of the situation, as Campbell's book both instructs and models, and we must design legal regimes in ways that are likely to enhance autonomy. We must also develop more mature views of criminal law. Criminal prohibition is not a straightforward vehicle for the expression and delivery of moral preferences or uncomplicated visions of a good life. Rather, criminal law is a coercive machinery of the state with a primary mission of social control and a range of additional, often unintended, consequences. Efforts to meaningfully enhance women's lives will have to come from some other place.

**Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* (New York: Harper Collins, 2015).**

Mary Jane Mossman

## *Gender and Judging: Reflections on "Sisters in Law"*

> We want to explore what it might be possible to achieve within the law and *whether the barrier to substantive equality is the law itself or the lack of equality vision in those who are charged with interpreting and applying the law.*[1]

This comment about a project of "rewriting" decisions of the Supreme Court of Canada, a project undertaken by a group of Canadian feminist law academics a few years ago, reveals the issue that is at the heart of Linda Hirshman's book about the first two women appointed to the United States Supreme Court: What is the relationship between gender and judging, especially with respect to goals of substantive gender equality?[2] Certainly, as women have increasingly entered the legal professions in many jurisdictions in the twentieth century, there have been high expectations that the appointment of women to the judiciary would significantly advance gender equality goals. Yet, as the feminist academics who tried to rewrite the decisions about equality cases in the Supreme Court of Canada discovered, it was a difficult challenge of "pushing the law and, at the same time, staying within the limits of the law."[3] In such a context, fundamental principles

1. Diana Majury, "Introducing the Women's Court of Canada" (2006) 18:1 Canadian Journal of Women and the Law 1 at 11 [emphasis added].
2. Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* (New York: Harper Collins, 2015).
3. Majury, *supra* note 1 at 10.


doi: 10.3138/cjwl.28.3.685

about judicial decision making may sometimes prove resistant to aspirations of gender equality in law.[4]

Issues about gender and judging have been increasingly addressed in academic literature. In one of the most comprehensive collection of essays, *Gender and Judging*, many of the challenges faced by women judges in nineteen different jurisdictions (including the United States) on five continents were explored.[5] Among others, this collection includes essays about the substantive impact of women judges on judicial decision making; women judges' coping strategies in relation to discrimination; increased rates of gendered advocacy by lawyers in courts where women judges are present; the differing approaches of feminist judges and of feminist adjudication by women judges; the need to revise judicial selection processes to foster more diversity in the judiciary, including women judges; and the role of judicial education programs about the significance of gender in law. Clearly, such a collection offers a rich source of ideas about the experiences, strategies, and impact of women appointed to the judiciary. Moreover, as part of a burgeoning literature about women judges in both civil law and common law jurisdictions, *Gender and Judging* arguably offers an important context for Hirshman's story of the first two women appointed to the US Supreme Court: Sandra Day O'Connor (appointed in 1981) and Ruth Bader Ginsburg (appointed in 1993).[6] As the editors

4. Denise Réaume candidly identified the challenges of rewriting the Women's Court decision in *Law v Canada (Minister of Employment and Immigration)*. See Denise Réaume, "Author's Note" (2006) 18:1 Canadian Journal of Women and the Law 143 at 143–44.

5. Ulrike Schultz & Gisela Shaw, eds, *Gender and Judging* (Oxford: Hart Publishing, 2013). Hirshman's bibliography, which focuses on American publications, did not include references to earlier biographies of Day O'Connor and Bader Ginsburg. See Rebecca Mae Salokar, "Ruth Bader Ginsburg" in Rebecca Mae Salokar & Mary L Volcansek, eds, *Women in Law: A Bio-Biographical Sourcebook* (Westport, CT: Greenwood Press, 1996) 78; Salokar & Michael Wilson, "Sandra Day O'Connor" in *ibid*, 210. As the editors of *Women in Law* noted, "Carol Sanger charges that there is ... an inclination, particularly when writing about women, to fall into 'the commemorative Victorian tradition,' in which the woman and her life are retouched to make the best presentation," a critique that may apply to some parts of Hirshman's book (at 12 – 13). See also Carol Sanger, "Curriculum Vitae (Feminae): Biography and Early American Women Lawyers" (1994) 46:5 Stanford Law Review 1245 at 1269.

