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University of Baltimore School of Law Center on Applied Feminism's 9th Annual Feminist Legal Theory Conference on Applied Feminism Today: Keynote Speaker Judge Nancy Gertner, Former United States Federal Judge for the United States District Court for the District of Massachusetts

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**UNIVERSITY OF BALTIMORE SCHOOL OF LAW CENTER
ON APPLIED FEMINISM'S 9TH ANNUAL FEMINIST LEGAL
THEORY CONFERENCE ON APPLIED FEMINISM TODAY:
KEYNOTE SPEAKER JUDGE NANCY GERTNER, FORMER
UNITED STATES FEDERAL JUDGE FOR THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**

Below is a transcription of the keynote speech from the University of Baltimore School of Law Center on Applied Feminism's 9th Annual Feminist Legal Theory Conference: Applied Feminism Today. Judge Nancy Gertner, former United States Federal Judge for the United States District Court for the District of Massachusetts, gave the keynote speech on March 4, 2016.

JUDGE NANCY GERTNER*:

I was on the bench for seventeen years, and I intend to write about that experience. The problem is that while my memoir was funny, this book—on judging—is not. In my memoir, I describe the fact that the only way I could face the discrimination I was facing was to crack jokes about it, to find the humor in horrific situations. I started writing about judging literally the minute I joined the federal bench. I recorded everything I did and why—the palpable change from who I had been on April 26, 1994, when I was an employment discrimination, civil rights, and criminal defense lawyer, and who I was supposed to be on April 27, 1994, when I was sworn in as a judge.

Everyone experiences that moment: who you were the day before and who you are the day after. But from the beginning, I knew that this book about judging would be different from the kind of book other judges would write. I had an abject lesson to that effect the first day I arrived on the bench. I had studied everything on the first case I had—*everything*. I memorized the papers, read them over and over again; I was incredibly prepared. I had replaced a judge named David Mazzone, a wonderful judge. He was about 6'3", a big man. I was supposed to be in his courtroom. I walked out, sat down, and I could not see over the bench. It was as if the world were saying, "Oh

* This address was transcribed by University of Baltimore Law Review staff editors.

really? You're going to fill these shoes?" It was a physical manifestation of what I was going to face. My first act as a judge was putting down telephone books so that I could see over the bench. Nonetheless, I still had trouble getting at least some parts of the role right.

The women in the room will understand this story. First, I couldn't get the robes part down. I really didn't want to wear the robe. I had a discussion with myself on whether I wanted to wear judicial robes at all. Do I want to wear something that distances me from the people I serve? I decided that since women were such late entries to the bench—it had taken so long for our representation as judges—that perhaps I should wear the robe. Still, I never could get it right. I kept on walking out on the bench, wearing red, typically, when all of a sudden my clerk would turn around and go, "Judge!" My staff decided to set up my judicial robes as a kind of passive seatbelt restraint. When I walked out of my lobby, I had to walk into the robe in order to get up. But then, as all of you women would do, I would put on the robe (since I had to walk out to the bench) while carrying my pocketbook. I never quite got the ceremony down, at all.

But while these were the physical manifestations of the changes I was obliged to go through, the transition was obviously more complex. Justice Roberts characterizes judges as umpires, only there to call balls and strikes. In a sense, this is the judicial analogue of "Watson," the robot on television. But that doesn't describe the job. Judging is not *only* about calling balls and strikes. Judging is about choice at every stage of the game. It is a procedural choice. How much time am I going to give this issue? If you don't think employment discrimination is important, then you give those cases fifteen minutes. If you don't think that sentencing requires more than guideline computations, you push it until the end of the day as part of the cattle call of cases. You have the choice of how much briefing you will allow, how long you will allow the judicial discussion to go on, how much time for oral argument, how far you will delve into the research before you will be satisfied, how deep you will probe into this. Do you ask, "Does it make sense?" And if it doesn't, do you try to fashion a response that does? Credibility is about choice. Whom do I believe?

