perez's home and her arrest for harboring a fugitive. The search was clearly illegal because the police had an arrest warrant for her brother, who occasionally spent the night at her apartment but did not live there. Perez sought to hold the city liable for deprivation of her rights by attributing the illegal search to inadequate training of police officers. The district court granted a directed verdict in favor of the city. Hug, noting that such a verdict would be appropriate only if the evidence permitted only one reasonable conclusion, held that the trial court erred in granting the directed verdict because the evidence could have permitted a finding of municipal liability. The city had no written guidelines pertaining to the search of the home of a third party and police officers were not taught the law of search and seizure on a regular basis. Thus, the jury could have found that the training program was so inadequate that it constituted gross negligence on the part of the city.

It is possible to discern a duty to protect in all three of the cases discussed in this section. The police, Fletcher allowed, may have a duty to protect women who call for help in the context of domestic violence. Also, Fletcher's agreement with Thompson suggested that the police have the responsibility not to leave people stranded on the road in the middle of the night. Finally, as Hug suggested, municipal liability might arise out of the police department's failure to fulfill its responsibility to train officers adequately so that they will not abuse the rights of citizens.

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72. *Id.* at 1427.

73. *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988) (Carroll, J. dissenting — contending that there was no special relationship between the trooper and the passenger that created a duty to protect her — particularly considering that she was an adult and within walking distances of two open businesses), *cert. denied*, 498 U.S. 938 (1990).

74. *Perez v. Simmons*, 859 F.2d 1411 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989).

DIFFERENT VOICES III: CONTEXTUAL V. RULE BASED DECISION-  
MAKING

Finally, the hypothesis that women judges speak in a different voice would find support if women's opinions manifest a contextual approach, while those written by male judges are marked by the application of rules. Most of the opinions examined in this study—at least at first glance—seemed to involve a straight-forward application of federal statutes, rules, standards of review, and precedents developed by the Supreme Court and the Ninth Circuit. The courts of appeals, reviewing cases from district courts, are confronted with a myriad of procedural rules. Moreover, numerous technical rules and standards are involved in the application of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment. It was, therefore, not surprising that the opinions of the women as well as the men, were dominated by rule-based decision-making.

Still, even the most rule-oriented legal reasoning involves interpretation and choices among different rules to apply in a given case. In several cases, a dissenting male judge disagreed with a woman judge's use of legal rules and castigated her for departing from established standards.<sup>75</sup>

There were also a number of instances in which the judge who wrote the opinion departed from rules and moved toward context. In cases where a claimant seemed to have a weak case, or had made procedural errors that the district court found to be fatal, men as well as women were willing to relax rules, commonly by construing a complaint under Section 1983 generously in order to find that the plaintiff had stated a claim,<sup>76</sup> or by overlooking technical errors made by the plaintiff in filing an action.<sup>77</sup> In those cases, the judge seemed to consider the context—claimants who were prisoners or who were too poor to retain a lawyer were at a disadvantage in the legal system, or problems of discrimination in employment, or abuse of authority by public officials—and relax the rules in order to

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75. *Balistreri v. Pacifica Police Dep't.*, 855 F.2d 1421 (9th Cir. 1988); *Bartelt v. Berlitz Sch. of Languages*, 698 F.2d 1003 (9th Cir. 1983), *cert. denied*, 464 U.S. 915 (1983); *Hung Ping Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982).

76. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (Thompson, J.), *cert. denied*, 498 U.S. 938 (1990); *Hunt v. Dental Dep't*, 865 F.2d 198 (9th Cir. 1989) (Thompson, J.); *Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989) (Pregerson, J.); *Hernandez v. Denton*, 861 F.2d 1421 (9th Cir. 1988) (Schroeder, J.), *vacated* 493 U.S. 801 (1989); *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (Fletcher, J.); *King v. Atiyeh*, 814 F.2d 565 (9th Cir. 1987) (Hall, J.); *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986) (Fletcher, J.); *Berg v. Kincheloe*, 794 F.2d 457 (9th Cir. 1986) (Thompson, J.); *Shah v. County of L.A.*, 797 F.2d 743 (9th Cir. 1986) (Pregerson, J.); *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) (Fletcher, J.); *Quick v. Jones*, 754 F.2d 1521 (9th Cir. 1985) (Nelson, J.).

77. *See, e.g., Baker v. Racansky*, 887 F.2d 183 (9th Cir. 1989) (Thompson, J.); *Jones v. Bechtel*, 788 F.2d 571 (9th Cir. 1986) (Hug, J.); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (1987) (Wiggins, J.); *Reynolds v. Brock*, 815 F.2d 571 (1987) (Pregerson, J.).

provide meaningful access to the courts. There were no discernible differences between women and men, however.

