



200711415

'Otherness' on the Bench: How Merit is Gendered[†]

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Abstract

This paper will focus on the construction of merit as the key selection criterion for judging. It will show how merit has been masculinised within the social script so as to militate against the acceptance of women as judges. The social construction of the feminine in terms of disorder in the public sphere fans doubts that women are appointable — certainly not in significant numbers to the most senior levels of the bench. It will be argued that merit, far from being an objective criterion, operates as a rhetorical device shaped by power. The paper will draw on media representations of women judges in three recent Australian scenarios: an appointment to the High Court; the appointment of almost 50 percent women to Victorian benches; and the scapegoating of a female chief magistrate (resulting in imprisonment) in Queensland.

1. Introduction

Despite the fact that the image of justice is feminised, the judge is invariably masculinised. He, not she, is the paradigmatic embodiment of wisdom and rationality in the Western legal tradition. This idealised figure is miraculously able to leave the particularity of his sex and other characteristics of identity, together with his life experiences, at the courtroom door in order to carry out the adjudicative role with impartiality. So complete is the bifurcation between the objectivity of the judicial role and the subjective persona of the judge that legal positivism avers that [he] does not make law but merely interprets it.¹ Depersonalisation and erasure of the self, construct the judge as little more than a conduit for 'right' answers within the adjudicative process. While the objective-subjective split represents the nub of the existential dilemma at the heart of

† An earlier version of this paper was presented at the International Research Collaborative on Gender and Judging, American Law & Society Annual Meeting, Baltimore, USA, 6–9 July 2006. I thank Judith Resnik, the commentator on the paper, and the participants for their helpful comments. Thanks also to Chris Atmore for research assistance.

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1 As expounded by, for example, H L A Hart, *The Concept of Law* (1961); Hans Kelsen, *The Pure Theory of Law* (1961); Joseph Raz, *The Authority of Law* (1979); Tom D Campbell, *The Legal Theory of Ethical Positivism* (1996).

adjudication, concern tends to be raised only when the judge is a woman, although it may also emerge when the judge is black² or gay.³ In such cases, the subjectivity of the embodied persona of the judge cannot be sloughed off. He or she is then indelibly marked as 'Other', an otherness that necessarily taints the adjudicative role and renders the delivery of justice problematic.

The appointment of women as judges, on which I focus, is a significant site of contestation in the narrative regarding the entry of women into the public sphere. After more than a century of struggle to be 'let in' to the legal profession, women now represent more than 55 percent of law graduates and 30 percent of the legal profession in Australia, figures that are mirrored in other parts of the Western world.⁴ Nevertheless, once we peer behind the ostensibly progressivist veneer of numerosity, a more complex story unfolds. The unruliness of the feminine, it would seem, can be kept at bay if women are retained in subordinate, managed or 'manned' positions. Indeed, women lawyers are welcome when their services can be effectively deployed to satisfy the needs of the global 'new knowledge economy' by facilitating capital accumulation. Employed lawyers, of whom a disproportionate 48 percent are women,⁵ comport with the proletarianisation theory of legal practice, which has been a corollary of the corporatisation of law firms.⁶ Lawyers are not identical to factory workers on a process line, but the practice of assigning discrete segments of a case to clusters of employed solicitors with limited autonomy under the control of a senior partner underscores the aptness of the analogy.

The percentage of women exercising autonomy and independent judgment in law remains disproportionately low. The equation is a familiar one throughout the public sphere: the more authoritative the position, the more men and the fewer women there are; the less authoritative the position, the more women and the fewer

2 Feminist Aboriginal magistrate, Pat O'Shane, has had a turbulent time since her appointment in 1986 and her dismissal has been contemplated because of complaints about her conduct on the bench, particularly with regard to police. O'Shane has stated that the attempts to remove her arise from her 'ideology' and her 'philosophies'. See Imre Salusinszky, 'Fighting for Justice' *The Australian* (31 January 2007) at 11; Chris Merritt, 'Government and Judges clash over Pat O'Shane' *The Australian* (31 January 2007) at 11. An earlier notorious incident involved her quashing a charge of malicious damage against four women who defaced a billboard in which a woman was being sawn in half. See Pat O'Shane, 'Launch of the Australian Feminist Law Journal: 29 August 1993' (1994) 2 *Australian Feminist Law Journal* 3.

3 For an insightful analysis of sexual diversity and the judiciary, an area in respect of which little empirical data exists, see Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Review* 565.

4 Ulrike Schultz, 'Introduction: Women in the World's Legal Professions: Overview and Synthesis' in Ulrike Schultz & Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) at xxxvi, xl.

5 The census figures of 2001-02 revealed that women comprised 31 percent of all practitioners. See Australian Bureau of Statistics, *Legal Practices: Australia 2001-02*, Cat no 8667.0 (2003).

6 Charles Derber, 'Managing Professionals: Ideological Proletarianization and Mental Labour' in Charles Derber (ed), *Professionals as Workers: Mental Labour in Advanced Capitalism* (1982). See also Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) at 273.

men. Sole practitioners and partners in law firms,⁷ barristers,⁸ and judges⁹ are notable examples of the more authoritative positions. Judging is seen as the apex of the professional legal practice pyramid and it is the domain that has attracted the most critical commentary because of the conventionally problematic relationship between authority and the feminine on which I elaborate.

The relationship between the legal profession and women as agents of legality has been historically fraught with difficulty. In the late 19th and early 20th centuries, women struggled to enter the legal profession but met with resistance everywhere.¹⁰ Reasoned argument, intellectual superiority and demonstrated ability on the part of women counted for little within a supposed sphere of rationality where masculinity had become the primary indicium of worth.¹¹ The modern liberal story of linear progress for women lawyers continues to stumble over positions involving the twin variables of authority and autonomy.¹² It is only in the last few years that the inequitable profile of women in the judiciary has prompted progressive governments to respond, somewhat shame-facedly, to criticism and appoint more women to the bench. The liberal state requires the most egregious instances of discrimination to be addressed in order to maintain an appearance of fairness and legitimacy.¹³

In Australia, the primary catalyst for state intervention was the issue of 'gender bias in the judiciary', which received intense scrutiny when it was 'discovered' by the media in 1993.¹⁴ Although well known to feminist legal scholars, the phenomenon briefly became a matter of national interest, featuring in major

7 The 2001–02 census data indicates that approximately 18 percent of sole practitioners and partners were women. See Australian Bureau of Statistics, above n5.

8 Approximately 15 percent of Australian barristers are women. See *ibid.* A minuscule percentage of women barristers appear before the most senior courts. Justice Kirby has computed that only about 13 percent of those who appear before the High Court are women, and even then not all of them have 'speaking parts'. See Michael Kirby, 'Appellate Advocacy – New Challenges', (Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006). See also, Michael Kirby, 'Women in the Law – What Next?' (2002) 16 *Australian Feminist Law Journal* 146; Margaret Thornton, 'Women Practitioners' in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 722.

9 Women now comprise 26 percent of all judges and magistrates in Australia. See *Judges and Magistrates by State (Including Women)* (2006) Australian Institute of Judicial Administration <<http://www.aija.org.au/JudgesMagistrates.htm>> accessed 10 February 2007. There is only one woman judge on the High Court and only one Chief Justice of a Supreme Court (Victoria). Canada seems to be performing somewhat better with the Chief Justice of the Supreme Court a woman, together with three other justices. For an analysis of the appointment of women to the federal and provincial courts in Canada, see Joan Brockman, 'Aspirations and Appointments to the Judiciary' (2003) 15 *Canadian Journal of Women and the Law* 138.

10 See for example, Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (2006); Thornton, *Dissonance and Distrust*, above n6.

11 For an elegant essay addressing the way a homologous relationship developed between reason and the masculine in Western thought, see Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (1984) at 138.

