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# Women and the Law: Symbolism and Reality

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# Women and the Law: the Symbolism and the Reality

Aileen Sprague\*

## INTRODUCTION

Justice is justly represented *Blind*, because she sees no Difference in the Parties concerned. She has but one *Scale and Weight*, for Rich and Poor, Great and Small. Her sentence is not guided by the Person, but the *Cause*.<sup>1</sup>

In light of the fact that it was only in the early decades of the twentieth century that women were allowed to enter the profession of law, it is somewhat ironic that a woman represents the iconic figure of justice and judging. “For more than 2000 years, people have looked at images of Justice, drawn meanings from them, and written about them.”<sup>2</sup> The ancient Greeks celebrated Athena as the goddess of justice. According to one classic story, Athena established what became the first court of law in order to conduct the trial of Agamemnon’s son Orestes.<sup>3</sup>

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\* Aileen Laurie Sprague - Associate Attorney, Motley Rice LLC, Providence, R.I. B.A. 1994, Fairfield University; J.D. 2001 Northeastern University School of Law. Thank you to the hard-working women of the Rhode Island bar, past, present and future. You serve as a daily inspiration to me. A special thanks to my husband, Tommy, for his unwavering support and to my children Robert and Catherine, for their unconditional love.

1. WILLIAM PENN, FRUITS OF SOLITUDE (1682), *reprinted in* SOME FRUITS OF SOLITUDE 140-41 (David McKay Company) (quoting Reflections and Maxims 407 to 409). This edition does not contain a year of publication. *See id.*

2. Dennis E. Curtis & Judith Resnick, *Images of Justice*, 96 YALE L.J. 1727, 1729 (1987).

3. *See generally* AESCHYLUS, THE EUMENIDES (E.D.A. Morshead, trans., Orange Street Press Classics 1998) (458 B.C.E.).

Significantly, Athena's court of law allowed rules of law to prevail over the rules of vengeance that dominated ancient times and conflicts.<sup>4</sup> Athena's court of reason supplanted the well-accepted "eye for an eye" form of justice in those ancient times.

Perhaps inspired by the ancient Greek mythological character, Lady Justice guards the entrances to our historic courthouses and stands as a statuary example of all that is good and worthy in our system of administering justice. In her long flowing robes, Lady Justice is often shown blindfolded, carrying a sword and scales, demonstrating her aversion to distractions, the power to implement her decisions and her aptitude for balancing competing interests in order to effect the just and fair result.<sup>5</sup> However, as the female figure developed as an icon for justice, "judges were rarely if ever women, [therefore] the use of a female figure suggests a justice removed from actuality."<sup>6</sup> This enduring symbol of power wielded in the form of a fair and balanced female arbiter of justice should have been a way-paver for women in the legal field. But, not surprisingly in light of the historical struggles for equality fought for by women in the United States in the late nineteenth and early twentieth centuries, women were precluded from the study and practice of law and denied the opportunity to emulate their mythical predecessors.

The early twenty-first century is an exciting time to be a woman working in the legal profession. There is an all-time high of three women serving on the United States Supreme Court, and women lawyers are making more advances in law each year. However, achieving an equal presence in the field, particularly at the upper levels of practice and on the bench, has proven to be an uphill battle.<sup>7</sup> Despite gains by women in the legal profession,

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4. *Id.*

5. See Curtis & Resnick, *supra* note 2, at 1729-34. See also Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges*, 61 S. CAL. L. REV. 1877, 1882 (1988) ("The mythic emblems surrounding the goddess Justice illustrate this vision of the proper judicial attire: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions.").

6. Curtis & Resnick, *supra* note 2, at 1765.

7. For example, of the 4560 lawyers in Rhode Island in 1996, 3460 were male and 1100 were female. See Tom Mooney, *Women Today for Lawyers, the Barriers Drop*, PROVIDENCE J.-BULL., Mar. 7, 1996, at A1. In light of the 2010

“the career gap is greater between women and men in the legal profession than it is between women and men in the general labor force.”<sup>8</sup> In 2010, according to the Rhode Island Bar Association, male members of the bar outnumber female members by two-to-one; out of the 6206 members of the Rhode Island Bar, 1970 members are female with the remaining 4236 members being male.<sup>9</sup> Of the 1970 female members of the bar, 169 are members of the Rhode Island Women’s Bar Association, presumably because they believe in that organization’s mission “to further the advancement of women in the law.”<sup>10</sup> More women than ever are graduating from law school and the number of women admitted to the bar are increasing. Fifty percent of incoming students in the Class of 2010 at Roger Williams University School of Law, Rhode Island’s only law school, were women.<sup>11</sup>