Four opinions written by women are noteworthy, either for their generous interpretation of the applicable rules or because they took an outright contextual approach. First, in *Johnson v. Transportation Agency*,<sup>78</sup> Fletcher relied on the Supreme Court's decision in *United Steelworkers v. Weber*<sup>79</sup> to uphold the agency's affirmative action plan, but she interpreted that decision quite freely. In *Weber*, the Supreme Court identified several aspects of permissible affirmative action plans including the requirement that a plan be temporary and remedial, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."<sup>80</sup> The district court in *Johnson* had found that the agency failed to show that the plan was temporary and remedial and expressed doubt that the plan was appropriately designed to break down entrenched patterns of discrimination. Fletcher found that the district court adopted an overly restrictive view of *Weber*. She asserted that, although the plan did not specify a termination date, neither did it contain a statement that it was intended to be permanent.<sup>81</sup> Finally, she found that the plan had a remedial purpose of redressing an imbalance, and it was not necessary for the employer to show a history of purposeful discrimination.<sup>82</sup> In short, Fletcher did not actually reject the rules, but used a contextual approach insofar as she interpreted those rules freely in order to uphold the Transportation Agency's affirmative action plan.

Second, Fletcher's opinion in a case that required her to interpret the provision in the Civil Rights Act of 1964, which forbids an employer to discriminate against an employee who has opposed any practice that the Act makes unlawful, clearly evidences a contextual approach to decision-making.<sup>83</sup> In that case black employees had filed complaints with the EEOC, picketed the campaign headquarters of the mayor, and lodged an administrative complaint with the Office of Contract Compliance alleging racial discrimination by their employer. Subsequently, they wrote a letter to the Los Angeles Unified School District protesting the District's presentation of an award for affirmative action to a representative of their company. The letter stated that the recipient of the award was a "Standard Bearer of the bigoted position of racism" at the company.<sup>84</sup> As punishment for writing the letter, the employees received four months' suspension without pay. The Court of Appeals' decision revolved around the

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78. 770 F.2d 752 (9th Cir. 1984), *cert. granted*, 478 U.S. 1019 (1986), and *aff'd*, 480 U.S. 616 (1987).

79. 443 U.S. 193 (1979).

80. *Johnson v. Bechtel*, 770 F.2d 752, 756 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

81. *Id.*

82. *Id.* at 757-58.

83. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

84. *Id.* at 1011.

question of whether the letter was protected under the Civil Rights Act as opposition to discrimination. Fletcher held that it was, even though it "does not fit the classic mold of protected 'opposition'. . . ."<sup>85</sup> Even though the letter did not refer to any specific instance of unlawful discrimination and was directed at an outside party, it still fell within the scope of the opposition clause. Here, Fletcher clearly moved from rules to context in order to decide the case.

Third, in a case that involved the constitutionality of body cavity searches, Hall's opinion manifests individualized rather than rule based decision-making. *Kennedy v. Los Angeles Police Department*<sup>86</sup> was an action under Section 1983 against the Los Angeles Police Department and two officers. The officers had arrested Kennedy for grand theft, which the jury found was without probable cause (she was holding some of her former roommate's property as security for a debt). They then escorted her to the jail where she was forced to submit to a body cavity search. Hall held that the police department's blanket policy of conducting body cavity searches of everyone arrested for a felony was unconstitutional. But rather than hold that such degrading and intrusive searches were always unconstitutional, Hall adopted a contextual approach by examining the particular circumstances of Kennedy's arrest to determine whether there was reasonable suspicion to conduct a body cavity search. In some cases, an arrest for grand theft might give rise to a reasonable suspicion that would justify such a search. A charge that evolved out of an ordinary disagreement between two roommates was not, however, such a case.

Finally, there was one case in which a woman judge—Schroeder—explicitly stated a preference for non-legalistic means of resolving conflict. *Ridgeway v. Montana High School Association*<sup>87</sup> arose out of a class action suit brought by female students attending public high schools in Montana and their parents challenging the practices in high school athletic programs that discriminated against female students. The parties had pursued a course of settlement with a professional facilitator that resulted in changes in the programs without the active involvement of the district court. This case centered on the issue of whether the high schools were required to change the seasons in which female students played volleyball and basketball in order to make them coincide with the conventional seasons elsewhere in the country. The district court declined to require a season shift on the grounds that it would not bring about significant improvements in opportunities for the female students. It did, however, consider whether the seasons policy constituted a violation of Equal Protection, and found that it did not. The plaintiffs then asked the Court of Appeals to consider the issue. In her opinion upholding the seasons policy, Schroeder praised the parties for their ground-breaking effort to bring

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85. *Id.* at 1012.

86. 887 F.2d 920 (9th Cir. 1989).

87. 858 F.2d 579 (9th Cir. 1988).

changes in athletic programs without “formalistic legal arguments and [with] a commendable emphasis upon practical ways to change the operation of school athletics in order to achieve equal opportunities for girls and boys.”<sup>88</sup> Now, however, Schroeder admonished, the parties have resorted to more formalistic arguments and “it appears the parties are asking that this court turn their butterfly back into a caterpillar”<sup>89</sup> by attempting to have the issue decided in isolation as a matter of Equal Protection analysis. Declining to resolve the Equal Protection issue, Schroeder underlined the need for the schools to continue to work together to achieve equality in athletics. Here, Schroeder took a contextual approach by reaching beyond the formal procedures of the law and established constitutional doctrine; she expressed a preference for seeking solutions through informal channels.

