The Gender of Judges

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The breadth and variety of the topics discussed at the 1985 NAWJ Convention raise a troubling question: is there any longer a need for an association of *women* law judges? While a few of the discussions center around "women's issues,"[1] most do not. Such diverse papers as *Judicial Performance Evaluation* and *Management of Complex Litigation* would be equally appropriate for a symposium of gender-unspecified judges. This suspicion of obsolescence is not limited to an association of women judges; I have heard similar observations about various formal and informal associations of women law professors and women lawyers, and I suspect that the same question arises in any field women have recently but successfully integrated. As long as women are a beleaguered minority, all-female associations are easily explained and justified by the need to share the special concerns that arise from minority status. As those concerns diminish, however, such associations become apparently more difficult to justify.

An association of women judges *is* defensible, however, if women judges differ significantly enough from male judges to provide a unique asset to the judicial enterprise. That uniqueness can then be nurtured by the give-and-take of annual meetings, and the participants might then continue to contribute even more when they return to the community at large. This essay suggests that women judges are identifiably distinct from their male cohorts in three ways. Women judges make a unique contribution to the legal system by their presence, their participation, and their perspective. The first two of these aspects of the feminization of the judiciary may decrease in significance as discrimination wanes, but the influence of a feminine perspective is independent of the existence of gender discrimination. Thus, I will briefly discuss the contribu-

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1. *See* Edward Donnerstein, Cheryl Champion, Cass Sunstein & Catharine MacKinnon, *Pornography: Social Science, Legal, and Clinical Perspectives*, 4 Law & Inequality 17 (1986); Marilyn Loftus, Lynn Hecht Schafran & Norma Wikler, *Establishing a Gender Bias Task Force*, in *id.* at 103 [hereinafter cited as *Gender Bias*]; Patricia Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, in *id.* at 3.

tion women judges make by their presence and their participation, and then address in more depth the feminine perspective. By the "feminine perspective," I do not mean the political agenda associated with *feminism*, but rather a distinctly *feminine* way of looking at the world. A feminist perspective is an ideology that encompasses the belief that men and women should have equal roles in society, but does not necessarily reach other aspects of the social or political structure. A feminine perspective, on the other hand, encompasses all aspects of society, whether or not they affect men and women differently.

Presence

The mere presence of women on the bench serves an educative function. Observing a woman in judicial robes helps shatter the stereotypes held by male judges, and by lawyers and law students of both genders. Additionally, judges occupy a highly visible position of authority, and the example set by women judges reaches far beyond the legal profession. Those non-lawyers who come into direct contact with women judges—as litigants, jurors, and witnesses—absorb a subtle but direct lesson about the role of women in our society. Even those who never enter a courtroom are aware of women judges through newspapers and the broadcast media. Members of the NAWJ thus contribute daily to the organization's demise by altering the circumstances which create its initial raison d'être.

Participation

Women's participation in the adjudicative process also reduces discrimination in a much more concrete way. A recent study in New Jersey indicates that women are not yet obtaining equal justice from our courts. Gender bias influences the outcome of litigation on everything from ordinary damage awards to divorce and custody disputes.[2] While there are, of course, many male judges who eschew gender-based decision making, women's experiences *as women* give them greater empathy and insight into women's problems. Although both men and women may—at an unconscious level—accept some of society's sexist ideology, women have a greater incentive to overcome their own unconscious gender bias: membership in a victimized group confers an additional ability and impetus to identify and combat the most subtle forms

2. New Jersey Supreme Court Task Force on Women in the Courts (1984).

that victimization might take.[3] Thus we can expect that an influx of women into the judiciary will result in a corresponding decrease in gender-biased decision making. Indeed, another article in this symposium offers specific strategies for reducing gender bias in the legal system.[4] Whether all women would agree with those particular strategies is unimportant: what matters is that some judges are now addressing the previously unasked question of what to do about gender discrimination in the legal system.

That women judges will be better able to respond to various overt and covert forms of gender discrimination is more than a speculative hypothesis. Justice O'Connor, despite her generally conservative political beliefs, is considerably more sympathetic to claims of gender discrimination than are her equally conservative brethren.[5] Moreover, the feminization of the judiciary may contribute to the elimination of gender bias in the legal system not only by enforcing equal rights, as O'Connor tends to do, but also by recognizing that women's different perspective can create different needs. A dispute between Judge Patricia Wald (a contributor to this symposium) and two of her brethren on the D.C. Circuit illustrates how her greater receptivity to the existence of a feminine perspective makes her better able to protect women's rights.