12 Backhouse compares the 'chilly climate' experiences of women professors with those of women judges, noting four patterns of experience that apply to both: exclusion, resistance, the denial of difference, and intimidation. See Constance Backhouse, 'The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case' (2003) 15 *Canadian Journal of Women and the Law* 167.

newspaper stories across the country.¹⁵ The most notorious instance involved a remark in the course of a marital rape trial by Justice Bollen, then a judge of the South Australian Supreme Court, who expressed the view that 'a measure of rougher than usual handling' was acceptable on the part of a husband towards a wife who was less than willing to engage in sexual intercourse.¹⁶ The ensuing furore compelled governments to review and justify their practices in making judicial appointments. The Commonwealth Parliament conducted an inquiry which highlighted the lack of transparency in the process.¹⁷ Some felt that appointment to the judiciary was too late to effect remediation and the focus should be directed to legal education.¹⁸ Nevertheless, a practice of appointing more women to State and federal courts was one strategy that was initiated. What was not anticipated by the reformers was the significant backlash that the appointments would generate, particularly in Victoria and Queensland where the changes were most marked.¹⁹

Conservative governments favour affirmative action ('AA') policies for 'Benchmark Men',²⁰ the white, heterosexual, able-bodied, middle class men who espouse mainstream Christian religious beliefs (if any) and right-of-centre political views against whom women and 'Others' are measured and invariably found wanting, for Benchmark Men are the normative agents of legality. Of course, such appointment practices are not termed 'AA' as that term, with its pejorative gloss, is reserved for the appointment of women and Others. They are assumed to have been appointed by virtue of their sex or other characteristic of

13 See, for example, E P Thompson, *Whigs and Hunters: The Origin of the Black Acts* (1975) at 184.

14 It is notable that the exposé coincided with initiatives in other parts of the world, such as the publication of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (1993).

15 See, for example, Liz Porter, 'Who Judges our Judges?' *Sunday Age* (17 January 1993) at 15; Karen Middleton, 'Some Judges are Women Haters, says Cook' *The Age* (13 May 1993) at 5; Keith Gosman, 'Judges on Trial' *Sydney Morning Herald* (14 May 1993) at 9.

16 *R v Johns* (Unreported, Supreme Court of South Australia, Bollen J, 26 August 1992).

17 See, for example, Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994); Australia, Attorney-General's Department, *Judicial Appointments: Procedure and Criteria* (1993); Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II (1994).

18 A further government initiative involved the preparation of gender-sensitive teaching materials on citizenship, work, and violence. The citizenship materials were prepared by Professor Sandra Berns, Paula Baron and Professor Marcia Neave, and the work and violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan: see Regina Graycar & Jenny Morgan, 'Legal Categories, Women's Lives and the Law Curriculum OR: Making Gender Examined' (1996) 18 *Sydney Law Review* 431. The writer chaired the overseeing committee.

19 In 1995, women comprised 6.9 percent of all judges and magistrates in Victoria, compared with 26 percent in 2006. In Queensland, the 1995 figure was 5.3 percent, compared with the 2006 figure of 29 percent. The Australia-wide figure for the decade changed from nine to 26 percent. For 1995, see Australian Institute for Judicial Administration figures reproduced in Thornton, *Dissonance and Distrust*, above n6 at 294. For 2006 figures, see the Australian Institute of Judicial Administration, above n9.

20 'Benchmark Men' is the shorthand term I coined to apply to comparators in discrimination complaints rather than enumerate a long list of characteristics of identity.

identity without regard to merit. It was the monopoly of Benchmark Men on the courts a century ago that enabled them to pronounce seriously and authoritatively that only men were persons for the purpose of legal practice.²¹ Their social power today permits them to continue to pronounce similarly that male judges are the 'best people' for the job, despite both the empirical evidence relating to women's achievements within the legal profession and the scientific evidence demonstrating that 'the mind has no sex'.²² Nevertheless, a norm has no meaning without an Other.²³ Thus years of diligent effort by feminist activists and their supporters to change the gendered constitution of the judge has been countered by the perennial need to reinscribe the normativity of benchmark masculinity and the otherness of the feminine within the social script.

Drawing on the Australian experiences of change, I consider three recent sites of contestation, all of which underscore the masculinity of merit within the adjudicative discourse. First, I consider the way the concept of merit assumes centre-stage in the case of the appointment of a woman judge, particularly at the most authoritative level; the second site of contestation relates to the assumption that merit has been subverted when a critical mass of women is appointed; the third scenario involves the resentment arising from the supposed disregard of the merit principle when a woman was appointed chief magistrate, which culminated in her being (wrongfully) convicted and gaoled.

These examples all received extensive attention in the Australian print media and show how negative representations of women judges circulate within popular discourse — both mirroring and constituting the woman judge in ways that entrench social stereotypes. These negative representations challenge not only the liberal accounts of progress and equal treatment, but also the feminist belief in gender justice. Such representations may also backlight the contentious view held by some feminists that women judges speak in a 'different voice',²⁴ a complex issue that I do not propose to explore in this paper.

2. *Three Sites of Contest*

A. *'Woman "of merit" joins High Court'*²⁵

Mary Gaudron was the first woman to be appointed to the High Court, a position she occupied from 1987 until 2003. When she resigned, it was anticipated that she would be replaced by another woman, but this was not to be. At the time of the appointment of conservative male judge, Dyson Heydon from New South Wales, as her replacement, the media debate was more concerned with the question of equitable State representation than the under-representation of women on the bench. However, Susan Crennan was appointed to the High Court in 2005, also by the Liberal government of John Howard.

21 See, for example, Mossman, above n10; Albie Sachs & John Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias in Britain and the United States* (1978).

22 Londa Schiebinger, *The Mind Has No Sex? Women in the Origins of Modern Science* (1989).

23 Jean-Francois Lyotard, *The PostModern Condition: A Report on Knowledge* (1984).

Justice Crennan had been appointed to the Federal Court 18 months before, having practised as a barrister for 26 years, mainly in the areas of commercial and civil law, and having played a role in a number of high-profile fraud cases. In addition, she was the first woman to be appointed Chairman (her choice of title) of the Victorian Bar Council, and the first woman to be appointed President of the male-dominated Australian Bar Association (not Women Lawyers, Women Barristers or Feminist Lawyers). A prominent role in professional associations assisted Justice Crennan in satisfying the informal criterion of 'being known'.²⁶ Justice Crennan's claim to merit was enhanced by being described as having a brilliant legal mind and a capacity for hard work, as well as being temperamentally suited to the task. In addition, these criteria were supplemented by descriptions of her as 'black letter', 'balanced', 'without baggage', 'fiercely independent' and 'not a feminist'.²⁷

While Justice Crennan served as a Human Rights and Equal Opportunity Commissioner in the early 1990s and was personally described as supportive of individual women, the dominant media representation was of a woman who distanced herself from the feminine — and feminism — and positioned herself close to the masculinist norm, the power of which has enabled it to claim neutrality for itself. Indeed, the Attorney-General, Philip Ruddock, went so far as to deny that gender had been a factor in Cabinet's choice — 'I'm pleased to be able to appoint the best person for the job', he said.²⁸ Eve Mahlab, a retired feminist lawyer, commented on the need for a woman judge to neutralise herself:

24 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982). Gilligan argues that men and women have been acculturated to speak in different voices that influence their approach to moral reasoning. Gilligan analogises male reasoning to that of a ladder of abstract rights in which a clear sense of hierarchy is discernible. Feminised reasoning, in contrast, is more akin to a web, arising from a sense of interconnection and concern for others. While highly contentious because of the potential for gender essentialism, Gilligan's work has struck a chord with some feminist legal scholars reacting against the aggressive adversarialism of legal practice. The question of whether women judges, in particular, employ a 'different voice' has given rise to an extensive literature. See, for example, Jennifer L Peresie, 'Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts' (2005) 114 *Yale Law Journal* 1759; Elaine Martin, 'Women on the Bench: A Different Voice?' (1993) 77 *Judicature* 126; Sue Davis, 'Do Women Judges Speak "In A Different Voice?"': Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit' (1992-1993) 8 *Wisconsin Women's Law Journal* 143; Joan Brockman, 'A Difference without a Distinction?' (1993) 8 *Canadian Journal of Law and Society* 149; Bertha Wilson, 'Will Women Judges really make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507; Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Woman's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39.

