

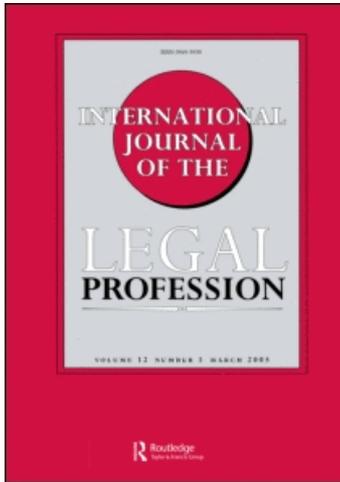
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International Journal of the Legal Profession

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title-content=t713426078>

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Online Publication Date: 01 March 2008

To cite this Article Kenney, Sally J.(2008)'Thinking about gender and judging',International Journal of the Legal Profession,15:1,87 — 110

To link to this Article: DOI: 10.1080/09695950802461837

URL: <http://dx.doi.org/10.1080/09695950802461837>

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Thinking about gender and judging

SALLY J. KENNEY

ABSTRACT *Reviewing the work of three political scientists who studied women judges provides an opportunity for rethinking the concept of gender and how to do gender-based research. Scholarship on women judges sometimes veers toward an essentialist view of women and gender differences, despite empirical evidence to the contrary. A close reading of this early work reveals some essentialist missteps but also offers strong examples of research across many methodologies that should serve as exemplars for current research across disciplines. If we move beyond the question of whether women decide cases differently from men, using sex as a variable, like other gender-based research strategies, can provide useful feminist insights.*

1. Introduction

How should we think about gender differences in ways that are theoretically sophisticated, empirically true, and do not lead to women's disadvantage? Political scientists who study women judges have been grappling with this problem for 30 years. Carefully examining the body of work of three pioneering scholars, Beverly Blair Cook, Elaine Martin and Sue Davis, yields insights beyond the particular subject matter and helps us to understand sex and gender more generally. Legal academics, sociologists, historians, and other scholars are increasingly studying gender and judging across jurisdictions and legal systems (Schultz & Shaw, 2003). Yet rarely does that work incorporate the insights of political scientists—a pity since political scientists advance gender theory, apply social science research methods, and understand judicial selection as a political process. Overlooking this early relevant work contributes to two problems in contemporary research. First, although she frequently functions as a straw woman, educational psychologist Carol Gilligan's work as applied to the question of whether women judges reason in a different voice has come to define *the* feminist approach to gender and judging and hampers our ability to theorise effectively about difference. Second, this dominance worsens rather than recedes over time. As new scholars take up questions of gender and

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judging, rather than build on their predecessors, many fall into the same predictable trap of essentialism. Even some of the later work of the three scholars I consider in depth falls into essentialism. Therefore, this essay argues that the earliest work in the field offers insights that repay careful consideration.

In this essay, I review the work of Beverly Blair Cook, Elaine Martin and Sue Davis. These three scholars are exemplary in at least four ways relevant to contemporary scholars. They theorise gender as a social process rather than treat sex as an essential difference. They investigate sex differences empirically rather than assume them. They treat women as a varied group and see feminism as something women (as well as some men) espouse to different degrees (if at all). They investigate gender beyond the question of whether women judges decide cases differently from men. Their work spans different research methods. My analysis is not confined to one approach; rather, I shall show how each methodological approach can illuminate the production of gender. Similarly, scholars have produced deeply flawed work within each method. I begin by defining my concepts of sex and gender and discuss sex as a variable. I then examine scholarship that treats sex as a variable: first, women judges in the political opportunity structure, second, judges' attitudes as inputs to decisions, and third, sex differences in judicial decisions, in general, in cases on sex discrimination, and in cases of divorce.

