

'Swearing Mary': The Significance of the Speeches Made at Mary Gaudron's Swearing-in as a Justice of the High Court of Australia

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Abstract

During the High Court of Australia's first century, Mary Gaudron served as the first and only female member of its bench. This paper commemorates the 25th anniversary of Gaudron's appointment to the High Court by examining the speeches made at her swearing-in ceremony, in February 1987. Largely ignored by scholars, swearing-in ceremonies provide unique insights into the history of courts and the personality and philosophy of their judges. Through the prism of Gaudron's swearing-in ceremony, this paper showcases the significance of these occasions as a commentary on the institutional and intellectual life of the Court. In particular, Gaudron's swearing-in ceremony tells a fascinating story of institutional and gender politics in the High Court: the legal community's varied response to the novelty of a woman High Court Justice; Gaudron's intricate balancing between her distinctive vision of her obligations as a mentor to women lawyers and her role as 'one of seven' on a collegiate bench; and the perennial tension between innovation and tradition in legal method.

I Introduction

Friday 6 February 1987 marked the beginning of a new era in the Australian legal system. In Canberra, a swearing-in ceremony was held at the High Court of Australia to welcome three Justices to their new roles: Sir Anthony Mason was elevated from puisne Justice to Chief Justice, and John Toohey and Mary Gaudron joined the bench as new Justices.¹ Not since the High Court's first

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¹ Transcript of Proceedings, *Swearing-in Ceremony, Mason CJ, Toohey and Gaudron JJ* (High Court of Australia, 6 February 1987) (*'Swearing-in Ceremony, Gaudron J'*). For a partial transcript of proceedings, reproducing only the Justices' speeches, see 'Ceremonial Sitting on the Occasion of the Swearing-in of the Chief Justice The Honourable Sir Anthony Mason KBE and the Swearing in

Justices took the judicial oath in 1903 had so many judges assumed office in a single ceremony. A decade before Gaudron's swearing-in, Attorney-General Ellicott had remarked on the particular significance of the swearing-in of new High Court Justices in the life of the nation.² He explained that the swearing-in of a new Justice not only marked the beginning of a new judicial life, 'but henceforth the court will inevitably *be different: one mind, one personality and one set of experiences* has replaced another.'³ As the Mason Court years unfolded, the truth of Ellicott's observation became apparent. The 1987 appointments heralded a transformation in jurisprudence, of both style and substance, which has left a lasting mark on the Australian legal system.⁴

Before a single judgment of the new Mason Court was written, however, the Court's February 1987 ceremony heralded a more direct and visible change to the Australian judiciary. A woman now sat on the High Court bench. As was so often the case in Gaudron's career, the Court transcript of this ceremony recorded her pioneering role as an Australian woman lawyer. Among the gathering of legal dignitaries named in the transcript, including 15 former and currently serving Australian judges, eight Solicitors-General, 11 presidents of representative legal associations and 39 Queen's Counsel, Gaudron was recorded as the *only* woman present in Court.⁵ She was also the *first* woman to have a speaking role at a High Court swearing-in ceremony.⁶

Gaudron's appointment offered hope to Australian women lawyers that it was possible for them to achieve the highest success in the Australian judiciary.⁷ With the recent passing of the 25th anniversary of Gaudron's appointment to the Court, this paper commemorates this historic event by examining the ceremony in which a woman's voice was first heard from the High Court bench.

The tradition of the swearing-in ceremony, with its exchange of speeches of welcome made by the legal profession to the new Justice and the new Justice's reply, was established in the High Court context at its first sitting in 1903.⁸

of The Honourable Mr Justice Toohey and the Honourable Justice Gaudron as Justices of the High Court of Australia' (1987) 68 ALR xxxiii.

² Transcript of Proceedings, *Swearing-in Ceremony*, Aickin J (High Court of Australia, 20 September 1976) 2 (R J Ellicott QC, Attorney-General of Australia).

³ *Ibid* (emphasis added).

⁴ See generally Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) and Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996).

⁵ *Swearing-in Ceremony*, Gaudron J, above n 1, 2–7 (list of dignitaries). Although in attendance, Dame Roma Mitchell's presence was not recorded in the official list of dignitaries in the transcript. On Dame Roma's trailblazing role as a woman in the law in Australia, see below n 73.

⁶ The next time a woman's voice would be heard at a High Court swearing-in ceremony was in 1995 when Susan Crennan, as President of the Australian Bar Association, welcomed Justice Gummow to the bench. A decade later, Crennan would herself give a swearing-in speech as a Justice of the Court. See Transcript of Proceedings, *Swearing-in Ceremony*, Gummow J [1995] HCATrans 119 (High Court of Australia, 21 April 1995) and Transcript of Proceedings, *Swearing-in Ceremony*, Crennan J [2005] HCATrans 895 (High Court of Australia, 8 November 2005).

⁷ As Gaudron remained the only woman on the Court for 20 years, that hope may have waned somewhat. By 2009, however, there was almost gender equity on the High Court bench.

⁸ See 'The High Court: Opening Ceremony, Distinguished Gathering. Bench and Bar Speak', *The Argus* (Melbourne), 7 October 1903, 9. Swearing-in ceremonies are not unique to the High Court in

This exchange builds a 'textual portrait'⁹ of the judge within a conventional form. Like the work done by art historians and others on the changing modes of visual representation of state officials, change to the form and substance of these heavily prescribed speeches can reveal insights into the history and biography of the Court, its judges and the legal, social and cultural context in which the Court operates.¹⁰ In 1987, for example, the exchange of welcome speech and reply by Commonwealth Attorney-General Lionel Bowen and the new Chief Justice Mason explored Australia's legal identity following the passing of the *Australia Acts*, as well as shedding light on Mason's judicial philosophy and his journey to the centre seat on the High Court bench.¹¹ However, Australian legal history has tended to overlook these ceremonies when tracing historical themes in the development of the Australian legal system, turning instead to the courts' official pronouncements, and, more recently, to Justices' non-ceremonial extra-curial writings and speeches.¹² Exceptionally, Sir Owen Dixon's statement in his swearing-in speech as Chief Justice in 1952, that 'strict and complete legalism'¹³ should characterise the Court's legal method, has received sustained academic interest,¹⁴ and illustrates the potential of these ceremonial statements for tracing the life of the Court as individual and institution.

Judicial swearing-in speeches have found a place in biographical writing, itself a growing genre in Australia.¹⁵ However, the nature of that discourse means

Australia. This paper is part of a broader project exploring, in the first instance, the insights of swearing-in ceremonies of courts exercising federal jurisdiction in Australia. For a rare academic analysis of the insights of swearing-in ceremonies, in the context of the New South Wales Supreme Court, see Leslie J Moran, 'Forming Sexualities as Judicial Virtues' (2011) 14 *Sexualities* 273.

⁹ Moran, above n 8, 274.

¹⁰ See Leslie Moran, 'Judging Pictures: A Case Study of the Portraits of the Chief Justices, Supreme Court of New South Wales' (2009) 5 *International Journal of Law in Context* 295. See also Roland Delattre, 'Ritual Resourcefulness and Cultural Pluralism' (1978) 61 *Soundings* 28 for an analysis of the impact of changes to ritual or ceremony as a reflection of changing institutional relations more generally.

