

CRITICAL PERSPECTIVES ON GENDER AND POLITICS

Critical Perspectives on Gender and Judging

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I began to write this essay as confirmation hearings opened for President Barack Obama's nominee for the U.S. Supreme Court, Judge Sonia Sotomayor, and long before he nominated Elena Kagan. The nominations have made the gender and ethnic identities of judges and senators alike salient. In their opening statements, senators burst with pride about a great country where anyone can achieve anything, regardless of gender, class, or ethnicity, while some equated empathy with prejudice and difference with partiality. In a *New York Times Magazine* interview the Sunday before, Justice Ruth Bader Ginsburg stressed the importance of more women on the bench (Bazelon 2009). Opponents' carefully orchestrated media attacks against Sotomayor, arguing that she lacked judicial temperament (too mean) and was racist, came straight from the misogynist playbook well thumbed from Hillary Clinton's presidential campaign.¹ I share Nancy Maveety's disappointment that the hearings squelched, rather than explored, the questions of what Martha Minow (1987) has so aptly named "the dilemma of difference"—how women can be both equal to and different from men—and the nature of judging, which has to do with how one's social location and life experiences inevitably shape judgment. The dullness of the actual hearings stood in sharp contrast to the euphoria in the Latino community where many sported the latest fashion: "Wise Latina Woman" T-shirts, dispelling any doubt about the symbolic importance of such appointments.

1. See Women's Media Center's "Media Justice for Sotomayor," <http://womensmediacenter.com/wordpress/?p=857>, last accessed July 29, 2009. See also Women's Media Center's video "Sexism Sells But We're Not Buying" on the media's treatment of Hillary http://www.womensmediacenter.com/sexism_sells.html, last accessed July 29, 2009. See also the *Politics & Gender* 5 (1) 2009 article by Susan J. Carroll, as well as the Critical Perspectives section on Race and Gender in the 2008 Democratic Presidential Nominations Process.

Whether we call our field feminist public law or gender and judicial behavior, we have felt marginalized within the discipline and the subfields of both women and politics and law and courts. Review essays on women and politics, textbooks, and even the editorial boards of our journals tend to include law and courts as, at best, an afterthought or leave it out altogether. The flurry of attention over such rare events as the nomination of a woman to the U.S. Supreme Court or a conference on the 200th anniversary of women and the constitution (1988 in Atlanta) punctuates the silence of the routine absence of a gender analysis of our third branch of government. Many political science departments lack a faculty member who studies either gender or public law. Studies of women in Congress and congressional elections dominate the subfield of women and politics, just as the U.S. Supreme Court attracts more researchers than state courts (for an exception, see Melinda Gann Hall's work). Despite the fact that most states elect their judges,² most political scientists ignore judicial races, just as most feminist groups that seek to expand women's political power (such as Emily's List) do not endorse women for judicial races. Instead, groups like the White House Project focus the lion's share of their efforts on legislative offices.

Worldwide, quotas have caused the largest boost to women's legislative representation. Valerie Hoekstra encourages scholars who study legislative quotas to also consider new proposals for judicial quotas, as well as consider, as Margaret Williams and Frank C. Thames (2008) do, whether quotas in one sphere make it more likely that they will win support in another. Louise Chappell examines one gender quota's effectiveness at securing a majority of women on the International Criminal Court. Both seek to bring a focus on judicial institutions to women and politics debates.

State judicial races now exhibit all of the pathologies of campaigns for other offices. They require vast sums of money, candidates face negative television advertisements that distort their records, and voters, challengers, and the media presume women and minority men to be less competent than white men. Two Supreme Court decisions, *Republican Party of Minnesota v. White* (2002), which held that states may no longer restrict judges from announcing their views on political issues, and *Caperton v. Massey* (2009), which held that judges must recuse themselves from cases when one of the parties makes a substantial financial contribution to one of the sitting judges, have drawn attention

2. Neither elective nor appointive systems generate a more gender diverse judiciary (Kenney N.d.).

to problems brewing with state judicial elections. The two most recent elections for the Wisconsin Supreme Court and the confirmation stalemates in the U.S. Senate of the last three administrations demonstrate a politicization of the state and federal selection process unlikely to disappear anytime soon.

If judicial selection is becoming more contested at local, state, and federal levels, so, too, are courts becoming more powerful and important both in other countries and at the international level. Worldwide, national polities from France to Russia to Hungary to Argentina are transferring more power to courts, as are supranational organizations such as the European Union (European Court of Justice), the World Trade Organization, the Organization of American States (Inter-American Court of Human Rights), the Council of Europe (European Court of Human Rights), and the United Nations (International Criminal Court and tribunals on the former Yugoslavia and Rwanda). A gender analysis of judging should encompass not just state and local courts as well as federal ones, but also courts in other countries and at the international level.