Although the female form served, historically, as an iconic emblem for justice, the law excluded women from the legal profession until the early twentieth century. In Rhode Island, legal precedent permitted women to take the bar examination and be admitted to practice law in 1920, but it took equality legislation and fifty years for women to consider entering the field of law in

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statistics from the Rhode Island Bar Association, 600 more women have joined the bar in fourteen years and 776 men have joined the ranks. Email from Kathleen M. Bridge, Commc’ns Program Coordinator, R. I. Bar Ass’n, to author (Nov. 5, 2010, 12:57 EST) (on file with author). Therefore, despite the fact that almost as many women have become lawyers in Rhode Island as men, the proportions have stayed the same.

8. Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?*, 18 GENDER ISSUES 59, 61 (2000).

9. Bridge, *supra* note 7.

10. RHODE ISLAND WOMEN’S BAR ASSOCIATION, <http://www.riwba.com/> (last visited Feb. 6, 2011). The Rhode Island Women’s Bar Association (RIWBA) is a professional, civic, social, and networking organization. *See id.*

11. According to the Admissions Department at Roger Williams University School of Law, the breakdown of male and female students over the last five years is as follows:

	Men	Women
Class of 2010	99 (50%)	99 (50%);
Class of 2009	112 (53.3%)	98 (46.7%)
Class of 2008	82 (45.3%)	99 (54.7%)
Class of 2007	91 (47.4%)	101 (52.6%)
Class of 2006	114 (55.9%)	90 (44.1%)

Email from Debi Curry, Assistant Dir. of Admissions, to author (Feb. 4, 2011, 16:14 EST) (on file with author).

increasing numbers.<sup>12</sup> Part I of this article focuses on the trials and tribulations of Rhode Island's female trailblazers – those who asserted their equality of employment in the legal field thereby paving the way for other women in future generations. Part II discusses why gender diversity matters in Rhode Island courts, concluding that the Governor should continue to appoint women to the bench and recognize women in the legal profession for leadership roles in policy and government. Part III discusses whether female judges rule differently than their male counterparts and reviews the literature analyzing the reasons women make good judges.

### I. TRAILBLAZERS AND THEIR TRAILS AND TRAVAILS

Rhode Island was one of the last states to admit women to the practice of law.<sup>13</sup> Every female member of the Rhode Island Bar knows or should know the story of Ada Lewis Sawyer.<sup>14</sup> Ms. Sawyer, with the support of her employers, Charles Salisbury and Percy Winchester Gardner, applied to take the Rhode Island Bar examination.<sup>15</sup> The Board of Bar Examiners declined her initial applications because the rules of admission to the bar “referred only to a qualified ‘person,’ and there was some skepticism at the time that this included women.”<sup>16</sup> It took a decision by the Rhode Island Supreme Court to open the courthouse doors to women.<sup>17</sup> In 1920, Justice Sweetland determined that, “[a]fter consideration, we are of the opinion that the word ‘person’ contained in the rules regulating the admission of attorneys and counselors should be construed to include a woman as well as a

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12. See Sophia Douglas Pfeiffer, *Reminiscence from a Past Bar Journal: October 1975: Women Lawyers of Rhode Island*, R.I. B.J., Mar. 1998, at 11.

13. *Id.*

14. In 2000, RIWBA's Award for Excellence was renamed the Ada Sawyer Award for Excellence in recognition of Ms. Sawyer's work advancing women in the legal field and her contributions to the profession. See Sarah Sutton, *Award memorializes unique life of state's first woman lawyer*, WARWICK BEACON, May 21, 2000, [http://www.warwickonline.com/view/full\\_story/1732691/article-Award-memorializes-unique-life-of-state-a-first-woman-lawyer](http://www.warwickonline.com/view/full_story/1732691/article-Award-memorializes-unique-life-of-state-a-first-woman-lawyer).

15. *Id.* The well-known Providence law firm of Gardner, Sawyer, Gates, & Sloan still bears Ms. Sawyer's name to this day. See *id.*

16. Alice B. Gibney, *Past, Present and Future: Women in the Law and the Superior Court*, R.I. B.J., Jan.-Feb. 2010, at 37.