¹¹ See *Swearing-in Ceremony*, Gaudron J, above n 1, 9–10 (Bowen), 13–15 (Mason CJ). Although not made directly to or by Gaudron, the themes within these speeches formed part of the broader context of her swearing-in.

¹² See, eg, Brian Galligan, *Politics of the High Court* (University of Queensland Press, 1987) and Leslie Zines, *The High Court and the Constitution* (Butterworths, 1992). Some analysis of sexuality, gender and swearing-in ceremonies exists: see Moran, above n 8; and Heather Roberts, 'Women Judges, "Maiden Speeches", and the High Court of Australia' in Beverly Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism* (Cambridge University Press, 2012) 113.

¹³ *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

¹⁴ On Dixon's invocation of 'legalism' and an overview of its impact on High Court jurisprudence, see, eg, Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429. Notably, other elements of Dixon's speech, including his reflections on the appropriate relationship between the bench and the bar during oral argument, have received considerably less attention. But see Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2003) 27, 232.

¹⁵ See, eg, Ayres, above n 14, 232 (Ayres only discusses Dixon's speech as Chief Justice, not his swearing-in as puisne Justice); AJ Brown, *Michael Kirby: Paradoxes and Principles* (The Federation Press, 2011) 271–3; Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 258–60. Works exploring individual judges' intellectual philosophies have also referred to their swearing-in speeches (but not the welcome speeches made to the new Justices). See, eg, Robin Creyke, 'Extra-Curial Writings' in Robin Creyke (ed), *The Brennan Legacy* (The Federation Press, 2002) 141; Geoffrey Lindell, *The Mason Papers* (The

that the biographer's gaze rarely, if ever, extends beyond his or her immediate subject to explore the broader patterns and themes of the High Court's ceremonies. Still less attention has been paid to the welcome speeches made to the new Justice.¹⁶ The absence of High Court swearing-in ceremonies held before 1996 from an online archive of transcripts of proceedings only partly explains this pattern of neglect.¹⁷ By studying Mary Gaudron's swearing-in ceremony as a moment of significance in the life of the Court and the nation, this article reveals key elements of the gender politics of the Australian legal profession in 1987¹⁸ and takes a step towards claiming a place for these occasions as a valuable narrative history of the High Court of Australia and the community it serves.

II Welcoming the First Female Justice to the High Court

Since 1903, welcome speeches made at High Court swearing-in ceremonies, including those made to Gaudron, have generally contained two main elements.¹⁹ First, leaders of the legal profession have conveyed the congratulations of their constituencies to the Justice. Such sentiments welcomed each of the new Justices in 1987.²⁰ Second, the welcome speech has traditionally included a brief biographical sketch of the new Justice's education and career.²¹

As a speech designed to celebrate the achievement of professional success by an individual (usually, and until 1987 exclusively, a man) these speeches strongly evoke the narrative features of the classical epic form, extolling the virtues and triumphs of their subjects in tones that tend towards hagiography and hyperbole.²² However, in a system where federal judges are chosen behind closed

Federation Press, 2007) 392, 395; and Heather Roberts, "'A Mirror to the Man" Reflecting on Justice William Deane: A Private Man in Public Office' (2011) 32 *Adelaide Law Review* 17.

¹⁶ The welcomes delivered to Dixon and Gaudron were not discussed by their biographers. See Ayres, above n 14, Burton, above n 15. Contra Brown, above n 15, 408; and see Moran, above n 8; and Roberts, above n 12.

¹⁷ All transcripts of High Court swearing-in ceremonies after 1996 are available in the Austlii archive: *High Court of Australia Transcripts*, AustLii <<http://www.austlii.edu.au/au/other/HCATrans/>>. Many, but not all, transcripts of proceedings of earlier High Court ceremonies, including Gaudron's ceremony, are maintained in the library of the High Court of Australia or the National Library of Australia.

¹⁸ For an exceptional study of pioneer women lawyers' lives and their illuminations of historical context, including the gender politics of the legal institutions in which they sought membership, see Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Profession* (Hart Publishing, 2006).

¹⁹ As indicated above, welcome speeches can also contain a third element, that is, commentary 'at large' on the challenges facing the High Court and the Australian community. See, eg, Attorney Bowen's allusion to the *Australia Acts*, above n 11.

²⁰ *Swearing-in Ceremony*, Gaudron J, above n 1, 25 (Bowen); 26 (Gyles QC) and 26 (Williams QC).

²¹ For a striking exception, in which contemporary debates over legal activism were prioritised above the traditional words of introduction and welcome to a new Justice, see Transcript of Proceedings, *Swearing-in Ceremony*, Kiefel J [2007] HCATrans 493 (3 September 2007) (Bugg QC, President of the Law Council of Australia).

²² Conway has explored how culture shapes the telling of life stories, arguing that for men the 'overarching pattern for life comes from adaptations of the story of the epic hero in classical antiquity' and consequently the 'courage, endurance, cunning and moral strength' exhibited by them in overcoming their trials. See Jill Ker Conway, *When Memory Speaks: Reflections on Autobiography* (Alfred A Knopf, 1998), 7. On the significance of this cultural script for how the stories of women lawyers, particularly the 'silences' in those stories, are told, see Mary Jane Mossman, 'Bertha Wilson:

doors, an address at a swearing-in ceremony also presents leaders of the Australian legal community with an important opportunity to introduce the new Justice to the public. In this sense, the speeches are both political and performative; transforming their subject from candidate to Justice and attesting to the 'confidence and esteem'²³ in which the profession holds the new judge. As Moran has argued, the biographical sketch thus serves a 'double function formulating and fashioning the subject not only as an *exemplary individual life* but also as *a subject that embodies the virtues of the judicial institution*'.²⁴

Consistent with this tradition, the three welcoming speakers each endorsed Gaudron's ability to perform the task for which she had been chosen. Roger Gyles, President of the Australian Bar Association, for instance, acknowledged Gaudron's 'outstanding career in the law [and] outstanding intellect'. Daryl Williams, President of the Law Council of Australia, opined that Gaudron's 'ability, assiduity and determination ... [would] stand [her] in good stead in [her] new position.'²⁵ A broad outline of the course of Gaudron's career to the High Court was also provided. These career highlights included Gaudron's University medal from the University of Sydney; her career at the Bar; her appointment as Deputy President of the Conciliation and Arbitration Commission; and her appointment as Solicitor-General of New South Wales.²⁶ In style and structure, these career chronologies underlined the consistency of Gaudron's career trajectory with those of her High Court colleagues and her possession of the skills and experiences considered 'ideal' for High Court office. With the exception of Gaudron's service on the Conciliation and Arbitration Commission, for example, the key points on her journey to the Court had mirrored those of Sir Anthony Mason. Bowen, in his welcome, also pointedly emphasised that by joining the Court Gaudron brought the number of former Solicitors-General on the Court to four.²⁷

Gaudron was, of course, exceptional even among her peers at the bench. Gaudron's unusually young age at the time of many of her noted appointments, including to the High Court, attracted easy attention within the conventional narrative. Speed and youth in career achievement was a traditional feature of welcome speeches, as testimony to the new Justice's extraordinary abilities and

"Silences" in a Woman's Life Story' in Kim Brooks (ed), *One Woman's Difference: The Contributions of Justice Bertha Wilson* (UBC Press, 2009) 431. The tendency towards hagiography, and its purpose in welcome speeches, is discussed in Moran, above n 8.