2. Sex and gender

Sex, meaning biological sex differences, has dropped from the lexicon, in favour of gender, making the distinction more confused than ever. Most feminists now theorise gender as a social process rather than an essential dichotomous difference, and use the word as both an adjective—gendered—as well as a verb. While gender differentiation is ubiquitous, which activities or attributes become the basis of differentiation vary, even within different groups (classes or races) of the same society at the same time, as well as across time and cultures. Gender differentiation thus does not flow inevitably from sex differences; rather it is the process by which we attach meaning to sex differences, most often to devalue whatever society associates with women (Chamallas, 2003). We must explore the construction of and asserted content of gender differences empirically rather than assume them (Kenney, 1996). Using gender to mean a sex binary may distort and conceal as much as it illuminates. Scientists have shown repeatedly that women differ as much from other women as they do from men, whether the attribute is strength, mathematical reasoning ability, or the ability to calm toddlers. The categories are overlapping bell curves not two non-intersecting wholes. Regardless of this fact, even though studies often find no differences, scholars continue to look for them and assume they are merely masked rather than address squarely what these inconsistent findings mean for gender theory.

3. Sex as a variable

Although postmodernism leads feminists to be sceptical of binaries such as male and female, not all attempts to use sex as a variable are misguided. Evidence does occasionally show differences worthy of feminists' attention. In some cases we are

right to question the sample size from which a sex difference is declared. Findings based on a few trial judges in Wisconsin, a few women agonising over abortion in Massachusetts, or even all judges in Michigan at one point in time do not prove essential sex differences. The problem is not the finding, but the meanings attached to it. If we abandoned the search for the essential sex difference that persists across time and place, we might be able to say some more interesting things about gender differences with empirical support. Rather than discovering an essentially different voice, we might uncover tendencies particular to a cohort. Why is it, for example, that we can generalise about baby boomers, or the approach of German judges on the International Court of Human Rights or European Court of Justice, in ways that do not lead to the same sort of essentialising we see when we find sex differences? If we could find a way to talk about tendencies and overlaps—if sex were one variable among many—feminist scholars might not have to be so worried about essentialism.

Besides the dangers of overgeneralisation that lead to claims of a false dichotomy, such research may wrongly claim sex to be the explanation when sex masks other determinants. President Carter, for example, appointed more judges to the federal bench than all other presidents combined and a higher percentage of women judges than any other president until President Clinton. If one finds sex differences among federal judges, it may merely be an artefact of the appointing president. But if one avoids this second pitfall by controlling for party, ideology, even such things as experience as a prosecutor versus experience as a public defender, then one is left with the concept of sex as a residual variable. Such an approach is at odds with a growing tendency to think of gender intersectionally within feminist theory.¹ Identity categories work in many intersecting ways that are patterned if not true for all members of the group. Not all black women think alike, but black women lawyers who went to law school in the 1970s were likely to have had many common experiences. By stripping away class, race, sexual orientation, to drill down to the core of what constitutes sex differences, one inevitably approaches sex as a biological category (one that feminists reject) instead of gender as a social process, a process that is intersectional, not just something that happens to women who are otherwise privileged. If using sex as a variable has a number of limitations, it also has great utility for feminist scholars when done well.

3.1. *Women judges in the political opportunity structure*

Unfortunately, comparisons between men and women continue to expose unfairness. Such an approach has radical implications for thinking about merit and the best process for choosing judges. By comparing the treatment of women lawyers considered (or not) for judgeships, and studying women's progress (or lack thereof) up the hierarchy, we can document differential treatment because of sex, the doctrinally simplest form of sex discrimination which, unfortunately, remains pervasive. The first political scientist to study women judges was Beverly Blair Cook and she did so at a time when women in political science, as well as research on gender, were both unwelcome. Although Cook came from a strong judicial behaviour background,² her use of sex as a variable is not reductive; she explored gender as a social process.

In her 1980 chapter, “Political Culture and Selection of Women Judges in Trial Courts”, Cook laid a foundation for future scholars by identifying every woman who has ever served as a judge on state or federal courts in the United States. Cook wrestled with how to think about the position of these women she will come to call tokens. Anticipating feminist standpoint theory, she recognised feminist consciousness does not flow inevitably from women’s experience (1980b, 49) and that women who do operate in the world of men may not be advocates for women or even themselves. As she considered the obstacles to feminist consciousness and advocacy, Cook implicitly assumed that women’s difference exists and would have an impact but for these systemic barriers. She would later look for evidence of these hypothesised latent differences empirically.