And, surely, "Watson" cannot figure all that out. Choice is everywhere. We cannot escape choice by pretending to be a robot. Justice Thomas said he was stripped down like a runner, shedding the baggage of ideology the minute he got on the bench. That's not remotely true. Justice O'Connor was quoted as saying that a wise old man and a wise old woman would reach the same conclusion in deciding cases. That is equally false. Judge Abrahamson of

Wisconsin was asked, “What does my being a woman specially bring to the bench? It brings me and my special background. All of my life experiences—including being a woman—affect and influence me.”

My point is: nobody is just a woman or a man. Each of us is a person with diverse experiences. Each of us brings to the bench the experiences that fit our view of law and decision-making. Each of us is not a “Watson.” Each of us is a complexity of experiences and backgrounds. The question is not *whether* to let these experiences enter into your judging; the question is *how*. And finally, the best quote—and my favorite—is my colleague at Yale who said that she hoped that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white man who hasn’t lived this life. And that, of course, is Justice Sotomayor.

Why don’t we ever talk like this? Why does Justice O’Connor say what she said? Even Justice Ginsburg rejected the notion that gender played a role in judging. Part of it is ideology. Part of it is that the legitimacy of the role depends upon the notion that we—the judges—are different from all of you, and that we are entitled to our independence as judges in exchange for accountability to the law and to the profession. We put on the robe—which I have so much trouble remembering to put on—to symbolize that accountability. But while we want to say that there are no differences between men and women on the bench, I want to talk a little bit about why that is not true, and more significantly, why it is important to talk about why it is not true.

If women and men are no different on the bench, then why do we care? Why does it matter? First we care about this because we care about women’s representation in all centers of power. I listened to the latest abortion argument before the Supreme Court. There was something remarkable—uplifting—about having three women on a Supreme Court of eight.

This is so that our daughters can envision that there are no boundaries, and so that our sons can understand that authority comes in all packages. Clearly, representation is important. But gender balance means more than just representation. My judging was different. The content of my decisions was different. My approach was different. I was different. I was an outsider. In my book, I am struggling with this concept: an outsider who had become the consummate insider. How does one deal with that?

The issue involves more than gender. Gender is to some degree an incoherent category in 2016. “Gender” really is “gender plus.” It is the way Justice Abrahamson described it: gender plus all of our experiences. Gender means something different for my generation

than it does younger women. And gender is more than just “female.” I was more than just a woman, although I was that. I had been a zealous advocate, a trial lawyer, a criminal defense lawyer. I knew precisely what I believed in, unlike Justice Thomas. I had regularly announced those beliefs in articles, speeches, panels, briefs, the record before the Senate, the *Boston Globe*, the *New York Times*, and demonstrations on the Boston Common. My confirmation process was quite complex.

In short order, those beliefs will grace the pages of my book. I never had a confirmation conversion—a change. And while my personal beliefs evolved with the new experience of judging, they never fundamentally changed. I never forgot what I believed in. In a certain sense, that set up a perennial tension over seventeen years. I knew that I opposed the death penalty, but I was assigned a death penalty case. I knew that I was pro-choice, and I was assigned an abortion case. I knew what I believed about the Federal Sentencing Guidelines (I was a critic), but I had to apply them. So, not forgetting who I was meant inviting an ongoing, never-ending tension in my work, which I think is just as it should be.

While many federal judges ascended to the bench after a lucrative career, or came from wealth, I did not. I was born on the Lower East Side of Manhattan—before it was cool—to parents who were poor. Neither of my parents had gone to college. I was married to the legal director of the American Civil Liberties Union, not a job from which one makes money at all. My practice was successful, but sort of Robin Hood-ish. I combined paying cases with appointed ones for little or no money, and often free cases—sometimes intentionally free, sometimes not intentionally free. My causes were my cases.

I ascended the bench when I was forty-eight. I was a feminist. Let me say that again: I was a feminist. There was no doubt about it. I was a feminist. Happily, that didn’t come up during my confirmation process because if they had asked me, I would have said, “Yes, I’m a feminist.” I joined a bench that was overwhelmingly male. The first woman judge, Judge Rya Zobel, a friend of mine, had been on the court for fifteen years without another colleague. A second woman, Judge Patti Saris, had come on only months before. And like Judge Saris, I was a mother, then of school-age children. The children of other judges were adults, no longer living at home. So, I brought to the bench my gender, my experiences: I was a woman with children along with my professional and personal history.