²³ Transcript of Proceedings, *Swearing-in Ceremony, McHugh J* (High Court of Australia, 14 February 1989) 13 (Byrne QC, President of the Law Council of Australia).

²⁴ Moran, above n 8, 274 (emphasis added). As the discussion of the significance of the *Australia Acts* by Attorney Bowen (and Mason CJ) in 1987 illustrates, the commentary offered by speakers at High Court swearing-in ceremonies can also take us beyond a discussion of the High Court, its judges and virtues, to encompass changes in, and challenges to, the legal system and Australian society at large. This paper is one aspect of a broader project designed to promote these further readings.

²⁵ *Swearing-in Ceremony, Gaudron J*, above n 1, 26 (Gyles QC), 27 (Williams QC). Attorney-General Bowen observed to similar effect that '[y]our Honour will serve this great Court with distinction' at 25.

²⁶ Interestingly, none of the speakers mentioned Gaudron's teaching experience at The University of Sydney and The University of New South Wales. It is unclear why this aspect of Gaudron's career was overlooked, particularly when Mason and Toohey's teaching roles had been emphasised by Bowen. *Ibid* 9, 17 (Bowen).

²⁷ *Swearing-in Ceremony, Gaudron J*, above n 1, 25 (Bowen).

determination.²⁸ For example, Williams, the final speaker to welcome Gaudron, said this:

Mention has been made since the announcement of your appointment that your Honour has, in the course of a most notable career, achieved a number of firsts or otherwise set records. But these are not simply as being the first woman in this or that position. You were the youngest person appointed as Deputy President of the Conciliation and Arbitration Commission, you were the youngest person appointed as Solicitor-General for New South Wales.²⁹

Bowen, by contrast, merely remarked that Gaudron had been appointed to the Commission '[a]t the age of 31.'³⁰ This comment gained its significance from the knowledge of the assembled audience, comprising predominantly of legal dignitaries, that 31 was a young age for such an appointment.³¹ Through these comments, Bowen and Williams thus distinguished Gaudron positively from her peers and endorsed her legal acumen and status as worthy to serve on the High Court bench.

Despite the congratulatory tones of the welcome addresses to Gaudron, a contemporary aficionado of High Court swearing-in ceremonies may be struck by their relative brevity and reserve. For example, Justice Virginia Bell's High Court swearing-in ceremony of 2009 stands in striking contrast to Gaudron's.³² Each welcome speech to Bell was longer than the combined welcomes to Gaudron. In addition, the 2009 welcome speeches were effusive in their praise and replete with descriptions of Bell's personality and core values, in addition to her legal experience. For instance, John Corcoran, President of the Law Council of Australia, observed that 'given [Bell's] life-long passion for and commitment to the law and social justice, one could not think of a more fitting and able person to sit on the highest court of our land.'³³ In his speech, Attorney-General Robert McClelland also punctuated his remarks with anecdotes drawn from Bell's life outside the law in order to illustrate her sharp analytical mind, sense of humour and her 'long experience with ... ordinary people'.³⁴ In contrast, Gyles, who of the three speakers welcoming Gaudron was alone in referring to the new Justice's disposition, did so without anecdote or elaboration by simply citing her 'lively personality'.³⁵ Again, unlike in Bell's ceremony, Gaudron's life experience beyond

²⁸ See, eg, Transcript of Proceedings, *Swearing-in Ceremony, French CJ* [2008] HCATrans 318 (High Court of Australia, 1 September 2008) (McClelland, Commonwealth Attorney-General).

²⁹ *Swearing-in Ceremony, Gaudron J*, above n 1, 27 (Williams QC).

³⁰ *Ibid* 25 (Bowen).

³¹ This, and other aspects of the welcome speeches discussed below, confirms what Moran has described as the 'central importance' of the audience and the 'framework of their understandings', that is, '[t]he immediate and wider context and the knowledge, history, experience, assumptions and expectations of the audience' in making sense of the objectives shaping the speeches. See Moran, above n 8, 284.

³² Transcript of Proceedings, *Swearing-in Ceremony, Bell J* [2009] HCATrans 4 (3 February 2009).

³³ *Ibid* (Corcoran).

³⁴ *Ibid* (McClelland).

³⁵ *Swearing-in Ceremony, Gaudron J*, above n 1, 26 (Gyles QC). Through this comment, Gyles may, perhaps, have been making an indirect reference to Gaudron's propensity for colourful language. This aspect of her personality had attracted contemporary media commentary, see, eg, Liz Hickson, 'Mary Gaudron Tomboy, Idealist — High Court Judge', *Woman's Day* (Sydney), 22 December 1986, 8. See also, describing Gaudron's 'fine grasp of the vernacular', Burton, above n 15, 48–9.

the law was underplayed. Williams made the only mention of Gaudron's extra-legal life, alluding to the fact that she was the Court's first wife and mother.³⁶ This reference was itself a novel departure from the swearing-in tradition and the meaning of its particular inclusion is explored more fully below.³⁷

The absence of anecdote from Gaudron's welcome speeches is remarkable because the use of this rhetorical technique was not restricted to the Court's most recent ceremonies, but rather was present throughout these occasions before and after 1987.³⁸ Contemporary media coverage indicated that Gaudron's life story provided ample anecdotes with which to pepper a welcome speech. For example, the press had recounted Gaudron's infamous childhood introduction to the *Constitution* during the 1951 'No' referendum campaign.³⁹ Stories of Gaudron's commitment to work, including heavily gendered anecdotes surrounding her balancing of work and family, were also reported.⁴⁰ The comparatively reserved tone present in the welcomes to Gaudron, and the absence of anecdotes that reinforced her difference, thus marked out the ceremonial speeches in style and tone from the contemporary press coverage surrounding her appointment to the Court. Importantly, the tone of the welcomes to Gaudron mirrored the style of address employed by Bowen, Gyles and Williams to each of the three Justices in 1987, thereby symbolically reinforcing her 'sameness' with her colleagues on the bench.

In different ways, however, gender undoubtedly punctuated Bowen's, Gyles' and Williams' welcome speeches to Gaudron. For example, the only speaker not to refer to Gaudron's gender openly, Bowen again relied on the audience's knowledge of Gaudron, and particularly her status as the first woman to join the High Court bench, to give meaning to his remarks. Commencing his address by reflecting on the government's 'great pleasure in being associated with [Gaudron's] appointment,'⁴¹ Bowen later elaborated:

The pleasure which is felt by the Government in being associated with *this* appointment is shared by a great many, including many who are non-lawyers.⁴²

It is possible this pleasure, as distinct from that surrounding the appointments of Mason and Toohey, might have been influenced by Gaudron's ties to the Labor party and strong friendship with her recently deceased and

³⁶ *Swearing-in Ceremony, Gaudron J*, above n 1, 27 (Williams QC).