After nearly 30 years in the profession, I am heartened to see younger American politics scholars examining state judicial races (Rachel Caufield, Mahlia Reddick, Traciel Reid, Margaret Williams), as well as international relations scholars looking at gender issues on international courts (Louise Chappell, Rachel Cichowski) and judicial scholars looking at the gender composition of international courts (Williams and Thames 2008). Comparativists, too, have discovered courts and law (Hilbink 2009), if not always gender.³ Treating the study of law and courts as a subfield of American politics makes even less sense than ever. Democratization, devolution, new constitutions, and constitutional reform of judicial selection have provided gender scholars an opportunity to apply their scholarly knowledge to public policy as Peter Russell did in Ontario (1990), Fiona Mackay (2005) and Alan Paterson have done in Scotland, and Kate Malleson and Hazel Genn have done in England.⁴ Trenchant analyses do not appear exclusively in scholarly

3. It seems that a focus on gender is sufficient to get one ejected from the field of comparative public law. Some political scientists think that scholarship cannot be about both gender and something else, whether that something is public law, public policy, or comparative politics. In compiling a list of all the books on comparative public law, for example, C. Neil Tate (2002, 6) expressly omitted both Susan Sterett's book and mine because they were on "sociological topics where those sociological topics do not have to do with the behavior of courts and judges and their relations with government." Charles Epp (1998), whose study similarly examined interest group sex discrimination litigation presumably avoided this fate by being a man.

journals, but also in governmental and NGO reports and even documentary films (see political scientist Ruth Cowan's (2008) film, *Courting Justice*, about women in the South African judiciary).

Many political scientists, such as Jilda Aliotta, Beverly Blair Cook, Nancy Crowe, Sue Davis, Susan Haire, Bert Kritzer, Elaine Martin, and Donald Songer, have examined the question of whether women judges decide cases differently from men. Contrary to the literature on women in legislatures, with the occasional exception of some sex discrimination and divorce cases (Boyd, Epstein, and Martin 2010; Martin with Pyle 2005; Peresie 2005), they mostly find no effect (Kenney 2008). Yet the search continues for the essential dichotomous sex difference. When a group of us congressional fellows met with Justice Sandra Day O'Connor in 1987, the *University of Virginia Law Review* had just published a controversial piece arguing that O'Connor decided cases with a distinctly feminine voice. Her essential female nature led her, ostensibly, to pay more attention to facts rather than deductively apply legal precedent. One fellow (Jacqueline Stevens) asked Justice O'Connor if the claim were true. A chagrined Justice O'Connor asked rhetorically what judge would not consider the facts before her and dismissed the point. She has concluded that "there is simply no empirical evidence that gender differences lead to discernible differences in rendering judgment" (p. 191; see also Lithwick, 2009). She quipped, "I would guess that my colleagues on the Court would be as surprised as I am by these conclusions" (O'Connor 2003, 191. Justice Ginsburg, who, unlike Justice O'Connor calls herself a feminist (Soloman 2009), said this of such studies:

I am very doubtful about those kinds of [results]. 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 "Cosi Fan Tutte": that's the way women are. (Bazon 2009, 22)

Feminist theory demands that we listen to women and, as scholars, take seriously the perspectives of the objects of our studies (Chamallas 2003). While not determinative, feminist and nonfeminist women judges' hostility to this essential difference frame of reference should give us

4. We have a long tradition of scholars using their expertise for social change, from Beverly Blair Cook and Norma Winkler advocating for women on the bench to Marianne Githens serving on Maryland's judicial nominating commission (1995) to those of us who have worked with state and federal gender fairness task forces.

pause, as should the repeated failure to unearth the essential dichotomous difference across jurisdiction, issue, and time. But perhaps more importantly, such questions do not exhaust the relevance of gender as a category of analysis to thinking about gender and judging, and these essays display a wider array of the use of gender as an analytical category. The essays in this section all take an antiessentialist approach to thinking about gender difference and explore gender as a social process, rather than merely sex as a variable. Like the writers in this section, Justices O'Connor and Ginsburg reject the "different voice" argument but remain adamant that gender matters and we need more women on the bench.

Beverly Blair Cook was the first woman political scientist to study women judges (Epstein 1996; Epstein and Mather 2003; Kenney 2008; Mather 1994), and her work merits rereading today for the depth of her feminist sensibility, as well as her methodological creativity. Karen O'Connor followed quickly thereafter, as did Jilda Aliotta, Elaine Martin, Sue Davis, Mary Volcansek, and later Nancy Maveety, Barbara Palmer, Barbara Perry, and myself. A much larger group — Judith Baer, Gail Binion, Lee Epstein, Lesley Goldstein, Christine Harrington, Lynn Mather, and Susan Mezey—expanded the gender analysis to the field of public law more generally.

Political scientists are asking important questions about gender and judging. Kathleen Bratton and Rorie Spill Solberg analyzed whether nominators are more likely to appoint women to courts where such an appointment replaces a woman or is the first woman appointment (2001, 2002, and 2005). Williams explored whether a gender gap in political ambition exists for women judicial as well as legislative candidates (2008), and whether women take a different path than men to judicial office (2006). Maveety considers the role that women judges play in mentoring women law clerks and encouraging other women to be judges. Karen O'Connor and Alixandra Yanus consider further how women, in all their diversity, influence decision making other than deciding cases differently.

