

## **PERSPECTIVES FROM THE BENCH ON FEMINIST JUDGMENTS**

*Judge Elinore Marsh Stormer\**

*Judge Stormer gave these remarks as part of a panel discussion on feminist judging at a conference sponsored by the Center for Constitutional Law at the University of Akron in October 2016. She offered insights on her own experience as a woman judge and on the role of judges addressing issues of gender equality in their courts.*

### **I. OPENING REMARKS**

I'm going to give you a brief history of my life, because I'm so old that I've experienced many of the things that you read about in articles that you have before you. When I went to law school in 1979, I had just taken a gap year, which did not involve me going to school. I was a waitress at the Brown Derby. I was just sick of school and that was very educational. It actually formed a lot of the things that have happened to me since then. I was a union worker. I was sexually harassed by my boss, who didn't feel that I could say or do anything about that, but found that I could get more tips if I was flirtatious. I'd lived this kind of intellectual life before that, and it really was very helpful to me as I went forward with the rest of my life.

I came to law school where twenty percent of my class was women, so obviously everyone else was a man. We had gotten past the question of whether or not women being in law school worked with taking a man's job, which is what Ruth Bader Ginsburg and Sandra Day O'Connor encountered. We were there, but to some extent there was still

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reluctance to perceive us as equals. We had very few women law professors, as a matter of fact, I can only remember one, but there may have been more than that. She taught contracts.

When I would go on job interviews, I interviewed with a number of firms in Cleveland, and at that time it was perfectly permissible for them to ask you questions like “do you expect to get married,” “how many children do you think you want,” and sometimes they would couch these questions in terms of “where do you see yourself in ten years” and my standard answer was “well as a partner in your firm, of course” and they would sit back and look kind of grim. When being interviewed by a man, who had pictures of his daughters behind him in his office, I would say “you know I’m certain that just like you would want for your daughters, you would see me as someone who would be viable in your office.”

I did work for a summer in a large multinational law firm in Cleveland. It just wasn’t for me. There were a lot of reasons for that, but one of them was the culture that existed. There were very few women, no women partners; it just didn’t feel like it was a good fit for me. I can tell you now, my niece who works at a northeastern law firm, went through a series of interviews and was told by her law school that if there was an inappropriate question asked like, “do you see yourself having children” that she was to stand up immediately and inform the interviewer that it was an unconstitutional question and she was to leave. She was a student at Yale. I said maybe you could do that if you’re at Yale. I am not entirely sure that most law students would feel comfortable doing that, but she’s quite aggressive about it. I mean she’s like “why would I listen to that question? Why would I answer that question?” Well, I didn’t feel that I really had any choice but to answer those questions. The good news is that I’m hoping that eventually what happens at Yale will trickle through and other people will feel empowered to say you can’t ask me those questions because they’re irrelevant. We should be judged by what we bring to the table as a brand new lawyer.

When I became a trial lawyer, I was also one of the very few women trial lawyers practicing at that time and it was also very interesting. Just to back up a little, I went to a boys’ school for college. I went to a school that was in the process of integrating women into the school, Davidson College; it was all male until I got there. I went thinking that I would meet all these really cool feminists and instead I met a lot of women who wanted to get what they call the “Mrs. Degree” and a few feminists. But it was a great opportunity for me, because I got very used to being in rooms where I was the only woman and so it didn’t

bother me when I became a trial lawyer and I was the only woman in the courtroom. For those who are thinking about becoming trial lawyers, you know it's a mental game. Part of it is how much bluster and block can you bring to the table. Can you intimidate the people on the other side of the room? This tactic just really didn't work on me, because I had been in rooms like that for so many years that it just wasn't even a factor. So that was a nice benefit of having attended a new integrated school. When I first started it was not uncommon to have men talking about what I looked like, commenting on my legs, commenting on my hair, etc. When I was pregnant I was urged not to come to court, that I shouldn't try cases. In fact, I did all those things and frequently very successfully, to be very honest. But the murmur in the back of your head was that you shouldn't do this.

So I can tell you that I was a feminist always. I am a feminist now and I am becoming more of a radical feminist as I get older, probably because of what I see happening on the national scene. The way the presidential candidates are being scrutinized about their clothes and hair really on both sides, but more on one than the other. There was a long discussion today on the internet about the fact that Hillary Clinton wore white. Oh my goodness, maybe she just decided to wear white! Maybe there was no message in that and the fact that we continue to let anybody talk about those things is just the same old problem. Should we wear pants, could we wear pants? Maybe we should; maybe we shouldn't. I hope we're eventually going to move beyond those discussions.

So how do you get to be a judge? You get to be a judge by running for office in Ohio, for those who might be from other states. You run for office and I ran the first time in 1990. At that time, there were three or four women judges in Summit County. I lost that election. I lost to a man by about a thousand votes. When I would go and make presentations during the campaign, there was a lot of discussion among people about my clothes and hair and my glasses; did I have kids, and where were they, and who was watching them while I was out running around. The most vocal support I got was actually from some of the older women, who thought my candidacy was great. I was actually afraid that many of them would say that I should be home with my kids, even though I wasn't going to be home with my kids if I was not a judge. I was working and loved being a trial lawyer. But they were the ones who said they were happy to see me doing this and that it was about time. A lot of the men would ask me why I didn't play golf. I've never played golf; I have no interest in playing golf. So I decided to turn that into a positive. I may not be golfing, but I'm at work. You can count

on me to be at work.