³⁷ See below text accompanying n 51.

³⁸ See, eg, Byrne's descriptions in 1989 of Michael McHugh's famed memory for cricket statistics (Transcript of Proceedings, *Swearing-in Ceremony, McHugh J*, above n 23, 13 (Byrne QC)) and anecdotes regarding the physical fitness and reading habits of Robert French in the speeches welcoming him as Chief Justice in 2008 (Transcript of Proceedings, *Swearing-in Ceremony, French CJ*, above n 28 (McClelland and Bathurst QC, President of the Australian Bar Association)).

³⁹ See, eg, Hickson, above n 35, and David McKnight, 'A Career of Firsts and Controversy', *The Sydney Morning Herald* (Sydney), 9 December 1986, 19. The anecdote also appeared in coverage of Gaudron's earlier appointments: see, eg, Lenore Nicklin, 'The Law and the Laundry', *The Sydney Morning Herald* (Sydney), 9 April 1974, 7. In her unauthorised biography of Gaudron, Burton utilised this story as the starting point for her narrative; see Burton, above n 15, 1.

⁴⁰ See, eg, Hickson, above n 35 and McKnight, above n 39.

⁴¹ Bowen had, earlier in the ceremony, used near-identical language to welcome Toohey to the bench. *Swearing-in Ceremony, Gaudron J*, above n 1, 18 (Bowen).

⁴² *Ibid* 25 (Bowen) (emphasis added).

controversial predecessor on the High Court, Lionel Murphy.⁴³ However, it seems unlikely that Bowen would have attributed the ‘pleasure ... shared by a *great many*’ Australians to Gaudron’s political connections. Only Gaudron’s gender explains why *this* appointment to the High Court was worthy of a special celebration in the wider Australian community.

As Bowen’s speech continued, he further implied the importance of Gaudron’s gender in her appointment in the following manner:

The High Court is the apex of Australia’s legal system. It is an institution of great, if not fully understood, significance. I trust it will always remain so and *that there will never be any artificial or irrelevant barrier* placed to the appointment of Australian lawyers of great excellence to this Court.⁴⁴

A telling feature of this passage is that Bowen characterised Gaudron’s appointment as a testament to the absence of sex-discrimination in the Australian legal system. This perspective may go some way towards explaining why Bowen’s speech did not list Gaudron’s ‘firsts’ as a woman lawyer. Such a catalogue would have invited questions regarding the existence of ‘barriers’ to women’s advancement in the profession, both prior to and contemporary with his government. Nevertheless, the absence of a reference to Gaudron’s firsts does lead to a striking contrast between Bowen’s speeches to Gaudron and Toohey. While the Commonwealth Attorney-General did not openly celebrate the appointment of the first woman to the High Court bench, he did find space in the formality and brevity of the occasion to highlight that Toohey’s appointment ‘mark[ed] the *first* occasion’⁴⁵ when two Justices from Western Australia sat on the High Court. Gaudron’s remarkable first was marked by implication alone.

The second speaker, Gyles, placed a different emphasis on Gaudron’s gender. In the shortest of the three welcome speeches, Gyles made the following comment:

Your career has been studded with firsts for a woman, but it would be *unduly sexist* of me to list them. Suffice it to say that your record stands on its own in any company.⁴⁶

It is unclear what exact intent stood behind Gyles’ allusion to Gaudron’s gender in this short passage. Like Bowen, Gyles relied on knowledge of the ceremonial audience to complete his speech. On the one hand, by remaining silent on Gaudron’s career accomplishments, this passage may appear to devalue the importance of Gaudron’s pioneering achievements both on a national stage and in her own journey to the High Court. On the other hand, Gyles’ intent may have been to acknowledge her role as a pioneer while avoiding portraying her singularly as a *woman* pioneer, with its easy capacity to accentuate her difference on the

⁴³ For media discussion of Gaudron’s ties to the Labor party and Justice Murphy, see, eg, William West, ‘Gaudron: Controversy is Certain’, *The Australian* (Sydney), 9 December 1986, 13. See also Paul Willoughby, ‘“Awed” High Court Judge Sets her First Precedent’, *The Advertiser* (Adelaide), 7 February 1987, 5. Gaudron had also spoken at Murphy’s memorial service, to great public acclaim. See Burton, above n 15, 247–9.

⁴⁴ *Swearing-in Ceremony, Gaudron J*, above n 1, 25 (Bowen) (emphasis added).

⁴⁵ *Ibid* 17 (Bowen) (emphasis added).

⁴⁶ *Ibid* 26 (Gyles QC) (emphasis added).

bench and to enliven the existing press speculation that gender had been a dominant consideration in her appointment.⁴⁷ On either reading, Gyles remarks thus reflect the wider tensions accompanying women's entry into the upper ranks of the legal profession in Australia in the 1980s.⁴⁸ While the Attorney's speech rejected any suggestion of tokenism, Gyles relied on the audience's interpretation of the phrase 'suffice it to say' and the generally warm tone of the balance of his remarks to provide his views on Gaudron's appointment to the bench.⁴⁹

Of the three speeches, Gaudron's gender was most apparent in Williams' address. Discussing Gaudron's 'predilection for pioneering',⁵⁰ including as the youngest person to be appointed Solicitor-General, Williams observed:

You have achieved another and more obvious first in being the first woman member of the High Court. And that carried with it other consequences consistent with Your Honour's predilection for pioneering. You are the first Justice of the High Court whose children have not addressed you as 'Father'.⁵¹

As mentioned above, Williams was alone at the swearing-in ceremony in identifying Gaudron as a mother.⁵² Read on its own, this might have been a victory for the feminist critique of the private/public distinction, reflecting a view that in order to inform the public about new appointees to the High Court, the judge's broader life experiences, including of their family, must be identified.⁵³ However, as Williams had not mentioned the fact that Mason and Toohey were both fathers,⁵⁴ this does not appear to have been his intent. Williams continued his welcome to Gaudron as follows:

You are, according to my research, the first Justice of the High Court in its more than 80-year-long history who has not had a wife. In this respect, Your

⁴⁷ West, for example, had reported that 'many lawyers' saw Gaudron's appointment to the Court as 'essentially political', an instance of 'cronism', and a consequence of the Labor Government's 'affirmative action program'. See West, above n 43.

⁴⁸ See generally, Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

⁴⁹ On the importance of the audience's assumed knowledge, see further Moran, above n 8, 284. Illustrating his point that 'what is "explicit" for one audience may be "invisible" to another', Moran recounts his experience presenting at an international conference on law and sexualities where that audience was unaware that the 'mullet' hairstyle referred to by Justice Fullerton of the NSW Supreme Court in her swearing-in speech was a common symbol of lesbian identity.

⁵⁰ *Swearing-in Ceremony, Gaudron J*, above n 1, 27 (Williams QC). See further text accompanying n 29 above.