17. *Id.*

man."<sup>18</sup>

While this seems like an obvious conclusion today, it was a significant legal ruling in 1920 when Rhode Island women did not enjoy equal rights, including the right to vote.<sup>19</sup> Ms. Sawyer went on to practice law in Rhode Island for sixty-three years, retiring at the age of ninety-one.<sup>20</sup> The state of the country was such that there was no influx of "persons" into the practice of law. "For precisely half a century not more than a handful of Rhode Island women followed Ada Sawyer into the law."<sup>21</sup> According to a survey, whose results were reported in October 1975, less than twelve women practicing law in Rhode Island on that date had been in practice for more than fifteen years.<sup>22</sup> To highlight further the paucity of admissions to the Rhode Island bar between Ada Sawyer's admission in 1920 and 1970, sixty percent of all women admitted to the bar in Rhode Island as of October 1974 had been in practice for only four years.<sup>23</sup>

Another trailblazer, Florence Kerins (later Murray), was born in 1916, and she would have a long-lasting impact on women in the law and the judiciary in Rhode Island.<sup>24</sup> Florence Murray was, and is to this day, a role model for professional women in Rhode Island.<sup>25</sup> In 1956, Justice Murray was the first woman to

18. Pfeiffer, *supra* note 12, at 11.

19. *Id.* Ada Sawyer's bar admission certificate, dated November 10, 1920, was awarded almost three months after Congress ratified the Nineteenth Amendment. *Id.*

20. Gibney, *supra* note 16, at 37.

21. Pfeiffer, *supra* note 12.

22. *Id.* Interestingly, the author indicated that the response to this survey was "excellent." *Id.* at 12. Of the few negative responses, "[o]ne unmarried older woman reacted indignantly" to the use of "Ms." in the survey's cover letter and indicated "that her many years of experience did not entitle her to 'any practical and valuable opinions for the modern young woman in present day situations,' and another woman was "too busy" and one woman's husband replied that his wife was "not interested." *Id.*

23. *See id.* at 11.

24. *See* S. Res.1032, 1997 Gen. Assemb., Jan. Sess. (R.I. 1997), available at <http://www.rilin.state.ri.us/BillText97/SenateText97/S1032.htm>

(congratulating Retired Associate Supreme Court Justice Florence Kerins Murray on being honored as the Grand Marshall of the Aquidneck Island and National Police Parade).

25. Similar to the trailblazing example set by Justice Murray, every state in the union has the inspiring story of a woman finally admitted to practice law, after years of rejection and adversity. The first woman to make her way into the judiciary was Esther Hobart Morris. A WOMAN OF THE

hold the position of Associate Justice in a trial court not only in Rhode Island, but also in all of New England.<sup>26</sup> After almost twenty years on the trial bench, Justice Murray was appointed Presiding Justice of the Rhode Island Superior Court in 1978.<sup>27</sup> A year later, Justice Murray was elected to the Rhode Island Supreme Court, becoming the first woman to serve on our state's highest court.<sup>28</sup> Only one other woman, Justice Maureen McKenna Goldberg has served on the Rhode Island Supreme Court. Upon Justice Murray's death, Justice Goldberg said, "I believe that her greatest contribution is that before she boldly marched into uncharted territory, she paused, turned around and beckoned the rest of us to follow."<sup>29</sup> Rather than citing any of the firsts that she achieved as a woman litigator or judge, Justice Murray said her greatest professional accomplishment "was the fact that I was able to juggle the time and have the energy to have three things going. One would be my home, one would be the court and one would be my personal life."<sup>30</sup>

Women in the legal profession historically have defended their qualifications and natural abilities by distancing themselves from their womanhood. Sandra Day O'Connor, the first woman seated on the United States Supreme Court, understood well how her work on the Court would be regarded with a sharp focus on her gender. She has said:

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CENTURY: FOURTEEN HUNDRED-SEVENTY BIOGRAPHICAL SKETCHES ACCOMPANIED BY PORTRAITS OF LEADING AMERICAN WOMEN IN ALL WALKS OF LIFE 522-23 (Frances E. Willard & Mary A. Livermore eds., 1893). Born in New York in 1813, Mrs. Morris was a pioneer of women's rights and a prominent leader in the women's suffrage movement. *See id.* In 1869, she was appointed justice of the peace for South Pass City in the northern portion of the Wyoming Territory, populated by "a few mining camps held by adventurous gold-seekers." *Id.* at 523. "During her term of office, which covered a period of one year, Judge Morris tried about fifty cases, and no decision of hers was ever reversed by a higher court on appeal." *Id.* at 522.

