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COMMENT

Some Real-Life Observations About Judging

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INTRODUCTION

I would like to share with you some personal observations about being a judge in America in the 1990s. Is it a great or even good job? For a woman, is it worth the price of getting there? How do politics and ideology affect the job? What is it really like? Can women judges make a difference? How much of a difference?

In the late 1970s when I first became a judge and women were struggling for a foothold in the judiciary, it was not "politically correct" to ask these questions. But our numbers are stronger now. Many of us have a decade or more of experience under our belts, and there are, I believe, lessons we can pass on to an audience of talented lawyers and law students who may one day have to make the choice of whether or not to become judges.

One of my illustrious predecessors on the D.C. Circuit, Harold Leventhal, after fifteen years, described judging as the best job in the world. "Sometimes I can't believe I am being paid for it," he said. On the other hand, Thurman Arnold, the old trustbuster of the 1930s and 1940s, left the same bench after only a few years observing: "I resigned from the United States Court of Appeals in Washington, D.C. about two years ago because I found the work of a Judge much duller than that of an advocate. . . . [A]ll we did was to listen to argument

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and write opinions.”¹ A few months ago, one of our brightest district judges resigned after thirteen months of undisguised misery on the job.²

Judging is not for everyone. Since 1974, there have been seventy-two resignations from the federal bench. Sometimes late at night, watching old movies on cable, the image of the revered, wise, omniscient, at peace-with-the-world judge—Andy Hardy’s father—appears on the screen. Who would not want to be his female counterpart? If the life of a judge was ever really like that, it certainly is not now.

Judging is at times lonely, isolating, and frustrating. Judges do have some power, but it must be exercised within tight limits. As a judge, you can never initiate action, only react to what is put before you. A judge can never treat a problem comprehensively, only in unconnected pieces. With judging, you almost never get feedback. I have little idea, even after thirteen years and more than 500 published opinions, which cases I ruled correctly on and which I flubbed. In that respect, I feel much like the blindfolded dart thrower who, no matter how hard he practices, never improves.

Like Thurman Arnold, I found the excitement and highs of advocacy more attractive than judging when I was younger. I think that youthful aspirants to the courts ought to be cautious. My former colleague Bob Bork once described an appellate judgeship as being “condemned for life to a law review.” In my retrospective sixties, I cannot conceive of spending thirty to forty years on the bench. Judges tend to get stale and bored after that long, excluding such notable exceptions as Oliver Wendell Holmes, and, of course, Skelley Wright, and David Bazelon on my own court. When the founding fathers bestowed life tenure on federal judges, the average life expectancy of men was in the forties. If we were drafting anew, a twenty-year nonrenewable term with good pension benefits would be worth thinking about.

If you are aiming toward the judiciary, think also about the differences between trial and appellate courts. Trial judges run their own courtrooms, manage their own proceedings, and have elbow room to experiment with “creative” settlements and remedies. They talk to lawyers, witnesses, and juries every day and, even on occasion, to the press. Their wits are challenged by the need to resolve controversies about arcane procedures and points of evidence on the spot so that

1. SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD 3 (1961).

2. Sandra Torry, *Some Judges Decide a Lifetime on the Federal Bench is Too Long*, WASH. POST, Jan. 20, 1992, (Business), at 5.

the trial can keep moving. Trial judges are seldom, if ever, in conflict with their fellow trial judges, and can therefore be truly collegial with them, often united by common contempt for the appellate courts which review their work. An old saw declares that appellate judges are like generals who stand above the battle, and when it is over come down to shoot the wounded. Some of the finest trial judges I have known repeatedly and decisively turned down appointments to appellate courts. The diversity of experience, the exposure to real people, and the autonomy of the trial judge make it a far more attractive situation for activist personalities, and certainly for younger lawyers, than appellate judging. I have often been perplexed by the reverse order of prestige that attaches to the two levels.

I. IS A JUDGESHIP WORTH THE PRICE OF GETTING THERE?

The price you pay for a judgeship fluctuates from person to person and from administration to administration. The vetting of a candidate's past both before and after a judicial nomination is fierce. The confirmation process is open season on your private life. You know of some of the recent imbroglios: Bork, Ginsburg, Thomas. In my case, my daughter's landlord, my son's high school coach, and my gynecologist were interviewed. For aspiring judicial candidates, youthful indiscretions had better be faced early on; forgiveness may not be forthcoming. One of the downsides to the advice I have just given about not becoming a judge too early in life is that the longer you wait, the more the bloodhounds have to track down. Living a publicly blameless life is an essential *sine qua non* for a judgeship. However, it is only the upfront part of the price a judge must pay.