⁵¹ *Ibid* 27 (Williams QC).

⁵² See text accompanying n 36 above. Contrast the media coverage of Gaudron's career which frequently mentioned both her marital status and children. See, eg, Hickson, above n 35 and McKnight, above n 39.

⁵³ See, generally, Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in S I Benn and G F Gaus (eds) *Public and Private in Social Life* (St Martin's Press, 1983) 281. In the context of legal reasoning see Margaret Thornton, 'The Public/Private Dichotomy' (1991) 18 *Journal of Law and Society* 448.

⁵⁴ See 'Mason, Anthony Frank' (2011) 47 *Who's Who in Australia* 1459 and 'Toohey, John Leslie' (2011) 47 *Who's Who in Australia* 2113.

Honour has bravely paved the way for the regular appointment to the Court of bachelors.⁵⁵

In this remarkable passage, Williams first reinforced Gaudron's disruptive influence on the homogeneity of the (male) bench⁵⁶ and then subverted her experience as a woman lawyer and subsumed it into that of the 'benchmark male'⁵⁷ appointee to the bench. Williams' tone, like Gyles', was presumably at least partly ironic, designed to inject humour into the proceedings by parodying Gaudron's publicised firsts as a woman lawyer. For Williams, humour may have provided the means to navigate the complex and politically sensitive issues surrounding the novelty, and historical moment, of Gaudron's appointment to the Court.

III Justice Gaudron's High Court Swearing-in Speech

A swearing-in speech of a High Court Justice is delivered in a setting rich with contradiction. It is a statement made in Court and from the bench and yet has no judicial force. It is a statement made by a judge who is liberated in content and form from the boundaries of a legal dispute and yet constrained by the weight of ritual and convention regarding the appropriate limits of extra-judicial speeches, including ceremonial remarks.⁵⁸ Finally, it is an autobiographical statement, frequently exploring relationships, experiences and values influencing the judge's life journey to the bench, made by a judge who at that moment symbolically replaces personal identity with the dispassionate neutrality of judicial office.⁵⁹

While these features of the swearing-in speech render it unique amongst judicial utterances, the twin exceptional features of the February 1987 ceremony placed additional pressures on Gaudron as she crafted her inaugural speech. First, as the most junior of the three Justices sworn-in that morning, and hence the final speaker, Gaudron would have been mindful to limit the length of her remarks. Second, Gaudron would have been acutely aware that, as the first woman to the High Court bench, all aspects of her performance of that role, including her inaugural address, would be subject to intense scrutiny. Indeed, Gaudron is reported as later reflecting: 'I do not want to be the first and last [woman on the

⁵⁵ *Swearing-in Ceremony, Gaudron J*, above n 1, 27 (Williams QC).

⁵⁶ On the narratives employed to describe the effect of women on the homogeneity of the bench, see Erika Rackley, 'Judicial Diversity, the Woman Judge and Fairy Tale Endings' (2007) 27 *Legal Studies* 74, 76.

⁵⁷ Thornton, above n 48, 2.

⁵⁸ Lindell discusses the issues surrounding extra-judicial commentary by judges, including the risk that such commentary could lead to claims of apprehended bias. See Lindell, above n 15, 'Introduction', 1, 5–8. See also James Thomson, 'Extra-judicial Writings of the Justices' in Blackshield, Coper and Williams, above n 14, 265.

⁵⁹ Within and outside feminist legal analysis, critique abounds of the purported necessity, impossibility and discriminatory implications of a personally non-descript judge to judicial neutrality. See, eg, Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201 and Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours your Judgement' (2008) 15 *International Journal of the Legal Profession* 73.

High Court]. People might say 'we tried a woman once and it did not work'.⁶⁰ It was in this setting that Gaudron delivered her notably concise speech.⁶¹

Gaudron commenced her remarks in a traditional manner, with statements of gratitude to the legal dignitaries for their attendance and support, and to colleagues and family for their assistance on her journey to the Court.⁶² Speaking prior to Gaudron, Toohey had singled out his wife Loma for particular praise in his speech.⁶³ However, Gaudron's choice to extend generalised thanks to the 'families'⁶⁴ in attendance, her own and those of her fellow Judges, ensured that her opening remarks did not accentuate her difference from her judicial predecessors as a wife not husband, mother not father.⁶⁵

In the balance of her speech, Gaudron then explored two themes: her identity as a Justice and judicial method.⁶⁶ In each, Gaudron wove a careful path between two competing objectives. On the one hand, as she had through her tributes, Gaudron's words worked to neutralise the difference between her experiences, identity and values and those of the 'benchmark' male paradigm appointee to the bench, a paradigm visibly manifest by the assembled male colleagues, and predecessors, on the bench. On the other hand, Gaudron confirmed her bold vision of her role as a Justice, including by openly embracing her distinctive role as the Court's first woman Judge.

⁶⁰ Mary Gaudron, quoted in Burton, above n 15, 269. It is unclear from Burton's quotation when, or in what setting, Gaudron made this statement. However, it speaks to Gaudron's sensitivity to the inevitable, albeit unfair, scrutiny of her as a representative of her gender.

⁶¹ Gaudron's speech was brief both within her own ceremony and by contemporary standards. For example, at a mere 670 words Gaudron's speech was approximately two-thirds the length of Chief Justice Mason's 1987 swearing-in speech (1100 words) and less than half that of Justice Virginia Bell's 2009 swearing-in speech (1650 words). Neither Mason nor Bell offered unusually lengthy remarks at their swearing-in ceremonies.

⁶² *Swearing-in Ceremony, Gaudron J*, above n 1, 27–8 (Gaudron J). Sir Anthony Mason also commenced his speech by thanking those in attendance, but did not extend his remarks to thank friends or family on this occasion: at 13 (Mason CJ).

⁶³ *Ibid* 22 (Toohey J); 27–8 (Gaudron J).

⁶⁴ *Ibid* 28 (Gaudron J).

⁶⁵ Moran has observed a similar phenomenon in speeches made by gay and lesbian Justices, where acknowledgments to family are in general terms rather than identifying the sex of their male or female partner by using a name. On these references, and how this practice has changed over time, see Moran, above n 8, 282.

⁶⁶ Many judges have chosen to limit their remarks principally to statements of gratitude and esteem for colleagues and mentors, rather than to engage in legal or social commentary 'at large'. See, for example, Transcript of Proceedings, *Swearing-in Ceremony, Dawson J* (High Court of Australia, 16 August 1982) and Transcript of Proceedings, *Swearing-in Ceremony, Heydon J* (High Court of Australia, 11 February 2003). This choice is itself revealing of the new judge's understanding of the appropriate role of a High Court Justice at a swearing-in ceremony. Mapping the relationships listed by the judges in their speeches is also valuable biographically and historically, shedding light on the judge's life and career and the relationships of influence within the upper ranks of the Australian legal profession.