25 Front page story in national newspaper announcing appointment of woman judge to High Court. See Elizabeth Colman & Natasha Robinson, 'Woman "of Merit" Joins High Court' *The Australian* (21 September 2005) at 1.

26 Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) *Public Law* 489 at 492.

27 Colman & Robinson, above n25.

28 Editorial, 'Caught in a Time Warp on Judicial Appointments' *The Age* (22 September 2005) at 14.

If, as a woman, you want to get on, you devote yourself to the goals of your male colleagues and you don't rock the boat by asking, "Is this fair to women?" ... What I think Susan Crennan always did, to her credit, was that she devoted herself to the goals of the male society that makes up the profession of the bar. She really contributed there and excelled.²⁹

Karen Kissane elaborates on Crennan's stance which, if not exactly anti-feminist (despite one newspaper headline)³⁰ could not be described as supportive of those women who had experienced discrimination at the hands of the legal profession:

She has certainly rejected feminist rhetoric; she says there is no evidence of gender bias in the law and that she has never suffered discrimination at the bar, and she does not believe in affirmative action.³¹

Despite her best endeavours, however, Justice Crennan could not neutralise herself entirely. Not only did the media pay disproportionate attention to her gender, but allusions to her age, and possibly even her sexuality,³² were also made by referring to her status as a grandmother.³³ The connotations of this grandmotherly image are that of a woman of mature years who is safe and unthreatening because her 'manned' state is likely to mitigate the dangerousness of the feminine in an unrestrained position of authority.

While a judge appointed to a superior court may feel that he or she is free to exercise autonomy in a way that is impossible for an appointee to a lower court, there is little in Justice Crennan's history to suggest that she is likely to start speaking in 'a different voice'.³⁴ Justice Crennan's appointment seeks to guarantee, as far as possible, that there will be no possibility of disorder emanating from an unleashing of the unruly feminine. This is not to suggest that Justice Crennan lacks a sense of justice, but the media representations of her convey the impression that she will be joining the ranks of those women who have never encountered sex discrimination themselves; it is always something that happens to someone else.³⁵ These representations clearly place pressure on her to maintain this stance.

29 Karen Kissane, 'Welcome to the Club' *The Age* (5 November 2005) Insight at 3.

30 Marcus Priest, 'Meet the High Court's Anti-feminist' *Australian Financial Review* (21 September 2005) at 1.

31 Kissane, above n29. Crennan's views on AA for women lawyers were reported as a reason for her having missed out on appointment to the position of Victorian Chief Justice. See Priest, above n30.

32 Moran (above n3 at 580–81) points out that the married (male) norm was actually UK policy under Lord Chancellor Lord Hailsham in the 1970s and 1980s, supposedly because of the dangers of blackmail. In light of the secrecy surrounding the appointments process in Australia, it is an unknown whether a comparable policy prevailed.

33 Michael Pelly, 'Ex-teacher, Legal Dynamo and, Oh Yes, a Woman: Welcome to the High Court', *Sydney Morning Herald* (21 September 2005) at 1; Michael Pelly, 'High Achiever: Court's Female Justice' *Sydney Morning Herald* (9 November 2005) at 10.

34 See Gilligan, above n24.

B. Lacking Testosterone

In contrast to the cautious approach of his federal counterpart, the Victorian Attorney-General, Rob Hulls, espoused a deliberate policy of appointing more women to the bench to 'obliterate the so-called blokey culture of the courts'.³⁶ In seven years, he has dramatically changed the gender profile of the Victorian justice system. Out of a total of 80 appointees to the various State courts, 37, or nearly half, have been women. Hulls has appointed 16 female magistrates, from a total of 94 (includes 16 new male magistrates); 15 of the 20 female County Court judges, from a total of 57 (includes 13 new male judges); and five of the six female Supreme Court judges, out of a total of 34, while the sixth he has promoted to Chief Justice (the court also includes 11 new male judges). While well short of a majority, these numbers appear dramatic because of the very low base from which the appointments began.

The appointment of 'so many' women has resulted in an undercurrent of disaffection and resentment on the part of male lawyers. One former member of the Bar Council is quoted as saying, 'there is scope for criticism of the way in which some senior and eminently qualified people [read "men"] have been overlooked'.³⁷ The most notorious comment is attributed to Robert Richter QC, who is reported to have said that it was an advantage for an appointee *not* to have testicles.³⁸ Other male lawyers described the appointments as 'queue jumping' and a divergence 'too far from merit',³⁹ which is 'undermining the intellectual rigour of the state judiciary'.⁴⁰

The controversy surrounding the appointment of Justice Neave is illustrative. When Marcia Neave, a law professor and Chair of the Victorian Law Reform Commission was appointed to the Victorian Court of Appeal in 2006, she was criticised for never having practised law: 'You have to have trial experience to understand if a trial has miscarried', said one exasperated commercial QC.⁴¹ This is despite the fact that an appellate court operates quite differently from a trial court

35 See, for example, Rosemary Balmford, 'Gender Equality in Courts and Tribunals' (1995) 94 *Victorian Bar News* 34 at 39–40. Rosemary Hunter, in her study of Victorian barristers, analysed the responses of women who denied the existence of discrimination. This included those who denied outright that there was any inequality of opportunity and the 'no-yes-but' group who endeavoured to suppress the notion of discrimination by rationalising their experiences in other ways. See Rosemary Hunter, 'Talking Up Equality: Women Barristers and the Denial of Discrimination' (2002) 10 *Feminist Legal Studies* 113.

36 Katherine Towers, 'Hulls takes on the Law's Old Guard' *Australian Financial Review* (6 April 2006) at 1.

37 Ian Munro & Fergus Shiel, 'The Two Sides of Rob' *The Age* (3 June 2006) Insight at 3.

38 Richter later apologised to a senior woman barrister who walked out of the gathering. See Steve Butcher, 'Women and the Law: Top Silk Apologises Over Bias Comment' *The Age* (27 November 2003) at 1.

39 Munro & Shiel, above n37.

40 Towers, above n36.

41 Ibid. In part, the antipathy displayed towards Justice Neave's appointment reflects the resistance towards the appointment of academics as judges. It was only in the 1990s that a number of law professors were appointed to both the Federal Court and the New South Wales District Court. The Australian convention was formerly to restrict the appointment of judges to the senior bar.

and Neave had many years of experience teaching and writing about property, equity and family law, as well as having taken responsibility for a vast array of references on the Law Reform Commission, including defences to homicide, sexual assault, intellectual disability and reproductive technologies.⁴² But then, Justice Neave was also attacked because of her law reform experience:

Capable though she is, she has devoted much of her life to changing laws, not impartially administering them. To me, she seems more qualified as an activist than a judge.⁴³

In determining Justice Neave to be insufficiently respectful of the law *as it is*, we see not only the repetition of the idea of the disorderly woman, but a repetition of the positivist myth that the good judge does not make law, but merely interprets it.

As the percentage of women appointed creeps towards 50 percent and approximates the proportion of women law graduates, complaints about the sacrifice of merit and the evil of affirmative action have become more vociferous. Not only is there a concern on the part of male barristers that their settled expectations have been overturned, there is a more insidious sub-text, which relates to the feminisation of the judiciary and the possibility of disorder within the state.

C. *Gaoing of Chief Magistrate*

Queensland Chief Magistrate, Diane Fingleton, was gaoled in 2003 for having sent an email to a subordinate magistrate, Basil Gribbin, in which she was found to have threatened him, as she required him to show cause as to why he should stay in his position despite his disloyalty.⁴⁴ Gribbin had provided another magistrate, Anne Thacker, with an affidavit and lawfully given evidence in judicial proceedings when Thacker sought review of a decision that she be transferred. Fingleton was convicted of an offence under the Queensland Criminal Code⁴⁵ and

42 Justice Neave's averred lack of experience can be contrasted with the contemporaneous appointment of two men to prominent positions in the media, whose lack of experience was deemed not to constitute a drawback to their appointment: 'Garry Linnell, the new head of news and current affairs at the Nine Network, has no experience in broadcast news but his boss, Eddie McGuire, insisted it did not matter. "You don't have to be an astronaut," McGuire said this week, "to know the moon isn't made of cheese."' See Caroline Overington & John Lehmann, 'News Sense Wins Over Experience' *The Australian* (8 June 2006) at 14. Mr Linnell was reported to be paid \$500,000. A new Managing Director of the Australian Broadcasting Commission was also reported at the same time to have been appointed without broadcast experience. See Helen Westerman, Kirsty Simpson, Debi Enker & Amy Marshall, 'Memo: ABC Chief' *The Age* (23 May 2006) at 11.

