

Feminism and the Language of Judging*

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Richard Epstein has spoken about how the language of law and economics might inform a discussion about judging. I am going to talk about how the language of feminism might inform a conversation about judging. Thereafter, you (the audience) and our co-panelist judges will be able to assess the degree to which these two languages, which are quite different, conform to an understanding of what the activity of judging is about.

I begin with a description of the conventions of judging, as currently understood in the United States—a description of what is expected from judges and of how the law talks about its aspirations for judges. It is easy to set out such a description. Judges are expected to be “impartial,” “independent,” “disengaged,” “dispassionate.” Federal statutes, constitutional interpretation, judicial canons, and state law agree: bias is forbidden. Judges may have no personal, direct, financial stakes in cases.

These aspirations are, at one level, well worth celebrating; we know about the capacity for governments to attempt to intrude upon and seek to undermine judicial independence. In the United States federal courts, some 20% to 40% of civil litigation involves cases in which the United States is a party. Federal judges therefore often sit in judgment of their employer, the United States, the very entity that gives them the jurisdiction from which to speak at all. We hope that our judges will have the willingness to “speak truth to power,”¹ to judge their governments. So we talk about independence in part because of a fear that sovereigns will attempt to still or alter the voices of judges.

* These comments are taken from my essay, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988). I appreciate the assistance of the editors of the Arizona State Law Journal and their willingness to permit me to depart from legal footnote conventions and to provide the first and last names of authors. Using only last names not only limits access (when authors have common names) and often relies upon reader recognition of those already well-known, but also assumes that gender is irrelevant.

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1. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 190 (1985) (“For that ultimate purpose—speaking truth to power—there must be a jurisdiction of the judge which the [government] cannot share.”).

The law also speaks about judicial dispassion, disengagement, and disinterest. As is all too familiar, judges have enormous powers—the potential to imprison individuals, to change lives, to order that assets be transferred from A to B, to compel obedience, and to inflict pain. We are very concerned that such powers not be used in a self-directed and self-interested manner. So we talk about the need for judicial disinterest. We also may, by speaking of judicial disengagement, hope to enable judges to judge, to have the capacity to make decisions that, in fact, will inflict violence and pain. Yet another reason for the language of disengagement may come from some hope that judges are somewhat mystical “others,” that they are not “us” and, therefore, that we are being judged by individuals with super qualities. This sense of judges as “others” may give some psychological comfort. In short, the terms of discussion in the United States—impartiality, freedom from bias, prejudgment, disinterest, dispassion—are readily understandable (albeit culturally bound).

But. There are two “buts.” The first is that there is a substantial gap between the stated aspirations for judges and some of the rules in practice. In practice, we do let judges make some decisions about cases to which they have some degree of connection, involvement, and interest. The second “but,” to which I will return in a moment, is that these aspirations may themselves be too limited.

A couple quick examples from the federal courts of the first problem: the distance between theory and practice. If a litigant wants to seek to disqualify a judge because of a claim of impermissible connection to a case, that litigant must ask the judge who is challenged to recuse herself or himself. Recall the stated legal aspiration: no person shall be a judge in a case in which he or she has an interest. Yet, federal statutes require litigants to ask the very judge challenged to judge his or her capacity to adjudicate. I am not saying that every time a judge is challenged in a motion for disqualification that a judge cares. But reported cases indicate that there are some instances when judges speak of themselves as personally distressed at the suggestion that they are not sufficiently disinterested, and yet have not themselves stepped aside.

Several rationales are offered for the requirement that the challenged judge decide the motion. One is that such a rule is an attempt to create a disincentive to challenging a judge, so that fewer of these claims are made. Another aspect is economy; the judge who is challenged has information about the alleged impermissible qualities. A third argument found in the literature is that it would somehow be “unseemly” for the challenged judge to have to explain himself to another person. The idea is that such testimony is not very “judge-like,” for judges should

not be forced to step down from their position of power and be turned into witnesses.

A second example of the gap between practice and the stated aspirations is, in the federal system, something called the "rule of necessity." This "rule" comes into play when a judge says: Under ordinary rules of disqualification, I, the judge, would be disqualified, but indeed, so would all other judges. Thus, because it is "necessary" that someone judge, I will. The classic example is a Supreme Court case called *United States v. Will*.² Congress had given a cost of living increase to the federal judiciary and subsequently voted a decrease. Judges claimed that the decrease unconstitutionally diminished judicial compensation, in violation of Article III of the Constitution. The question would thus affect federal judges' salaries. At the time the case was litigated, a federal statute required that, if a judge had even a penny at stake in a case, that judge could not sit on that case.³ Further, Supreme Court cases had also said that, as a matter of due process, judges could not sit on cases in which they had even attenuated financial interests. Yet, federal judges decided *Will*. They said they had to and that they could—by virtue of the "rule of necessity." In short, judges with direct financial stakes in the outcome sometimes decide cases.