Before she did so, Cook sought to explain the variation in the number of women in different jurisdictions. Some states had no women judges while California had 20. Differences in state subcultures provided some explanatory power for these differences. She found the size of the court mattered enormously but the method of selection did not. In an earlier study, Cook documented women’s exclusion from higher prestige courts, and the efforts of judges to shunt women into special jurisdictional courts dealing with family and juvenile law (1978b). How many women should we expect to be serving on the bench given the pool of eligibles, assuming no discrimination? Between 1920 and 1970, states varied as to whether 1 or 5% of lawyers were women and 1–10% of trial court judges were women. She hypothesised that as the number of eligible women increases, we might expect the number of women judges to increase.

Cook traced the 12 chances Florence Allen—the first woman on the Ohio Supreme Court and the first woman on any federal appeals court and the only woman on a federal appeals court for 32 years (she sat on the Sixth Circuit)—had to be appointed to the US Supreme Court (1980a). Cook effectively documented Allen’s exclusion from the group of insiders most eligible for appointment: close friends of the president, champions of the New Deal (particularly Roosevelt’s court-packing plan), and senators. As the social movement that produced suffrage waned and elites turned against unmarried women partnered with other women, such as Florence Allen (Faderman, 2000), homophobia may also have played a role (Organ, 1998, pp. 228, 242). In 1982, Cook compared Florence Allen’s 12 unsuccessful attempts to reach the Supreme Court to the process that yielded the first woman Supreme Court justice, Sandra Day O’Connor. Cook set their credentials against other Supreme Court justices and found elite education, politically active and connected families, and comfort if not affluence in both Allen and O’Connor’s background, as in nearly all of the justices. Noting that only eight of 101 male justices were unmarried, Cook contrasted Allen’s unmarried status (without remarking on her two lengthy partnerships with women) with O’Connor’s marriage, three children, and break from work when her children were small, making her life experiences closer to the experience of most American women than Allen’s and therefore more acceptable to her appointing authorities. Cook plotted women’s groups’ first involvement in the process in recommending three women candidates for the Arthur Goldberg vacancy. The first formal project to place women on the federal bench was the National Women’s Political Caucus’s project which began in 1977. Cook showed

how the American Bar Association's Standing Committee's evaluations of potential women nominees thwarted women's progress and echoed the views of many, such as Chief Justice Burger, that no qualified woman existed. When President Reagan gave the committee O'Connor's name in 1980, the committee had reluctantly accepted the viability of women candidates and had its first woman member, who also became the chair.

In her 1984 article entitled "Women Judges: A Preface to Their History", Cook argued that only when three factors have been achieved will women's numbers rise: an increase in the number of judicial positions to be filled, an increase in the numbers of eligible women, and an increase in the number of gatekeepers positively inclined to give women fair consideration, although she also recognised the importance of the pressure exerted by a strong feminist movement. Cook ultimately rejected the 'trickle up' argument: that women will automatically increase their numbers on the bench as their numbers in the legal profession rise. Instead, she carefully documented the factors that thwart women's proportional representation. A significant finding was that the larger the size of the court, whether they are superior and municipal courts as a whole, federal appellate courts, or state supreme courts, the greater the likelihood of a woman member. She documented the admission of women to the bar, their progress, the number of women Supreme Court clerks and law professors, noting the importance of serving as a clerk or working in a prestigious law firm for being on the fast track for high judicial office. She also documented the interval between a state's admission of women to the bar and appointment of women to the state trial court supreme court (104 years for Iowa, which admitted the first woman to the bar, 110 years for Missouri, which took the longest, the average being 50). Vital gatekeepers, such as the law professors who suggest law clerks to Supreme Court justices, do not recommend women in proportion to their increasing numbers.

Although her earlier findings found women appointed proportionate to their representation in the legal profession, by 1984, Cook found a disparity between the numbers of women judges we might expect based on the number of women lawyers of 50%, and found the transition from non-attorney to attorney judges to have reduced the proportion of women serving. She traced the career paths of women judges. Contrary to her earlier finding that the method of selection did not affect the proportion of women judges, Cook found women more likely to find a place on the bench through appointment rather than election and that having women on appointing panels increases the number of women chosen. Women have the best chance of serving on a state bench in a large state with an elective system, strong party organisations, and weak interest groups, under Democratic Party hegemony. Political scientists will continue to explore whether the type of selection system affects the numbers of women selected (Alozie, 1996; Cook, 1988; Bratton & Spill, 2002).