43 Andrew Bolt, 'Law Wears a Dress' *Herald-Sun* (1 March 2006) at 21.

44 A detailed analysis of this case is found in Rosemary Hunter, 'Fear and Loathing in the Sunshine State' (2004) 19(44) *Australian Feminist Studies* 145.

45 *Criminal Code* 1899 (Qld), s 119B was a new section designed to protect witnesses from retaliation in judicial proceedings and Diane Fingleton was the first person to be charged under it. The precise wording of the section is as follows:

'A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or a member of the family of a judicial officer, juror or witness in retaliation because of — (a) anything lawfully done by the judicial officer as a judicial officer; or (b) anything lawfully done by the juror or witness in any judicial proceeding; is guilty of a crime. Maximum penalty — 7 years imprisonment.'

sentenced to 12 months imprisonment, reduced to six months on appeal.⁴⁶ After serving her term, the High Court unanimously overturned the conviction, finding that she was immune from prosecution when performing her duties.⁴⁷ Fingleton received backpay and was restored to the magistracy (but not to the position of chief magistrate).

Fingleton had been appointed to her position by a Labor Attorney-General who, like his Victorian counterpart, felt that talented women had been overlooked for too long and something should be done about it.⁴⁸ In Fingleton's case, it was her commitment to social justice and reform that were the key reasons for her appointment, not her gender.⁴⁹ Gender, however, undoubtedly played a role in her demise.⁵⁰ Unlike her male predecessor, whose career was similarly terminated by a revolt over a transfer, Fingleton ended up in prison while he was rewarded with a carefree life of fishing.⁵¹

Fingleton's promotion to chief magistrate angered some of her colleagues who considered themselves to be more experienced, although she had spent four years as a magistrate. Fingleton felt that the antipathy towards her was exacerbated by her push for reform and her forthright manner.⁵² In other words, she espoused a style that is regarded as forceful and authoritative in a male chief magistrate but unacceptable in a female chief. Ironically, however, had Fingleton occupied the docile and deferential subject position conventionally associated with the feminine, it is unlikely that she would have been appointed to a position involving the management of more than 70 magistrates spread over a large geographical area with a brief to put the magistracy in order. She would probably then have been found to lack forcefulness and authority.

An assertive woman (a *feminist* chief magistrate) who has offended the old guard can expect to be sanctioned more heavily than the comparable man.⁵³ Nevertheless, such a savage attack on a woman occupying judicial office may be unprecedented, although there are instances of the scapegoating of women lawyers

46 *R v Fingleton* (2003) 140 A Crim R 216.

47 *Fingleton v The Queen* (2005) 216 ALR 474.

48 Although a number of women were appointed to the Queensland judiciary in the late 1990s, Roslyn Atkinson was singled out for particular attack by the Queensland Bar Association because she did not come from the senior ranks of the bar but had rather more diverse professional and life experiences. See Barbara Hamilton, 'Criteria for Judicial Appointment and "Merit"' (1999) 15 *Queensland University of Technology Law Journal* 10.

49 Hunter, 'Fear and Loathing in the Sunshine State', above n44 at 146.

50 Peter Wilmoth, 'A Life at Law turned Inside Out' *Sunday Age* (25 September 2005) at 15.

51 Leisa Scott & David Nason, 'Frying Fingleton' *The Australian* (7 June 2003) at 19.

52 Wilmoth, above n50.

53 The vicious attack on Claire L'Heureux-Dubé when she was a member of the Supreme Court of Canada, which included one of her brother judges on the bench writing a furious letter to the press, comes closest to the Fingleton case. Justice L'Heureux-Dubé's sin was to have taken a feminist stance in a sexual assault case. Indeed, she is described as the first Supreme Court of Canada jurist to have proudly accepted the label 'feminist'. See Backhouse, above n12 at 187. Although the attack on L'Heureux-Dubé was relentless and personal, it did not result in a comparable attempt to remove her from the bench.

leading to the demise of their careers.⁵⁴ Hunter refers to the 'terrorising effect' of the scapegoating of Fingleton, in that no other senior woman dared to speak out lest she become the next 'sacrificial victim'.⁵⁵

3. *The Masculinity of Merit*

A. *The Definitional Conundrum*

Women figure prominently among the top students in law schools, and have done for several decades.⁵⁶ But, if this is the case, why is it that these women when now being considered for senior positions are repeatedly found to be lacking in merit? There is something suspect about the concept since it is rarely defined. Indeed, merit seems to have entered political discourse only comparatively recently, 'its advent apparently coinciding with women's increasing pursuit of positions of influence within the public sphere'.⁵⁷

Merit is an abstract term involving a claim to excellence, commendation or worth, but it has no meaning without reference to the social context in which it appears. Aristotle evinced a clear understanding of this issue two and a half thousand years ago,⁵⁸ but it is rarely subjected to scrutiny by modern decision-makers operating within a liberal meritocracy. It is assumed to be unproblematic that the 'best person' will be instantly discernible to all, as if by magic. In the case of judges, this process of instantaneous recognition is also deemed to occur even though, out of a pool of hundreds or even thousands, 'there is no way at the end of the day there is just one who is the best ... There will always be five or six names who are good enough to be appointed'.⁵⁹

The 'best person for the job' is the person who, on the basis of past performance, displays the greatest promise or potential. Hence, far from merit being an objective variable, there is always an element of uncertainty associated

54 See Ann Daniel, *Scapegoats for a Profession: Uncovering Procedural Justice* (1998), where the author documents the case of Carol Foreman, a prominent divorce lawyer in Sydney of 'enviable repute'. However, her brilliance, aggression and determination, all characteristics that would have been extolled in a man, underpinned her demise. Her success in demolishing wealthy husbands on behalf of her clients saw her 'driven out of the profession with great fanfare' when she was found guilty of professional misconduct.

55 Hunter, 'Fear and Loathing in the Sunshine State', above n44 at 153.

56 Jane H Mathews, 'The Changing Profile of Women in the Law' (1982) 56 *Australian Law Journal* 634. Judicial associateships (or clerkships) are a popular destination for top graduates. A study of High Court associates 1993–2000 revealed that approximately 47% were female. See Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25 *Alternative Law Journal* 295 at 297. In the UK, women secure more first and upper-second class degrees. See Erika Rackley, 'Representations of the (Woman) Judge: Hercules, the little Mermaid, and the Vain and Naked Emperor' (2002) 22 *Legal Studies* 602.

57 Rosemary Whip, '"Merit" and the Political Representation of Women' (2001) 20(2) *Social Alternatives* 41.

58 Aristotle, *Politics* (John Warrington trans, 1959 ed) at §1283a.

59 Michael Lavarch, former federal Attorney-General, now Dean of Law at Queensland University of Technology, quoted in Marcus Priest, 'Ruddock Appointee joins Court Debate' *Australian Financial Review* (15 November 2004) at 3.

with it, because it involves making predictions about the future: *if candidate A were to be appointed to a position she has never occupied before, how will she perform?* Furthermore, there is an undeniable element of subjectivity in determining what factors are taken into account and how they are evaluated.⁶⁰ Despite this element of subjectivity, liberal individualism assumes that merit involves rational choice.

Merit also encompasses the idea of desert, in the sense of entitlement: *after twenty years at the bar, he deserved to be appointed to the bench.* The two meanings of merit — excellence and desert — have become conflated, so that 'the best person for the job' is deemed to be the most deserving, as well as the most outstanding.