Judge Wald was the sole dissenter in *Steele v. FCC*.[6] In *Steele*, the FCC had awarded a competitive radio frequency to a female applicant in preference to a similarly-situated male applicant, on the ground that female ownership would enhance programming diversity. The D.C. Circuit reversed the award and invalidated the FCC's female preference policy. The two male judges in the majority rejected the notion that gender could be related to diversity:

> Women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs, for example, women in fact appear to be just as divided among themselves as are men. Therefore it is not reasonable to ex-

3. *See* David Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 Harv. Women's L.J. 59, 81 (1985) (women are more self-reflective because of their "marginal" position in society).

4. *Gender Bias*, *supra* note 1, at 103.

5. *See, e.g.*, Craft v. Metromedia, Inc., 106 S. Ct. 1285 (1986); Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). *See generally* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. (forthcoming 1986); Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. Chi. L. Rev. 389, 455-56 (1985). It would be interesting to study comparisons among other judges on gender discrimination issues, to see if women are consistently more likely to remedy such discrimination than are men of similar background.

6. 770 F.2d 1192 (D.C. Cir. 1985).

> pect that a woman would manifest a distinctly "female" editorial viewpoint.[7]

Judge Wald, in contrast, found the FCC's assumption of a connection between a station owner's gender and the station's programming quite reasonable:

> As the majority quite correctly states, women are not uniform in their choices of lifestyle, or their political, social or moral beliefs. . . . The point is not that [women] have some cohesive, collective viewpoint. Certainly Phyllis Schafly and Eleanor Smeal differ on most issues related to women; what they share, however, is their awareness that women as a group are currently facing critical issues. The nexus between diversity of control and diversity of content concerns such things as the selection of topics for coverage in news, editorials, and programming, the emphasis accorded to the issues, and the fairness with which the issues are presented . . . .[8]

Thus the recognition of the existence of a feminine perspective—regardless of the substantive content of that perspective—sometimes enhances the contribution that women judges can make in their decisions. Women's participation seems to feed upon itself: it takes a female scholar to recognize that it takes a female judge to recognize that it takes a female radio station owner to recognize women's needs in programming. Thus women's participation in each of the enterprises reinforces the value of their participation in each of the other enterprises.[9]

As society becomes less discriminatory, however, there will be a diminishing need for women as role models or as influential representatives of women's interests. Moreover, there is an unsettling limit to the participation rationale: it seems to justify female participation only in those disciplines that have identifiable "women's issues." A female mathematician, for example, seems not to be contributing anything unique (except to the extent she is a role model). The legal community itself offers a sharp illustration of the limitations of the participation rationale. For many years, women in both practice and teaching were channelled into "women's areas" such as family law and discrimination law.[10] Even now, women who teach corporation law or tax law are often asked why they don't teach more gender-oriented subjects. An adequate de-

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7. *Id.* at 1199.

8. *Id.* at 1209.

9. This chain also raises an interesting question: will women *readers* be more receptive to the theories propounded in the text? One admittedly fuzzy piece of evidence suggests they will: whenever I have propounded bits of virtue-based political or moral theory to my classes (without labeling it as such), women seem much more willing than men to accept it.

10. *See, e.g.*, Donna Fossum, *Women Law Professors*, 1980 A.B.F. Research J. 903, 911-13; James White, *Women in the Law*, 65 Mich. L. Rev. 1051, 1063 (1967).

scription of the feminization of a discipline must therefore describe women's contribution to the discipline as based on more than presence and participation.

Perspective

In ground-breaking studies on the development of moral sensibility in men and women, Carol Gilligan has provided an empirical basis for describing such a contribution.[11] Her work suggests that men and women tend to develop different perspectives on the world and different ways of thinking about themselves and their relationship to the world. Where men see themselves as fundamentally autonomous and independent of others, women instead see themselves as fundamentally connected: women are essentially members of communities, men are individuals who happen to live in communities. This dichotomous view of the self, of course, results in divergent descriptions of relationships between selves, and disparate theories of how disputes between individuals ought to be resolved. Gilligan found that women tend to resolve such disputes less abstractly and more contextually than do men: a problem can never be divorced from the context in which it arises. In contrast, men resolve disputes by resort to abstract rights and universal norms.