The serious part of the tab is the surcharge on political correctness, and here I use the term in its more literal sense. I think our current judicial appointment system is upside down. In the search for ideologically compatible judges, particularly in the appellate courts and the Supreme Court—which Presidents from Jefferson on down have engaged in but which I think has greatly accelerated in recent years—I fear we are in danger of abandoning any sense of what a judge should be. My own naive belief is that a judicial candidate should have a track record of achievement and distinction, whether in private practice, government service, or teaching.

I appreciate the realpolitik of conservative Presidents not nominating liberal judges, and vice versa. However, there have been commendable examples of past Presidents who nominated judges from other parties on the basis of their achievements and reputations for excellence, fairness, courage and the like. Party affiliation aside, we should expect nominations for high judicial posts to be men and women who have excelled at what

they have done, who enjoy the respect and confidence of those with whom they have worked, even their opponents, and who stand out among their peers. When the drive for ideological purity outdistances any attempt to find the best and the brightest, the seasoned and the respected, even within the President's own party, we are in trouble.

Future chroniclers of our times may find it inexplicable that so few in our sophisticated system of government—a system that we so proudly proclaim as a model for emerging democracies all over the world—stand firm for a meritocracy in judicial selections and that we cannot agree on an objective standard of accomplishment for judicial candidates.

When I came on the bench, there were judges picked by Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter. This resulted in diverse viewpoints, although, unfortunately, not enough diversity of race or gender. Today, well over sixty percent of the federal judiciary has been selected by Presidents Reagan and Bush. The range of diversity is much narrower on the basis of political affiliation alone. When this fact is compounded by an overreliance on philosophical conformity as the touchstone for appointments, diversity will likely disappear altogether. This, in my view, is not good for the judiciary or the nation, nor is it in the view of an avowedly conservative judge, Richard Posner, who has written in his latest book:

Law uses a crude methodology to deal with extremely difficult questions. . . . America no longer has a homogeneous legal establishment There are no "logically" correct interpretations . . . no overarching concepts of justice that . . . give direction to the enterprise. . . . The more diverse the judiciary, the more robust are the decisions that gain strong support in it. . . . A diverse judiciary exposes [and] reduces the intellectual poverty of law. . . .³

II. WHAT DO JUDGES ACTUALLY SPEND THEIR TIME DOING?

The ordinary citizen does not have a clue as to how judges spend their time. As a member of a twelve-person court of appeals, I sit on 115 appeals a year, plus several hundred motions and summary appeals (no oral argument). Except for the three or four hours a day, four days each month when we hear oral argument, plus the hour of conferencing with fellow panelists after each day's argument, and monthly judges' meetings about court administration, I spend the rest of my time in chambers with three law clerks and two secretaries. The District of

3. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 458, 460 (1990).

Columbia Circuit specializes in administrative appeals, which comprise more than sixty percent of our docket. These appeals involve long agency records which require me to read, on the average, 7000 to 8000 pages of briefs and records a month. Before the argument in each case, I gather my preliminary thoughts, along with any questions I want to pursue at oral argument. My law clerks, who split each month's docket in thirds, write bench memoranda on the cases, which I review after I read all of the original material. Sometimes law clerks detect issues or errors I missed and vice versa. In this respect, we reinforce each other. The law clerks also carry on a lively dialogue with clerks in other chambers which often provides useful point-counterpoint that would not otherwise exist, because judges almost never discuss cases with each other before argument. Basically, the only person a judge has to bat the case around with is a captive law clerk fresh out of law school.

Oral arguments are the fun part of being a judge, getting to joust and parry with counsel, to probe, to surface the unraised issue, and to extract concessions. Although the volume of case filings allows argument in only half of all cases, oral argument is prized by the judges as the only time when we get to relate to the outside world, the only time cases take on a human face, and the only time we get to flex our intellectual muscle against live opponents. Oral arguments are short—fifteen to twenty minutes is the average in our court—after which we are cast back into our monastic lives. For this reason oral arguments can be misleading. Never rely on the mood or even the intensity of the questioning from the bench as an indicator of the outcome. Judges play devil's advocate perhaps more than we ought. We test each other's mettle and make debaters' points in public because we rarely have extended discussions in private. However, oral argument lasts only for twelve or so hours a month. The rest of our time is spent in relative solitude.