26. S. Res. 1032, 1997 Gen. Assemb., Jan. Sess. (R.I. 1997), available at <http://www.rilin.state.ri.us/BillText97/SenateText97/S1032.htm>.

27. *Id.*

28. *Id.*

29. *Rhode Island Supreme Court's Florence K. Murray dies at 87 years-old*, RHODE ISLAND LAWYERS WEEKLY, April 5, 2004, available at <http://rilawyersweekly.com/blog/2004/04/05/ri-supreme-courts-murray-dies-at-87/>.

30. *Id.*

Yes, I will bring the understanding of a woman to the Court, but I doubt that that alone will affect my decisions . . . I think the important fact about my appointment is not that I will decide cases as a woman, but that I am a woman who will get to decide cases.<sup>31</sup>

In Rhode Island, Beverly Glenn Long, who passed the bar in 1951 and served as the first woman president of the state bar association, said that she specifically did not join the Rhode Island Women's Bar Association because "I'm not a woman lawyer. I'm a lawyer who is a woman, and I'm a lawyer first."<sup>32</sup> This attitude may have been necessary in the years when women in the profession were more of a rarity and the attitudes of male colleagues were dismissive and condescending.

As women became less of an anomaly in the legal profession and took their place in greater numbers among male colleagues, could women embrace their gender and their inner lawyer? In an effort to learn the background and path of the next generation of women, the *Rhode Island Bar Journal* published an article in 1975 entitled, *Women Lawyers of Rhode Island*.<sup>33</sup> The author, based on results of a survey sent to all female members of the Rhode Island Bar Association, reported that of the forty-nine female members, only three were judges – one in Superior Court, one in District Court and one probate judge.<sup>34</sup> Acknowledging that this was a small study, limited by the small number of women lawyers in Rhode Island at that time, the ultimate conclusion was, like many national studies about women in the law, inconclusive, but contrary to prevalent stereotypes.<sup>35</sup> In 1975, women lawyers:

[M]arry, have children, and remain active professionally; they do not look overwhelmingly for safe bureaucratic jobs in government; nor do they hide out in back rooms of law firms drawing up trusts and wills for rich old ladies.

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31. Daphne Eviatar, *Justice O'Connor Was Influenced by 'the Perspective of a Woman' Too*, WASH. INDEP. (May 29, 2009, 12:46 PM), <http://washingtonindependent.com/44936/justice-oconnor-was-influenced-by-the-perspective-of-a-woman-too> (citation omitted).

32. Mooney, *supra* note 7.

33. Pfeiffer, *supra* note 12, at 11-14.

34. *See id.*

35. *See id.* at 14.



They favor general practice, find the law an intellectual challenge and are not timid about going to court.<sup>36</sup>

These sentiments, such as defying women professionals' stereotypes, remain the same today. In 2006, "[n]o woman [held] the Chief Judge position in any of the courts."<sup>37</sup> In 2010, women head four out of the seven Rhode Island courts: Judge Haiganush Bedrosian<sup>38</sup> at Family Court, Judge Alice Bridget Gibney at Superior Court, Judge Jeanne E. Lafazia at District Court and Judge Mary M. Lisi at the Federal Court.<sup>39</sup> In 2006, only "one State Supreme Court Justice out of five [was] a woman";<sup>40</sup> that number remains the same today. "At this 20 percent level, Rhode Island is much lower than the national average of 38 percent."<sup>41</sup> Therefore, while Rhode Island has achieved some gender equality on the bench, particularly at senior levels, the fact that women are not fairly represented on our state's highest court has implications for the perception of equality for women in the legal profession.

## II. WHY GENDER DIVERSITY IN THE COURTS IS IMPORTANT

According to the United States Census Bureau, as of October 1, 2009, 51.4 percent of the population of the State of Rhode Island is female.<sup>42</sup> The fact that there are more women living and working in our State has far reaching implications in many different areas of life and society. The participation of women in the Rhode Island legal profession as lawyers and judges is essential to the development and contribution to the perception and reality of justice in our state.

How important is gender diversity on Rhode Island courts?<sup>43</sup>

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36. *Id.*

37. STATUS OF WOMEN IN RHODE ISLAND: A MID-DECADE REPORT, THE WOMEN'S FUND OF R.I. 12 (2006), *available at*: <http://www.wfri.org/SOWRI-final.pdf> [hereinafter STATUS OF WOMEN IN RHODE ISLAND].