While there may be objective criteria enumerated for a position, such as certain qualifications, skills and experience, they mean little without the evaluative element.⁶¹ Qualifications and abilities have to be weighted in relation to other criteria, and their relevance and standing compared with those of other candidates. Applying the merit principle to a selection process without any articulated criteria clearly presents something of a challenge, although this has historically been the method used in the selection of many prestigious positions, despite the insistent myth of objectivity. We are all caught up in the discourse of the 'best person' and want to believe in merit based on objective criteria, rather than extraneous factors, as the basis of appointment, but are at a loss to know how best to conduct the process of identification and evaluation.

It is a feminist truism that for a woman to succeed she has to be better than her male counterparts.⁶² Perhaps this is why the merit of a particular judge is expressly raised only when the appointee is a woman: 'Every time a woman gets appointed there is noisy talk about the "merit" of the appointment, but whenever a man is appointed there is silence on the question of merit'.⁶³ Try substituting 'Man "of merit" joins High Court' for 'Woman "of merit" joins High Court' in the case of the headline referred to above. It is virtually unimaginable.⁶⁴ Indeed, it would be tautologous because masculinity is already a tacit criterion of judicial merit.

When Queensland Attorney-General, Matt Foley, appointed six women judges out of seven to the Supreme Court of that State in the late 1990s, like Mr Hulls, he

60 Clare Burton, *Redefining Merit*, Affirmative Action Agency Monograph No 2 (1988); Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law & Society* 28.

61 Richard H Fallon, 'To Each According to his Ability, from None According to his Race: The Concept of Merit in the Law of Antidiscrimination' (1980) 60 *Boston University Law Review* 815 at 822.

62 See, for example, Mary Gaudron, 'Speech to launch Australian Women Lawyers', (Speech presented in Melbourne, 19 September 1997).

63 Kim Pettigrew, barrister, quoted in Fergus Shiel, 'Engendering a Legal Minefield' *The Age* (6 December 2003) at 8.

64 This could well change if the focus shifted to sexuality, or some other suspect characteristic of identity. For example, Justice Kirby speculates as to whether he would have been appointed to the Australian High Court had he 'come out' as a gay man prior to his appointment. See Moran, above n3 at 586, 596.

was accused of making appointments on the basis of gender rather than merit.⁶⁵ Indeed, he was officially asked under the protection of parliamentary privilege whether he would continue 'making appointments to judicial office on grounds other than judicial merit'.⁶⁶ Such asseverations do have an effect on public policy and it is notable that the appointment of women judges in Queensland slowed down following the imbroglio involving Diane Fingleton.⁶⁷

A graphic example of the way women and merit are treated as disjunctive within popular culture is encapsulated in a web-based poll at the time a replacement was being mooted for Mary Gaudron on the High Court, which asked participants '[s]hould there be more women judges on the High Court?' and offered a choice of one of three answers: 'Yes', 'No', or 'Should Be Decided on Merit'.⁶⁸

Deconstruction of the objectivity of merit in the context of judging, perhaps unsurprisingly, soon reveals it to be a masquerade as the process is characterised by an extraordinary opacity. When we look at the outcome for the Australian High Court, for example — three women,⁶⁹ one openly gay male judge and no Indigenous judges out of 45 appointments in over a century — the myth of the objectivity of merit is exposed.⁷⁰ Nevertheless, decision-makers and commentators endlessly reiterate reliance on the 'essential criterion of merit' as though it were unproblematic.⁷¹

65 See, for example, Hedley Thomas, 'Selection Process is Judicious: Welford' *Courier Mail* (2 September 2004) at 2; Terry Sweetman, 'Misjudged, Misguided Misogyny' *Courier Mail* (15 February 2000) at 15; Scott Emerson & Geoffrey Newman, 'Forget Judges' Gender: Gibbs / New Women on the Bench' *The Australian* (12 February 2000) at 3; Sue Monk, 'Judge Blasts "Political" Appointees' *Courier Mail* (15 November 1999) at 1.

66 Hunter, 'Fear and Loathing in the Sunshine State', above n44 at 153.

67 Ibid. It may also signal the ebbing of a feminist influence within the judiciary before it has barely begun, as noted by Backhouse in the Canadian context, following the concerted attack on Justice L'Heureux-Dubé. See Backhouse, above n53 at 189.

68 Australian Broadcasting Corporation, *Public Record* (2003) (no longer on website), quoted in Rachel Davis & George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819, 833. Davis and Williams record the outcome: 'Out of 983 votes, 56 percent voted 'Yes'; 4 percent voted 'No'; and 40 percent voted 'Should Be Decided on Merit'.

69 The appointment of Justice Susan Kiefel was announced at the time of going to press (13 August 2007). As with the announcement of Justice Crennan's appointment, Attorney-General Ruddock stressed the merit of the appointee, while seeking to dispel any doubt that gender may have been an issue. He nevertheless acknowledged that he turned his mind to the fact that she was from Queensland. 'What bollocks', says commentator Ross Buckley in disputing the fact that one issue could be legitimately addressed but not the other. (Ross Buckley, 'Gender was a Factor in the latest Court Appointment' *Courier Mail* (15 August 2007) at 15). The defensiveness of the Attorney-General in endeavouring to present women judges as gender-neutral highlights the continuing ambivalence around their appointment.

70 A similarly skewed composition in the case of federal and State courts has been confirmed by reports into the judiciary. See, for example, Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, above n17; Australia, Attorney-General's Department, above n17.

B. *Searching for Criteria*

Conventionally, an Attorney-General makes a recommendation to Cabinet and the names are announced in due course. Even though the position may now be advertised in some jurisdictions, consultations with key individuals and professional bodies remain confidential. Governments in Australia retain an exclusive right to identify candidates for the bench,⁷² and there is resistance towards transferring this power to an unelected body, despite the benefits of independence.⁷³ While one can be critical of the highly politicised nature of the nomination hearings held for selection of US Supreme Court judges, the public process assists in making women's voices audible.⁷⁴

The long history of appointing only Benchmark Men as judges has made it difficult to re-imagine judicial merit in a non-gendered way. In other words, the fundamental or objective criterion associated with *hoi aristoi* (the best people) has informally come to include masculinity, because Benchmark Men were the only appointees for so long. Rosabeth Moss Kanter's description of the way social conformity is maintained within corporations can also illuminate our understanding of the constitution of judicial merit:

The more closed the circle, the more difficult it is for 'outsiders' to break in. Their very difficulty in entering may be taken as a sign of incompetence, a sign that the insiders were right to close their ranks. The more closed the circle, the more difficult it is to share power when the time comes, as it inevitably must, that others challenge the control by just one kind. And the greater the tendency for a group of people to try to reproduce themselves, the more constraining becomes the emphasis on conformity.⁷⁵

What is at work here is the phenomenon of homosocial reproduction whereby like favours like.⁷⁶ That is, Benchmark Men tend to appoint those who look most like themselves as a testament to their own worth and desert. Potential candidates may be inducted into the 'club' at an early stage of their careers. By means of what Dermot Feenan terms an 'epistemology of ignorance', lack of knowledge about criteria for appointment and networking operates to preserve privilege and ensures that women are excluded.⁷⁷ He argues that ignorance is therefore a constitutive

71 See, for example, Davis & Williams, above n68 at 823; Samantha Maiden, 'High Court Decision only on Merit, says PM' *Adelaide Advertiser* (19 December 2002) at 3; Paul de Jersey, 'Equal Justice for All' *Courier Mail* (16 February 2000) at 17; 'Merit the Key to choosing Judges' *Courier Mail* (18 November 1999) at 20.

72 Canada, Britain and some US jurisdictions have instituted independent representative committee systems that allow greater transparency. For a thoroughgoing analysis and critique of the US judicial selection process, see Judith Resnik, 'Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure' (2005) 26 *Cardozo Law Review* 579.

73 The creation of an independent commission has been mooted since at least the 1970s. For a comprehensive analysis of the process, see Davis & Williams, above n68. The American White House has similarly objected to a transfer of the nomination power from the President to 'a group of unelected and unaccountable citizens'. See Resnik, above n72 at 638.

74 Resnik, above n72 at 635.

75 Rosabeth Moss Kanter, *Men and Women of the Corporation* (1977) at 68.

76 The 'homo' in homosocial is from the Greek *homoios* (like), not from the Latin *homo* (man).

aspect of existing power relations. The lack of transparency surrounding the selection process can only serve to augment those power relations.