IV Gaudron's Vision of Herself as a Judge

Gaudron chose to commence and conclude her swearing-in speech with an emphatic statement of sameness with her male colleagues on the bench. After her words of thanks, she began her substantive reflections by remarking:

Because I believe that too often we emphasise difference at the expense of common cause, I would wish that the day had arrived when the appointment of a woman to this Court was unremarkable.⁶⁷

Gaudron then ended her speech with the following words:

I shall do my very best to discharge my judicial duties, to effectuate what I conceive to be immutable judicial obligation, and to uphold the standards of this Court, and *in so doing I hope to be and, to be perceived to be, simply one of seven* doing their collective best to uphold the law and the institutions of the law.⁶⁸

As the first woman Justice of the High Court, speculation regarding how gender might influence Gaudron's approach to the judicial function was to be expected. Carol Gilligan's *In a Different Voice* had been published five years prior to Gaudron's appointment,⁶⁹ and laid the foundation for questions about the difference gender might make in judging.⁷⁰ In addition, the Australian press had touted Gaudron as a determined upholder of 'women's rights',⁷¹ and as a prominent member of the Women Lawyers' Association.⁷² Against this background, by declaring in her swearing-in speech that she wished '*to be and, to be perceived to be, simply one of seven*' Gaudron made an important affirmation of her shared judicial identity with her (male) colleagues and commitment to traditional judicial values.

Among these statements downplaying her difference on the bench, however, Gaudron offered the following observations:

⁶⁷ *Swearing-in Ceremony, Gaudron J*, above n 1, 28 (Gaudron J).

⁶⁸ *Ibid* 29 (emphasis added).

⁶⁹ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

⁷⁰ Published within a year of Gaudron's appointment to the Court, see Suzanna Sherry 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543, and the ground-breaking work by Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987). Published after Gaudron's swearing-in, the first woman to join the Supreme Court of Canada, Bertha Wilson, also reflected on this issue in a much discussed paper, 'Will Women Judges Really make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507. For a more recent perspective on the debate surrounding whether women judges make a 'difference' see Erika Rackley, 'Detailing Judicial Difference' (2009) 17 *Feminist Legal Studies* 11, 13–16. On the questions regarding feminist judges making a difference, see references below n 76.

⁷¹ See, eg, Hickson, above n 35. For an earlier use of this phrase in connection with Gaudron see Janet Hawley, 'Mary Gaudron's Brilliant Career', *The Age* (Melbourne), 10 May 1980, 17.

⁷² McKnight observed that Gaudron had taken a 'leading role' in the Women Lawyers' Association from the outset of her legal career, 'expressing a commitment to the advancement of women that has remained', McKnight, above n 39. In 1972, Watts had also quoted Gaudron as saying that the NSW Women Lawyers' Association was a 'pretty militant body'. Barrie Watts, 'Merciless Mary Cuts the Bigwigs to Size', *The Australian* (Sydney), 12 December 1972, 3.

Whilst I am the first woman appointed to this Court, my appointment is the result of the courage, determination and professionalism of women who made their mark in the profession in days when the value of women's contribution had to be established.

Of the many women lawyers who were instrumental in advancing the status of women within the legal profession, Dame Roma Mitchell's contribution merits particular acknowledgement. I am particularly honoured by her presence here today. My constitutional duty is to all Australians but I hope that consistent with and by reason of the discharge of that responsibility, I shall be able to contribute as effectively to the status of women lawyers as has Dame Roma.⁷³

The multi-layered gender references in this passage broke new ground for High Court swearing-in speeches. Most obviously, Gaudron spoke from the bench not simply *in* a woman's voice, but *as* a woman judge, explicitly recognising her gendered identity and how that differentiated her from her male colleagues on the bench.⁷⁴ To date Gaudron remains the only High Court Justice to have embraced an identity as a female judge in her swearing-in speech. By paying homage to Dame Roma Mitchell, Gaudron also affirmed that women's roles in the Australian legal system extended beyond that of the (frequently unnamed) wife/mother thanked by the incoming judge in *his* speech. Further, in contrast to Bowen's speech, Gaudron openly acknowledged women's experiences of discrimination in the Australian legal profession. Finally, Gaudron articulated her desire to 'contribute' to the status of women lawyers in Australia. Although framed in general terms, this sentiment was bold for its era. Indeed as Gaudron herself later recalled, her role as mentor initially met with resistance from her colleagues on the bench.⁷⁵

However, the selection of words and grammar in this passage also appears to confine Gaudron's feminist leanings. For example, Gaudron's use of the past tense when acknowledging the 'courage' of the first women lawyers, worked to distance the struggle of these early pioneers from the suggestion of a continuing struggle for professional suffrage. As the only woman officially recorded as attending the 1987 ceremony, in a courtroom replete with the current and past, male, leaders of the Australian legal profession, it is unlikely that Gaudron would have believed that barriers to women's professional success had been removed. Rather, Gaudron appears to have phrased this aspect of her speech to distance her audience from any hint of complicity in a gender-bias in the legal profession.

⁷³ *Swearing-in Ceremony, Gaudron J*, above n 1, 28 (Gaudron J). Dame Roma Mitchell's achievements as a trailblazing woman lawyer included: first female QC, first female Supreme Court Justice, and first female State Governor. See generally Susan Magarey and Kerry Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2007).

⁷⁴ For a discussion of the High Court swearing-in speeches of Justices Crennan, Kiefel and Bell, and how these judges silenced their female voice in these speeches, but, interestingly, not on other ceremonial occasions, see Roberts, above n 12.

⁷⁵ Mary Gaudron, 'Speech to Launch Australian Women Lawyers' (1998) 72 *Australian Law Journal* 119, 121. In this speech, Gaudron recalled the shocked and critical response from her High Court brethren in 1989 when she informed them of her agreement to speak to a gathering of women lawyers in Perth. However, she indicated that her colleagues' criticisms were short-lived. While in Perth, the bench's scheduled dinner was at an exclusive 'men only' club, which granted Gaudron the dispensation of 'honorary man' for the evening. Gaudron declined the invitation on principle. See further discussion in Burton, above n 15, 270.

Further, in her speech Gaudron also carefully restricted her remarks to a role in advancing the cause of women *lawyers*, rather than Australian women at large. This language implies that Gaudron differentiated between her role as a mentor in a purely extra-judicial sense and the use of her judicial power, through her decisions, to assist women. Given the debates surrounding whether women judges would, or should, decide cases differently and whether ‘feminist’ judging was consistent with judicial impartiality,⁷⁶ it is understandable that Gaudron narrowed the purchase for criticism of her remarks on this basis, particularly in her first, ceremonial, speech. Indeed, although not facing the heightened scrutiny and controversy that welcomed Gaudron’s appointment to the bench, only moments before Gaudron’s speech, John Toohey reflected on the value of new Justices adopting a circumspect approach to their ceremonial speeches:

I make no promises and give no undertakings in regard to the years ahead. However modestly such forecasts are couched, they have a habit of coming back to haunt the speaker.⁷⁷

Gaudron’s speech thus navigated the competing tensions surrounding her appointment as the first woman on the High Court by softening her references to gender in these ways, and by sandwiching these remarks between statements emphasising her commitment to her common identity as a judge.