38. In 2002, Judge Bedrosian was the first recipient of the Ada Sawyer Award. Sutton, *supra* note 14 (formerly the RIWBA's Award of Excellence).

39. JUDICIARY OF R.I., <http://www.courts.state.ri.us/misc/judicial-roster.htm> (last visited Feb. 21, 2011); U.S. DIST. COURT FOR THE DIST. OF R.I., <http://www.rid.uscourts.gov> (last visited Feb. 21, 2011).

40. STATUS OF WOMEN IN RHODE ISLAND, *supra* note 37, at 12.

41. *Id.*

42. *State & County QuickFacts: Rhode Island*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/44000.html> (last visited Jan. 29, 2011).

43. This author believes racial diversity is as important as gender

Gender diversity is incredibly important to a properly functioning judiciary in our State. Specifically, gender diversity reinforces the citizenry's understanding that justice is equal and fair for all and that any person is capable of participating in that system as a lawyer, judge, or litigant.<sup>44</sup>

Notwithstanding the fact that women were barred from the profession until 1869 and that the most significant gains for women have been made since the passage of Title VII, we see that the number of women on the bench has not kept pace with the number of women in the profession. This suggests that barriers that have worked to exclude women from the legal profession may be greater for women trying to enter the judiciary.<sup>45</sup>

Having an equal representation of women on the bench in Rhode Island is vitally important for two separate, but interconnected reasons. First, judicial gender diversity provides the women who hold those positions with the opportunity to serve as mentors to other female attorneys and court staff. Second, it affects the public's and litigants' perceptions of equality in the court system, particularly where women are participating and litigating within that system.

According to research done by the Women's Fund of Rhode Island in 2006, "Rhode Island women continue to face barriers to political, economic and social equality and the status of women in the state has deteriorated on several key measures . . . ."<sup>46</sup> However, despite barriers to and deterioration of women's status in several key areas, women continue to participate and achieve in the legal field and that participation and achievement does impact the State of Rhode Island. For example, a significant sector of the Rhode Island justice system involves conviction of criminals, including female offenders. "Between 1977 and 2004, Rhode Island's female prison population grew by 362% with an average

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diversity, but the scope of this article focuses solely on women in the legal profession.

44. See Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts: An AJS Study*, *JUDGES' J.*, Summer 2009, at 28, 28 (2009).

45. Coontz, *supra* note 8, at 61.

46. STATUS OF WOMEN IN RHODE ISLAND, *supra* note 37, at 2.

annual percent change of 9.2% per year.”<sup>47</sup> While Rhode Island has a relatively small female prison population today, the two hundred-fifteen women who have spent time in our state’s prison likely have appeared in our court system and before members of our judiciary as well.<sup>48</sup> Seeing women lawyers as advocates in the courtroom and women judges as decision-makers may inspire a level of confidence in female offenders about our legal system because they may feel an increased sense of understanding by having women in the courtroom. Moreover, witnessing these professional women garnering respect and deference from lawyers, litigants and the public may be a significant event in the lives of female inmates.

In contrast to the positive effect of seeing women in the courtroom, resistance to increased numbers of women in the judiciary continues. One of the main arguments against change in the form of advancement of a group at one point considered to be in the “minority” is that the group advancing cannot (by virtue of their differences) compete at the same intellectual level as the established group. Does appointing a qualified woman to the bench compromise the quality of the judging or does that decision to include qualified women in the judiciary enhance the quality of the judicial work? Justice Ruth Bader Ginsberg commented on the importance of gender diversity in the courts:

But we also bring to the table our life’s experience, which is different. A very important difference: Are you male? Are you female? Are you a girl from the golden west? Or are you a kid who grew up in Brooklyn? All of those

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47. NATASHA A. FROST, JUDITH GREENE & KEVIN PRANIS, INST. ON WOMEN & CRIMINAL JUSTICE, *HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004*, at 113 (2006), available at <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf>. It is interesting though that “[t]hroughout the period from 1977 to 2004, Rhode Island’s female imprisonment rate was substantially lower than the average female imprisonment rate across the states.” *Id.*