After the arguments each day, the judges confer. When I first came on the court, I imagined that conferences would be reflective, refining, analytical, dynamic. Ordinarily they are none of these. We go around the table and each judge, from junior to senior, states his or her bottom line and maybe a brief explanation. Even if the panel is divided, the discussion is exceedingly crisp. The conference changes few minds. Assignments are made, life goes on. Chief Justice Rehnquist, in his book on the Supreme Court,⁴ says that much the same thing is true on his Court. He speaks of a "practice of not discussing the merits of cases at conference" because "there is usually 'no real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the court.'"⁵

4. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987).

5. *Id.* at 294-95.

Back in chambers, the judge and law clerks work on the opinions assigned to the judge. The clerks usually block out a first draft, much reworking and editing occurs, and a penultimate draft is eventually sent to the panel. Panel members sometimes accept the draft uncritically (usually if they are of the same basic views as the writer), sometimes suggest changes, sometimes (particularly if the case reflects a compromise of sharp differences) go so far as to edit the draft. Every month each judge undertakes this process for at least three or four published opinions and many more unpublished memoranda. In recent years, our court has quite effectively brought its docket current. About the time we circulate last month's drafts, a new cycle of reading briefs and preparing for the next round of oral arguments begins.

What do we *not* spend our time doing? Talking or discussing cases with our colleagues. Tightly worded memoranda are our major mode of communication between conference and circulation of first drafts.

Thinking great thoughts is also out. Forty to forty-five published opinions a year to write, ranging from ten to 110 pages each, consumes our time. The elegant prose, the visionary idea, the qualitative leap forward in the law will probably be canceled by the practical necessity of getting consensus among more cautious colleagues. Final opinions will usually be committee products with all the obstacles to virtuoso performance that entails.

We also do not speak out much on the burning issues of our time. The ethical restrictions on a federal judge are formidable. Judges may not join organizations which stand for controversial principles,⁶ participate in political affairs, make political contributions,⁷ or conduct fund-raising for any cause, no matter how worthy;⁸ judges cannot sit at the head table or speak at a fundraiser,⁹ march or demonstrate or write letters to the editor on any issue likely to come to court,¹⁰ appear before any legislative body or executive agency on behalf of any cause outside of our judicial expertise,¹¹ accompany a spouse to a political event, even if he or she is running for office;¹² earn more than \$19,000 extra in teaching or other legitimate occupation;¹³ sit on any board of a profit-making organization,¹⁴ join any organization which is likely to appear

6. CODE OF JUDICIAL CONDUCT Canon 5(A) (1975).

7. *Id.* Canon 7(A)(1)(c).

8. *Id.* Canon 4(C),5(B)(2).

9. *Id.* Canon 5(B)(2).

10. *Id.* Canon 5(A).

11. *See id.* Canon 4(B).

12. *See id.* Canon 7(A)(1)(c).

13. 5 U.S.C. app. 7, § 501 (1988 & Supp. 1991).

14. *See* CODE OF JUDICIAL CONDUCT Canon 5(B) (1975).

before the court,¹⁵ or talk to anyone outside the court (presumably even our spouse) about any issues that might come up in court.¹⁶ In everyday terms, this means a judge is often a conversation stopper at cocktail parties, a dull dinner companion, a frustrated citizen, and a sterile source of support in community affairs. The road to anonymity is paved with appellate judges whose names appear in the newspapers only in the most unfortunate contexts. If lucky, judges' good deeds merely go unrewarded. If unlucky, we are roundly punished for them.

Not much time is spent socializing or just plain schmoozing with fellow judges. Real friendships are rare on the court. Heartfelt differences of philosophy and ideology militate against them. Powerful egos often impede them, even among philosophical allies. Judges are like monks without the unifying bonds of a common faith. They are consigned to one another's company for life. They cannot speak about their work outside the walls of the monastery. Lingering resentments and hostilities must be kept under wraps—and a bottle of Mylanta at hand—to preserve the image of a court that is impartial and neutral enough to decide other people's disputes.

My daughter has often told me that I suffer from peer deprivation, and she is absolutely right. My advice is never to sacrifice your family or even close friendships to a judicial career, for without the first, you cannot do right by the second.

Lest you think me unduly cynical, let me refer you to another excerpt from Judge Posner's book. He writes:

[Judges] rarely level with the public—and not always with themselves—concerning the seamier side of the judicial process. This is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision making, the indolence and apathy that life tenure can induce. . . .¹⁷

Actually, I am a bit more optimistic than Judge Posner and find judging a mixed bag, with the good parts usually outweighing the unpleasant. However, a dose of realism about the less enthralling parts of the job is something prospective judges need to confront.