The notion of abstract rights is a quintessential example of disregarding context. Rights are never described by reference to a particular individual, with identifiable needs and attributes, but only by reference to what Justice Harlan called a "cipher": an empty, fungible being who can be plugged into any legal equation.[12] Because rights are abstract and universal, they can transcend individual choices. A necessary concomitant of universalizable rules, however, is a pluralist political structure. In order to avoid unresolvable conflicts between different individuals' value structures, a rights-based political system must abjure any official preference for specific values, instead opting for protection of each individual's right to structure his own value system. A rights-based system thus accommodates competing visions of the good life without choosing among them. As Ronald Dworkin puts it, a rights-based society "must not constrain liberty on the ground

11. Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982); *see also* Nancy Chodorow, The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender (1978); Dorothy Dinnerstein, The Mermaid and the Minotaur: Sexual Arrangements and the Human Malaise (1976). As Patricia Wald notes, judicial decision making is intimately intertwined with morality, both individual and societal. Wald, *supra* note 1, at 3.

12. Reynolds v. Sims, 377 U.S. 533, 623 (1963) (Harlan, J., dissenting).

that one citizen's conception of the good life of one group is nobler or superior to another's."[13]

A feminine society, by contrast, makes decisions based on what is right under the circumstances, not on who has rights in the abstract. One important consequence of this rejection of abstractions is that such a society will have to decide what *is* right, to make value choices and choose among competing visions of the good life. Defining virtue can no longer be done at the individual level: a feminine society is a virtuous society in the sense that it cannot be pluralist.

Imagine a dispute between those who believe adultery is immoral and those who do not. A rights-based society resolves the issue by determining—according to previously specified rules for defining rights[14]—whether adultery, or laws against it, violate anyone's rights. Of course the process will not be simple and will involve significant disputes: What are this society's rules of rights? Does emotional harm to an adulterer's spouse count? Does the educative influence on other people's children count? One question no one will ask is whether the conduct should be regulated in order to promote the potential adulterer's individual virtue, because a pluralist society cannot make that value choice. Every actor is responsible for his own virtue unless another's rights are at stake. A virtue-based society approaches the question differently. Instead of asking whether there is harm to the adulterer's spouse, it asks whether there is harm to the adulterer's virtue. The answer to that question will come from a weaving together of the community's traditions and aspirations with creativity and compassion, and it will be explicitly and unashamedly a value choice.

What happens when a contextual, virtue-based woman meets the abstract, rights-based male world? She changes the shape of that world. In almost every discipline, women are integrating their feminine perspective into a previously male world view. Women writers and literary critics are finding voices and telling tales in which relationships between characters may take precedence over development of character, and characters are unwilling to differentiate universal principles from particular applications.[15] Fe-

13. Ronald Dworkin, Taking Rights Seriously 273 (1977).

14. Examples of a "right-defining rule" might be that every individual has the greatest amount of freedom compatible with a similar amount of freedom for all, or that rights must be accorded so as to increase (or at least not to decrease) the liberty or welfare of the least fortunate members of society. *Cf.* Robert Nozick, Anarchy State and Utopia (1974) (adopting a version of the first example); John Rawls, A Theory of Justice (1975) (adopting a version of the second example).

15. *See, e.g.*, Contemporary Women Novelists: A Collection of Critical Essays (Patricia Meyer ed. 1977); Sandra Gilbert & Susan Gubar, The Madwoman in the

male philosophers are reconciling those universal principles with their particular applications by describing the allegedly nonexistent category of "concrete universals": transcendent human essences that are explicitly located in space and time.[16] Even the natural sciences have not escaped the masculine distortion: women in these fields are beginning to identify theories and approaches that are distinctively masculine, and to develop feminine responses.[17]

The feminine emphasis on connection and contextuality might similarly transform law. Independent of political philosophy, a feminine perspective grounded on contextuality and community yields different approaches and different results in many areas of law—including areas both within and without the feminist agenda of "women's issues." Justice O'Connor, for example, is "conservative" on law and order issues,[18] but considerably closer to "liberal" when it comes to race discrimination[19] or establishment of religion.[20] These conflicting positions are reconcilable if she is

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Attic: The Woman Writer and the Nineteenth Century Literary Imagination (1979); The New Feminist Criticism: Essays on Women and Literary Theory (Elaine Showalter ed. 1985); Writing and Sexual Difference (Elizabeth Abel ed. 1982); Louis Gould, *Life After Radcliffe*, N.Y. Times Book Review, Sept. 23, 1984, § 7, at 9. *See generally* Sherry, *supra* note 5.

16. *See, e.g.*, Philippa Foot, Virtues and Vices and Other Essays in Moral Philosophy (1978); Iris Murdoch, The Sovereignty of Good (1970); Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science (Sandra Harding & Merrill Hintikka eds. 1983); Women and Philosophy: Toward A Theory of Liberation (Carol Gould & Marx Wartofsky eds. 1976); Drucilla Cornell, *Toward A Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291 (1985). *See generally* Sherry, *supra* note 5.