48. See POPULATION REPORT, PLANNING & RESEARCH UNIT, DEPT. OF CORR., STATE OF R.I. 6 (2009), available at <http://www.doc.ri.gov/administration/planning/docs/FY09%20Population%20Report.pdf>. According to the Rhode Island Department of Corrections Planning and Research Unit, the average population in the Gloria McDonald Awaiting Trial and Medium Security facility was 127 females and the average population in the Dorothea Dix Minimum Security Facility was 88 females in fiscal year 2009. *Id.*

differences, I think, make the Supreme Court bench, make all the benches in the country, ever so much better than they were when only one kind of person sat in the seat of judgment.<sup>49</sup>

While women's different life experiences and background cause them to think differently than men, the quality of their legal judgment on the bench is equal to their male counterparts. These results highlight the importance of fostering equality and gender diversity in the Rhode Island courts.

### III. DO WOMEN JUDGE DIFFERENTLY THAN MEN?

The preamble of the Rhode Island Code of Judicial Conduct guarantees “[o]ur legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”<sup>50</sup> During his confirmation hearings, now Chief Justice John Roberts revealed his view of the role of a judge as similar to that of a baseball umpire – one who “calls balls and strikes.”<sup>51</sup> “[A] good judge is supposed to put aside his or her personal feelings and values when donning the robe. The robe and all its trappings are designed to hide individual physical characteristics, and in so doing, symbolically represent the impersonal nature of judging.”<sup>52</sup> Judge Learned Hand said it best:

You must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible to human beings to do so absolutely, but just so far as you can, not to interject

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49. *Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law: A Conversation with Justice Ruth Bader Ginsburg*, 56 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 9, 16-17 (2001) (interview by Lynn Sherr, ABC News Correspondent, on Nov. 15, 2000).

50. R.I. CODE OF JUDICIAL CONDUCT Preamble, available at <http://www.courts.state.ri.us/supreme/jtd/code.pdf>.

51. See *Text of John Roberts' Opening Statement*, USA TODAY, [http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext\\_x.htm](http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm) (last visited Jan. 30, 2011).

52. Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1210-11 (2000) (citing Judith Reznick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1882 (Sept. 1988)).

your own personal interests, even your own preconceived assumptions and beliefs.<sup>53</sup>

That vision of the judicial task would permit any intelligent and talented member of the legal bar to be a good judge, regardless of their background or gender.

The root of this command that judges should completely divorce themselves from the judicial task is the fear, especially on the national stage, that judicial candidates will become “judicial activists” when they ascend to the bench, injecting their own personal emotions and political thoughts into the process of applying the facts to the law. Judicial candidates take great pains to appear robotic and rigid in their adherence to the principle that judges should not insert their personal viewpoints into a case’s fact pattern and apply the law to the facts without passion or prejudice. As a practical matter, it is essential that a judge not substitute her version of the facts or torture the legal concepts involved in a particular case in order to reach a result she feels is right. However, while judges must be methodical and thorough, they are not mechanical beings who can easily leave their opinions, shaped by their background and experience, outside the courthouse.

This brings us to the question of how women contribute to the pursuit of justice. Since the first woman was appointed to the judiciary, there has been serious debate as to whether a female judge could be as competent as a male judge. Certainly, a potential judge’s personal experiences and background influence his or her judicial decision-making. A woman’s experience and road to the bench can be vastly different from a man’s legal career path. “[Female judges] bring an individual and collective perspective to [their] work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it [a]ffects.”<sup>54</sup>

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53. Robert H. Hall, Letter to the Editor, *The tenure of judges*, 70 JUDICATURE 320-21 (1987).

54. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (quoting Utah Supreme Court Justice Christine M. Durham) (internal quotation marks omitted) (citing Betty Barteau, *Thirty Years of the Journey of Indiana’s Women Judges: 1964-1994*, 30 IND. L. REV. 43, 88 (1997)).

[W]omen, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Rubin, described as ‘a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.’ Our system of justice is surely richer for the diversity of background and experience of its participants. It was poorer, in relation to the society law exists to serve, when nearly all of its members were cut from the same mold.<sup>55</sup>

As equal members of society, women’s contribution to the attainment of justice for individual members of society is accomplished through the application of the same qualities that our male equals have mobilized to the effort – that is, intelligence, hard work, patience and a commitment to integrity, honesty and fair dealing. But, Judge Rubin’s observation that “a distinctive medley of views influenced by differences in biology, cultural impact, and life experience” is a richer bench is astute, and an observation that has piqued the interest of scholars.<sup>56</sup>

So, does diversity of background and experience make women better at the judicial role than men? Before she was considered to take a seat on the United States Supreme Court, Judge (now Justice) Sonia Sotomayor told an audience that she “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>57</sup> No empirical study has been

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55. Ruth Bader Ginsburg, *2004 Albritton Lecture: Women’s Progress at the Bar and on the Bench: Pathmarks in Alabama and Elsewhere in the Nation*, 56 ALA. L. REV. 1, 7 (2004) (referring to a statement by Minnesota Supreme Court Justice Jeanne Coyne).