Every judge has to transition to neutral, however defined, or try to do so. It is endemic in the job—that move. We select judges in their late forties and older, after a life lived in the profession and the world, with their attitudes and their experiences—expressed and

unexpressed—unlike what Justice Thomas said. In fact, it was Chief Justice Rehnquist who observed, “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias.” So, on the one hand, you are to subsume your old identity into this job. Put on the robes, and be fair. On the other hand, you never can.

The question for me was, how could I be me in this job, true to myself and true to the ethos of judging? Should I try to subsume myself? Was that legitimate? How would I do that? There was the easy way to reconcile these tensions. First, as I mentioned, I questioned whether I should wear a judicial robe at all. I resolved that I would. But I also would do things in the courtroom that resonated with my experiences as the only woman in a courtroom when I was a young lawyer. I would redress every slight in my job as a judge that I had recorded over twenty-four years of practice. I remembered what it had been like to be an outsider, representing the powerless and the reviled. Some judges could not have been more hostile to claims of civil rights and civil liberties, the rights of defendants, and worse yet, to the young woman who was making these claims. I was going to make sure that didn’t happen in my courtroom.

I remembered how easy it was for the courtroom doors to close—not just figuratively—but literally. I remembered an uncooperative or sullen clerk, who told me that I did not have a right to this or that public record. Or another, who when I asked if a young associate could join me at counsel table said, “One woman in a courtroom is bad enough.” Or the judge who talked about conducting a fair trial, all the while regularly meeting with the prosecutor. I remembered how unequal resources made the system deaf to the voices of the people I represented. I remembered what the perfunctory endorsement “denied” meant to my clients. I remembered the sound of prison doors clanging shut. I remembered being stuck—actually stuck—in the visitors’ room because the door that let you into the prison had jammed, and the door letting you out of the prison had malfunctioned. I promised myself that I would never forget what that moment was like.

I also understood how much work it took to make the system fair. Staying up all night, a team of lawyers on a case, no matter how much it cost, doing everything, if everything was required to win. Justice, I knew, did not enforce itself.

I would create an accessible courtroom. But I’m not sure that it was just my gender or, as I said, the package of experience that I

brought to the table. I was determined to be attentive not just to the wealthy of defendants but to those like my family, whose voices were rarely heard. I was secure enough in myself and my skills that I could be informal, even funny.

I'm a *Saturday Night Live* fan. I just love *Saturday Night Live*. I think in another life, I wanted to be a comedian. So, at one point, the phone in my chambers was ringing. I had to go get the phone. My clerk was not around, and the lawyers in front of me—all men—were just jabbering on, far too long and too loud. So, I stood up, and I said, "Uh, talk amongst yourselves! Topic: Law!" and I left the bench.

I allowed the court proceedings to continue over the din of a crying child because that was the only way for a mother to be present for her husband's case. I would circulate headsets, not only for the defendant (as I was obliged to do by law), but also to his family, so that all the non-English speakers could understand what was happening. I would allow spirited discussions in my courtroom, everyone interrupting one another. My clerks would go crazy, saying, "Judge, they're interrupting you." I said I come from a family where everyone interrupted everyone. I never knew where my sentences began and yours ended. And I did what I could to let lawyers make their arguments and try their cases, as I had wanted to do.

But it was more than just atmospheric. It was also procedural. I cared desperately about access to justice. The courtroom had been the territory where I had lived my life. It was more than just a question of filing papers or opening the courtroom door, or allowing a courtroom of appropriate size to accommodate a crowd. It was about meaningful access to justice. It was about getting a hearing. It was about a judge engaging with the issues. It was about not kicking you out of court because you were a day late. It was about understanding that access to justice means a judge who will not be an automaton—who will not be "Watson" on the bench.

The first thing I wrote when I left the bench was an article called "Losers Rules." Judges in one case management session I attended were told, "You shouldn't write an opinion unless you have to because it slows things down." I thought, "That's absurd." Writing an opinion is the way you define legal norms and standards. It's the way you identify precedent. But, in addition, in employment discrimination cases I began to realize that encouraging judges not to write opinions skewed the judge's decision-making in unanticipated ways. When the defendant won an employment discrimination case, the judge had to write an opinion. The case was over. Summary judgment was granted to the defendant. But if the plaintiff won, you

did not have to write a decision; the case simply moved on to a jury trial.