After Beverly Blair Cook, Elaine Martin is the political scientist with the most sustained body of work on women judges. Like Cook, she used sex as a variable to see if presidents use different criteria for choosing men and women judges. In 1982, Martin explored the disparate impact³ of using the criterion of being well known by senior judges as the basis for choosing judges. Her survey found that 43% of the women felt that they would not have been considered under the previous

system rather than merit selection because they lacked the political influence and credentials. Carter was looking for women with a profound commitment to 'equal justice under the law' and 90% of the women he appointed had accepted pro bono work or worked for legal aid, and 90% had shown a demonstrable commitment to feminism. If Carter's women judges behaved differently than men once on the bench, it might well be because he carefully chose them from among feminists rather than because of either an essential female difference or from having experienced life as a woman. Martin may not be prepared to second the National Women's Political Caucus's researcher Ness's claim that the American Bar Association (ABA) blatantly discriminated against women and minority men by giving them lower scores when they presented identical credentials, but she did consider a second example of disparate impact: how the ABA's criteria of valuing large firm experience made it nearly impossible for women to pass muster because large firms refused to hire women attorneys. Rather than emphasise women's difference as a claim to their presence on the bench, Martin suggested that if we use objective criteria of merit, women are more deserving than the men Carter appointed. By de-emphasising political connections, Carter's merit commissions let the women candidates' stronger academic credentials emerge. Moreover, Martin suggested that circuit nominating commissions imposed a standard of judicial experience on women but not men candidates because they were skittish about women's abilities. President Reagan placed little priority on diversity but continued to employ a gender double standard. He required women but not men to have had either judicial or prosecutorial experience. Moreover, all of the politically active women appointed by Reagan were active at the national level, in national Republican politics, or presidential or senatorial campaigns (Martin, 1987, p. 140). Martin suggested that women may have had to meet a stronger ideological test than men.⁴ She showed the value of using sex as a variable. Comparing men and women provided a basis for rethinking our notions of merit—academic excellence, or knowing a Senator? Is large firm experience perhaps more relevant for the prospective trial judge and judicial experience more relevant for the appellate judge? Interrogating existing standards may expose misogyny by laying bare double standards. Lastly, Martin gave us insight into where a different voice might come from if we find it empirically, and to expect it to be transitory and variable.

According to Martin (2004b), Bush (41)'s⁵ record of appointing women improved upon Reagan's and even Carter's, although his interest in appointing women occurred only after the Clarence Thomas hearings, and half of these appointments date from the year he ran unsuccessfully for re-election. Moreover, he mostly elevated women Reagan had appointed, rather than expanded the number of women overall serving on the federal bench. President Bush, therefore, only after the Thomas confirmation, like candidate Reagan before him, perceived an electoral advantage in appointing more women to the federal bench. (Reagan had promised to appoint a woman to the US Supreme Court.) White men were a minority of Clinton's appointments and Clinton's judicial selection team included many women.

Martin's findings were supported and elaborated by other studies. Scherer (2005) showed that Clinton appointed the largest number of women and the largest percentage of women to the bench of any president. Women nominees,

however, were more likely to run into trouble with the Republican-controlled Senate. Although diverse, Clinton's appointees were ideologically moderate and indistinguishable in their votes from Bush (41)'s judges. Clinton's women appointees were more likely than men to be sitting judges and less likely to come from private firms. More women, however, now have experience as prosecutors, particularly in the US Attorney's offices, a traditional pipeline to the bench. Presidents seem to hold women to a higher standard of experience either as a judge or a prosecutor than men. Studies by Citizens for Independent Courts showed that the Senate took five months to take action on Clinton's male appointees, while they took eight months to take action on Clinton's female and minority appointees (Biskupic, 2000).