V Gaudron’s Understanding of Judicial Method

While Gaudron’s discussion of gender in the legal profession was a first for a High Court swearing-in speech, her second theme, judicial method, was a familiar topic for these occasions. In addition to Sir Owen’s famous allusion to ‘strict and complete legalism’ in his 1952 swearing-in speech,⁷⁸ Gaudron’s colleagues Sir Gerard Brennan, Michael McHugh and Michael Kirby, for example, each selected this topic for their inaugural speeches.⁷⁹ Sir Anthony Mason, only moments before Gaudron’s speech, also used the ceremony to discuss principles of legal reasoning.⁸⁰ Through this choice of the familiar, Gaudron thus positioned her speech within the dominant tradition of the

⁷⁶ See references above n 70; Rosemary Hunter, ‘Can Feminist Judges Make a Difference?’ (2008) 15 *International Journal of the Legal Profession* 7; Rosemary Hunter, ‘An Account of Feminist Judging’ in Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 30.

⁷⁷ *Swearing-in Ceremony, Gaudron J*, above n 1, 22 (Toohey J). See also, Toohey’s view that ‘the more you speak outside the Court, the more vulnerable you are regarding judgments’, quoted in Brown, above n 15, 279.

⁷⁸ *Swearing-in of Sir Owen Dixon as Chief Justice*, above n 13, xiv.

⁷⁹ See, Transcript of Proceedings, *Swearing-in Ceremony, Brennan J* (High Court of Australia, 12 February 1981) 14 (Brennan J); Transcript of Proceedings, *Swearing-in Ceremony, McHugh J*, above n 23, 16–17 (McHugh J).

⁸⁰ *Swearing-in Ceremony, Gaudron J*, above n 1, 14–15 (Mason CJ), discussed in text accompanying n 93 below. Toohey, perhaps heeding his own caution regarding ‘promises’ in a swearing-in speech (see above text accompanying n 77), eschewed legal method as a topic on this occasion. Instead, he framed his speech in terms of his personal experience of laymen’s interaction with the law and the need for law and lawyers being intelligible to this broader community audience. See *Swearing-in Ceremony, Gaudron J*, above n 1, 22–3 (Toohey J).

swearing-in ritual. In its content and tone, however, her speech blended traditional principles of legal reasoning with a reformer's critical perspective.

In her succinct style, Gaudron's views on judicial reasoning were contained in the following three paragraphs:

The dominant jurisprudential traditions of western society, based on the understanding of legal rights and responsibilities implicit in legal positivism, have in recent times been the subject of critical academic legal analysis in Australia and in other areas of the English speaking world. This is hardly surprising when borne in mind that its acknowledged founder, Jeremy Bentham, dismissed the idea of a natural right even to liberty as 'terrorist talk' and 'nonsense on stilts'.

Of course, the law has changed since the time of Jeremy Bentham, and so too have people's expectations of it. Social, political, technological and economic changes have placed added demands on the law, and have also given impetus to new patterns of jurisprudential thought and requirement for the critical evaluation of conventional judicial method.

Whatever be the long term implications of that evaluation, three things will, I believe, remain inevitably unchanged: the need for rigorous and dispassionate intellectual analysis; the obligation to ensure equality before and under the law, and the obligation to ensure that justice is done in accordance with the law.⁸¹

Although understandably brief and general in nature, this passage stamped Gaudron as a judge with sympathies towards legal realism and progressive forms of interpretation.

As Gaudron acknowledged, by the 1980s critiques of 'traditional' theories of legal reasoning based on the idea that law was merely 'found' and not constructed by judges were gaining momentum in Australia.⁸² For example, within the judiciary, Murphy J had been a vociferous champion of a critical evaluation of the law and legal reasoning.⁸³ Less controversial judges, including Brennan in his swearing-in speech as a puisne Justice in 1981, had also recognised the inevitability of judicial law-making within the High Court's function, and the appropriate role of policy in that process.⁸⁴ In academic circles, Gaudron's former teacher Professor Julius Stone, in his influential work, *The Province and Function of Law*, had refuted the then dominant tradition of legal positivism decades earlier, arguing instead that appellate judges faced 'leeways of choice' in their decision-

⁸¹ *Swearing-in Ceremony, Gaudron J*, above n 1, 28–9 (Gaudron J).

⁸² For an overview of legalism and realism in Australian academic and judicial history see Brian Galligan and Peter Russell, 'The Politicisation of the Judiciary in Australia and Canada' (1995) 67(2) *The Australian Quarterly* 85.

⁸³ On Murphy's jurisprudence, and its reception by the broader Australian legal community, see Michael Coper and George Williams (eds) *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) and John Williams 'Murphy, Lionel Keith' in Blackshield et al, above n 14, 484.

⁸⁴ Transcript of Proceedings, *Swearing-in Ceremony, Brennan J* (High Court of Australia, 12 February 1981) 14 (Brennan J). In September 1987, then Justice of the New South Wales Court of Appeal Michael McHugh had also offered extended extra-judicial commentary on this theme, in papers later published as 'The law-making function of the judicial process. Part 1' (1988) 62 *Australian Law Journal* 15 and 'The law-making function of the judicial process. Part 2' (1988) 62 *Australian Law Journal* 116.

making.⁸⁵ The writings of feminist legal academics in the 1980s, such as Catharine MacKinnon in the United States and Margaret Thornton, Regina Graycar and Jenny Morgan in Australia, also challenged ‘traditional’ theories of legal reasoning.⁸⁶ Whether as counsel in the *Equal Pay Case*,⁸⁷ as Deputy President of the Arbitration Commission, or as a student and lecturer at the Universities of Sydney and New South Wales respectively, Gaudron would have been exposed to ‘critical academic legal analysis’ of this nature.⁸⁸ Although Gaudron did not elaborate on what a ‘critical’ evaluation of the law encompassed in this speech, these phrases clearly opened up her judicial method to non-traditional perspectives on law and legal reasoning.⁸⁹

It is true that Gaudron also ensured that her approach was firmly embedded within the heartland principles of the Australian legal tradition. Her invocation of the three ‘unchanged’ components in judicial analysis in her speech, embodying the fundamental commitment to the rule of law, recalled the key tenets of the judicial oath taken by the three new Justices at this ceremony.⁹⁰ Positioned in the penultimate passage of her speech and followed by her statement of her desire ‘to be, and to be perceived to be simply one of seven’,⁹¹ Gaudron’s confirmation of these principles, like her choice of judicial method as a theme for her speech, connected her to the more conservative paradigms of judicial philosophy and the established norms of the ceremonial speech.

A close reading of this passage, however, also reveals a bold and innovative thread in Gaudron’s perspective on judicial method. The distinctiveness of her remarks, even in the context of that day’s proceedings, emerges clearly by comparing her speech with Sir Anthony Mason’s discussion of judicial method in his swearing-in speech as the Court’s new Chief Justice.⁹² Mason observed:

Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair. In discharging that obligation judges do not exercise

⁸⁵ Julius Stone, *The Province and Function of Law* (Associated General Publications, 1946). On the significance of Stone’s contribution to theories of judging, see further, Anthony R Blackshield, ‘The Legacy of Julius Stone’ (1997) 20 *University of New South Wales Law Journal* 215.