6. Day O'Connor retired from the court in 2006, but Bader Ginsburg was later joined by Sonia Sotomayor in 2009 and Elena Kagan in 2010 (both appointed by President Barack Obama). See also Paul Koring, "The Fight to Fill Antonin Scalia's Seat on the U.S. Supreme Court," *Globe and Mail* (24 February 2016) A11 <www.theglobeandmail.com/news/world/the-fight-to-fill-antonin-scalias-seat-on-the-us-supreme-court/article28898659>.

of *Gender and Judging* suggest, however, relationships between gender and judging are inevitably complicated by other aspects of identity:

> Tracking down and providing evidence for effects of difference due to the gender of the judge is always made harder by the fact that male and female gender intersects with other aspects of difference ... such as age, race/ethnicity, family background, class/social stratum, sexual orientation, religion. Besides, personality traits such as looks, manners and behaviour[,] which determine human interaction, have an influence on personal value systems and take concrete form in individuals' life experience. [Moreover,] it is conceivable that the early generations of female judges ... may, due to obstacles in the way of advancement, have adopted attitudes different ... to those of later generations.[7]

Indeed, as Hirshman clearly notes, Day O'Connor and Bader Ginsburg experienced different family backgrounds and strategic paths to the US Supreme Court, differences that may have shaped their individual approaches to gender barriers in their legal work and judicial decision-making:

> O'Connor was appointed in 1981 by a Republican president [Ronald Reagan] ... Ginsburg was put on the Court by a centrist Democrat [Bill Clinton in 1993]. They came from completely different backgrounds: Republican/Democrat, Goldwater Girl/liberal, Arizona/Brooklyn. Ginsburg, the brunette, opera-loving New Yorker, used to call her blond colleague the Girl of the Golden West ... O'Connor, the uncomplaining, open-faced, cheerful, and energetic westerner, was easy for her brethren to accept in 1981 ... Ginsburg, the brilliant, solitary alumna of the feminist movement, brought an unwavering vision of the Constitution and a lifetime of experience in movement politics when she arrived.[8]

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7. Schultz & Shaw, *supra* note 5 at 29–30, citing Shultz, "Wie Männlich ist die Juristenschaft?" in Ulrich Battis & Ulrich Schultz, eds, *Frauen im Recht* (Heidelberg: CF Müller, 1990) 319. A recent empirical study of the Ontario Court of Appeal concluded that in some kinds of cases, the party making the judicial appointment and a judge's gender were both significant variables with respect to individual voting patterns of judges, with gender the stronger variable; in this context, the authors recommended that a "diversity in the political and gender mix of appellate court panels is essential" and that much more extensive empirical research is needed. See James Stribopoulos & Moin A Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45:2 Osgoode Hall Law Journal 315 at 362–63 [emphasis added].
8. Hirshman, *supra* note 1 at xv. Although Hirshman's book is important for its detailed analyses of important sex discrimination cases in the United States and the strategies adopted by Day O'Connor and Bader Ginsburg on these issues, this review focuses on their different paths to the US Supreme Court to take account of how their experiences and politics shaped their strategies.

Certainly, both women moved in important and influential (albeit different) circles in the United States, and they both employed effective strategies as ambitious and highly intelligent women lawyers to achieve their goals.[9] For Hirshman, however, their differences meant that they were not "soul sisters" but, rather, "sisters in law": "they were similar ... not generic," and they formed "a productive relationship" on the Court.[10] As a result, Hirshman's analysis focuses on telling the stories of how Day O'Connor and Bader Ginsburg succeeded in being appointed to the US Supreme Court, and how their approaches and strategies as judges at the US Supreme Court contributed to progressive outcomes in women's rights cases. These are important stories about judicial decision making—and about the first women judges at the US Supreme Court. At the same time, Hirshman's detailed analysis fails to demonstrate how the appointment of these two women accomplished her subtitle's extraordinary claim: that they 'went to the Supreme Court and *Changed the World.*'[11]

One important similarity in the early experiences of these two women was their graduation from law schools when women were just a tiny minority of law students, a factor that is arguably significant to their professional formation and in relation to their (often limited) access to important opportunities for advancement.[12] Sandra Day grew up on a cattle ranch in Arizona with a father who was a

