

# Visible on “Women’s Issues”†

*Judith Resnik\**

In the late 1970s, when I first started teaching large law school classes, a colleague gave me what he took to be very kind advice. He said:

Be careful. Don’t teach in any areas associated with women’s issues. Don’t teach family law, don’t teach sex discrimination. Don’t teach trusts and estates. Teach the real stuff, the hard stuff: contracts, torts, procedure, property—and don’t be too visible on women’s issues.

I came to the large classroom setting after teaching in a clinical program. At the time, I was working on articles about procedure, habeas corpus, and women in prison. I taught and wrote about all three topics. After a few years, I had to admit that my colleague’s remarks were descriptively close to the mark. My virtually all-male colleagues *were* more interested in my work on procedure and federal courts and less interested in my work on women in prisons.

I have told this anecdote before, and by its telling learned that my experience is in no way idiosyncratic, nor is it a tale of any particular law school in the United States. Others have documented and described the problems women face as law teachers. The articles by Marina Angel,<sup>1</sup> by Richard Chused,<sup>2</sup> and by several participants<sup>3</sup> in this symposium<sup>3</sup> provide both qualitative and quantitative detail. Unfortunately, these descriptions are not of historical significance alone. In 1989, I was the chair of the Section on Women in Legal Education of the Association of American Law Schools. During that year, I repeatedly heard examples of the risks of being identified with “women’s issues.” In 1991, when writing and giving talks that invoke feminist theory, I continue to encounter disinterest in, and sometimes hostility to, feminist scholarship and commentary.

Thus, the advice to stay away from “women’s issues” is still given. But something *has* changed. Many of us are challenging the assumption

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\*Orrin B. Evans Professor of Law, University of Southern California Law Center. My thanks to Lise Anderson, Pat Cain, Dennis Curtis, Amy Hafey, Carolyn Heilbrun, Lynne M. Hufnagel, Lee Seltman, and Barrie Thorne; to Eleanor Fox and other members of the planning committee for the conference, Voices of Women, held in April of 1990; and to the editors of this journal.

1. Marina Angel, Women in Legal Education: What It’s Like To Be Part of a Perpetual First Wave or The Case of the Disappearing Women, 61 Temp. L.Q. 799 (1988).

2. Richard Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537 (1988).

3. See, e.g., Patricia A. Cain, Feminist Legal Scholarship, 77 Iowa L. Rev. 19 (1991); Marjorie Maguire Shultz, The Gendered Curriculum: of Contracts and Careers, 77 Iowa L. Rev. 55 (1991).

embedded in that advice—that there are separable, identifiable “women’s issues.” Think about the words: “Be careful; don’t teach in any area associated with *women’s issues*.” What is the referent? What are the areas *not* associated with “women’s issues”? Jean Love’s materials on torts,<sup>4</sup> Thomas Wartenberg’s essay on philosophy,<sup>5</sup> the almost 100-page bibliography prepared for this symposium,<sup>6</sup> and the discussion during the conference have all made plain that, if I don’t teach in areas related to women’s issues, I just *can’t* teach: All areas of law are connected to and touch on “women’s issues.”<sup>7</sup>

My purpose in this speech is to sketch a few of the many places in which “women’s issues” illuminate procedure and federal courts, two subjects about which I teach and write regularly.<sup>8</sup> Let me begin with procedure, with the role of the judge, and with the feminist issues embedded in any conversation about appropriate “judicial” behavior. Women as judges in the United States is a relatively recent phenomenon.<sup>9</sup> When some women take on that role, they respond in ways that raise questions about the range of behavior permissible to judges.

Take the recent case involving Judge Lynne Hufnagel of the Denver District Court. Judge Hufnagel rearranged the furniture in her courtroom to respond to the needs of the elderly, the handicapped, and children. The *New York Times* offered this description: “Judge Hufnagel steps down from the bench to greet young witnesses at the courtroom door, then walks them to a special seat with its back to the defendant [but] facing the jury.”<sup>10</sup> In late 1987, a man named Frank Travis Green was accused of sexually abusing a young girl. He was tried before Judge Hufnagel. As was her custom, Judge Hufnagel escorted the young girl and another young witness to and from the witness seat in the courtroom. Green was convicted, and he appealed. The appellate court reversed the conviction.<sup>11</sup> That court held: “It is axiomatic that a trial judge must be free of all taint of bias and partiality . . . .”<sup>12</sup> The court concluded that Judge Hufnagel’s activity—

4. Jean Love, *Bringing Gender Issues Into the Torts Course*, *Torts and Retorts* (Newsletter, Ass’n of Am. L. Sch., Section on Torts-Compensation Systems), Fall 1989, at 4.