17. *See, e.g.*, Evelyn Keller, Reflections on Gender and Science (1985); Elizabeth Kulbert, *Scientific Ideas: Men's Vs. Women's*, N.Y. Times, Oct. 17, 1985, at 19. For an example of the difference a feminine perspective can make in scientific endeavors, see Barbara Sherry & Roland Rueckert, *Evidence for at Least Two Dominant Neutralization Antigens on Human Rhinovirus 14*, 53 J. Virology 137 (1985) (demonstrating that rhinoviruses have numerous antigen-specific sites: antigen reaction is thus a particular, not an abstract, process).

18. *See, e.g.*, Segura v. United States, 104 S. Ct. 3380 (1984); New York v. Quarles, 467 U.S. 649 (1984); Colorado v. Nunez, 465 U.S. 324 (1984); Anderson v. Fuller, 455 U.S. 1028 (1982). *See generally* Robert Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 B.Y.U. L. Rev. 1, 19-26; Comment, *supra* note 5, at 437-447 (1985).

19. For example, compare O'Connor's position with Rehnquist's in the following cases: Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Rogers v. Lodge, 458 U.S. 613 (1982); Hathorn v. Lovorn, 457 U.S. 255 (1982). *See generally* Sherry, *supra* note 5.

20. For example, compare O'Connor's position with Rehnquist's in the following cases: Goldman v. Weinberger, 106 S. Ct. 1310 (1986); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985); Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). *See generally* Sherry, *supra* note 5.

taken to reject masculine protection of individual rights in favor of a feminine focus on community. Protecting the rights of criminal defendants can be viewed as harming the community, and is justified primarily by a vision of rights as paramount. Dismantling the barriers erected by race discrimination or religious favoritism, on the other hand, serves to protect a particular type of individual right: the right to full membership in the community. Thus the feminine perspective on the rights of criminal defendants intersects with the conservative masculine approach, in that both are reluctant to protect individual rights at the expense of community interests. The feminine perspective on racial and religious discrimination intersects instead with the liberal masculine results. In the latter case, however, the results are reached through different routes: the feminine perspective rejects discrimination because of its impact on community membership, and the liberal perspective rejects discrimination as an ordinary violation of principles of individual rights.[21] Thus women judges, operating under a distinctive paradigm, may reach results that are not predictable by reference solely to their ordinary political preferences.

A feminine perspective may also operate at a deeper level to influence the process of decision making or lawmaking itself. Two examples drawn from this symposium are illustrative. The debate over antipornography legislation has often been characterized as a femin*ist* dispute, but it may also be seen as a femin*ine* dispute in the following way. Pornography's primary effect is educative in the sense that it instructs and influences the morality (and thus perhaps the behavior) of its readers. The most persuasive reason for restricting it, then, is disagreement with its underlying morality. Pornography conveys a view of women that is simply immoral. For the government to make such a value choice—to say, in effect, that a virtuous or moral community should not allow the propagation of immoral material—is quite consistent with the value-based feminine political vision but inconsistent with the value-neutral masculine political vision. The antipornography legislation thus exemplifies the conflict between a feminine morality and the masculine legal structure, insofar as restrictions on pornography mesh more easily into a virtue-based structure than into a rights-based structure.

More significantly, the antipornography legislation itself seems to suffer from a disjunction: despite its feminine underpinnings of value choice and virtue, it is cast in the masculine lan-

21. For an elaboration of the feminine aspects of Justice O'Connor's jurisprudence, see Sherry, *supra* note 5.

guage of rights and justified on the masculine ground of the harm it causes to other individuals (rather than on the ground of its immorality).[22] This disjunction undermines any justification for the legislation under either perspective. From the masculine perspective of abstract rights, the right of free speech is likely to prevail over the rights of women who are harmed by it, because the harm to the latter is neither sufficiently immediate nor sufficiently certain. The feminine perspective affords a better justification for the antipornography legislation, but there is not yet an underlying feminine first amendment jurisprudence, and thus the feminine aspects of the legislation conflict too sharply with established law. In particular, the notion that the government may make ideological or moral value choices about what citizens may read clashes with our established (masculine) first amendment jurisprudence. What is needed is a theory of the first amendment based on contextual morality. The complete absence of such a value-based theory, and the poverty of the justifications offered for the legislation under the neutral rights model, have thus far combined to deal ultimate defeat to the antipornography legislation everywhere it has been proposed.[23]

Judge Wald's contribution to this symposium offers another example of the potential scope of a feminine perspective on law. Most obviously, of course, Judge Wald takes as her starting premise that men and women do view human interactions in different ways. In the context of techniques of constitutional interpretation, she thus concludes that originalism necessarily fails to take account of women's perspective, since none of the Framers were female. She and Karst,[24] however, like many others who have written about women and the law, seem implicitly to limit women's contribution as judges and lawmakers to "women's issues."[25] Her primary justification for rejecting originalism is thus that male constitution-writers are not attuned to women's needs.