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9. *Ibid* at xv.
10. *Ibid* at xv, xxii.
11. *Ibid* [emphasis added]. It is arguable, of course, that the appointment of two women judges may have changed American jurisprudence, at least to some extent, in relation to gender equality. Linda Greenhouse reviewed this book in the *New York Times*, arguing that the author's admiration for Bader Ginsburg is clearly evident, while it was harder for the author to understand Day O'Connor. Greenhouse also suggested that the book's title yoked the two women together as if they were soul mates when it would have been a better book if she had tried to recognize how these two women, who were smart and ambitious, took different paths to career success at a time when social norms were changing but some traditions still prevailed. See Linda Greenhouse, "'Sisters in Law' Looks at Sandra Day O'Connor and Ruth Bader Ginsburg," Sunday Book Review, *New York Times* (14 September 2015) <www.nytimes.com/2015/09/20/books/review/sisters-in-law-looks-at-sandra-day-oconnor-and-ruth-bader-ginsburg.html>. Hirshman's subtitle may reflect an earlier study. See Elizabeth Vrato, *The Counselors: Conversations with Eighteen Courageous Women Who Have Changed the World* (Philadelphia: Running Press, 2002). See also Hirshman, *supra* note 1 at 314, n 43.
12. In her contribution to *Gender and Judging*, *supra* note 5, Elaine Martin analyzed the impact of three women judges in the United States who had written about their views as judges: Patricia Wald (born in 1928 to a single mother who was part of a large Irish-Catholic family of blue-collar workers); Dorothy Nelson (born in 1928 to a middle class family in California); and Rosemary Barkett (born in 1939 to Syrian immigrants in Mexico who then immigrated to the United States). Martin suggested

"vociferous conservative" and whose touchstones were self-reliance and individual responsibility; according to Hirshman, Day O'Connor "still calls herself 'a cowgirl.'"[13] She left the ranch to attend Stanford University in 1946 at the age of sixteen; a significant event for Sandra Day was a seminar during her university days with Harry Rathbun, an engineer and non-practising lawyer, who espoused ideas about consciousness, awareness, and the nature of reality as essential to human life. Yet, as Hirshman indicated, although Day O'Connor later credited Rathbun with helping her to shape her philosophy of life, she "may not have noticed that Rathbun's theories about finding personal meaning could support almost any outcome."[14]

Sandra Day graduated from Stanford Law School in 1952, one of only four women, but a highly successful one: she had been elected to the honourary society and had worked as an editor of the law review. However, notwithstanding these traditional marks of academic success, Day applied for about forty law firm jobs, all without success. Indeed, one firm stated pointedly that it had never hired a woman lawyer and never would—because "[o]ur clients wouldn't stand for it"; she was instead offered a position as a legal secretary.[15]

According to Hirshman, "Sandra Day showed no sign of indignation at her treatment by the law firms" and "did not try to change the society to fit her idea of just treatment." She applied to the deputy attorney for San Mateo County because she had heard that he had once hired a woman. When she learned that there were no funds for additional attorneys in the budget, she agreed to work for free until funds became available; and when no office space was available, she put her desk beside that of a secretary, because she "got along [with her] pretty well."[16] She did eventually receive a salary and later served as a government lawyer with the Army Quartermaster Corps when she accompanied her husband, John O'Connor (who had been a fellow student at Stanford Law School), to Europe. When the O'Connors returned to the United States, they settled in Phoenix, Arizona, where

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that the judicial decisions of these three women reflected different approaches of women judges. Wald's views reflected her gendered life experiences, Nelson's revealed women's unique perspectives, and Barkett's sense of "what it means to be powerless" was a foundation for her feminist jurisprudence. See Elaine Martin, "Profiles in Leadership: Emminent Women Judges in the United States" in Schultz and Shaw, eds, *supra* note 5 at 69, 81.

13. Hirshman, *supra* note 1 at 4–5.
14. *Ibid* at 8–9. According to Hirshman, "Rathbun's loose commitment to bettering the world without a firm picture of what a better world would look like" was evident in Day O'Connor's pragmatic approach to both legislative and judicial decision making: "She would solve the problem before her without worrying about what big principle she was laying down" (at 9).
15. *Ibid* at 13–14. The California firm was Gibson, Dunn, and Crutcher.
16. *Ibid* at 18.

the Republican party was engaged in a conservative revival. After a couple years as a sole practitioner, Day O'Connor retired to be at home with her young children and "threw herself into Republican campaigns" as a volunteer. Over time, Day O'Connor held increasingly important positions in the party, while also meeting all the social expectations of women in the 1950s (including making dinner each evening for her husband and children). Indeed, as Hirshman suggested, Day O'Connor engaged in "a lifelong practice of being at once a man's man and a girl's girl."[17]