5. Thomas Wartenberg, *Teaching Women Philosophy*, 11 *Teaching Phil.* 15 (1988).

6. Paul George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 *Iowa L. Rev.* 87 (1991).

7. For further discussion of efforts to ignore gender issues, see Judith Resnik, *Naturally Without Gender: Women, Jurisdiction, and the Federal Courts* (forthcoming 1992); Deborah Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *Yale L.J.* 1731 (1991).

8. For development of the themes raised here, see Judith Resnik, *Housekeeping: The Nature and Allocation of Work in the Federal Trial Courts*, in *Feminism Jurisprudence Symposium*, 24 *Ga. L. Rev.* 909 (1990); Judith Resnik, *On the Bias, Feminist Reconsiderations for the Aspirations of Our Judges*, 61 *S. Cal. L. Rev.* 1877 (1988); Judith Resnik & Carolyn Heilbrun, *Convergences: Law, Literature, and Feminism*, 99 *Yale L.J.* 1913 (1990).

9. *See generally*, National Center for State Courts, *Women in the Courts* 85-105 (Winifred L. Hepperle & Laura Crites eds., 1978).

10. Lis Wiehl, *National Rules for Child Witnesses?*, *N.Y. Times*, Jan. 12, 1990, at B12.

11. *People v. Green*, No. 88CA0230 (Colo. Ct. App. June 22, 1989).

12. *Id.* at 2 (citing *People v. District Court*, 560 P.2d 828, 831 (Colo. 1977)).

helping the girls to the witness chair—breached that norm.<sup>13</sup>

Certainly, the idea of fair judging is well worth praising, and certainly, the act itself of being a fair judge is extremely complex.<sup>14</sup> But is the assumption of the Colorado Court of Appeals correct—that a jury perceives a fixed, immobile judge (one who ignores the physical characteristics of certain witnesses) as the embodiment of impartiality and perceives a judge who assists child witnesses to their seats as partial to those witnesses? Think about the words used in the United States to describe the appropriate judicial stance: “disinterest,” “disengagement,” and “impartiality.” As many have detailed, these aspirations are not followed fully in practice<sup>15</sup> and, equally as important, miss a good deal of how judges do and should behave. I understand, both as a litigator and as a teacher of procedure, that judges are engaged, embedded, and deeply dependent—on the culture and government that empowers them and on the lawyers and litigants before them. Judges cannot escape these connections and responsibilities; the questions are about how to capture and to cabin that interaction. When teaching about the role of the judge, it is incumbent upon me to explore with students the nature of judicial *dependence* as well as judicial independence.<sup>16</sup>

My next example comes from questions of jurisdiction and the allocation of authority among different judges within the federal system. On April 2, 1990, the Federal Courts Study Committee (FCSC) issued its report.<sup>17</sup> Congress created the FCSC in 1988 in legislation directing the Chief Justice of the United States Supreme Court to appoint fifteen people to consider the future of the federal court system.<sup>18</sup> In many respects, the FCSC Report is a stunning piece of work. In just over a year, fifteen people wrote what is in essence a book on a wide-ranging set of topics related to federal courts. My purpose here is not to elaborate the strengths and

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13. According to the court, the “trial judge’s actions towards the child witnesses could have been perceived by the jurors as an indication that the trial judge believed in the credibility of the children who were testifying.” *Id.* In another case, *People v. Rogers*, 800 P.2d 1327 (Colo. Ct. App. 1990), the Colorado Court of Appeals again reversed a conviction in which Judge Hufnagel had escorted a child to the seat, assigned a staff person to sit next to her, and provided water. In *Rogers*, the trial judge also instructed the jury that “by doing these things I’m not implying, nor are you to understand that I am implying, any opinion as to [the victim’s] credibility or any weight to be given to her testimony. You’re to apply the same standards judging her credibility that you would to any other witness. I merely do these things to try to make testimony for younger children easier.” *Id.* at 1329.

14. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237 (1987); Judith Resnik, *On the Bias*, *supra* note 8.

15. See, e.g., Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 Ariz. St. L.J. 237 (1989) (summarizing the problems of gender-based discrimination in courts and the efforts by many states to document and address these problems).

16. See Robert M. Cover, Owen M. Fiss, & Judith Resnik, *Procedure 180-427; 1316-1569* (1988) (Ch. 2: The Forms of Adjudication and Ch. 6: Decision Centers and Their Authority).