My point here is not simply one of deconstruction, of the gaps between reality and theory. My concern is that the aspirations as stated are incomplete and inaccurate. Further, when one turns to feminist theory, one can learn a good deal about what might be missing in the conversation about judging. To illustrate how feminist theory might help, I will use examples from areas other than law. Many theorists think about people who hold power, who are judge-like in the sense that they have power over others. Feminist theologians, feminist political scientists, and feminist psychologists have all considered people who are powerful; I will use brief examples from some of these works—starting with theology.

Theology is a complicated issue for feminists, because, as Gerta Lerner reminds us, Christian-Judaic monotheism conceptualizes the universe as created by a single force, God's will.⁴ Further, God covenanted and contracted, but only with men. How then do feminist theologians respond? One example is Rosemary Ruether, a Christian

2. 449 U.S. 200 (1980).

3. 28 U.S.C. § 455 (1988), with the addition of subsection (f), now permits judges with de minimis financial interests to divest themselves of that interest and to continue to preside. *Id.*

4. GERTA LERNER, *THE CREATION OF PATRIARCHY* 200 (1986).

theologian, who describes the male monotheistic tradition as based on a social hierarchy: God, men, women. Ruether also writes about one response, within both Judaism and Christianity, to attempt to add a little bit of the female to the male. In the terms of this symposium, to add "compassion"—for example, the image of Mary as a mediating force arguing that Jesus temper judgment with mercy. Another example comes from the Jewish concept called "Shekhinah," sometimes defined as the feminine presence of God.

Rosemary Ruether rejects these efforts at what she calls divine androgyny. She makes the point that, in these descriptions, we women are always the secondary, the mediating, the compassionate but subordinate force. In her views, this role is limiting, permitting only that females act as mediators, as the recipients of divine power. "[S]he can be God's daughter, the bride of the [male] soul But she can never represent divine transcendence in all fullness."⁵ Not only does Ruether reject an androgynous God, she also rejects God portrayed as the mother. Ruether is not particularly interested in perpetuating the imagery of God the creator and the validator of existing hierarchical social structure; rather Ruether wants to think more about a God concerned with equality. A patriarchal theology with a parent image is none too appealing, for it always makes us children. Moving from God the king to God the queen, from God the dad to God the mom, does not respond to her criticism.

A second feminist theorist is the political philosopher, Sara Ruddick. In contrast to Ruether, Sara Ruddick is quite interested in images of parenting and particularly images of mothering. Ruddick explains that mothering has been relegated outside the political sphere to the private arena. Ruddick proposes that we think about mothering, a complicated task in which one is extremely powerful, indeed life-giving, and yet also powerless. Mothers cannot prevent children from becoming ill, cannot protect children from wars, social disease, and violence. Ruddick proposes that we talk about the qualities of mothering in the context of the political world; she proposes, with some hesitation, something she describes as "maternal thinking," which she has used as both the title of an article and a book that has recently been published.⁶

Ruddick writes about how child-raising entails both efforts at preservation and at promoting growth, and that these goals are often in tension. Preservation, protective behavior, may well inhibit growth; efforts at excessive control can be a problem. Hence, in mothering,

5. ROSEMARY RUETHER, *SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY* 61 (1983).

6. SARA RUDDICK, *MATERNAL THINKING* 23-27 (1989); Sara Ruddick, *Maternal Thinking*, 6 *FEMINIST STUD.* 342, 346-48 (1980).

there is constantly a sense of one's own profound limitations, of the unpredictability of the consequences of one's work, of enormous power, and of powerlessness. For Ruddick, mothering is not a biological or gendered category, but a social category that she proposes could usefully be brought to the political sphere.

Thus, two snippets of feminist theory. It should be clear from these brief summaries that feminist theory is not of a piece. For example, Rosemary Ruether does not embrace the concept of mothering as a vehicle for understanding, while Sara Ruddick proposes that we use such a concept. But there is also some degree of continuity. Feminists talk in a language that is quite different from the language of judging. These two feminists are interested in interconnections, in gods and mothers *in* relationship to others. These feminists talk about power in light of humility, power and yet the absence of control, and the difficulties engendered by being both powerful and powerless.

Now return to the language of judging in law. "Disinterest," "disengagement," "impartiality," "independence"—these are all terms deeply suspicious of relatedness and of relationship. Law talks about disengagement but does not talk about the degree to which judges are engaged, dependent, and connected. How might such language affect our conversations around judging?

First of all, as both a litigator and as a teacher of procedure and adjudication, I am constantly struck by the dependence of judges. In my experience as a litigator, judges are not out there, rushing to make decisions; they are not slaying statutes willy-nilly. They are not running amok, they are not reaching for constitutional grand theory. In my experience, sometimes the problem is persuading judges *to* decide. I do not here refer only to waiting for the decision, but also to the range of doctrinal reasons, such as deference and comity to other institutions, that result in a refusal to decide. Alternative dispute resolution is another vehicle of non-decision; judges suggest that parties settle a case in lieu of the court adjudicating a case. Thus, the discussion of unrestrained judges is often out of sync with the experience of litigating cases.