Ruth Bader's background was different. She grew up in Brooklyn, one of two daughters of a Russian immigrant father who worked in the garment industry; sadly, her older sister died of meningitis when Bader was just two years old, leaving her an only child. She always claimed that it was her mother, who had been raised Orthodox, who "taught her more about the tradition of justice than the more rigid rules of the Jewish faith"; unfortunately, her mother died of cervical cancer the day before her daughter's graduation from high school.[18] Bader then attended Cornell University, with help from scholarships, and was hired as a research assistant by Robert Cushman, who was already engaged in the most contentious political issue of the time, the anti-Communist crusade of Senator Joseph McCarthy; Cushman is now "legendary among political scientists for having sounded the alarm against what would become McCarthyism." Moreover, Hirshman asserted that Cushman "left his protégée not only with a charge to make the world better but with a clear idea of how to make things better."[19] And, according to Hirshman, Bader's "encounter with Professor Cushman enabled her to put a frame around her beliefs and inspired her to a life in the law ... to see the grievances of a disempowered group ... women like herself ... [but also] an overall commitment to equality for all disempowered people."[20] Bader met Martin Ginsburg at Cornell, and they married when she graduated; by that time, he had completed first year at Harvard Law School. Since Bader had finished first in her class at Cornell, she was also accepted at Harvard Law School, but she followed Ginsburg when he was drafted to Fort Sill, Oklahoma; there, she accepted a position at the local Social Security office but when she became pregnant, her supervisor explained that she

17. *Ibid* at 19–20. Significantly, Hirshman noted that Day O'Connor opened her own practice because firms were closed to women lawyers in Phoenix in the late 1950s; by contrast, John O'Connor quickly obtained employment at Fennemore, Craig, von Ammon, McClennen, and Udall.
18. Bader Ginsburg recalled her mother when her appointment was announced in the Rose Garden at the White House: "I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve and daughters are cherished as much as sons." Hirshman, *supra* note 1 at 7.
19. *Ibid* at 9–10.
20. *Ibid* at 11.

could not then fly to a training session required for promotion, so she could not be promoted.[21]

However, a few months after the birth of their daughter, the Ginsburgs returned to Harvard, with her husband now in second year and Bader Ginsburg about to embark on 1L. According to tradition, Erwin Griswold arranged a dinner party for women students, each accompanied by a member of faculty, at which the women were asked to justify "taking a place a man would otherwise have had"; it seems that Bader Ginsburg responded that it was important for women to understand their husbands' work. Her discretion was not rewarded, however, when she later requested the Harvard degree after transferring to Columbia for her third year (in order to keep her family together, while her husband started his practice in New York City); Harvard declined her request.[22] Bader Ginsburg summered at Paul, Weiss, Rifkind, Wharton, and Garrison before her third year, but even though she had the highest marks in third year at Columbia Law School, she was not offered a job at the firm. Moreover, when her Harvard professors forwarded her name for a clerkship at the US Supreme Court, Justice Frankfurter quickly responded: "I'm not hiring a woman," and, thus, she clerked for Justice Palmieri at the lowest level of the federal court system.[23] She then worked as a researcher on a project at Columbia Law School focused on foreign court systems. Indeed, at a critical moment in the emergence of women's rights in Swedish social policy, Bader Ginsburg travelled to Sweden to further her research project. She then joined the faculty at Rutgers Law School, teaching civil procedure, and also giving birth to her second child.[24]

Thus, by the 1960s, Hirshman reported that both Day O'Connor and Bader Ginsburg were "leading relatively conventional lives, [but] the '60s *were* happening': for example, Betty Friedan published *The Feminine Mystique*; the US Congress enacted the *Civil Rights Act* which prohibited sex-based discrimination in employment; and the Students for a Democratic Society began circulating a memo about 'sex and caste.'"[25] In 1969, after years of volunteer activities for the Republicans in Arizona and an appointment as assistant attorney general, Day O'Connor was appointed to a vacant seat in the Arizona Senate: "[R]elentlessly

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21. *Ibid* at 14. As Hirshman noted, the US Supreme Court held that states could not segregate the races in 1954, but "nothing the government supervisor did to women was considered illegal in 1955" (at 14). Significantly, Ginsburg became aware of another employee, who kept her pregnancy secret, who did not suffer the same fate.
22. *Ibid* at 15–16. Apparently, Harvard changed its policy years later (in the late 1970s). In addition, Marty Ginsburg had been diagnosed with testicular cancer in his third year; with the help of other students, both Marty and Ruth completed their years successfully and then moved to New York.
23. *Ibid* at 20–21.
24. *Ibid* at 15–16, 20–23.
25. *Ibid* at 24.