Now that political science, and even the subfield of public law, enjoy larger numbers of gender scholars, it is easy to slip into the trap of writing only for one another and other political scientists. Yet scholars in sociology, anthropology, law, and history are studying gender and judging, too, mostly without any connection with feminist political science. The Collaborative Research Network on Gender and Justice of the Law & Society Association is a network of more than 130 scholars

from more than 17 countries and has been in operation for four years.⁵ Our work could benefit enormously, not only from scholars in other subfields such as international relations and comparative politics studying gender and judging, but also from the interdisciplinarity example that Beverly Blair Cook established for this work.

American Political Science Association President Robert Putnam called on political scientists to deploy their knowledge for the good of the polity (2003). The APSA Taskforce on Inequality and Democracy was part of an answer to that call. Second-wave feminism drew heavily on the leadership and expertise of women academics who served on Commissions on the Status of Women or, like sociologist Norma Winkler, who advised the gender bias task force and judicial education movements (as did Karen O'Connor in Georgia). Unfortunately, more recent feminist endeavors, from electing women to office to changing policy, benefit less from the synergies of working with academics. With a few noble exceptions, we have retreated to separate spheres and do not know one another, let alone interact or work together. As just one example, a few years ago, Celinda Lake, perhaps the leading feminist pollster, and who had done graduate work in Political Science from the University of Michigan, confided that she had never heard of the journal *Women & Politics*, as we discussed what research we might fund that would help elect more women to office in Minnesota.

Those of us who understand law, courts, judging, and judicial selection have a special obligation to speak to the issues of the day. Who is sounding the alarm that only 22% of President George W. Bush's appointments to the federal bench were women compared to 28% of President Bill Clinton's (Diascro and Spill Solberg 2009, 292)? Who is protesting that Idaho and Indiana's supreme courts no longer have even one woman justice? NARAL Pro-Choice America, Planned Parenthood, and Legal Momentum (formerly the National Organization for Women Legal and Education Fund) follow judicial races closely for nominees' positions on feminist issues, most importantly reproductive rights, but neither groups of women lawyers, women judges, nor groups aiming to recruit women to public office are trumpeting the importance of increasing the number of women in the judiciary. We need to contribute not just our expertise but our leadership, our clout, and our labor to projects such as the

5. http://blog.lib.umn.edu/kenne030/genderandjudging/about_the_blog/. See the recent special issues of *Feminist Legal Studies* and *The International Journal of the Legal Profession*. Ulrike Schultz and Gisella Shaw are editing the papers from the 2009 Oñati conference that Hart will publish in 2010.

Infinity Project's efforts to secure the appointment of women to the U.S. Eighth Circuit Court of Appeals (see <http://www.theinfinityproject.org>).

Recent experimental evidence from psychology shows that both men and women rate women leaders capable but not likable for exactly the same attributes that lead men to be regarded as capable and likable. People seem to recoil from ambition in women, but not in men. Some senators and the media's treatment of Sotomayor displayed two features that feminist scholars have long analyzed. First, she was treated as "the other," in this case many intersecting categories of otherness. She was regarded as a Puerto Rican working-class woman impaired by partiality and bias unlike white men who are vested with impartiality, neutrality, and objectivity.

Second, women judges suffer from a double standard of judicial behavior. Women earn disapproval for behaviors (even if much less severe) that pass unnoticed in men. Critics charged Sotomayor with being a mean interrupting bully — yet analysis showed her to interrupt no more than her current colleagues, and though she asked sharp questions in oral arguments, her tone was much more respectful and less sarcastic than that of Justices John Roberts and Antonin Scalia. National Public Radio's Nina Totenberg's (2009) exposure of this double standard in her response to Jeffrey Rosen (2009) shows the important lesson of Tali Mendelberg's (2001) work. We must name bias as the first step to eliminating its effect. The essays in this section all demonstrate the centrality of a gender analysis to an understanding of judging.

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Judging Alone: Reflections on the Importance of Women on the Court

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"The word I would use to describe my position on the bench is lonely." So said Justice Ruth Bader Ginsburg in 2007, when asked to comment on her position on the U.S. Supreme Court after the resignation of Justice Sandra Day O'Connor.¹ After a year as the Court's only woman, Ginsburg had begun to feel the solitude that comes from judging alone, being the Court's only descriptive and often symbolic representative of women's interests. Ginsburg's position was not, sadly, as rare as we might hope in industrialized democracies. Although some countries, such as Canada, have had near majorities of women on their respective high courts, other countries, such as the United Kingdom, continue to have only one woman on their national tribunals.

This essay reflects upon how the "loneliness" articulated by Justice Ginsburg affects policy outcomes and reflects the institutionalized nature of sexism within the federal judiciary. We argue that although there is no persuasive evidence for a "woman's judicial voice," the representation of diverse women judges on our nation's courts has powerful implications for public policy favorable to women. Moreover, and perhaps more importantly, we argue that having multiple women judges on a court may be important for socialization and collegiality. We urge future

1. Joan Biskupic, "Ginsburg Lonely Without O'Connor," *USA Today*, 15 January 2007.