Williams (2007) examined gender and ambition for judicial office among Texas lawyers. Although she found fewer women in her sample declaring ambition for judicial office, she found women more likely than men to express ambition after controlling for other factors. Jensen and Martinek (2007) examined how women candidates fared in judicial elections, finding women, but especially Republican women, to be more successful than men. Githens's 1995 study as a participant observer on the Maryland judicial nominating commission, however, showed the importance of thinking of gender as a social process even as we simply compare the standards imposed on men versus women. Ambition is a social construction, not an inherent sex trait that boys or girls either have or lack at birth; rather it is nourished in some and discouraged in others—nourished, in fact, through the very social processes such as how judicial nominating commissions treat applicants (Lawless & Fox, 2005). Githens demonstrated that the Maryland judicial nominating commission treated men and women with aspirations for the bench differently. Commissioners perceived women as 'uppity' for seeking to rise above their station. Conversely, commissioners regarded men who applied for judgeships as lacking in ambition since judgeships paid far less than practice in a large firm.

3.2. *Sex differences as inputs and the cause of hypothetical outputs*

Once a sufficient number of women were on the bench to study, research on the barriers to women's full equality in securing judicial office receded and the question of how decisions of women judges differed from those of men came to dominate. In 1981, Cook surveyed the 170 women sitting on state courts, and a comparative sample of men. She hypothesised that women as a group would be more feminist than men on women's rights cases. Yet from the very beginning, she eschewed an essentialist approach. Cook dismissed what she called the biological model "that women will exhibit a different style of decision-making and emphasize different substantive goals compatible with certain intrinsic characteristics of the sex" (1981, p. 216), arguing that such a model—the precursor to the different voice—poses no challenge to the existing order of women's separate spheres. Rejecting both models, Cook embraced a socialisation model and added a feminist political philosophy: because women experience sexism and discrimination, "male authorities do not feel for or act for women's interests, and women authorities largely do" (1981, p. 217), a finding Patricia Yancey Martin *et al.* (2002) would later refer to as the feminist standpoint.

Cook identified judges by sex, party, and ideology, asked them whether they considered themselves feminist or supportive of the women's movement, and then asked them a couple of hypothetical questions (1981). Cook found gender gaps on each measure. She then administered two hypothetical questions and asked judges to assume that the law would support a decision for either party. One is about temporary alimony for a woman custodial parent to acquire an education, the other for a married mother to be able to change her name to her maiden name despite her husband's disapproval. Cook found consensus on the hypothetical case on alimony; but she also established that attitude and feminism but not sex and party predicted judges' behaviour on the second hypothetical case about name change.

As soon as enough women were on the federal bench to compare, Elaine Martin (1987) demonstrated the significant differences among them. Presidents Carter and Reagan both imposed extra requirements on their women appointees that they did not impose on men, albeit different ones. Carter wanted evidence of a commitment to equal justice under law; Reagan wanted either judicial or prosecutorial experience as well as evidence of involvement in Republican politics. The two groups were in closest agreement as to whether there should be a woman on the Supreme Court (100% Carter women judges/85% Reagan women judges). The gap between the two widened in their support for women in public office, and grew widest (95% to 37.5%) in their positive support for the women's movement. Martin showed that not all women judges think alike. By having previously exposed the gendered selection mechanisms, Martin showed why we might expect greater differences between Carter and Reagan women appointees than between Carter and Reagan men appointees.

In the same study, Martin also surveyed women judges attending the 1986 annual meeting of the National Association of Women Judges and compared them to a sample of men judges (1989). She modified Cook's protocol, but asked questions that allowed her to plot the gender ideology of judges and then analysed whether that led to differences in answers on increasing the number of women judges, on women judges' behaviour, on perceptions of gender bias in the courts, and on hypothetical cases that raised gender issues from battered women, to divorce, to abortion. On the important question of whether men's view of women is affected positively by the presence of women judges, men feminists were most strongly in agreement. On the next two questions, on whether women have a unique perspective and the bench does not reflect society without women members, gender, led by women feminists, showed the strongest agreement, followed by women non-feminists, then men feminists, then men non-feminists. Women judges, however, virulently disagreed about the difference gender makes. Women judges, feminists and non-feminists, were more likely than men feminists to agree with statements that women judges behaved differently from men, that they have an ability to bring people together, and that they face special problems in the justice system. Feminism, however, was more important than gender in predicting whether judges agreed with the statement that "judges sometimes treat women attorneys, witnesses or litigants in demeaning, condescending or unprofessional ways".