17. Federal Courts Study Committee, *Report of the Federal Courts Study Committee* (1990) [hereinafter FCSC Report].

18. *Judicial Improvements and Access to Justice Act of 1988*, Pub. L. No. 100-702, 102 Stat. 4642 (codified as 28 U.S.C. § 331 “note”).

weaknesses of the FCSC Report, but rather to highlight how, in discussions of the federal courts, feminist theory helps illuminate contemporary issues.

Among the many recommendations of the FCSC Report are a few about the allocation of judicial power—between federal and state courts, and between Article III judges (appointed pursuant to Article III of the Constitution and having life tenure and salaries protected from diminution)<sup>19</sup> and non-Article III judges (administrative law judges, bankruptcy judges, and magistrates judges, whose positions are created pursuant to legislation and who have fixed terms). In addition to the roughly 600 Article III judges, today's federal judiciary includes some 300 full-time magistrates and another 300 full-time bankruptcy judges, all of whom are authorized to work at a range of tasks including pretrial management, discovery supervision, adjudication of motions, and presiding at trials.<sup>20</sup>

The FCSC Report focused on and emphasized the specialness of the Article III judiciary: "the federal judiciary is composed most importantly of Article III judges."<sup>21</sup> Urging that this group of judges be kept very small, the Report cited the suggestion that "1,000 is the practical ceiling."<sup>22</sup> One of the reasons offered is that a

judge who felt like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did would not approach the judicial task with the requisite sense that power must be exercised responsibly—especially when that judge by reason of having life tenure, lacked the usual incentives to perform assigned tasks energetically and responsibly.<sup>23</sup>

This description—about what motivates Article III judges—is animated by assumptions that judges work hard in order to make money, to obtain promotions, to avoid being demoted or fired, and to feel important or to obtain recognition from others. Given that Article III judges are unlikely to be fired (or, with occasional exception, to be promoted) or to experience major changes in their salaries, the argument is that Article III judgeships must offer status and prestige to attract competent people to the bench and then to keep their work at a high level of quality. But the size of the federal judiciary has become problematic, because the number of cases filed at both trial and appellate levels has increased over the past few decades. To maintain Article III judges as a small and thus elite group, the FCSC Report recommended reallocating work so that non-Article III judges assume some of the tasks currently assigned to Article III judges.

The FCSC report, like other commentary about the structure of adjudication in the federal system, is thus filled with comments about the nature and value of different kinds of work and with proposals to create and maintain hierarchies of workers to undertake different but related

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19. U.S. Const. art. III, § 1.

20. 28 U.S.C. § 633 (1991); 28 U.S.C. § 152 (1991); and Administrative Office of the United States Courts, Annual Report of the Director at 46-47 (1989) (data on authorized positions as of June 30, 1989).

21. FCSC Report, *supra* note 17, at 69.

22. *Id.* at 8.

23. *Id.* at 7.

tasks. These topics are familiar ones to readers of feminist theory, which discusses the kind of work that women do in the United States,<sup>24</sup> about comparable worth, the ranking of occupations, and sex segregation in the workplace.<sup>25</sup> When teaching and writing about the contemporary transformation of the "federal courts," feminist literature devoted to examining work among individuals holding different social statuses provides a rich resource. I detail a few of these intersections below.

First, one of the disappointments for me in reading the FCSC Report is that its recommendations about structure were derived with relatively little discussion of the activity of judging itself. Research for the Report did include questionnaires, which asked about the stresses, the caseload pressures, the reliance on law clerks, the time for reflection—all of the daily experiences of being a judge. Those questions were sent to Article III trial judges.<sup>26</sup> But the body of the Report does not give detail about the responses to those questions, nor were similar questions asked of those individuals (magistrates and bankruptcy judges) who are also "federal judges" but who lack Article III status. Hence, it is difficult to assess whether the FCSC Report's claims of the need for prestige, visibility, and small numbers of Article III judges are shared by individual Article III judges themselves and whether those judges find that the activities of judging provide sufficient incentives for responsible, energetic performance.<sup>27</sup> Moreover, because no comparable data were collected for non-Article III judges, we have not learned what animates their work.

Feminist research might have offered another approach. One method is to look closely at the experiences and practices of those in a given field or line of work and to attempt to build proposals for change out of those experiences. Take, for example, the activities involved when people pro-

24. See, e.g., Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (1977); Dolores Hayden, *Redesigning the American Dream: The Future of Housing, Work, & Family Life* (1984); Susan Moller Okin, *Justice, Gender & the Family* (1989); Deborah Rhode, *Justice and Gender* (1989).