Some prominent men are nevertheless beginning to question conventional wisdom as a result of their experience with talented women lawyers. For example, Justice McHugh, in a speech he gave shortly before his retirement from the High Court, expressly adverted to the masculinity of merit: '[Women] are at a disadvantage in competing on merit, as that term has been defined and understood in a male-dominated profession'.⁷⁸ The malleability of merit, the conservatism of the legal professional milieu and the virtually infinite criteria it embraces nevertheless authorises attacks on women judges for random deficiencies within legal and popular discourses as I have shown.

It is noteworthy that the higher one ascends in a hierarchy of prestigious positions in the public sphere, the greater is the emphasis on merit but, paradoxically, the more elusive and the less transparent the criteria. As the descriptive variables become more slippery, the assertion of Benchmark Men to their *right* to occupy the most authoritative positions becomes more insistent. I argued two decades ago that merit served an ideological role in assuaging concerns about the basis of societal allocations in the context of AA.⁷⁹ Merit provides a distributive mechanism within liberalism that compels individuals to take responsibility for their success and non-success in life, regardless of countervailing realities such as the homosociality of the senior ranks of the bar, from where judges are generally drawn. The discourse of merit has thereby been able to sustain traditional power relations and conventional iterations of masculinity and femininity. In this way, merit operates as a central legitimating principle of the masculinist state.

While the transparency of selection criteria is clearly desirable,⁸⁰ there is unlikely to be unanimity as to what they should be, as Chief Justice Gleeson of the Australian High Court points out:

There is plenty of room for argument about what constitutes merit in judicial selection. But, if it means nothing else, it must at least include the capacity to preside over adversarial litigation, conduct the proceedings with reasonable efficiency, and produce a well-reasoned judgment at the end.⁸¹

77 Dermot Feenan, 'Understanding Disadvantage partly through an Epistemology of Ignorance', (Paper presented at the International Research Collaborative on Gender and Judging, American Law & Society Annual Meeting, Baltimore, USA, 6–9 July 2006).

78 Michael McHugh, *Women Justices for the High Court: Speech at High Court Dinner hosted by WA Law Society, Perth, 27 October 2004* (2004) High Court of Australia <http://www.hcourt.gov.au/speeches/mchughj/mchughj_27oct04.html> accessed 26 June 2006.

79 Thornton, 'Affirmative Action, Merit and the Liberal State', above n60. Malleon has recently written on the relationship between merit and AA with particular regard to judicial selection in the UK. See Kate Malleon, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126.

80 Davis & Williams, above n68 at 835ff.

81 Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591 at 592.

How does one assess the *capacity* to preside, conduct and produce? Surely, one can have the *capacity* to perform a task without actually having done it before. Would Justice Marcia Neave, who was attacked for not having conducted trials, satisfy the capacity requirement? 'Capacity' and 'merit', like 'integrity', 'skill' and 'experience', are constructed in such a way that the terms themselves have become gendered.

In 1993, the federal Attorney-General, Michael Lavarch, in a discussion paper on judicial appointments, produced a longer list of criteria. He proposed a range of skills: legal, advocacy, administrative, oral and written communication, together with efficiency, as well as a range of personal qualities: practicality and commonsense, vision, a capability to uphold the rule of law and act in an independent manner. Finally, the appointee should contribute to the institution's fair reflection of society (consistent with merit).⁸² Again, while most of the skills can probably be demonstrated, the personal criteria make little sense without explication, evaluation and reference to a particular context. Furthermore, one could always include a range of other desirable traits, such as knowledge of and sensitivity to diversity, contributions to the community, and evidence of understanding and commitment to social justice. The point is that there can never be closure in the constitution of merit because of the essential permeability and subjectivity of the evaluative element, which is going to differ in every context according to the candidate pool.⁸³

C. *The Rhetoric of AA*

A further means of denigrating women judges that enhances the construction of merit in conventional masculinist terms is to suggest that they have been appointed as a result of affirmative action. AA is an open-ended concept that encompasses a range of pro-active strategies designed to promote institutional diversity. These strategies might best be thought of as positions on a continuum. At one end are clustered minimalist strategies, or weak forms of AA, which might include encouraging women and minorities to apply or ensuring that the names of women and Others are included among the short-listed candidates. At the other end of the continuum are stronger forms of AA, such as quotas and preferences; interventions designed to overcome the under-representation problem sooner rather than later. Quotas have been ordered by United States courts from time to time to remedy instances of egregious racial discrimination in the workplace,⁸⁴ but they have never been ordered in Australia. In any case, it does not follow that quotas or preferences displace the merit principle, as the best qualified candidates will be chosen when a choice has to be made.⁸⁵ Despite this commonsense view of the operation of quotas, the conservative swing engendered by neoliberalism has

⁸² Lavarch, above n59.

⁸³ Malleon, 'Rethinking the Merit Principle', above n79 at 137.

⁸⁴ See, for example, *RIOS v Enterprise Association Steamfitters Local 638* 501 F 2d 622 (2nd Cir, 1974); *United Steelworkers of America v Weber* 443 US 193 (1979).

denounced anything other than a strict application of the equal treatment standard, which usually means retention of the status quo. The attack on an outcome-oriented approach led even to the excision of the phrase 'affirmative action' from the official lexicon in the late 1990s.⁸⁶ While it would be absurd to suggest that sex-based quotas were being used to appoint judges without regard to individual merit, this is the asseveration being made by those opposing the appointment of women judges in Victoria and Queensland.

By a certain sleight of hand, AA is construed by its detractors as being concerned with biology, not merit, thereby amounting to a form of reverse discrimination. AA, like merit, is another discourse in which gendered dualisms involving normativity and otherness circulate. The false antinomy between AA and merit is an insidious way of entrenching the idea that the beneficiaries of AA are unmeritorious, but it is one that is repeated endlessly within popular discourse, sometimes by women judges themselves⁸⁷ — the ultimate testament to its ideological force.

I C F Spry depicts AA as a misguided policy of the left, spurred on by sectional interests:

The matter of political appointments is now exacerbated by the current tendency of Labor governments to appoint unsuitable female judges, often at the instance [*sic*] of feminists... Accordingly many of the female judges — there are some few exceptions — who sit in various Australian courts are there by reason of gender and lack the necessary abilities.⁸⁸

It is a familiar tactic for conservatives to tag as 'political' all progressive judicial appointments in order to denigrate them, whereas they extol conservative appointments by the use of descriptors such as 'meritorious'. A similar tactic is employed to denigrate women regardless of political persuasion. Spry would like the legal profession to adopt a stronger critical stance towards AA in light of what he claims to be the 'poorer quality of justice that is, with few exceptions, dispensed by female judges and law officers'.⁸⁹ He does not hesitate to attack the Victorian Attorney-General for appointing a woman, Marilyn Warren, to the position of Chief Justice:

85 See, for example, Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] All ER (EC) 865; *Re Badeck and others (Landesanwalt beim Staatsgerichtshof des Landes Hessen and Hessischer)* [2000] All ER (EC) 289.

86 The removal of the phrase from the *Affirmative Action (Equal Opportunity for Women in the Workplace) Act* 1986 (Cth) was the most notable example. This was a weak piece of legislation that encouraged self-regulation; it certainly did not mandate quotas. It was replaced with the even weaker *Equal Opportunity for Women in the Workplace Act* 1999 (Cth). See Margaret Thornton, 'EEO in a Neo-Liberal Climate' (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77. Quotas are similarly seen as a fundamental erosion of the merit principle in the UK. See Malleon, 'Rethinking the Merit Principle', above n79 at 129.

87 See, for example, Balmford, above n35 at 36–37.

88 I C F Spry, 'Affirmative Action for Judges' *National Observer* (Summer 2004) at 67.

89 *Id* at 68.