Martin's study had many methodological limitations. Her sample was not representative, we might question whether her scale revealed meaningful differences,

she did not control for other potentially important variables, and she dealt with self-reported opinions and hypothetical cases rather than actual behaviour. Nevertheless, Martin made several important contributions. First, like Cook, she did not assume that sex is a proxy for feminism but investigated when gender produces attitudinal differences empirically. She did not treat gender as a simple dichotomy, but recognised the presence of feminist men, who may differ little from feminist women, and non-feminist women, who seem to differ less than we might think from feminist women and more than we might expect from non-feminist men. Yet her work took an essentialist turn when she condensed it for publication in a reader on women and politics under the heading the “unique contribution of women judges” (Martin, 1993, p. 178). Martin showed that feminist ideology may well be more important than gender in predicting different votes in hypothetical cases, yet treated feminism as dichotomous. The presentation of the work illustrates a recurring problem: the way feminist ideology transmorphs into sex differences and a gender continuum becomes dichotomous sex differences.

In a 1991 conference paper, Martin criticised legal academics’ importation of Gilligan and Ruddick as a way of talking about hypothesised differences from the outset, instead of examining the question empirically. Martin surveyed women state and local court judges sitting on the bench in 1987 regarding their views of their representational role and the difference women make. They overwhelmingly rejected the view Martin labels token, that is the view that because of their high visibility, women judges should be more cautious than men in breaking with tradition. The highest agreement was with the statement that we need more women judges because the bench without women does not reflect the total fabric of society (85%). Fewer, but an overwhelming majority, agreed with the view that “women have certain unique perspectives and life experiences different from men that ought to be represented on the bench” (80%). Fewer still (62%) responded that women judges are probably more sensitive to claimants raising issues of sexual discrimination than are men. The biggest divisions among women, however, were with what she labels voice: that women judges have an ability in the decision-making process to bring people together in a way that men don’t. The largest group (40%) disagreed with this statement, 30% agreed and 30% were neutral.

More recently, sociologist Patricia Yancey Martin examined Florida judges and found that “compared with men judges and attorneys, women judges and attorneys were more conscious of gender inequality, observed more gender bias in legal settings, and showed a stronger connection between experiences with gender bias and feminist consciousness” (Martin *et al.*, 2002, p. 669). Drawing on feminist standpoint theory, however, Martin *et al.* argue that feminist consciousness is a political achievement, not an automatic consequence of being a woman or experiencing life as a woman. Women observed more gender bias dynamics, and were more likely than men to agree with a variety of feminist principles ranging from property division post-divorce, to rejecting rape myths and negative stereotypes about domestic violence. The findings held across race. While not making claims directly for outputs, Martin *et al.* argued that the presence of women judges will make the legal system more objective, more legitimate in the eyes of women claimants, and help all judges raise their consciousness on these issues.

3.3. *Decisions as outputs*

The first study of the effects of women judges found no differences between men and women in their sentencing behaviour, even in rape cases, nor evidence that the gender of the judge interacted with the gender of the defendant (Kritzer & Uhlman, 1977; Palmer, 2001). Later analysis of the same data confirmed that although men and women judges did not differ in their overall sentencing behaviour, women judges were twice as likely as men judges to send women to jail (Gruhl *et al.*, 1981). Women judges, more so than men, treated men and women defendants similarly. Illustrative of the complex and often paradoxical way we think about gender, Kritzer and Uhlman had hypothesised that women would fear crime more than men and therefore would be tougher on criminals, particularly rapists. Gruhl *et al.*, however, hypothesised that women would be more lenient. Perhaps the most important finding, however, was buried in a footnote where Gruhl *et al.* noted that in their miniscule sample of seven, from which they were trying to determine whether sex determines sentencing behaviour, “for all three dependent variables there are more differences among the seven women judges than between the men and women judges” (1981, p. 314). Once sex was introduced into the equation as a variable, however, gender became a dichotomous difference.