As the above discussion demonstrates, there were a few opinions in which women judges spoke in a different voice with a contextual rather than a rule-based approach. Those were the exception, however. In all of the other cases women chose a rule-based approach; moreover, men spoke in a different voice with a contextual approach as often as the women did.<sup>90</sup>

#### CONCLUSION

Do women judges speak in a different voice? Sometimes, some women judges do. But sometimes, some men judges also speak in that different voice. The results presented here do not provide empirical support for the theory that the presence of women judges will transform the very nature of the law.

The results of the present study may be explained in several ways. First, it is entirely possible that Gilligan’s theory of sexual differences is wrong. If women neither use different methods of reasoning nor focus on connection and caring rather than autonomy and rights, it makes perfect sense that judges who are women will not exhibit differences from their male colleagues. Second, assuming the validity of the “different voice” theory, it is possible that the nature of law and legal processes subverts any sex-based differences. Women who become federal judges may simply adapt to the requirements of the male oriented power structure. In order to pursue a career in the law that leads to an appointment on the federal appellate bench, women may—whether consciously or not—find it necessary to adopt the traditional rules of legal reasoning. They may not find an opportunity to depart from those rules to express a different voice.

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88. *Id.* at 587.

89. *Id.*

90. See *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989) (Beezer, J.); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987) (Wiggins, J.); *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986) (Canby, J.), *vacated*, 487 U.S. 1212 (1988); *Jones v. Bechtel*, 788 F.2d 571 (9th Cir. 1986) (Hug, J.); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984) (Pregerson, J.).

Menkel-Meadow has noted that her "research efforts and other evidence. . . seems to indicate that women in law are being assimilated into the traditional culture of the profession rather than bringing the innovations often urged by feminist lawyers."<sup>91</sup> It is possible that women judges, perhaps even more than women lawyers, are being assimilated into the culture of judges. Still, as the number of women judges increases, assimilation may be replaced by transformation.

Finally, the present study was limited to analysis of opinions in only two areas of the federal law by members of just one circuit of the Court of Appeals. Expanding the analysis to other areas—such as the rights of the accused, freedom of expression, freedom of religion, the free exercise clause, as well as federal statutes—may reveal differences that did not emerge in the analysis of cases that arose under the federal anti-discrimination statute and the federal provision that protects constitutional rights. Likewise, analysis of additional circuits may reveal differences that do not exist among the judges on the Ninth Circuit.

A great deal of additional work is needed before the question of whether women judges speak in a different voice can be answered with any degree of certainty. It is my hope that the present work will encourage others to embark on research in this area both by studying other courts and other areas of the law using the framework that I have developed and by generating new ideas for testing feminist theories.

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91. Menkel-Meadow, Exploring a Research Agenda of the Feminization of the Legal Profession, *supra* note 9, at 313.

TABLE I

NAME	APPT DATE	PRES	BIRTH DATE	LEGAL EDUCATION	OCCUPATION
Shirley Hufstedler	1968	LBJ	1925	Stanford	state judge
Walter Ely	1964	LBJ	1913	U. Texas	private practice
Dorothy Nelson	1979	Carter	1928	UCLA, USC	law professor
William C. Canby, Jr.	1980	Carter	1931	U. Minnesota	law professor
Betty B. Fletcher	1979	Carter	1923	U. Washington	private practice
Proctor Hug, Jr.	1977	Carter	1931	Stanford	private practice
Mary M. Schroeder	1979	Carter	1940	U. Chicago	state judge
Harry Pregerson	1979	Carter	1923	Berkeley	state judge
Cynthia Holcomb Hall	1984	Reagan	1929	Stanford, NYU	U.S. Dist. Ct. tax law, fed. judge
Charles E. Wiggins	1984	Reagan	1927	USC	politics
David R. Thompson	1985	Reagan	1930	USC	private practice
Robert R. Beezer	1984	Reagan	1928	U. Virginia	private practice

NAME	EXPERIENCE	A.B.A. RATING	RELIGIOUS AFFILIATION	NET WORTH
Shirley Hufstedler	judicial	WQ	Protestant	NA
Walter Ely	no	Q	Methodist	NA
Dorothy Nelson	no	Q	Bahai	\$183,365
William C. Canby, Jr.	no	WQ	Protestant	\$110,343
Betty B. Fletcher	no	WQ	Protestant	\$314,070
Proctor Hug, Jr.	no	WQ	Catholic	NA
Mary M. Schroeder	judicial	Q	Catholic	\$93,500
Harry Pregerson	judicial	WQ	Jewish	\$728,073
Cynthia Holcomb Hall	judicial	Q	Episcopalian	\$1,700,445
Charles E. Wiggins	no	EWQ	Protestant	\$575,000
David R. Thompson	no	WQ	Presbyterian	\$360,500
Robert R. Beezer	judicial	WQ	Protestant	\$506,399

Note: I have used most of the categories developed by Sheldon Goldman in his studies of judicial selection. See, Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981); Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334 (1983). The author wishes to thank Sheldon Goldman for providing information on the judges.

NA=information not available

Q=qualified

WQ=well qualified

EWQ=exceptionally well qualified