⁸⁶ For an assessment of the prolific feminist scholarship contemporary to Gaudron’s speech, see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (The Federation Press, 1st ed, 1990).

⁸⁷ *National Wage and Equal Pay Cases* (1972) 174 CAR 172. Gaudron appeared as counsel for the Commonwealth.

⁸⁸ A decade after her swearing-in speech, in her launch of Australian Women Lawyers, Gaudron paid tribute to the contribution of these and other feminist legal academics and legal theorists. Gaudron, above n 75, 123.

⁸⁹ The contributions to the collection honouring Gaudron published in (2004) 15 *Public Law Review* provide illustrations of Gaudron’s later application of a distinctive ‘critical’ perspective in her High Court judgments. See also, Burton, above n 15, especially ch 17.

⁹⁰ Judges swear, or affirm, to ‘do right to all manner of people, according to law, without fear or favour, affection or ill-will’. See *Swearing-in Ceremony, Gaudron J*, above n 1, 28 (Gaudron J, taking the affirmation of office).

⁹¹ See text accompanying n 68 above.

⁹² Michael McHugh’s articles published in 1988 provide a different comparator of roughly the same era from a (future) colleague on the High Court. Like Mason CJ’s speech, these articles display McHugh’s openness to judicial law-making and the limits to those powers. See McHugh, above n 84. See also McHugh’s remarks on judicial choice in constitutional cases. Transcript of Proceedings, *Swearing-in Ceremony, McHugh J*, above n 23, 16 (McHugh J).

unlimited freedom of choice or the freedom of choice that is inherent in the legislative and political process. ... [E]ven in those cases where the rules in question are common law or judge-made rules, judicial freedom of choice is restrained by our efforts to ensure that judicial development of the law, though responding dynamically to the needs of society, is principled, orderly and evolutionary in character. There is an expectation that the rules by which conduct is to be judged should be reasonably ascertainable or predictable, as well as yielding just and fair results.⁹³

Although both Mason and Gaudron recognised the need for limits on judicial innovation, in tone and substance these limits accounted for a far greater proportion of Mason's speech.⁹⁴ In addition, in contrast to Gaudron, although Mason recognised that in its common law jurisdiction the Court paid 'closer attention' to 'academic writings', including those from outside Australia,⁹⁵ Mason did not place a significant emphasis on the role of critique, be it '*critical* academic legal analysis' or a '*critical* evaluation of the law'.

That Mason crafted a more cautious, restrained portrait of legal method and the Court's role in his swearing-in speech as Chief Justice is not altogether surprising. Historically, the speeches of new Chief Justices of the High Court have tended to place greater emphasis on the Court's history as an institution while puisne Justices have more readily allowed their individual judicial personalities to emerge from their swearing-in speeches. In addition, the Court in 1987 had undergone significant changes in composition, while the passing of the *Australia Acts*, and the implementation of the Court's special leave procedure, opened a new era in the Court's control over the development of Australian law.⁹⁶ In this context, the tenor of Mason's remarks appears directed towards reassuring the legal community that Australia was not at the brink of a legal and judicial 'revolution'.⁹⁷

Gaudron was not charged with speaking as the new leader of the Australian judiciary; rather, she faced the narrower task of framing herself as a new Justice, albeit the Court's first female Justice. What a comparison of these speeches demonstrates, however, is that in substance and tone Gaudron cast herself as more open to legal change and innovation than her new Chief. While Gaudron appeared to temper these tendencies later in her speech by returning to the three 'unchanged' principles of legal reasoning, and by affirming her desire to be perceived as 'simply one of seven' on the bench, her explicit endorsement of a 'critical'

⁹³ *Swearing-in Ceremony, Gaudron J*, above n 1, 14 (Mason CJ).

⁹⁴ In addition to this passage, Mason also emphasised the significant differences between the roles of the Australian High Court and the United States Supreme Court by virtue of the absence of a Bill of Rights in Australia. *Ibid* 15 (Mason CJ).

⁹⁵ *Ibid* 14 (Mason CJ).

⁹⁶ On the impacts of these events, see, the 'Australia Acts' and 'Leave to Appeal' entries in Blackshield, Coper and Williams, above n 14, 43, 425. Sir Anthony was also the first Chief Justice sworn-in after the Court had weathered the controversies of the 'Murphy Affair'. See further: at 486.

⁹⁷ Although, the Mason Court period has been characterised as effecting such change. See, eg, the title of Pierce's work, above n 4. Interestingly, Professor Lindell in his 'Introduction' to Sir Anthony Mason's collected extra-judicial speeches has reflected that in this body of work Mason did not cast himself as an 'innovator', although Mason was 'keen to emphasise the inevitability of change in the development of all major areas of the law and how the law — especially judge-made law — should respond to that change'. Lindell opined that this approach was 'very likely ... almost certainly due to the constraints of judicial office.' Lindell, above n 15, 2–4.

evaluation in law-making nevertheless carved a distinctive and progressive profile for this new judge.

VI Conclusion

The morning after Mary Gaudron's swearing-in, Paul Willoughby for *The West Australian* reported that 'an 82 year-old tradition died yesterday when Justice Mary Gaudron became the first woman to take the bench of the High Court.'⁹⁸ Willoughby's reference to the life and death of tradition, although intended as a dramatic flourish, points to a tension underlying Gaudron's swearing-in ceremony. Given the potential for the High Court's first woman judge to invite claims of the 'end of tradition', the question of how the speakers at her ceremony were to adapt the conventional forms of swearing-in ritual to the novelty of the first woman High Court Justice was particularly poignant.

In the welcome speeches to Gaudron, the traditional words of congratulation and praise were followed by statements employing irony, parody, humour, and the implicit knowledge of the audience to mark and also to manage the visible and symbolic impact of Gaudron's gender difference on the homogeneity of the High Court bench. For Gaudron, her inaugural speech presented an opportunity to frame her identity as both a legal thinker and symbolic figure. She did so in terms that carefully balanced the competing values of tradition and distinctiveness in her appointment. Through the subtle and dramatic differences and continuities with the traditional form of the swearing-in ceremony, the speeches at this High Court ritual offer a fascinating window into the intricate articulations and negotiations of institutional and gender politics within High Court and the Australian legal system.

This article has used Mary Gaudron's swearing-in ceremony as Justice of the High Court as a vehicle to mark the 25th anniversary of an important moment in Australian legal history. However, its purpose has also been to demonstrate that, far from being empty rituals, swearing-in ceremonies are a unique site for scholarly analysis. Gaudron's ceremony demonstrates the wealth of valuable legal and biographical commentary provided on these occasions by, and about, new members of the bench. Such insights are not confined to the 'famous' appointees to the Court; future research into the now 109-year tradition of High Court swearing-in rituals, and of the swearing-in ceremonies of other Australian courts, promises to provide further insight into the institutional values and social history of law in Australia.

⁹⁸ Paul Willoughby, 'Mary Gaudron — First Among Equals', *The West Australian* (Perth), 7 February 1987, 6.