In 1983, Gottschall compared the voting of Carter appointees on the Court of Appeals over a two-year period to see if they were liberal activists, as critics charged. He found Carter’s appointees to be similar to those of other Democratic administrations and different from Republican appointees. In order to look for gender effects, Gottschall only compared white women to white men, displaying the view of gender as a residual variable, that which is not confounded by other factors, rather than understanding gender intersectionally. He found little difference between men and women on rights of accused and prisoners and some differences for race and sex discrimination cases, with the caveat that he analysed only 19 votes cast by women. Another study of federal district judges found male judges to be more liberal and women more likely to defer to government (Walker & Barrow, 1985). It found no significant differences between male and female US District Court judges on issues of women’s rights or criminal policy. Women judges, however, were more likely to uphold government regulation and less likely to support personal liberty claims. Allen and Wall’s (1987) study showed that four out of five women on four state Supreme Courts were the court’s most liberal members.

Sue Davis’s study of judges on the Ninth Circuit Court of Appeals (1992–93) was grounded in feminist theory. She acknowledged the critiques of Gilligan as well as the ways in which scholars often misread or misinterpret her work (Kenney, 1995). Recognising that finding a different, female, or feminine voice in one woman jurist hardly proves anything about the category of women, Davis searched for evidence of the different voice by pairing the women judges on the Ninth Circuit with their most similar men—men appointed by the same president, similar in education and background and at a similar location on the liberal–conservative spectrum. Davis’s different voice looks more like a feminist voice than does Gilligan’s. For Davis, the different voice is one that asks about gender; it considers

the impact of the challenged practice on women. Such a voice recognises a role for the state in protecting members of the community and in valuing connection. Perhaps most controversially, the different voice eschews bright-line legal rules in lieu of pragmatism and contextual reasoning. Davis looked at equal protection and civil rights cases. She found many of the elements of the different voice in the cases she examined, but little evidence of gender differences between paired men and women, let alone a dichotomy. She concluded with agnosticism as to whether Gilligan was wrong altogether, as applied to the judiciary, or whether the sort of women who become federal judges are the sort of women who think like men. Paradoxically, her findings did not lead her to a strong criticism of Gilligan, or to reject the different voice as a way to frame gender and judging. Instead, she leaves us with the possibility that the wrong sort of women serve on the bench (too manly?) or that the male system overpowers the feminist voice.

Davis's study offered the important insight that both men and women used feminist tools of analysis in their reasoning in landmark equal protection cases out of the Ninth Circuit. Moreover, this reasoning looked a lot like other kinds of legal reasoning. What's fair? Who is disadvantaged by this rule? Who is left out of the picture by this abstraction? Whose perspective and labour is valued? Whose is devalued? Which citizens do the police protect, and which do they scorn as provoking and therefore deserving their own beatings? Some of the judges (in one case a man) fail to see the injustice in sex discrimination, but there are men who do see it, and all of the women do. Both men and women judges occasionally struggle to do justice rather than strictly follow rules, and other judges criticise them vigorously in their opinions for results oriented decisions. Davis found that whether one approached sex discrimination law as a feminist matters—it determines outcomes in important cases. Women and some men employed feminist tools of analysis. The feminist mode of reasoning is neither foreign to legal reasoning, nor inherent in women's bodies. Davis took a step forward in empirically showing that while women are likely to apply a feminist analysis of equal protection cases, some, but not all, men do too. In the end, however, she retreated from an anti-essentialist view of gender and questioned whether women judges could give full expression to either their full femininity or feminism, suggesting that only "the right sort of women"—women who accepted the yoke of the law—would be appointed in the first place.