[Mr Hulls] claimed publicly that she was the most appropriate person to be appointed, a foolish claim because in fact there are various other available persons who are regarded as substantially more capable.⁹⁰

What is being played out here is the rhetoric of merit, which reveals itself to be a concept shaped by power. This power has traditionally been wielded by Benchmark Men and has largely gone unchallenged. Progressives generally, not just feminist legal scholars, are questioning the power of Benchmark Men to determine behind closed doors what constitutes merit in judicial appointments. This has compelled gatekeepers to defend a position that has become increasingly untenable, or to specify criteria, when formerly there were none — other than benchmark masculinity and 'being known'.

These established characteristics of the judiciary and the clandestine nature of the appointments process have meant that women and Others have had no opportunity to contest and contribute to the construction of merit. I suggest that the disparagement of the feminine, which has been counterpoised with the masculinity of merit, is another rhetorical device that has served to sustain judging as a profoundly gendered activity. AA is one element of the arsenal of attack that has been useful to detractors in the case of the appointment of more than the single token woman, for it is assumed (or feared) that a critical mass of women will have some devastating (albeit unspecified) effect. A more open process may well mean more contestation but the popular (mis)representations of women judicial candidates can then be publicly countered rather than being insidiously perpetuated.

4. *The Fictive Feminine*

Once women were 'let in' to the public sphere, it was assumed that it would only be a matter of time before an egalitarian end state was reached in which equality between the sexes existed. When anomalies were pointed out, the rationality of liberalism would triumph and sex would have as much relevance as eye colour in appointment to public office.⁹¹ As we know only too well, the liberal story does not comport with the gendered reality.⁹² Liberalism glosses over the animus towards the feminine because it encapsulates a pre-modern, non-rational element that sits uncomfortably with the rational humanism of liberal individualism. Nevertheless, misogyny remains a key sub-text of the Western religious and cultural tradition, which constitutes women as 'others' to the masculinist norm.

90 Id at 69. Two years before, Spry did not demur in publicly denigrating Mary Gaudron when she announced her retirement from the High Court. See I C F Spry, 'The Unlamented Departure of Justice Gaudron' *National Observer: Australia and World Affairs* (Spring 2002) at 68.

91 Richard A Wasserstrom, 'On Racism and Sexism' in Richard A Wasserstrom (ed), *Today's Moral Problems* (3rd ed, 1985) at 20–21.

92 See, for example, Deborah L Rhode, 'Gender and the Profession: An American Perspective' in Schultz & Shaw, above n4 at 10; Fiona M Kay & Joan Brockman, 'Barriers to Gender Equality in the Canadian Legal Establishment' in Schultz & Shaw, above n4 at 59; Kate Malleeson, 'Prospects for Parity: the Position of Women in the Judiciary in England and Wales' in Schultz & Shaw, above n4 at 178–79.

For almost three millennia, the influential theorists and jurists were all men, as were virtually the entire *dramatis personae* of the public sphere. These figures have possessed the power to write about the feminine in such a way that women were always the objects, never the subjects of the authoritative social narratives. This lack of voice has allowed the category 'woman' and the concept of the feminine to be subjugated by power.

According to Aristotle, women were possessed of an imperfect deliberative faculty.⁹³ The view that the difference and inferiority of women is grounded *in nature* is entrenched within the Western intellectual tradition, an idea that has not evaporated with the cautious letting in of women associated with Second Wave feminism. Women's assignation to the private sphere, sexuality, affectivity, reproduction and care came to be associated with the essentialised feminine — or the fictive feminine as I term it — denying all vestiges of individual subjectivity. This is in contrast to the imagined masculine that dominates the public sphere, encompassing the qualities of reason, impartiality, authoritativeness and decisiveness which, coincidentally, go to make up merit in the constitution of the judge. The most pernicious strand of this mythical binarism is that the feminine has been constructed as a force that is dangerous to public office.

While caring for others would seem to be a positive characteristic for participation in public life, as it is closely connected to justice and mercy, it has also been constructed as the basis of the disorder of women. This thesis, which is elaborated upon by Carole Pateman,⁹⁴ is based on the work of a number of canonical theorists, such as Rousseau and Freud, and avers that women are incapable of developing a sense of justice.⁹⁵ Their reasoning is that because women are preoccupied with the love and care of intimates, they can never transcend the particularity of the family in favour of the claimed universality associated with public sphere activity. Rousseau's idealised women, such as Sophy in *Émile*,⁹⁶ are confined to motherhood and subordination in the private sphere, the realm of the particular. The disability of particularity meant that they could never be full citizens, let alone assume responsibility for judging or the running of the state. The fictional binary plays down the inevitable role of particularity in the public sphere, such as the movement between the universal and the particular in the adjudicative process.⁹⁷ If women sought to think beyond the needs of their families as male judges do, disorder would result:

Love and justice are antagonistic virtues; the demands of love and of family bonds are particularistic and so in direct conflict with justice which demands that private interest is subordinated to the public (universal) good.⁹⁸

93 Aristotle, above n58 at §1260a.

94 Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989).

95 See, for example, Sigmund Freud, 'Some Psychological Consequences of the Anatomical Distinction between the Sexes' in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (1960) Vol XIX at 257–58.

96 Jean-Jacques Rousseau, *Émile* (Barbara Foxley trans, 1993 ed).

97 Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (1999) at 193–94.

98 Pateman, above n94 at 21.

Classical liberalism was able to deal with the tensions between love and justice, as well as corporeality and reason, provided that the feminised side of the set of dualisms associated with the public/private dichotomy were quarantined within the private sphere. This legitimated the domination of the public sphere by Benchmark Men, allowing them to mark as masculine, under the guise of universality, the values of reason, autonomy, authority and merit.

The disorder generated by female sexuality is a recurring leitmotif of the Western tradition. Female sexuality and eroticism were frequently adduced as a justification for refusing to admit women to the legal profession.⁹⁹ Nonsensical though this gendered binary is, since it denies the sexuality, corporeality and affectivity of men — at least in the public domain — it continues to have currency in the rhetorical construction of judging.¹⁰⁰

Although there is a growing literature on women and judging, it has tended to steer away from engagement with the psychoanalytic effects of the dark and primordial facets of the feminine. The focus has been largely directed to overcoming structural hurdles that are perceived to be tractable to remediation, rather than addressing the discomfiting but pervasive fiction of the feminine as a disorderly force in the public realm, which transcends any simple blueprint for reform. This thesis possesses significant explanatory potential in light of the latent hostility towards women judges that continues to circulate.¹⁰¹ The detractors of the appointment of women judges rarely go beyond endlessly repeating that the appointees are unmeritorious, as I have shown; they do not articulate just how disorder will manifest itself in the public sphere, but we are assured that it will.

More insidious is the fear that a feminised judiciary will not be a fit and proper institution for men. Once the tipping point is reached, feminised occupations encourage male flight,¹⁰² as with white flight (a phenomenon associated with the entry of Blacks and Hispanics into white, middle class neighbourhoods in the United States). If an influx of women judges takes place, the crucial boundary between the masculinist norm and the feminised Other could similarly dissolve. Both the masculinity and the elitism of judging as an occupation would then be in

99 Thornton, *Dissonance and Distrust*, above n6 at 45; Margaret Thornton, 'Authority and Corporeality: The Conundrum for Women in Law' (1998) 6(2) *Feminist Legal Studies* 147. Richard Collier has deliberately set out to challenge the 'disavowal of men's corporeality' and the 'asexual professionalism' associated with law. See Richard Collier, "'Nutty Professors', 'Men in Suits' and 'New Entrepreneurs': Corporeality, Subjectivity and Change in the Law School and Legal Practice' (1998) 7(1) *Social & Legal Studies* 27.

100 I have argued elsewhere that the insidiousness of fraternity in legal discourse should be exposed as it is a powerful means through which the imagined masculine claims reason to itself. See Margaret Thornton, "'Liberty, Equality and ?': Endowing Fraternity with Voice' (1996) 18 *Sydney Law Review* 553. For numerous examples of the gratuitous inclusion of the affective in the decisions of male judges, see Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995); Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (2nd ed 2002).

101 The hostility is by no means always latent, as seen in the case of Justice L'Heureux-Dubé (see Backhouse, above n12) and Diane Fingleton (see Hunter, above n44).