sociable and bent on a public life, the transition to the legislature was natural for a woman who never seemed to recognize how uppity she was."[26] In the prevailing atmosphere of new opportunities for women, moreover, the Republicans appointed Day O'Connor as Chair of one of its powerful committees; and then in 1972, she was elected majority leader in the state Senate. In this context, she was Senate leader when the Equal Rights Amendment (ERA) came to Arizona for ratification—after Arizona's representative in the US Senate, Barry Goldwater, had voted against it. And so it was that "O'Connor's Republican party in Arizona followed Goldwater to the right," rejecting the ERA. As Hirshman argued, "O'Connor was caught between her ambitions in a conservative Republican Party and her professed concern for women's rights ... The easy days of feminist principles and conservative politics were over."[27]

In this same period, Rutgers and other law schools were being pressured to create courses about women's legal rights; as one of just two women teaching at Rutgers, Bader Ginsburg took on this task. After copious library research, she recognized how government legislation "could hurt women in so many ways," and she initiated letters to Congress in relation to her legal analysis while also beginning to work with her local branch of the American Civil Liberties Union (ACLU).[28] In 1971, she was appointed director of the national ACLU Women's Rights Project, splitting her time between it and her new appointment at Columbia Law School.[29] This arrangement created the opportunity for Bader Ginsburg to engage in strategic litigation, including at the US Supreme Court, to challenge laws that discriminated on the basis of sex—often successfully. As Hirshman concluded:

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26. *Ibid* at 23–24.
27. *Ibid* at 23–25, 47–49.
28. *Ibid* at 25–28, 32–35. As Hirshman also noted, the *Harvard Law Review* published an article about equal protection in 1969. In its 150 pages, it mentioned sex discrimination only four times, three times to distinguish it from "genuinely suspect" categories such as race and once in a footnote that queried whether "experience teaches that the biological differences between the sexes are often related to performance." *Ibid* at 37. A few years later, Philip Kurland, a constitutional law scholar, published an article about the Equal Rights Amendment to explain that while its goals were appropriate, it was likely to cause "social disruption." *Ibid* at 52. These publications clearly created major obstacles for the litigation challenges presented by the ACLU and Bader Ginsburg.
29. *Ibid* at 56–58. Bader Ginsburg had spent a semester at Harvard as a visiting professor, at a time when Harvard "had just noticed it had no permanent female faculty." However, Harvard delayed consideration of an appointment for Bader Ginsburg, and she accepted the offer from Columbia instead.

> The days of assuming automatically that women were different from the standard citizen were over. From then on, the hundreds of remaining laws the movement had identified as preferring men—or women, as it turned out—would have to show a "fair and substantial" reason for distinguishing between them. The government could no longer assume for its convenience that women, the little darlings, would be too ditsy to administer estates—or anything else. Even the conservative Warren Burger signed on to that.[30]

At the same time as the ACLU and Bader Ginsburg were achieving this success in the US Supreme Court, however, the ERA was being defeated in the "hostile landscape" of Day O'Connor's Arizona.[31]

For an earlier generation of law professors and law students, Bader Ginsburg's careful efforts to use a succession of litigated cases to raise the bar in relation to matters of sex discrimination are explained by Hirshman in excellent detail. She also explains how law clerks at the court, some of whom had been students of Bader Ginsburg, often provided strategic memos to the justices at the court, thus "largely transform[ing] the constitutional status of women in America."[32] At the same time, Hirshman carefully documented the increasingly important roles played by Day O'Connor in the Republican party, including her championing of William Rehnquist for appointment to the court by President Richard Nixon.[33] To some extent at least, these differing paths to the Court—Bader Ginsburg, the advocate; Day O'Connor, the Republican legislator and loyalist—reflected their long political allegiances. However, their experiences as women in the legal profession arguably influenced their approaches to decision making too. For Bader Ginsburg, the advocate, it was possible to be uncompromising in the strategic arguments she presented to the court in pursuit of women's rights; by contrast, as a leading member of the

30. *Ibid* at 42–44. Bader Ginsburg's research and written brief resulted in the court's decision to require a new and higher standard for sex discrimination cases: the "fair and substantial" test, rather than merely one of "rational connection."