III. HOW MUCH DOES POLITICS ENTER INTO JUDGING?

We are a political democracy. Politics is built as securely into our constitutional scheme as the Russian wiretaps into the old American Embassy in Moscow. To dislodge them one would have to demolish the

15. *Id.* Canon 5(B)(1).

16. *Id.* Canon 3(A)(6).

17. POSNER, *supra* note 3, at 190-91.

whole structure. Our colleagues are our colleagues as a result of politics. The kind of controlling precedent the Supreme Court hands down to lower courts reflects the makeup of that Court and has been determined, in large part, by the politics of the nomination and confirmation process. In that narrow but important segment of the caseload (I estimate it at about fifteen percent) where judgment counts, whether your view or an opposing one will prevail often depends on the political philosophy of the majority. I am not saying anything so simplistic as that judges always vote in favor of the philosophy of one party or the other. However, the values by which judges make choices in areas of discretion will more often than not be in sync with that section of the political spectrum they inhabited in their former lives.

Should there be more or less access to federal courts for dispute resolution? Do the Fifth and Fourteenth Amendment guarantees of equal protection of the laws prohibit disparate treatment for members of groups who have historically suffered societal discrimination? What does "liberty" in the Fourteenth Amendment encompass? Does a woman have the right to control her own reproductive processes? Such searing controversies are played out against a backdrop of judges' values and preferences as well as judicial precedents.

As the philosophical balance of our appellate courts and Supreme Court shifts precipitously to the right, we can see the impact on our jurisprudence. We still operate under the same Constitution, basically the same federal rules, and most of the same statutes that were in effect ten years ago. However, circuit court precedent changes daily. Old precedent is overruled or distinguished away, and the law takes different turns in many areas. In the District of Columbia Circuit, doctrines on standing, ripeness, Freedom of Information Act law, and the boundaries of Fourth Amendment searches and seizures are unrecognizable from a decade ago when I came on the court. The role of politics and elections in our jurisprudence, while not always predictable in the short run, is inexorable in the long run. Presidents have always instinctively known that. Recent Presidents have aggressively exploited it.¹⁸

Thus, jurisprudence does follow the elections, slowly and subtly, not always completely but usually quite perceptibly, especially when one party controls the White House for a long time.

IV. WHERE DOES JUDICIAL PHILOSOPHY AS CONTRASTED WITH POLITICS ENTER THE PICTURE?

We hear much these days about purported conflicts between judicial activism and judicial restraint, between so-called "principled" and "com-

18. See, e.g., William F. Buckley, *A Serious Question That Conservatives Need to Answer*, WASH. POST, Feb. 23, 1992, at C7 ("George Bush has been entirely orthodox in his nominations to the Supreme Court and to the lower courts.").

passionate" decisionmaking. In the tensions of these judicial times the concepts seem bent out of shape. The most zealous and activist judges—those most insistent on reaching out to find cases as vehicles to announce or pronounce new or modified principles of law—accurately consider themselves steadfast practitioners of principled decisionmaking. The line between what Judge Harry Edwards of my court calls "ideological maneuvering"¹⁹ and what others call "principled decisionmaking" is a thin and sometimes invisible one to the engaged participant. For many judges, their ideologies are their principles.

Another colleague, Judge Laurence Silberman, writes critically of the "compassionate judge" who, he says, has no fixed ideology, who too often fashions the law to meet a desired outcome.²⁰

There you have it: The liberal judge worries about ideological maneuvering; the conservative judge worries about pragmatists who decide cases ad hoc on the merits. Which is activism, which is restraint? Who is the more principled? The culmination of this, in my view, largely sophistic debate came in a recent "op-ed" piece of the *Wall Street Journal* praising newly confirmed Justice Thomas as being an example of "activist judicial restraint."²¹

Candidly, the new judicial epithets of "unprincipled" and "compassionate" judges leave me just as cold as the old "activist" or "restraint" labels. On my court, so-called conservative judges, professing to abide by judicial restraint, are as commonly found rejecting executive agency decisions, overturning precedent, and raising issues sua sponte, as their liberal colleagues. Both kinds of judges are, of course, motivated by the goal of principled and coherent decisionmaking.