I began to realize that a body of law evolved, but only in losing cases, skewing the precedent and distorting the way judges saw the field. I was determined to write opinions when the plaintiff won. This didn't necessarily mean that the plaintiff always won in my court, but it meant that when she did, I would make sure to record it in a formal decision. I wanted to see balance in the precedent. This concern did not come from my gender, but from my experience as a civil rights lawyer.

But the core issue is not about technique, or atmospherics, but—how to deal with my values, whether the substantive decisions that I wrote were different from the substantive decisions of the men in the courtroom next to me. Could scholars do with respect to all judicial decisions what a group of feminist scholars have done with respect to Supreme Court decisions? Could they rewrite such decisions from a feminist perspective that is also true to the demands of professionalism and judicial legitimacy? They surely can. Legal questions rarely have a single answer, but more likely, a range of answers. And one part of that range may well reflect a feminist perspective.

And apart from legal doctrine, gender and experience figured in the nuts and bolts of judicial decision-making, credibility determinations. When I was on the bench, I would regularly receive the testimony of police officers. If you are a judge from the suburbs whose only encounters with police officers were cordial, the threshold for your believing that the officer did something wrong would be much higher than my threshold. I had seen officers lie on the stand. It doesn't mean that I believed every officer was lying. It does mean that I could envision that as a possibility, and that could affect my determination of his or her credibility.

In discrimination cases, when an employee accused an employer of calling her a "bitch," a judge who had always been in a position of power in his career might say, "Surely this didn't bother the employee."¹ I knew what it is like to be a new entrant into the employment market, and how words like that might resonate. Again, that didn't necessarily mean that a woman or a black person would win in my court. But it did mean that I would encourage a jury trial

1. In employment discrimination law, this is called "stray remarks," which are remarks that a judge determines are not central to the discrimination claim.

on that issue when the judge next to me might say, “Surely this is no big deal,” and grant summary judgment to the defendant employer.

But the case that I recall the most in which my gender/experience played a role was this: A woman prisoner, in an all-woman prison that had formerly been an all-male prison, complained that one of the guards had sex with her. The staffing of the prison had not changed when the prison’s composition changed. Nor were the staff and the guards trained in dealing with women prisoners. The woman did not claim force; she did not claim that he pinned her to the ground or that he beat her. She claimed they had nonconsensual sex, and, given his power, she had to oblige him. When she left the prison—when she was released—she brought charges against the guard, and he was prosecuted. It is a *per se* criminal violation. But she also sued the administration that had enabled this—that had not trained the guards, that had no video cameras around, that enabled a single male guard to accompany this woman prisoner in places where he shouldn’t be.

It was March of my last year on the bench. Every March the judges had to report motions that were pending over six months. I was respectful of the list, but did not let it wholly determine what I did or when I did it. Sometimes I had motions pending over six months because I was grappling with issues in the way I thought judges were supposed to do.

In March of 2011, just before I left the bench, my clerk came to me and suggested that one of the cases I could dismiss was the woman prisoner’s case. After all, she suggested, there were twenty or so cases that had done so. I could dismiss and, in all likelihood, be affirmed should the dismissal be appealed.

But those twenty cases were, in effect, a single decision, not well reasoned, copied by the next nineteen judges following the first, perhaps pressured by their six-month lists. In other settings, I have called this the Westlaw version of the old-fashioned game of “telephone.” The Westlaw game of telephone is this: The law clerk goes online; he or she copies a bit of text that looks appropriate; and then the law clerk presents it to the judge. The clerk hasn’t read the case in any detail, much less the cases on which it was based, or their facts. The judge receiving the Westlaw cut and paste may not actually know how the work was done. The quotation may have made sense in case one, but by case twenty it was not making sense. And certainly, in case twenty-one—my case—it was even less applicable. So, I instructed my clerk to go back, read the facts of the cases (even the briefs), and the decisions on which these decisions were based. And I encouraged her to think about whether these decisions applied to the specific context we had—or should apply.