31. *Ibid* at 49.

32. *Ibid* at 69.

33. *Ibid* at 118–19. As Hirshman noted, Rehnquist had been a classmate of Day O'Connor at Stanford Law School, and his credentials were impeccable and impressive. At the same time, he had opposed racial civil rights and had testified in relation to a proposed civil rights ordinance in Phoenix in 1964 that a law forbidding shopkeepers from discriminating on the grounds of race would sacrifice their property rights to protect the rights of racial minorities: "[I]n such cases, property rights mattered more than racial justice" (at 118). As Hirshman also noted, "despite Rehnquist's substantive opposition to every aspect of the women's legal movement, Sandra O'Connor flung herself into the campaign for his appointment" (at 118).

Republican party's establishment, O'Connor sometimes had to compromise.[34] In her story of their different paths to the US Supreme Court, it is not surprising that Hirshman's admiration for Day O'Connor sometimes appears a bit strained, by contrast with her mostly unambiguous admiration for Bader Ginsburg's uncompromising support of women's rights.

Yet Hirshman also notes how Day O'Connor demonstrated that she could hold her own with male members of the court. For example, she identifies how she defended the concept of affirmative action at a judicial conference in which Antonin Scalia had engaged in a negative diatribe; according to Hirshman, Day O'Connor responded: "Why, Nino, how do you think I got here?"[35] Moreover, Day O'Connor used the precedents established in the earlier sex discrimination cases to promote equality goals; in an early opinion, she explained the need to use reason rather than "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[36] As Day O'Connor's expertise on the court rose, moreover, she wielded her position as the "clear center of the more conservative court" like the seasoned politician she was:

> She cast ambiguous votes at conference or professed herself undecided until she saw the draft of the assigned author and then she dragged her feet about signing on to drafts that were circulating, all techniques designed to draw the authors of assigned opinions to her in order to ensure her support. Her most visible strategic tactic was the concurring opinion, agreeing with the outcome of her chosen majority but differing with the opinion of whoever was writing ... When she was, as she often was, the critical fifth vote, O'Connor used the concurrence power to strip the majority opinion of its majority, setting out a different explanation for the outcome ... Almost without exception she used the vehicle of the concurrence to make conservative rulings more liberal and the liberal opinions more conservative, usually by tying the outcome to the particular facts in the case.[37]

Hirshman's detailed analysis of decision making at the US Supreme Court, and especially the jockeying for a majority among the justices, reveals the complexity

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34. *Ibid* at 119. In relation to her support for Rehnquist, who was clearly not a supporter of women's rights, for example, Hirshman suggested that "despite her recognition of the value of law as an instrument for women's advancement, she might have decided that the conservative agenda she shared with her good friend—favoring the states over the federal government and business over government at any level—was more important than her concerns for women. Certainly, once she got to the Court, she voted with Rehnquist on federalism and regulatory issues almost all the time" (at 119).
35. *Ibid* at 119.
36. *Ibid* at 140–42. According to Hirshman, Marty Ginsburg walked into his wife's study with Day O'Connor's opinion and asked: "Did you write this?"
37. *Ibid* at 183. As Hirshman noted, the pattern of Justice Day O'Connor's concurring opinions "drove lower courts to distraction" because of the lack of guidance about how to apply the principles to cases with different facts (at 183).

of background (and "backroom") negotiations, often based on the divergent political viewpoints that so often created a divided court. After Bader Ginsburg's appointment in 1993, moreover, she too demonstrated an ability for compromise in pursuit of important goals. For example, she wrote concurring opinions in support of majority judgments that were often "happy face dissents," designed to "save the day for another case by minimizing the harmful aspects of a loss."[38] Hirshman's claim that the two women established a productive relationship on the court is well documented, although Bader Ginsburg politely declined to join Day O'Connor's early morning aerobics class for women clerks.[39] In her discussion of the significant women's rights cases, moreover, Hirshman offers an excellent insider's view of the workings of the court and the strategic positions adopted by these first two women justices in their work with their male colleagues.[40]

Some of Bader Ginsburg's litigated cases and Day O'Connor's early opinions will be familiar to feminist lawyers and academics working in the 1970s and 1980s, when these developments in the US Supreme Court sometimes provided arguments in women's rights cases in Canada, particularly prior to the creation of equality rights in the *Canadian Charter of Rights and Freedoms* in 1985.[41] However, as Canadian equality jurisprudence evolved pursuant to the *Charter*, subsequent developments in the United States may not be so well known, although the pattern of retrenchment on the part of a conservative judiciary may appear somewhat familiar.[42] Thus, as a comparative study of the role of women judges and their strategies, Hirshman's book may be quite useful to Canadian legal scholars who are interested in the "inside" story of the evolution of jurisprudence at the US Supreme Court, especially in relation to women's equality rights.