So what, if any, judicial philosophy should a judge adopt? The closest approximation I can espouse is something that some of my colleagues roundly denounce: A pragmatism that decides cases on the merits, what Judge Posner calls "practical reason," that takes all the circumstances including precedent, real-world significance and institutional relationships with the other branches into consideration, tempered on occasion by compassion.²²

It is time to abandon labels that no longer have accepted meaning and to recognize that judges are human beings bent on arriving at the best solutions to societal problems put before us in the context of the

19. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 849.

20. Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092 (1991).

21. L. Gordon Crovitz, *Justice Thomas's Opinions: No Wonder They Wanted to Stop Him*, WALL ST. J., Jan. 29, 1992, at A13.

22. POSNER, *supra* note 3, at 454-69.

political reality that the President and Congress make and enforce the laws and usually, but not always, know more about how to do it properly than judges do. For our citizens to have confidence in the courts' decisions, they must be convinced that judges are impartial as to litigants, including the state, and that we are not embarked on personal ideological crusades. This is the closest I have been able to come to a judicial philosophy.

V. ARE WOMEN JUDGES TREATED DIFFERENTLY AND DO THEY MAKE ANY DIFFERENCE?

This is really an entirely separate subject, worthy of a separate speech, but let me touch on a few highlights. From the beginning, women lawyers and judges have asked two questions: Will we really be treated as equals with men judges, and will our presence make any difference in the way the law develops? As to the first question, I believe women judges still find they are expected to prove themselves to their peers, to courthouse staff, to lawyers, and even to law clerks. The question is always out there about a woman judge: Is she as smart, as dependable, as quick, and as stable as her male colleagues, or is she maybe a little spacey? The federal judiciary is still a predominantly male institution (well over eighty-five percent),²³ and, in the main, it still thinks in male terms, though the number of judges' daughters attending law schools is probably the single greatest facilitator of attitudinal change we have going for us. It is frustrating that in a profession with twenty-five percent women practicing attorneys and fifty percent women law students we still have only one woman on the Supreme Court, four federal circuit courts out of thirteen on which no woman sits, only three on which more than two sit, and that there are sixty out of ninety-four federal district courts on which no woman sits.²⁴ The number of women in the United States Judicial Conference, the governing body of the federal judiciary, is under ten percent.²⁵ The number of women heading or serving on key Judicial Conference committees is just as small.

I see those numbers reflected frequently in the reactions of that body to important legislative overtures. The Violence Against Women Bill,²⁶ which would have treated violent acts of men toward women in the same fashion as racial violence, was opposed by the Judicial Conference on the ground "it would embroil the federal courts in domestic relations disputes" and "flood [the federal courts] with cases that have

23. See JUDICIAL STAFF DIRECTORY (1990).

24. *Id.*

25. *Id.* at 297.

26. S. 15, H.R. 1502, 102d Cong., 1st Sess. (1991).

been traditionally been the province on the state courts."²⁷ Translated, this means that it is permissible to have fender bender cases, minor contract diversity actions, agency claims of any size, and nickel-dime drug busts in federal court, but not cases where women are battered or beaten.

Through seniority, women on the bench will eventually rise to positions of power in the federal and state judiciaries. Hopefully, these women will wield their power to assist other women in the legal profession rise by selecting worthy women for key administrative court staff positions, introducing jobsharing and flexible time arrangements, and creating the invaluable job networks for upwardly mobile women law clerks and attorneys. It is also important for lawyers and litigants to see women on the bench. It gives assurance to women lawyers that they will not be perceived as anomalies. As the number of women judges has increased I have personally noticed that law firms and government offices more frequently use women as lead counsel and at counsel tables. However, we still have a long way to go in removing all residue of a double standard.

The second question I posed is a more difficult one. Is there, as we would all like to think, a secret spring of sensitivity to women's or even humanity's plight and problems that a woman judge can bring to the law? On balance, I think so. Although I am usually six leagues deep in administrative law and regulatory agency cases, there have been those rare and satisfying occasions when I do see something in a case that my male colleagues simply "don't get": intuitive negative reaction to an asserted but undocumented justification that women did not get choice assignments in an agency because they choose not to compete for them, a sensitivity to a male colleague's patronizing attitude toward women lawyers or litigants, or a heightened understanding of the real but ineptly articulated reasons why women need to be represented in media power positions.

A women's experience does add something special to the interpretation of events, which is a crucial element of judging. This need not be seen as a discrete woman's voice which changes the outcome of cases, but rather as an additional lens through which arguments, rationales and justifications are filtered to create an accurate image of reality.