25. See, e.g., Roslyn L. Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, 10 *Sigs* 311 (1984); Symposium: *Approaching Pay Equity Through Comparable Worth*, 45 *J. Soc. Issues* 1 (1989) (Rosemary Hays Lowe & Michele Andrisin Wittig eds.); Sandra Harding, *The Science Question in Feminism* 58-81 (1986) (Ch. 3); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1750 (1990).

26. See 2 Federal Courts Study Committee, *Working Papers and Subcommittee Reports* (July 1, 1990) (copy of questionnaire and summary of responses under "Additional Miscellaneous Documents") (not paginated). Photocopies of answered questionnaires are on file with the author.

27. Each questionnaire provided space for additional information on "caseload pressures" and their impact on work habits. Responses were wide ranging. For example, one judge described the federal district court workload as "nirvana" compared to the state judicial system in which that judge had worked. Another stated that the "day [the job] becomes a drudge is the day you should start worrying." In contrast, many protested the working conditions. One stated that the caseload pressure requiring work "seven nights a week, [was] intense and unreasonable;" another commented that "there are simply too many civil cases to push through the system, too many motions, and far, far too many criminal cases, for any human being to be satisfied that he or she is dispensing justice, rather than pushing cases and papers out the door." Photocopies of the questionnaire responses are on file with the author.

vide care for others—often, but not only, for children and the elderly. Feminist political theorist Sara Ruddick has thought a good deal about the nature of that work.<sup>28</sup> Her thesis is that “maternal thinking”—the work and social practices that are “demanded” by children’s needs “that their lives be preserved and their growth fostered” in ways “acceptable” to the culture of which they are a part<sup>29</sup>—would also inform the political world. For Ruddick, being a “mother” is not a biologically-based but a socially-based category.<sup>30</sup> That work constantly reminds one that one is both very powerful (often in control of another’s activities) and also powerless (helpless to prevent illness or safeguard children from war). Ruddick seeks to have political and legal decisionmakers understand that they, like mothers, are both powerful and powerless. She argues that paradigm behaviors and attitudes engendered by mothering, long dismissed as irrelevant to the political sphere, have much to teach.

Ruddick’s claims about the nature of mothering are controversial; I raise them here not to endorse or debate them but to use them as exemplary of another methodological approach. The point is that Ruddick built her theory based on close examination of the experience of people engaged in the activity of mothering. Such theory based on the lived-experiences of those affected is central to most feminist work.<sup>31</sup> Such an approach would have well-served those concerned about the federal *judiciary*, for all its judges, Article III and non-Article III alike, have the power to judge. The restructuring of the federal judiciary should proceed from knowledge of the experiences of the 600 Article III trial judges and the equal number of federal judges who lack life tenure but who also do the work of judging in the federal system.

Ruddick’s claim that mothering is an activity seldom examined for its political and social implications brings me to another aspect of the FCSC’s recommendations—in which a proposal is made to allocate much of the judicial work in social security cases to judges outside the Article III judiciary. Once again, theory is built top-down. Aside from its procedural complexity and redundancy, little description of the experience of being a decisionmaker in social security litigation is provided. One FCSC proposal is to create an Article I court without life-tenured judges to hear social security claims challenging federal government decisions to withhold disability payments.<sup>32</sup> This new court would decide questions of “fact” and would leave only “questions of law” to be decided by the life-tenured Article III judges.<sup>33</sup> Because the FCSC Report stipulated that Article III judges were the most important workers in the federal judiciary, an implicit

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28. Sara Ruddick, *Maternal Thinking*, 6 *Feminist Stud.* 342 (1980); Sara Ruddick, *Maternal Thinking* (1989). The citations that follow are all to the 1989 book.

29. Ruddick, *supra* note 28, at 17-21.

30. *Id.* at 40-41.

31. *See, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829 (1990).

32. FCSC Report, *supra* note 17, at 55. Dissenting from this recommendation were FCSC members, The Honorable Joseph Weis, joined by Edward S.G. Dennis, Jr., and Morris Harrell. Senator Charles E. Grassley dissented separately. *Id.* at 58.

33. *Id.* at 56.

assumption is that such judges do the most "important" work. What is relegated to other judges—in this context, decisions about whether disability benefits have been wrongly terminated—is thus deserving of less attention from the most "important" workers and may therefore be perceived to be less important work.