56. *Id.*

57. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002). After her comments about her race and gender caused a stir with the Senate Judiciary Committee and others, then-Judge Sotomayor clarified,

I want to state upfront, unequivocally and without doubt, I do not believe that any ethnic, racial or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to become a good and wise judge, regardless of their background or life experiences.

Ari Shapiro, *Sotomayor Differs with Obama on ‘Empathy’ Issue*, NAT’L PUB. RADIO, July 14, 2009, <http://www.npr.org/templates/story/story.php?storyId=106569335>. Ironically, Justice Alito did not raise any concerns when he

done in Rhode Island to determine whether women judges make better or different legal decisions or whether they approach cases differently than male judges. On a national level, however, “[t]he empirical evidence exploring whether women and men judges approach legal issues differently is both limited and inconclusive.”<sup>58</sup> In one statewide study conducted in Pennsylvania, some statistically significant differences were found – some expected and some unexpected.<sup>59</sup> For example, “female judges were more likely than male judges to find a male defendant guilty of assault than a female defendant under the same factual circumstances,” and female judges were unanimous in awarding alimony unlike male judges who were not unanimous under the

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testified that his immigrant ancestors and experiences as a parent would cause him to empathize with people in cases before him in similar situations:

[W]hen a case comes before me involving, let's say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can't help but think of my own ancestors because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time, and they were people who came to this country.

When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way that children may be treated in the case that's before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up, often just because it doesn't think of what it's doing, the barriers that it puts up to them.

So those are some of the experiences that have shaped me as a person.

*See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 475 (2006) (statement of Samuel A. Alito, Jr.).*

58. Coontz, *supra* note 8, at 61.

59. *Id.* at 64.

same factual circumstances.<sup>60</sup> Unexpectedly, “male judges’ personal injury awards were over twice as large as female judges . . .” and “male judges were more likely to award civil damages for simple assault under the same factual circumstances.”<sup>61</sup>

A study that examined all sexual harassment and sex discrimination cases decided between 1999 and 2001 in all of the Federal Courts of Appeals revealed that “judges’ gender mattered to case outcomes. Though plaintiffs lost in the vast majority of cases, they were twice as likely to prevail when a female judge was on the bench.”<sup>62</sup> One interesting outcome of the author’s statistical analysis that supports the importance of a diverse judiciary was that “[m]ale judges were more likely to find for plaintiffs [in the sexual discrimination and harassment cases] when at least one female judge was on the panel.”<sup>63</sup> This finding demonstrates the significance of having both men and women on appellate panels and shows that women can and do exert influence in decision-making on these panels.

Another study, focusing on justices sitting on all fifty states’ highest courts, federal district, and appellate court judges and analyzing over 1000 judges, found that while women who become judges may have weaker credentials and less experience, women judges perform at about the same level as male judges.<sup>64</sup> Recognizing that credentials are ordinarily considered a strong predictor of exceptional performance, the authors noted that reasons for this inconsistency in women judges’ performance is that “the type of woman who becomes a judge may be highly intelligent or motivated.”<sup>65</sup> The authors also posited that it is possible that:

[W]omen are naturally more gifted judges than men are. The various psychological differences between men and women might favor women, so that even if women have

60. *Id.* at 68.

61. *Id.*

62. Peresie, *supra* note 53, at 1761.

63. *Id.* at 1778. The author found that having a female judge on an appellate panel more than doubled the probability that a male judge would rule for the female plaintiff in sexual harassment cases and almost tripled that probability in sexual discrimination cases. *Id.*

64. Stephen J. Choi et al., *Judging Women* 30-31 (UNIV. CHI. LAW & ECON., Olin Working Paper No. 483, Sept. 28, 2009).

65. *Id.* at 30.



less training and experience, they end up being superior judges. It might also be the case that women's experiences give them a distinctive perspective that enhances their judicial talents.<sup>66</sup>