102 See, for example, Ann Game & Rosemary Pringle, *Gender at Work* (1983).

jeopardy. Feminisation and male flight must therefore be resisted at all costs. Race, sexuality and religion also worry Benchmark Men, but a critical mass of women, including one that is on course to reach the tipping point, as with the Victorian judicial appointments, is deeply destabilising because it hints at the real possibility of feminisation.

5. Conclusion

This paper has sought to focus on the perception of women as judges rather than analyse modes of adjudication. The representational cameos I have presented challenge the objectivity of merit in both the selection process and the evaluation of judging. To allay any suspicion of disorder, the woman judge must suppress the feminine and assume the masquerade of Hercules.¹⁰³ She must position herself close to the masculine norm in order to ensure a semblance of authority. I have shown that the animus towards the feminine has not evaporated with the 'letting in' of women and the effluxion of time. A mere belief in liberal individualism cannot instantaneously erase the centuries of distrust that underpins liberal theory and is kept alive by public policy, legal discourse and popular culture. Faith in the idea that a critical mass will dilute the animus towards the feminine has not been borne out by the evidence. The attacks on women judges appointed in Queensland and Victoria attest to this. Once the FW2 ('first woman to...')¹⁰⁴ phenomenon lost its novelty, it was hoped that a critical mass would allay the fear of the feminine and pave the way for acceptance. While there is some evidence of tolerance of diversity, numerosity has simultaneously revived the fear of disorder and feminisation.

I suggest that the current political climate in which there has been a notable swing away from social liberalism has accentuated the resiling from progressive initiatives, such as the acknowledgement of group harms, whether on the basis of gender, race, sexuality or other characteristic of identity. The turning away from the systemic character of sex discrimination towards an exclusive focus on the individual is one such example. The antinomy between AA and merit is a product of conservative discourse, underpinned by sexism, racism and a latent homophobia. Neoconservatism goes hand-in-glove with neoliberalism, giving rise to a revival of the discourse of 'the family', which has encouraged a move away from the subjectivity of the feminised self in favour of the objectified (masculinist) position. The feminised Other thereby becomes ineffable once more, which is why we see a marked tendency by women appointees to 'mainstream' and neutralise the feminine.

Aliotta suggests that it might take several cohorts of women moving through law school before the impact is felt in the judiciary.¹⁰⁵ While I would like to believe in this progressivist thesis, I reiterate the scepticism articulated at the outset. Rather than acceptance of increasing numbers of women in authoritative

103 Rackley, 'Representations of the (Woman) Judge', above n56.

104 Cheris Kramarac & Paula A Treichler, *A Feminist Dictionary* (1985).

105 Jilda M Aliotta, 'Gender and Judging: Some Thoughts toward a Theory' (Paper presented at Annual Meeting of Midwest Political Science Association, Chicago, 3–6 April 2003) at 10.

positions, the incidence of backlash may invite a more pronounced imperative on the part of women judges to govern the self and render mute what might be construed as a different voice. Nevertheless, the philosophical devaluation of the feminine underlines the quicksand nature of difference theory. It can be employed strategically, as Kate Malleson suggests, but it is a double-edged sword.¹⁰⁶ Law is more comfortable with sameness, but there is also a danger that a focus on difference may entrench essentialism.

Undoubtedly, there is increased scope for diversity and dissent as the numbers of women on courts increase, but the unevenness of social change is apparent with a move towards a more conservative political milieu. Inevitably, the contemporary political imperatives will exert an impact on judging, rendering the process both more and less feminised. Some women judges will continue to perceive themselves as honorary men while there will be some at the other end of the spectrum who will perceive themselves to be feminist judges. In between, there will be a range of perspectives. What we want is an acknowledgement of the subjectivity of women judges and a movement away from the notion that women are a homogeneous and undifferentiated mass, an assumption with which male judges rarely have to deal.

If we come back to Richter's comment about women being appointed because they do not have testicles, we see something of the deep atavistic fear at the prospect of women, understood in biologicistic and abject, as well as unmeritorious, terms, constituting not just a critical mass on the bench, but dominating it. The objectified projection of corporeality carries the seeds of invidiousness with it, which inhibits the construction of individual subjectivity. One or two 'women of merit' can be tolerated when they position themselves close to the masculinist norm and suppress all vestiges of the feminine. They do not then threaten the crucial line of demarcation between the norm and the Other. Indeed, their very presence as exceptions to the rule serves to uphold it. To this end, individual women trail blazers in authoritative positions are frequently reminded of their outsider status.¹⁰⁷

A predominantly masculinised institution that has historically sustained male power and privilege is not going to change overnight into a humane and caring one by a few women when the feminine continues to be associated with disorder in public sphere decision-making. Indeed, in my study of women and the legal profession, I argued that legal institutions were more likely to change women than the converse.¹⁰⁸ Inadequate attention has been paid to the deeply gendered

106 Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Legal Studies* 1.

107 Madame Justice L'Heureux-Dube of the Supreme Court of Canada considers the phenomenon in the context of the struggle for equality. See Claire L'Heureux-Dube, 'Outsiders on the Bench: The continuing Struggle for Equality' (2001) 16 *Wisconsin Women's Law Journal* 15. A telling anecdote she relates in the context of her initial appointment in 1973 involved a young neighbour rushing up to her with the 'news', 'They have appointed a woman as a judge and my father says she's a nobody!'

108 Thornton, *Dissonance and Distrust*, above n6.

institutions that women are entering.¹⁰⁹ The constraining factors that delimit autonomy, including public scrutiny and the possibility of being overruled, are undoubtedly stronger for women judges than for men.¹¹⁰ Most significantly, Benchmark Men, who remain the primary decision makers, prefer to appoint women who espouse values most like their own.¹¹¹ That is, they should be white, able-bodied, heterosexual, middle class and politically right of centre.

Gilligan's theory, or at least the way it has been represented, in associating a different morality with women, triggered a major debate around women and judging.¹¹² However, I agree with Kathy Davis that insufficient attention has been paid to the rhetoric at the heart of the Gilligan debate,¹¹³ which helps to understand its contradictions and its circularity. That is, no definitive resolution is possible with different voice theory because the aim is to persuade as to a particular way of thinking rather than make a truth claim.

The concept of merit exercises a similarly rhetorical role, as illuminated by Maria Drakopoulou who explains how a particular *episteme*, or conceptualisation of knowledge, emerges during a given historical period which, rather than being seen as 'a progressive unfolding of truth', is 'an integral part of a genealogy of feminist legal knowledge'.¹¹⁴ Through the *querelle des femmes* of early seventeenth-century England, Drakopoulou suggests that women were able to create a discursive space in which to contest contemporary essentialised representations of female nature. Invoking this idea of the *episteme*, we can see how the 'different voice' struck a chord with feminist legal scholars, for it enabled the negative views of female nature within the Western intellectual tradition to be discursively contested.

In the end, what constitutes merit is determined in a context of power, which means that it is necessarily always going to be contested. Its claim to produce an objective 'best person' is a rhetorical claim designed to maintain the judiciary as a gendered regime. If we conceptualise merit as a technology of disciplinary power that takes its colouration from the prevailing political climate, we can take advantage of its performative character. It can be unsettled by interrogation and exposure of its ambiguities and contradictions, as I have sought to do, and then reimagined. However, closure can never be attained, for the meaning of merit will always be contested. While both authoritative legal and popular discourses suggest that the meaning of merit is fixed, such a claim is based on no more than the rhetoricity of power.

109 Aliotta, above n105 at 5.

110 Heather Elliott, 'The Difference Women Judges make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence": A Research Proposal' (2001) 16 *Wisconsin Women's Law Journal* 41.

111 Patricia Yancey Martin, John R Reynolds & Shelley Keith, 'Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis' (2002) 27(3) *Signs* 665.

112 Gilligan, above n24.

113 Kathy Davis, 'Toward a Feminist Rhetoric: The Gilligan Debate Revisited' (1992) 15(2) *Women's Studies International Forum* 219.

114 Maria Drakopoulou, 'Women's Resolutions of Lawes Reconsidered: Epistemic Shifts and the Emergence of the Feminist Legal Discourse' (2000) 11 *Law & Critique* 47.