Decades of feminism, *inter alia*, demonstrate that there is a good deal of controversy about what work is and ought to be valued and about whose perspective on what tasks is and ought to be adopted. The process of "naming"—providing detailed descriptions of specific activities—is one feminist strategy used to challenge assumptions about a given activity's value.<sup>34</sup> In the context of the allocation of work between Article I and Article III judges, detailing the nature of social security work helps to explain the temptation—by any with sufficient power to do so—to avoid that work. Naming also raises questions about how that work might be restructured for those who do it, and what value should be accorded to deciding such cases.

In many social security disability cases, a claimant argues the existence of a physical or mental disability that interferes with the capacity to work. The government disputes the claim, and the judge (initially under current provisions, an administrative law judge) must assess whether the evidence is sufficient to terminate benefits. In addition to understanding the applicable regulations, described by one author as "highly technical and complex,"<sup>35</sup> the decisionmaker must also evaluate medical evidence, information about vocational skills, and the credibility of witnesses. The questions in disability cases often involve finding "facts" about the relationship between an individual's described experience of pain and her or his capacity to obtain gainful employment.<sup>36</sup> Without benefits, many recipients who are already economically marginal become desperately poor. Not only are these cases often filed by litigants who lack lawyers, but the claims themselves may be exceedingly difficult to articulate. "Physical pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned."<sup>37</sup>

Many social security cases are thus cases of dependency—dependency in the sense that individuals are economically needy and dependency in the sense that the litigants are more dependent upon trial judges for assistance, interpretation, and patience, than are those who can afford able lawyering. These cases can be very difficult for decisionmakers—who may feel

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34. See Marie Withers Osmand & Barrie Thorne, *Feminist Theories: The Social Construction of Gender in Families and Society*, in *Sourcebook of Family Theories and Methods* (Pauline Boss, William Doherty, Ralph LaRossa, Walter Schumm, Suzanne Steinmetz eds., in press) (manuscript on file with author); Catharine A. MacKinnon, *Consciousness Raising, in Toward a Feminist Theory of the State* (1989).

35. See Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. Rev. 461, 467 (Professor Levy provided research assistance to the FCSC). See Richard A. Posner, *Introduction to the Federal Courts Symposium*, 1990 B.Y.U. L. Rev. 1, 1-2.

36. See 42 U.S.C. § 423(d)(1)(A)(d)(2)(A) (1991); Levy, *supra* note 35, at 492-93.

37. Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* 4 (1985).

powerless to affect an individual's pain or to interpret rules in a manner that seems responsive to, let alone alleviating of, suffering. Occasionally, decisionmakers may feel jubilantly powerful because they can prevent government from wrongfully withholding benefits, alter administrative interpretations of rules, or preclude those not disabled from claiming moneys allocated by Congress for the truly needy. These cases involve factfinding, the complex and messy activity of interacting with litigants, witnesses, and sometimes lawyers, in an effort to make sense of a morass of information. Factfinding requires decisionmakers to hear different versions or interpretations of events and then demands that decisionmakers attempt construction and reconstruction of those events. In many federal benefits cases, all that work is needed to render judgments about amounts of money important to the claimant but perhaps seen as "small" in contrast to the amounts at stake in other "federal" cases.

The issue raised in the context of federal benefit cases is of broader application. The proposal to allocate "factfinding" in social welfare cases to non-Article III judges is illustrative of a general assumption about factfinding in the literature of both procedure and federal courts. A distinction is commonly drawn between the work of factfinding (often relegated either to juries or to "lower tier" judges) and that of lawmaking (often decided by higher echelon actors—appellate judges).<sup>38</sup> What is factfinding all about? How might we talk about it? What are the skills needed to do factfinding? Are such skills necessarily less valuable, less rare, or less demanding than those used in deciding questions of law?

In my experience as a clinical law teacher, I have always found it easier to prepare students (and myself) for appellate arguments than for trials or hearings. I can anticipate about ninety percent of what an appellate bench will ask and, with the help of colleagues, I can simulate an appellate argument. It is far more difficult to anticipate the complicated dynamics of trial, with its set of live actors, rather than a "record appendix." Is it "harder" to be a trial judge than an "appellate" judge? Should more value be attached to one aspect of judging than another? Is it important that judges who sit on appeal have some first-hand experience, by working on trial benches, with how records come into being? Implicit in these questions is my sense that the FCSC Report was too quick to assume that factfinding was not a central and difficult task to be shared by Article III and non-Article III judges. What is needed is examination of the actual work of first-tier judges—not only their work on trials but their work as managers, negotiators, and settlers of a range of kind of cases<sup>39</sup>—before one shifts work from one set of judges to another.