One reason that has been offered to explain the uncertain results from these gender-based judicial outcome inquiries is "the inadequacy of the theoretical frameworks available for understanding and interpreting judicial behavior. While the tradition of the judiciary stresses impartiality, objectivity, and disinterestedness, there are no conceptual frameworks for reconciling the gap between legal theory and legal practice."<sup>67</sup> President Barack Obama indicated while he was a Senator from Illinois that his ideal Supreme Court candidate would possess empathy.<sup>68</sup>

Empathy is a virtue, and it is also a desirable quality in a judge, who of course must interpret and apply the law in the context of real-life cases. We cannot properly decide our cases without acquiring some insight into the contextual realities of each party's situation, and a judge's knowledge of the human condition and capacity to identify with others is important to that endeavor. The imperative of judicial impartiality does not require judicial indifference to the real people who come before the court; it requires evenhandedness and lack of prejudgment. As a *judicial* virtue, empathy enables the judge to achieve a better understanding of the parties' circumstances without being predisposed toward one side or the other.<sup>69</sup>

Neither litigants nor lawyers that appear in court want judges to be swayed in their decision-making or management of cases solely by empathetic feeling, nor do we really want judges to

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66. *Id.*

67. Coontz, *supra* note 8, at 63.

68. Jerry Markon, *Obama's Empathy Standard Drawing Heat*, WASH. POST, May 21, 2009, [http://voices.washingtonpost.com/supreme-court/2009/05/obamas\\_empathy\\_standard\\_drawin.html](http://voices.washingtonpost.com/supreme-court/2009/05/obamas_empathy_standard_drawin.html).

69. Diane S. Sykes, Circuit Judge, United States Court of Appeals for the Seventh Circuit, Address at the Association for Women Lawyers, 30<sup>th</sup> Annual Women Judges Night 10-11 (April 20, 2010) (citations omitted), <http://law.marquette.edu/s3/site/images/faculty/awl-speech-2010.pdf>.

be robotic in their application of the law to the facts. In fact, when we discuss the admirable qualities that a good judge possesses, we wax poetic about integrity, honesty, impartiality, diligence, patience, dignity, and courtesy. These qualities cannot be programmed into a robotic machine, but are qualities present in human beings and are formed by a person's environment growing up, her background, training, experience, mentors, and other intangible factors that cannot be measured by a strict criteria. Moreover, these qualities are not a specialty of the male gender. "Since gender, race, ethnicity, and socioeconomic status affect people's perceptions of fairness and justice, it is conceivable that female and male judges attach different weights to the factual aspects of identical situations."<sup>70</sup> In other words, "[o]f course, judges have life experiences and philosophical views that affect their understanding of the cases they must decide, and some of these may be linked to gender, race, or ethnicity."<sup>71</sup>

Judge Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court, aptly stated:

Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear. In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.<sup>72</sup>

This is the very reason that our system benefits from a gender diverse judiciary. Not only do we need judges who understand legal principles and who think logically, but we also need judges who view that doctrine in the grander scheme of the real world – a

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70. Coontz, *supra* note 8, at 71; *see generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY & WOMEN'S DEVELOPMENT (Harvard Univ. Press, 1982).

71. Sykes, *supra* note 68, at 11-12.

72. Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 641 (1996) (citations omitted).

world that includes men and women.

The application of legal principles to concrete situations is always interpretive, and while legal education can train judges to focus on the factual matters of cases, the meaning that factual matters have for judges is an interpretive social process and this is precisely where a judge's experiences could have bearing on the decision making process. We, of course, expect judges to set aside personal viewpoints when deciding cases, yet beneath the robe of justice is an individual whose perceptions of the world have been influenced by their experiences in it.<sup>73</sup>

#### CONCLUSION

Despite Justice's blindfold, women judges cannot "deny the connection between judging and the experience of life."<sup>74</sup> Women's experiences are different and society itself needs "judges to have knowledge of and sensitivity to the pains and joys of life . . ."<sup>75</sup> This article demonstrates why it is important that Rhode Island has female judges on the bench of its court system, particularly in leadership positions, because different views based on different backgrounds and experiences ensure not only the appearance of equality, but also the execution of justice for Rhode Islanders. Additionally, gender diversity on the courts ensures that all those who come before those courts are receiving justice because all aspects of society are represented.

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73. Coontz, *supra* note 8, at 71.

74. Curtis & Resnick, *supra* note 2, at 1760.

75. *Id.* at 1760-61.