Given Hirshman's interest in explaining how these first two women judges "went to the Supreme Court and changed the world," it is not surprising that her book tends to see Bader Ginsburg as providing greater support for changes in the status of American women. At the same time, it is necessary to take account of the reality that Day O'Connor faced as the "only woman" on the Court for twelve

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38. *Ibid* at 216–19. As her clerk suggested, Bader Ginsburg was "very smart ... [a]fter all, she was a cause lawyer and knows how to build things for the future" (at 219).
39. *Ibid* at 147, 244.
40. In discussions about the cases, Hirshman's book includes background information, including memos from clerks, written exchanges among the justices with respect to drafts, and marginal comments on draft opinions. She also conducted interviews with some retired justices and included their comments. See *ibid* at 371–72 for the bibliography of interviews and correspondence with the author.
41. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
42. For example, L'Heureux-Dubé J argued that because the Canadian *Charter* is a twentieth-century document, its interpretation requires the application of principles of international human rights. Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa Law Journal 15 at 35–36.

years prior to Bader Ginsburg's appointment. Clearly, her role was not an easy one, in spite of her cheerful and outgoing personality as a highly social "Golden Westerner," and her approach to decisions was often pragmatic, preserving the status quo when forward movement was impossible. As Justice Bertha Wilson, who was the "only woman" at the Supreme Court of Canada from 1982 until the appointment of Justice Claire L'Heureux-Dubé five years later in 1987, poignantly explained, women lawyers have to prove themselves again and again in their careers: "[A]ll your life as a woman you are proving yourself ... proving ... that you can do it."[43] Moreover, there is evidence that the appointment of Day O'Connor to the US Supreme Court in 1981 was an important factor in the Canadian government's selection of Wilson for the Supreme Court of Canada in the following year,[44] a significant appointment with respect to the early years of *Charter* jurisprudence.

In the end, like many stories about women in law, Hirshman's conclusion also recognizes how Day O'Connor's contributions on the court created opportunities for Bader Ginsburg and for the other women more recently appointed: "She certainly made it easier for her sister in law, Justice Ginsburg. O'Connor was determined not to be the last."[45] For Hirshman, what is fundamental about each of the women judges in the US Supreme Court is their "life experience as a woman."[46] And, for her, this statement is as true for Day O'Connor as for Bader Ginsburg, the "sisters in law." At the same time, it is a stretch to accept Hirshman's assertion that both judges were "beacons of feminist jurisprudence,"[47] an issue that remains highly contested by feminist academics in a number of different jurisdictions.[48] Indeed, perhaps a more persuasive claim for the appointment of women judges to the highest courts, and not only in the United States, is just because "the incorporation of difference on the bench subtly changes and, ultimately, improves the judicial product."[49]

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43. Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) at 200. See also Mary Jane Mossman, "'Contextualizing' Bertha Wilson: Wilson as a Woman in Law in Mid-20th Century Canada" in Jamie Cameron, ed, *Reflections on the Legacy of Justice Bertha Wilson* (Markham, ON: LexisNexis, 2008) 1.
44. Although Wilson's appointment was not universally supported by the legal profession, it seems that the federal government believed that "*in the context of the times*," it was important to appoint a woman. Eddie Goldenberg, *The Way It Was: Inside Ottawa* (Toronto: McClelland & Stewart, 2006) at 89 [emphasis added].
45. Hirshman, *supra* note 1 at 298.
46. *Ibid* at 300.
47. *Ibid* at 298–99. Although it is possible, at least in retrospect, to see these two women as "icons," it is more difficult to accept Hirshman's claim that they were both "beacons of feminist jurisprudence" (at 299).
48. See Schultz & Shaw, *supra* note 5 at Part V, especially Beverley Baines, "Must Feminist Judges Self-Identify as Feminists?" (at 379).
49. Erica Rackley, "What a Difference Difference Makes: Gendered Harms and Judicial Diversity" (2008) 15:1–2 International Journal of the Legal Profession 37 at 49, quoting Lady Brenda Hale in the United Kingdom.