Relevant to this analysis of the respective spheres for Article III and non-Article III judges is another topic of feminist theory—one that goes by the shorthand "essentialism" and which has different aspects. Some have used the term to ascribe an "essential" nature to those within the category

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38. See, e.g., 28 U.S.C. § 2254(d) (state court findings of fact reviewed in federal court only under specified conditions); Fed. R. Civ. P. 52(a) (federal trial courts' findings of fact reviewed under "clearly erroneous" standard).

39. See Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).



of "women."<sup>40</sup> Others have criticized as "essentialist" some feminists who tend to describe aspects of "woman" as unchanging across race, culture, class, and sexual preference.<sup>41</sup> The language of essentialism also appears in discussions of the federal judiciary: Supreme Court opinions speak of the "essential attributes of judicial power."<sup>42</sup>

How might understandings gained from critical analysis of essentialism in feminism inform the conversation about the federal judiciary? One might, for example, argue that Article III judges, by virtue of the constitutional selection process and guaranteed jobs, are more important than any other set of judges in the United States. An alternative claim would be that it is not their "essence" as creatures of Article III, but rather the work that they do, the cases that they decide, that makes them more important. Yet another claim would be that the value attributed to Article III judges depends, in part, upon the existence of non-Article III judges—just as being "manly" may depend upon the existence of "womanly" traits to be avoided.

Some of the complexities of defining what constitutes "Article III-ness" are readily revealed in Supreme Court cases. The Court cannot decide whether it is the nature of Article III judges' work (a general caseload that includes civil and criminal cases, the power to punish by contempt, the conduct of jury trials, and the like) or the structural protections accorded the judges (their nomination by the president, confirmation by the Senate, and life tenure), or some combination thereof that delineates Article III adjudication from non-Article III adjudication.<sup>43</sup> As a consequence, it is difficult to decide which delegations of judging are either constitutional or wise.<sup>44</sup> Mapping case law and commentary against feminist examinations of essentialism clarifies the sources of the arguments made for the "specialness" of Article III judges.

Who should do factfinding in social security disability cases? In other

40. For critical commentary of this approach, see R.W. Connell, *Gender and Power: Society, the Person and Sexual Politics* 54-62 (1987) (describing "categorical theory" as contrasted with "practice-based theory"); Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism in Feminism/Postmodernism* (Linda J. Nicholson ed., 1990).

41. See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990).

42. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (using the phrase "essential attributes of judicial power") (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). Both *Northern Pipeline* and *Crowell* address the question of what authority may constitutionally be given to non-Article III federal judges.

43. See, e.g., *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Crowell v. Benson*, 285 U.S. 22 (1932). A current example of how to delineate Article III judges from others is the issue of whether bankruptcy judges, as well as Article III judges, can preside at jury trials. See *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded to consider jurisdictional issues*, 111 S. Ct. 425 (1991), *on remand*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991); see also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

44. See Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 *U. Colo. L. Rev.* 581 (1985).

kinds of cases? The “most important” members of the federal judiciary? Less important members of the judiciary? Should the work be concentrated in a particular set of judges or distributed? How might those judges with less prestige be reconsidered and the value of their work appreciated? What is the interaction between the class, race, and gender of litigants and the prestige of the judges who preside over their cases? These are the questions for the federal judiciary today, as new hierarchies are being created by federal court practices.<sup>45</sup> To think about the various activities of judging, the status of judges, and the allocation of jurisdiction is to think about the nature and the value of the work done. To choose one hierarchy and to focus on the problems of one set of actors (the already relatively-privileged Article III judges), in contrast to another (magistrates or bankruptcy judges, for example), is to make decisions about social and political conceptions of how to achieve a “good” society.<sup>46</sup> These are, of course, “women’s issues,” just as they are at the core of conversations about the future of the federal courts.

Indeed, the absence of feminist analyses is somewhat surprising, given that phrases associated with women crop up with fair frequency in those conversations. The connection between hierarchies and women’s work is overt—made so by the very words chosen to ascribe value. In the subject areas of procedure and federal courts, if one wants to say that something is unimportant, a stock phrase (if one chooses to use it) is available—that something is just “a housekeeping rule.” For example, Justices Black and Douglas, dissenting from the promulgation of amendments to the Federal Rules of Civil Procedure, wrote:

We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants . . . that in practical effect they are the equivalent of new legislation . . .<sup>47</sup>

With the miracle of computers, I looked at how Article III judges have used the word “housekeeping.” As I detail elsewhere,<sup>48</sup> Article III judges have used the word often, but over the life of the federal judiciary the use of the word “housekeeping” has changed. A first use was to indicate the activity of creating and maintaining a personal household. According to the federal courts, both men and women set up or “went to” housekeeping.<sup>49</sup> A

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45. See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. Rev. 3 (Article III appellate judges’ delegation of work on prisoner and social security cases to staff attorneys and law clerks).