And this county is a little bit different from other counties. Most of the judges in Ohio are men, and in this county, that's not true. By my count, we have 19 female judges and 9 male judges. We're a little bit different, but I can tell you that when running, you do have to think about your appearance in a different way than men. You can come across too strong; are you too sweet; are you too feminine, etc. These are issues that my male opponents never had to think about—your husband, your hair, your hemline. When you run as a woman, you know they're going to ask you about your husband, they want to know about your hair and they're going to talk about your hemline.

## II. THE DIFFERENCE GENDER MAKES

I would say that being a woman judge, you really are called upon to make decisions based upon the law. But this does not leave behind the fact that we're female and we've had a different experience.

It doesn't show up necessarily in sex discrimination cases, but I can give you a couple of examples where it does. Prostitutes. In Summit County I was on the municipal bench for thirteen years. I was the second female judge on that bench; Carla Moore, who is now an appellate judge, was the first. At that time we had a lot of prostitution in the city of Akron. A lot of women were prostituting themselves for crack cocaine. Many of the male judges felt that prostitution was just a moral failure on the part of these women; that they really just liked the fact that they could have sex for money, and therefore they should be treated with scorn. I felt that many of them were forced to turn to prostitution because they were uneducated and could not find employment. I learned later that probably eighty percent of them were victims of post-traumatic stress disorder or sexual trauma in their home of origin. So, for them, providing sex for favors or sex for money was how they got through their lives. Many of them had children as a result of having sex with strangers and were trying to take care of their kids. They were not doing it for fun. I didn't meet a single prostitute who thought it was great. As a matter of fact, many of them did not enjoy sex with men at all. They much preferred the company of women, but this was a way for them to take care of themselves. Maybe they had been scorned as lesbians, but this was a way for them to provide for themselves. They needed counseling, they deserved counseling and they deserved treatment for drug addiction because they were self-medicating. That was probably the way they forgot how crappy their life had been.

So I do think that there are perspectives that we can bring as women that are different. We still follow the law, but I'm happy to say that we did add a lot more treatment and we now have trauma-informed counseling available that wasn't previously available.

A second example of a different perspective is the recognition of the battered woman defense. That is something that really arose from women judges who could acknowledge that women can be pushed to the point of violence themselves after having witnessed and endured violence for an extended period of time. We could perhaps understand that in a slightly different way from a man. I hope that a lot of this is changing but to the extent that we feel more vulnerable and have less power innately because our bodies are smaller, we're just not as strong. There are perhaps ways that we think differently. Rape is not a crime of sex; rape is a crime of violence. I think that was something that was first articulated by women. Does that really change the law? No, it really doesn't change how you view that law, but it perhaps pushes forward ways that we think about what kind of evidence that is going to be admitted. Or it may inform sentencing.

In another example is the question of how judges view the testimony of people in a bench trial. There is one thing I learned a long, long time ago at a seminar in fact finding for judges that talked about the halo effect. People tend to believe very beautiful people more easily than those who are not traditionally beautiful. That's why con people tend to look a certain way and are seen as very charming. The seminar talked about how you deal with having a person on the stand who really can't answer the questions being asked. How do you judge whether they're credible? The example included a video of a woman who was asked about the distance between two cars when a traffic light turned green. This woman was hemming and hawing about distance, because she did not have the ability to judge distance. I felt very sympathetic to her and would have found her very credible, because I have this same problem.

I do agree that gender shouldn't necessarily be relevant, but it does provide a different perspective. I would just say that I'm trying to provide you with the history of how things began to change at least in this county. I can't say this for other counties, but there are a lot more women judges now than when I took the bench. And as the number of women increases, the difference in perspectives becomes less apparent, because you have a collective of people. The first woman may struggle a little bit, but the next one struggles a little bit less and third or fourth ones struggle even less. The need to prove that you belong there dissipates to a large extent.

I do think that we have moved past some of the gender-based issues, but I also believe that we bring a unique perspective. It's not necessarily better or worse, and it's not just necessarily gender-based. Political affiliation can have an effect on how any person makes decisions and how they judge. Religious affiliation can have an impact on how people judge. I was a criminal sentencing judge for twenty-one years, so you see a lot of variation from the bench. Mary Margaret Rowlands (judge on the Summit County Court of Common Pleas General Division) was also never a prosecutor so we had a distinctive flavor to the work that we did. I never did criminal defense work, she did some, and so we brought all of those things with us to our decision-making.

### III. FEMINIST THINKING IN JUDICIAL DECISION-MAKING

I think we can agree that the Constitution requires that we all be treated equally and I think we can agree that it is just not true. Our society says that it is just not true. It doesn't matter if you're female or not female or you're in the process of deciding if you're female or something else. It's certainly not true if you're African-American. It's not true if you are an immigrant. Right now it's not true in a lot of different ways. I think that's where the rubber hits the road with judges, because the things that we aspire to in our law, we are called upon to interpret in real situations with real people.