It is in the fact of her rejection of originalism, however, rather than her justification for that rejection, that Judge Wald

22. *See* Catharine MacKinnon, *Not A Moral Issue*, 2 Yale L. & Pol'y Rev. 321 (1984); Sunstein, *supra* note 1, at 28.

23. It has been defeated by mayoral veto in Minneapolis, by voter rejection in Cambridge, and by judicial invalidation in Indianapolis. As of this writing, no feminist antipornography legislation has been successfully adopted by any other city.

24. Kenneth Karst, *Woman's Constitution*, 1984 Duke L.J. 447.

25. *See, e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 Law & Inequality 33, 51-52 (1984); Ann Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913, 965-68 (1983); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175, 175 n.2 (1982).

most intriguingly illuminates the feminine perspective I have been describing. She admits that abandonment of originalism leaves "very few road maps"[26] for judicial decision making. Her own description of how judges should make difficult constitutional decisions without resorting to originalism raises interesting questions. She advocates a creative weaving of "our own intellectual and moral resources, . . . our respect for precedent, the letter and the spirit, and our appraisal of the strength and the vulnerability of the legal and social structure of which we are a part."[27] Even constitutional interpretation, in her view, requires proper attention to values ("moral resources") and context ("the legal and social structure"). While this theory of interpretation is not confined to women judges (or women scholars), a feminine perspective may be uniquely suited to resolving the problems that arise once a position of contextual decision making is adopted.

The problem with a jurisprudence grounded on contextuality and value choices is that it lacks constraints. If virtuous behavior can be coercively required, it is a short step to requiring vicious behavior. What is to stop a society from deciding that virtue encompasses different behavior depending on gender or race? Using contextual value choices to resolve disputes requires empathy or unity between the decision maker and the other participants, or it becomes simply an exercise of raw, unconstrained power. As Duncan Kennedy has suggested in discussing the virtue of paternalistic statutes, making formally unconstrained decisions on someone else's behalf may be appropriate in a private context, but is too subject to abuse in a public context.[28] An illustration of such abuse may be found in the Supreme Court's long history of upholding statutes that discriminate against women on paternalistic grounds.[29] The liberal fear is that a virtue-based jurisprudence will degenerate into a random system based on moral principles that are "plural, conflicting, and open to the influence of [judges'] personal moral beliefs."[30] Is it possible for a society to be caring without being coercive?

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26. Wald, *supra* note 1, at 13.

27. *Id.*

28. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 646-49 (1982).

29. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981); Goesart v. Cleary, 335 U.S. 464 (1948); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872). *See generally* David Kirp, Mark Yudof, & Marlene Franks, Gender Justice 31-36 (1986) (historical survey of paternalism).

30. Stephen Macedo, *The Public Morality of the Rule of Law: A Critique of Ronald Dworkin*, 8 Harv. J.L. & Pub. Pol'y 79, 87 (1985). The radical response to the fear is that the degeneration is inevitable and has already occurred.

There are three responses that a feminine scholar can make: the first two depend on process and the last on substance. To the extent that women themselves participate in the judicial enterprise, they will prevent gender-biased abuse of the opportunities contextual decision making provides. Thus the participation of women as judges operates on one level—within either the masculine or the feminine paradigm—to constrain the gender-directed harms of the system. Representative institutions need little constraint. The operation of the feminine paradigm, moreover, also suggests another procedural constraint on non-originalist decision making. Because women are more naturally connected to others, they are more likely to be governed by true empathy: paternalism grounded not on power, but on the sort of equation of self and other that causes a driver to fling her arm across the passenger seat when she comes to a sudden stop. Increasing the likelihood of proper motivation decreases the likelihood of abuse.

A more substantive response is that tolerance is a virtue. Paternalism can be tempered by a willingness to accept as valid viewpoints other than one's own. To the extent that tolerance is a value under a feminine morality—as the metaphor of the web suggests it is—a feminine jurisprudence contains its own constraints in the same way that a jurisprudence of abstract rights or neutral principles does. Such a jurisprudence of virtue does not yet exist in any developed form, but the influx of women into the legal community, and their formal and informal interactions with each other and with their male colleagues, are necessary steps in its development.