46. See Okin, *supra* note 24.

47. Statement of Justice Black and Justice Douglas on the promulgation of amendments to the Federal Rules of Civil Procedure, 374 U.S. 865, 865-66 (1963) (footnote omitted).

48. Resnik, *Housekeeping*, *supra* note 8, at 914-33.

49. *Penfield v. Chesapeake, Ohio and Southwestern R.R.*, 134 U.S. 351, 355 (1890) (personal injury action in which proof of residence was argued on the basis that the wife of an injured traveling salesperson had “hired a house and went to house-keeping”); *Williams v. North Carolina*, 317 U.S. 287, 312 (1942) (Jackson, J., dissenting) (involving the validity of a divorce obtained in Nevada; the couple “set up housekeeping as husband and wife”).

second use emerged toward the end of the nineteenth century; judges spoke about the care and maintenance of public places and businesses as "housekeeping."<sup>50</sup> Thereafter, a third usage of the word emerged. "Housekeeping" moved from the maintenance work in the material sense to the idea that the rules by which institutions run were themselves "housekeeping" rules.<sup>51</sup> Fourth, and only common since the 1960s, the word "housekeeping" has come to mean an activity of lesser order.

This fourth sense depends upon the existence of two sets of rules or two sets of institutions, such as federal and state courts or courts and agencies. One institution characterizes either its own rules or those of another as "housekeeping," and with such characterization may come permission either to employ or to ignore a given rule, statute, or practice. I should note that the deployment of the label "housekeeping" is itself complex and deserves more exploration than I will provide here.<sup>52</sup> Suffice it to point out that sometimes, claiming that a particular rule is "housekeeping" is the basis for asserting authority to rely upon that rule,<sup>53</sup> while upon other occasions the claim that a rule is "housekeeping" is the very reason to ignore it.<sup>54</sup>

Part of the reason that the term "housekeeping" can be used to trivialize an activity or the assertion of power embodied in that term is that "housekeeping" has a gender. The gender is female; it is we (women) and we are the "second sex."<sup>55</sup> And, just as a range of behaviors and activities are trivialized as "women's work," so can one find a plentiful array of issues characterized as "housekeeping" in case law—from claims of executive privilege to federal prosecutions of individuals who have already been

50. *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40, 43 (1989) (question of jurisdiction of the Longshoremen's and Harbor Worker's Compensation Act when claim was brought by injured laborers who provided "housekeeping and janitorial services"); *FTC v. Texaco, Inc.*, 393 U.S. 223, 227 (1968) (Stewart, J., dissenting) (provisions in a contract for a gas station franchise relating to the "use and appearance of the station" referred to as "housekeeping provisions").

51. *Chrysler v. Brown*, 441 U.S. 281, 309 n.39 (1979) (5 U.S.C. § 301, "Departmental Regulations," which authorizes the heads of federal departments and agencies to make rules for those departments, as the "federal housekeeping statute").

52. See Resnik, *Housekeeping*, *supra* note 8.

53. As in *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965).

54. See, e.g., *Howe v. Smith*, 452 U.S. 473, 482 (1981) (federal statute obliging the Director of the Federal Bureau of Prisons to certify the availability of adequate "treatment facilities" prior to permitting state prisoners to be housed in federal prisons is "simply a housekeeping measure" and does not require that prisoners so transferred be "in need of treatment"); *Sullivan v. United States*, 348 U.S. 170, 173 (1954) (failure to comply with executive order requiring United States Attorneys to obtain Justice Department authorization prior to presenting information on tax violations to a grand jury was not the basis for violating a conviction).

By ignoring an activity labeled "housekeeping," a claim is silenced—a phenomenon again familiar to feminists. See Tillie Olsen, *Silences* (1978); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 *J. Legal Educ.* 147 (1988) in the symposium, *Women in Legal Education—Pedagogy, Law, Theory, and Practice*.