Such discussion is also, at least some judges report, out of sync with their experience as judges. A few years ago, Patricia Wald, Chief Judge of the Court of Appeals for the District of Columbia, was on a panel about judicial restraint. She told her audience that constitutional cases were, for most judges, "a rarity—gourmet fare, definitely not the bread and butter of our everyday work lives."⁷ Her criticism was not simply

7. Patricia Wald, *Judicial Review and Constitutional Limitations*, 14 GOLDEN GATE U.L. REV. 645, 650 (1984) (panel discussion).

that much of constitutional theory was irrelevant; she told her academic audience that the experienced reality of judges was that the social structure pressed them to make decisions on narrow grounds. She urged academics to have theories of jurisprudence that grow out of the experience of judges rather than those that are driven by assumptions at odds with experience.

Recognizing that the act of judging involves routine, daily, difficult, sometimes not very glamorous, indeed, sometimes boring activity may help shift our conversation a little bit about judicial restraint. Talking about how judges are socially and culturally imbedded (and should be) will help us to recognize that there are not too many "lone rangers" out there.

With feminist insights, some of the legal rules might change as well. I began with an example about a disqualification rule that requires a litigant to bring a motion to disqualify before the very judge whom one is seeking to have disqualified. Thinking about this rule from the point of view of feminist theory, one sees that such a rule is protective of the hierarchy of judicial power. The idea is that a judge should not be a "mere" witness; that a judge should not be perceived, like the rest of us, as having to explain oneself to another. Feminist theory helps us to appreciate that such a switch in roles—from judge to witness—might indeed be celebrated instead of bemoaned. To let oneself have to be judged as well as to sit in judgment could provide a glimmer of what it might be like to enter a courtroom without that protective veneer of the first name "judge." Being judged occasionally might enable some degree of understanding of different perspectives. Having judges also *be* judged challenges the stability of the hierarchy and explores the possibility that one can be powerful as well as less powerful at the same time.

Think also about the "rule of necessity." Again, one can see that the rule of necessity protects and maintains a hierarchy of power. The image promoted is of judges as super-judges; here is "God the Father," all knowledgeable, unchallengeable. Imagine instead a notion that power can shift. With research, one can find there are at least seven states that do not have "rules of necessity." Via either constitutional or statutory provision, these jurisdictions have a vehicle by which, if every judge is disqualified on a court, an ad hoc court or judge sits for a particular case. A wonderful example comes from a Texas case of 1925. The case involved a fraternal insurance organization called Woodsmen of the World.⁸ Apparently all the male judges were members of that

8. Johnson v. Darr, 114 Tex. 516, 272 S.W. 1098 (1925).

organization. Because all the judges were disqualified, for a brief moment the Supreme Court of the State of Texas was comprised of three women, given the power to judge.

Such stories are not so easy to find. They appear in footnotes or are noted by little stars or asterisks. We do not have a tradition of reporting that Judge X is disqualified for a particular reason. As Linda Greenhouse recently discussed in the *New York Times*, the United States Supreme Court does not even docket some of the motions for disqualification.⁹ We would do well to change this practice, to acknowledge that some judges are disqualified, that there can be substitution, and that there need be no fear in thinking that a judge holds power intermittently.

In addition, we might talk more about judging as a painful and difficult activity. In Western art, the visual image of justice is a stoic woman, who sometimes wears a blindfold and who often holds a scale and sword. This image captures a fair amount of the power but not too much of the anguish.¹⁰ In contrast, a Nigerian statue called the "Lord of Jurisprudence" is a wooden figure with knives piercing its chest, and described by one art historian as "an image displaying a spirit so strong he can wear upon his stalwart chest the painful, intricate issues of his peoples, symbolized by inserted blades."¹¹

Perhaps if we talked more about judging as burdensome, complex, and terrible, we might then talk more about communal modes of decisionmaking. Many countries have trial judges who sit in groups. The United States is somewhat odd in having single-judge trial courts. Yet these days, under efficiency/economy claims, anyone who suggests adding judges to a trial bench is met with disapproval. If we talk more about the difficulty of judging, we might consider the need for groups of judges to work together.

We might also challenge some of the rhetoric of an adversarial system that suggests that "compassion" is not already a part of the act of judgment. Compassion is constantly an activity that judges and juries engage in, often without a vocabulary to describe and discuss it. Of course judgment is a problem; it engenders pain; it involves a difficult process; it involves obligation and responsibility. Judgment is an ex-

9. Linda Greenhouse, *Questions for a Reticent High Court*, N.Y. Times, Nov. 22, 1989, at A22, col. 2.

10. See generally Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987).

11. Robert Thompson, *Kongo Power Figure*, in PERSPECTIVE: ANGLES ON AFRICAN ART 177, 180 (1987).

pression of connection of self to others. Thus I suggest that the aspirations for judges be altered, that we talk about judicial independence and dependence, disengagement and connection, compassion and dispassion, and celebrate the dailiness of these activities.