

The Difference Even One Woman Makes on an Appellate Bench

By Stephanie B. Goldberg

If Elena Kagan is confirmed as a Supreme Court justice, three of the nine justices will be women. It's an unprecedented event for the nation's highest court, causing pundits to speculate whether women will have gained "critical mass" on the Court so that it is no longer perceived as a male institution.

Yet appearances can be deceiving. According to the National Women's Law Center (NWLC) in Washington, D.C., women account for only 29 percent of the 161 active judges on the federal courts of appeal. Many circuits are "vastly underrepresented," the NWLC reports. The Eighth Circuit has only one woman judge, Diana E. Murphy, who is the first woman appointed to that circuit. Other

circuits singled out by the NWLC for their low percentages of women on the bench are the Tenth Circuit (18 percent), the Third Circuit (21 percent), and the Fourth and Eleventh Circuits (25 percent each).

The Difference Theory

There is a broad consensus among scholars, bar groups, and centrist politicians that it's important to have women on the bench as role models and to lend diversity of experience. However, the proposition that women will decide cases differently than men on the basis of their life experience is a prickly one. Former Justice Sandra Day O'Connor told a women's magazine in 1981, "Yes, I will bring the understanding of a woman to

the Court, but I doubt that alone will affect my decisions. I think the important thing about my appointment is not that I will decide cases as a woman, but that I am a woman who will get to decide cases."

In her book *The Majesty of the Law*, O'Connor summed it up succinctly: "The power I exert on the court depends on the power of my arguments, not on my gender."

Justice Ruth Bader Ginsburg, a lifetime opponent of special treatment for women, was equally uncomfortable with the so-called difference theory, which builds on the work of linguistic scholar Carol Gilligan and holds that women tend to prize relationships, context, and an "ethic of caring."

In a 2009 interview with the *New York Times*, Justice Ginsburg expressed her skepticism of empirical legal studies suggesting that women judges exert a particular influence on the bench. "I certainly know that there are women in federal courts with whom I disagree just as strongly as I disagree with any man. I guess I have some resistance to that kind of survey because it's what I was arguing against in the '70s. Like in Mozart's opera *Così fan Tutte*: that's the way women are."

Yet even she conceded that her life experience as a woman may have helped educate her fellow justices to hold in *Safford v. Redding* (2009) that a strip search by school authorities of a 13-year-old girl, suspected of having ibuprofen, violated her constitutional rights. "I think it makes people stop and think," she told the *New York Times*, "maybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male justices] first thought of their own reaction. It came out in various questions. You change your clothes in the gym, what's the big deal?"

The Impact of Gender

A growing body of research suggests that women exert a pattern of influence on their male colleagues and may exhibit differential voting practices in cases dealing with

sexual harassment and other types of employment discrimination. But the scholars in the field of empirical legal studies are cautious about generalizing from their results—for example, they will not assume that what may hold true in sexual harassment cases extends to other areas of the law.

As a student at Yale Law School in 2005, Jennifer Peresie examined 556 sex discrimination and harassment federal appellate decisions from 1999 to 2001. Peresie found that when a woman judge was part of the panel, plaintiffs won their claims 34 percent of the time compared to 17 percent with an all-male panel. When two women judges sat on the panel, the figure jumped to a 43 percent likelihood of winning.

Peresie hypothesized that male judges accorded women judges a measure of deference in this area and also may have voted with them in the hopes of winning concessions later on. Another interpretation was that having women on the panel moderated male behavior, regardless of how the women voted. Her conclusion was that women judges mattered, not simply for appearances' sake but in how cases were decided.

Peresie's study was among the first to show the impact of gender. Other studies were inconclusive because of failures in design, too few women judges in a sample, or a failure to compensate for ideology.

In 2008, Washington University's Christina L. Boyd and Andrew D. Martin and Northwestern University School of Law's Lee Epstein analyzed the outcomes of a variety of claims from 1995 to 2002. Again, the most striking evidence of gender impact was in sex discrimination claims. They found male judges were 10 percent more likely to rule against plaintiffs in these cases but were 15 percent more likely to rule in their favor when a woman judge was part of the panel.

In addition, the authors state that the findings are consistent with an "informational" view of judging—that the life experience of women judges regarding discrimination is viewed as a valuable type of knowledge and is accorded respect by their male

colleagues. Likewise, in areas in which a woman's life experience is irrelevant or identical to that of her male colleagues, the gender impact will be imperceptible. As Epstein summed it up, the results show that "women have an effect on the law, but it's a small effect because sex discrimination is a small part of what courts do."

In a way, these findings represent a middle ground between "difference feminists" and those who deny that women bring a different viewpoint to the law. How relevant is it to jurisdictions like the Eighth Circuit, where the fight has waged for the last five years to increase the number of women on the bench?

The Omega Project

University of Minnesota professor Debra Fitzpatrick, interim director of the Center on Women and Public Policy, makes it clear that the struggle will rage on regardless. The center spearheaded the Omega Project as a means of educating the public and legislators on the need for more women on the appellate bench. According to Fitzpatrick, the project employs a multi-pronged approach of grooming and counseling women interested in public service, assembling lists of qualified women, and keeping the pressure on.

"We're working all the way back to law schools to get younger women engaged from the get-go," says Fitzpatrick, pointing out that Elena Kagan targeted the goal of sitting on the Supreme Court as an undergraduate. "We're thinking about the pipeline and the long-term foundational work so that when a nomination is open, no one can make the case that there aren't any qualified women."

Instead of positioning gender balance on the appellate bench as a women's issue, there's awareness that the dearth of women is an embarrassment. "We're the worst," Fitzpatrick sighs, "the absolute worst." ❗

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The Gender Gap in Federal and State Courts

The Center for Women in Government & Civil Society at the Rockefeller College of Public Affairs & Policy at the State University of New York (SUNY)—Albany recently issued a comprehensive report on the representation of women in federal- and state-level judgeships. The report, which analyzed quantitative data from a variety of sources, concludes that the under-representation of women "cannot be attributed to the lack of women who are qualified to serve on the bench, but to the lack of opportunity and access afforded to women."

Findings include the following statistics:

- Women occupy only 22 percent of all federal judgeships and 26 percent of all state judgeships.
- At the federal level, only New Jersey and Connecticut achieved 33 percent representation. Women account for 10 percent or less of the judges in eight states. No women hold judgeships in the Montana and New Hampshire federal courts.
- No women serve on the U.S. district or magistrate benches of the U.S. Northern District of New York despite a pool of 359 female judges in New York state courts.
- Women are also absent from the U.S. bankruptcy courts for the districts of Alaska, Hawaii, Idaho, Indiana, Iowa, Maine, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, South Dakota, Vermont, Virginia, and West Virginia.
- The picture is somewhat brighter at the state level, where women hold at least 33 percent of the judgeships in eight states. Yet in 13 states, women hold 20 percent or less of all judgeships. There are no women judges on the supreme courts of Idaho, Indiana, and Mississippi; or on the Alaska Court of Appeals.

Source: "A Report of the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York," Spring 2010, www.albany.edu/womeningov/judgeships_report_final_web.pdf.