55. Simone de Beauvoir, *The Second Sex* (1953).

prosecuted by a state.<sup>56</sup> Given its current deployment, I would like to see “housekeeping” acquire a fifth sense. Whenever that word appears as the characterization of a particular activity, I would like the reader to see it as a flag—as a reason to question the claim of value being made. One quick example: the legislative hearings that created the FCSC were entitled “Judicial Housekeeping,”<sup>57</sup> chosen presumably to downplay the political significance of the creation of a commission to make recommendations about the structure of the federal courts. The very title should underscore, not mask, the political content of proposals to alter court jurisdiction.

“Women’s issues” are thus a part of the discussion of the role of judge, the allocation and valuation of judicial work, the jurisdiction of federal and state courts, of Article I and Article III judges. Gender comes into play whenever I teach; all courses implicate “women’s issues.” Gender also comes into play whenever I write, one example of which is the way in which this essay—and many other feminist articles—depart from standard law journal format.<sup>58</sup> I have raised a series of questions about judging and

56. See *Sullivan v. United States*, 348 U.S. 170, 173 (1954); *United States v. Howard*, 590 F.2d 564, 567-78 (4th Cir. 1979) (federal and state government may prosecute individual for same criminal behavior if it violates each “sovereign’s” criminal laws); *Legal Aid Soc’y v. Brennan*, 608 F.2d 1319, 1329 n.14 (9th Cir. 1979) (executive orders requiring evaluations of inflationary impacts of legislation referred to as “housekeeping”); *United States v. Procter & Gamble Co.*, 174 F. Supp. 233, 238 (D. N.J. 1959) (claims of executive privilege referred to as “housekeeping”).

57. *Judicial Housekeeping*, 1988: Hearing on H.R. 3227 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 21 (1988).

58. A second example is the form of footnote citation, which has recently changed. In 1990, Kate Bartlett, in her article *Feminist Legal Methods*, supra note 31, opened with a footnote that explained her regret at not being able to persuade the journal’s editors to use the first names of those she cited. 103 *Harv. L. Rev.* at 829. As she detailed, a system of citation that used only last names assumes the irrelevance of gender. Moreover, in a society such as the United States in which men’s last names in lieu of women’s often become the “family” name, a woman’s first name may be the only name that is hers.

Progress has occurred on the citation front. Carolyn Heilbrun and I published an article after Kate Bartlett. We were able to persuade the editors to include first names of authors of books and articles—on the condition that we added an explanation taking full responsibility for the deviation from the form. See Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 *Yale L.J.* 1913, 1913 n.\*\* (1990). We included first names because the use of only last names not only limited access (when authors have common names) and often relied on reader recognition of the already well-known but also prevented knowing the authors’ gender. Furthermore, one popular citation system privileged those people who write books over people who write articles; authors of books got their first initial included in the cite, while authors of articles did not. Unfortunately, we were not able to obtain inclusion of the full names of litigants. With the full names of litigants, one might not assume for example that all welfare recipients are women. Rather, one would know that the lead plaintiff in *Goldberg v. Kelly*, 397 U.S. 254 (1970), was John Kelly, and not the fictional “Mrs. Kelly”—the prototypically female welfare recipient often invoked by those who read extracts in law school casebooks.

With the 1991 publication of the fifteenth edition of “*The Bluebook: A Uniform System of Citation*”—the citation form book compiled by the law reviews and journals of Columbia, Harvard, University of Pennsylvania, and Yale and used by many law journals—comes acceptance of a revised footnote format. The new policy is to include first names of authors of both books and articles. See *The Bluebook: A Uniform System of Citation* 111 (15th ed. 1991) (“For signed materials appearing in periodicals (including student-written materials), give the

hierarchy, and I have suggested how feminist theory might influence one's approach to these questions. I have not given "answers," and thus have not conformed to the "standard" law review format—in which a problem is laid out, some caselaw and other literature discussed, and then a proposal about what "to do" set forth, all to be attributed to the author of the work. In contrast, feminist essays often raise either new questions or related questions from different vantage points. Much feminist work is not devoted to "specific" answers as much as to opening up a process of conversation in which, collectively, ideas are explored and then alternative modes suggested by virtue of an extended exchange.

"Women's issues" infuse teaching, text, and footnotes. I do not see any place, any subject matter in the law school curriculum in which one can "stay away" from "women's issues." And rather than trying to keep a low profile on women's issues, I take this symposium, the conference that engendered it, and the wealth of commentary and literature invoked as marking a very visible celebration of the interdependencies of women's issues and law.

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author's full name . . ."; using as the first example, "Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 *Yale L.J.* 1913, 1942 n.122 (1990)". Hopefully, litigants will soon share the privilege—naming themselves—now enjoyed by writers.