As it turns out, these were cases without any meaningful analysis. Indeed, the facts were interesting, virtually all involving male prisoners and female guards. Filtered through their own gender, the judges were effectively saying there was no problem: “You mean that you were upset because you were having sex with a female guard? I don’t think so.” To be sure, that was a judgment that should have been made by a jury, not a judge. In other cases, there was an Eighth Amendment analysis, not fleshed out, but implicit. Some judges were suggesting that an Eighth Amendment violation should be reserved for forced sex, not simply sex that was non-consensual. I did not agree. It seemed to me that the Eighth Amendment should apply also to sex under conditions of inequality, sex under conditions of coercion. And so I wrote a decision refusing to dismiss the case and allowing it to proceed to a jury trial. I could have just said, “Denied,” but I thought it was an important rationale to articulate.

Another example in which my experience/gender played a role was a criminal case with a woman defendant. She was facing a considerable sentence. Her role had been to watch the drug stash, as the leader of the drug gang had directed. Under the vagaries of the Federal Sentencing Guidelines, the amount of the drugs mattered more than virtually any other factor. When I read the presentence report, my experience representing battered women suggested to me that the signs were there—that the defendant was being beaten by her drug boss. Her lawyer ignored all of this; he just wanted to churn out a plea. I suspended the sentencing so that we could explore what the nature of the relationship was, and my instinct was right. She had been abused by the man that she was working for.

There are many more like stories from my career, which may well match those of you in this audience. The common law reflected the “reasonable man” standard, defined by only one part of our population. The criminal law gave more credence to the provoked male whose wife was in bed with another man, than the woman whose husband had cheated. Provocation sufficient to reduce the degree of murder, or even exonerate, had a different resonance in different contexts.

So why does it matter? Why should I write this book (besides the fact that I really want to write it)? Why should I describe the complexity of my decisions, which is really the complexity of everyone’s decisions? Why should I do that when I run the risk of delegitimizing the judicial enterprise?

I write about my experience with judging because I think it’s important to make explicit what is implicit in the job. It is important to describe the struggle that judging entails so that we can address it

rather than pretending it does not exist. It is important to identify decisions that appear to be neutral, but were not neutrally arrived at. I think I can do this without delegitimizing the enterprise. I have to do it.

I left the bench in September 2011, so that I could write and teach about this experience. The book that I am writing is unusual in a number of respects. First, most books on judges or written by judges describe how you should decide. It's as if you'll lose legitimacy if you were actually to describe the process. Or books about judging are written by others who have not been judges and are saying, "Here's how they must have decided." Well, I really want to write about how judges did decide.

And judges are rarely critical of their own work. I will be critical of my work. I have given, just in one area, all of my sentences to a social scientist to tell me if I was biased in what I did, the ways in which my decision-making was skewed. And I really do mean to take this body of work, hold it up to the light, and say what was good about it and what was bad about it. I want to talk about what I've done and put a critical lens to it because I actually think that, at the end of the day, one will say, "You know, it was a good thing to have someone with these experiences and this background struggle to harmonize them on the bench."

How did I deal with that struggle? In a quintessentially judicial way, I wrote opinions. If I couldn't justify what I was doing on the page, then I couldn't do it. Writing opinions was the way to keep me from dissolving into my advocacy. Writing opinions was the way that I could make what I was doing transparent. To be sure, some of my former judicial colleagues are discomfited by this proposed book. Everything about the discussion is fraught with the distorted popular debate about activism. Was the woman prisoner decision activism or analysis? Was the battered-woman case an instance of a judge wrongly impinging on advocacy, or does a judge have special responsibilities in a criminal case? When is it outcome-determinative for me to seek to air the issue?

The fear of being labeled an activist may be part of the reason why there are so few books describing the actual process of judging, particularly at the trial level. But writing about judging—gender and judging, politics and judging, how you struggle, how you manage it, how you talk about it—seems to me to be well worth the risk. I want to situate judicial legitimacy in a more realistic framework. I want to describe what the enterprise actually looks like. Now that I am off the bench, my husband has summarized my life in the way that only he can. He says the problem with me is that now that I can speak, I can't seem to shut up, and that is true. Thank you very much.