Do I think that women judges are better than men judges? No, I do not. Do I think that all women judges are feminists? No, many women judges would not say that they are feminists. As a matter of fact, there are plenty of women who are harsher to women because they feel they've overcome a lot of barriers and that those women need to learn the same way that they did. It's not a question of not lending a hand to help them; it's a question of swatting them just like they were swatted. So you have a variety of types of women judges so you cannot say that everybody's a feminist.

But I do think that your gender changes the way you perceive the world. If you have empathy no matter where you start, you're going to have a different perspective from a person who believes that empathy on the bench is inappropriate. I don't know that having empathy is due to being a feminist. I do think that there were some interesting points in the conference materials.<sup>1</sup> For example, that women who accept

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1. [Conference Materials](#), The U.S. Feminist Judgments Project: Rewriting the Law, Writing the Future, Center for Constitutional Law, University of Akron School of Law, Oct. 20-21, 2016.

appointments continued to be measured against some sort of paternalistic yardstick requiring them to jump higher and run faster than other male candidates lest they be labeled as an undeserving token. It is at this point, that I cannot hide my disappointment in some quarters of the profession who persist in undermining women in senior offices referring to them in patronizing terms or ranking them in some sort of unspoken contest in which I suspect they themselves would not fare well. Sadly, I do think that some of that still exists. The best example from the book was from Ginger Rogers. She said, "I did everything that Fred Astaire did, but I danced backwards and in heels." So I do think there is some difference still. I do think that women have a special relationship with the law. That's not to say it's necessarily better however.

#### IV. ON THE NEUTRALITY OF THE LAW

The question is whether the law is inherently neutral and objective, or whether it has evolved based on a male perspective. I agree that it has been male derived. We say the victors write history and basically the victors for many years have been white men and they've been writing a lot of things for hundreds of years. However, in the last fifty years or so that has really started to change.

And I'm a child of all of that change. I can tell you that at one point I worked for the county executive and I met with the human resources director because we had a sex discrimination claim filed. I asked the human resources director if there were any jobs where we could truly say only a woman (or man) could do the job. She very quickly answered and said sperm donor and wet nurse. So sperm donor and wet nurse are the only things you can really say only one sex can do and everything else should be gender neutral.

Think about that, it's pretty hard to see that really in practice. I think that when you recognize that you're dealing with a male-dominated system, you have to be cognizant that we should be trying to be truly neutral. But men bring a different perspective to how they view the world and we just need to be cautious. All judges need to be cautious, that you're not using a worldview that is a politically traditional worldview to making decisions.

#### V. ON INTERFACING WITH JUDICIAL COLLEAGUES

Part of the problem is that we're really not allowed to talk to each other about cases. We are actually prohibited from talking to other

people about cases. We are expected, particularly if it's a bench trial, to make decisions on our own. We stand alone. We live in our own little tower. We can talk to our staff but we really are not supposed to talk to other judges about what we're doing.

But there are other ways you can have an impact on your colleagues, for example when hiring staff. As an individual judge, you can also set an example through your written decisions in regards to how cases should be handled. For example, the battered women's defense came about because a judge decided they had to recognize the situation. This woman really has a defense here and it should be recognized by the court. Then it works its way up through the system and finds its way into other courtrooms and now there is a different perspective available for those cases.

To the extent that we can influence others, I think we're called upon to try to do that. Some benches are much more collegial and they're having philosophical discussions about judging. We can go to conferences, judicial conferences. I'm a probate judge now and going to the National Probate Judges conference. Professional meetings and organizations are a way to influence how your colleagues think.

#### VI. THE MEDIA'S PERCEPTION OF WOMEN JUDGES

There is a question about the media's effect on the perception of women in the courtroom, including judges. When I was thinking about this, I asked myself "is Judge Judy a feminist?" I don't have any idea. The prior judge who did what Judge Judy does, was the television show Night Court. So there was this really kind of goofy guy who was the same kind of judge as Judge Judy. I think it has made a difference seeing women being portrayed as judges to all of us who have had to run for election.

It is important to point out that in general, American television does not depict normal-looking people. We are never really going to look like them. English television, has much more normal-looking people including normal-looking judges who wear normal clothes. And if you watch some of the American shows, the women judges are decked out, they are showing cleavage and they're not wearing jackets. In fact, most of us, could not dress like Michelle Obama but I also can't dress like most of the newscasters. You would be offended and I would not want to be showing off my flabby arms. So I do think they create a sort of sexy look for American television that we have to counter, but I think most people when they think about judges think they want somebody who

looks like your mom. They have a feeling that a judge should be more maternal looking than some of the people they see on television.

In real life, there are still expectations of conservative dress in the courtroom. To the young women lawyers here, when you first start out, you just have to go buy one blue suit that you are really comfortable with and you feel really powerful in because all the men have already done that. They have one blue suit and they change the tie and they change the socks and they wear different shirts and they wear the same suit every day. Then we fuss and fume about what to wear, but I really recommend that you don't do that. When you first start out just get something that's going to be neat.