This is occurring visibly right now in some state courts. For instance, all three women judges on the Minnesota Supreme Court voted together to impose a protective order against visitation by a father who had

27. AD HOC COMM. ON GENDER-BASED VIOLENCE, UNITED STATES JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 1, 7 (1991).

threatened to kill his estranged wife unless she stopped seeking custody of their children.²⁸ The men on the court voted two to one to deny the order; the women carried the outcome. A recent study showed that just one woman on the state supreme court significantly increases the number of pro-woman rulings in discrimination, alimony, and property settlement cases.²⁹ Another earlier study concluded that although American judges had largely succeeded in efforts to free themselves from stereotypical habits of thinking about race, the same was not true as to gender.³⁰

Many male judges still adhere to traditional notions about the essential "natures" of men and women and the appropriate roles these "natures" dictate in society.³¹ One dramatic example is illustrative. In twenty-two right-to-die cases in fourteen states from 1979 to 1989, courts tended to view as rational a man's pre-illness statement about his wish to die rather than be maintained on life-support, while women's pre-illness statements were more often regarded as emotional, unreflective, and not to be credited.³² In seventy-five percent of the men's cases (but in only fourteen percent of the women's cases) were the patients' expressed wishes honored.³³

Bertha Wilson, the first of three women justices on the Supreme Court of Canada, recently registered her belief that there is a substantive component that women can add to the law. Justice Wilson said:

Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other; the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but, rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.³⁴

28. David Peterun, *Women Judges Shifting Balance in Sex-Based Cases*, MINN. STAR TRIB., Dec. 23, 1991, at 1.

29. *Id.*

30. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971).

31. Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980).

32. *Id.*

33. Steven Miles & Allison August, *Courts, Gender and the 'Right to Die'*, 18 LAW, MED. & HEALTH CARE 85 (1990).

34. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSOODE HALL L.J. 507, 520 (1990).

The law, in America as in Canada, is still a harsh mistress, and despite the burgeoning literature of feminism, basically gives no berth to feminist critiques about legal institutional structures and norms that perpetuate the power of men over women. Candidly, most women judges do not yet feel confident enough to even mention such notions in explaining their judgments. Perhaps time and growing self-confidence will make a difference in this area. For now, the judiciary is still a newly integrated male club, and women judges are expected to be agreeable, charming, bright, incisive, nonthreatening, loyal, not irritatingly individualistic, supportive, cheerful, attractive, maybe witty—to a point, but not pushy, insistent, aggressive, sarcastic, unyielding, or any of the other qualities our male colleagues exhibit every day.

VI. BOTTOM LINE: IS JUDGING A WORTHWHILE OCCUPATION?

After all this you may well ask whether being a judge is worthwhile at all. My answer is yes. I guess I knew from the moment that I clerked for a judge after law school that judging was where I wanted to end up. Precedent can constrict your decisions and a majority of the court can outvote you, but in the most fundamental sense you are your own woman, albeit often a lonely one. In the words of one of my favorite mystery writers, as a judge you can “deal straight and sleep at night.”

A judge can do some good. Even when the laws on the books are distasteful and the directives from higher courts seem obstinate or insensitive, there is often room in individual cases for discretion and interpretation and judgment. Just meander through any volume of the Federal Reporter and glimpse at the incredible range of human problems presented to our courts for resolution. Judges, whether committed to judicial restraint or to judicial activism, seize these opportunities every day, I can assure you. Judicial work is ever-changing even if your judicial colleagues are not.

Ultimately there must be judges to resolve disputes between people, organizations, political branches, and different levels of government. There must be judges in whom citizens and officials repose enough confidence not to take to the streets when they do not like their judgments. During the past year and a half, I have journeyed to Eastern Europe seven times as a member of various delegations sent to explain our constitutional system to Czechs, Bulgarians, Romanians, Lithuanians, and Russians. Coming out from under Socialist regimes where judges have been considered state apparachniks, lowly paid and lowly regarded, and either outrightly corrupt or subject to party discipline, those countries marvel at a judiciary like our's where judges are truly independent and no one dares to tell them how to rule. Even more startling to them is the power entrusted in our judges to declare acts of the executive or

legislature invalid. The uniqueness of our judges' power and prestige is unknown in nine-tenths of the world. Our problem is to preserve it and use it to the best purposes so its currency does not deteriorate.

Being a judge requires guts, intelligence, some guile, perseverance, the will to win over boredom, overwork, understimulation, lack of fun and camaraderie in the workplace, no reward or incentive programs, modest pay, lack of upward mobility, nonexistence of feedback, isolation, and for the most part, anonymity. To paraphrase the late Robert Hutchins, it's not much, just the best there is.