In a subsequent study, Davis *et al.* (1993; see also Songer *et al.*, 1994) expanded the exploration of the different voice from the Ninth Circuit to the entire Court of Appeals and beyond equal treatment cases to cases on criminal procedural and obscenity. Where her matched pairs showed little difference on the Ninth Circuit, Davis *et al.* found women judges on the Court of Appeals as a whole more likely than their male colleagues to support claimants in sex discrimination cases (63–46%), and more likely than their colleagues to support the defendants in search and seizure cases (17.7–10.9%), although they found no significant differences in obscenity cases. The difference narrowed somewhat but persisted when they compared women appointed by Democratic presidents to men in employment discrimination cases, and disappeared between Republican-appointed men and women. Nor did they find differences when they factored the party of the appointing president into her analysis of search and seizure cases.

Davis and colleagues laboured to apply Gilligan whereas one might think her previous study would lead her in the opposite direction. She first interpreted the finding that women seem more likely than their male colleagues to see the harm of sex discrimination as consistent with an ethic of care that gives weight to the harm of community exclusion. Although they cited harsh critics of the Gilligan approach (Epstein, 1988), they were non-committal about what their findings show. The first alternative they considered was that the psychological and legal theories of difference were wrong. Women could support claimants in sex discrimination cases because they have experienced discrimination directly, or have encountered gender-based obstacles in their lives, or have affinity with those who have. Alternatively, perhaps the difference is not evident in a vote? They noted that to the extent they found women speaking in a different voice on the Ninth Circuit, men did too. The third possibility they considered was that law crushes the different voice, and women, as newcomers, cannot withstand law's hostility to an ethic of care. Lastly, women of the generation who are likely to be judges might either have had the ethic of care stamped out of them, or they might have been especially chosen for judicial office because they lacked this supposedly essential gender trait in the first place.

Calling for further study, Davis *et al.* ended by pointing out that until women's different approaches to legal reasoning are welcomed in the study of law, we will not really know whether women have a distinctive impact on the legal system. Implicit in their conclusion was the assumption that women are different, and we just have not been clever enough to uncover that difference empirically; alternatively, that the power of law has suppressed the difference, despite the contradictory evidence that differences were fleeting, a function of partisanship or liberalness, and despite the strong evidence that Davis found in her close textual analysis of the Ninth Circuit that men were asking the woman question and using feminist modes of analysis too. Missed was the opportunity to point out how tricky it is to operationalise Gilligan and marry a gender analysis to an ethic of care.

By 1994, Songer *et al.* equated feminist legal scholarship with the Gilligan position of difference. Gone was the thoughtful asking the woman question of the early Ninth Circuit work. Still they found little evidence of the different voice. Employing a predictive model, they found gender to add nothing to the predictive power in either obscenity cases or in search and seizure cases. As predicted, presidential appointment effects were strong. The gender of judges, however, was strongly related to the probability of a liberal vote in job discrimination cases (38% probability for men, 75% for women). They recognised that women could be more attentive to discrimination generally because of their experiences rather than because they reason in a different voice; but they then returned to the different voice as the dominant frame. They then mused whether law school stamps out the different voice in favour of rights and hierarchies—suggesting that it represses the different voice in everything but discrimination cases.

Rather than seeing law silencing women judges' different voice, perhaps what we see in Davis is political science repressing Davis's more anti-essentialist approach over time. Although she starts with a disfavoured topic—how gender affects judging—she begins with doctrinal analysis, perhaps the discipline's least approved of method.

She moves to a statistical analysis of opinions and at last, to a predictive model. In the process, however, we lose the critical eye and sophistication of feminist theory with which she began; the different voice frame thus becomes more conservative and essentialist. What is striking is that the further she moves down the path of statistical analysis, the farther away we get from any real support of the different voice with the possible exception of sex discrimination cases. Yet Gilligan remains firmly entrenched as the dominant gender frame.

3.4. *Outputs in sex discrimination cases*

“Research on state supreme courts, the US Courts of Appeals, and the US Supreme Court consistently has shown that women judges tend to be the strongest supporters of women’s rights claims, regardless of their ideology” (Palmer, 2001, p. 91). Yet even that finding has varied, depending on the time period. In her 2003 essay for the *UC Davis Law Review* reviewing political science studies of whether men and women decide cases differently, legal academic Theresa Beiner is forced to conclude that “the effects of race and gender of judge are inconclusive” (p. 610). In a recent example, Jennifer Segal studied President Clinton’s judicial appointees to the district courts and found the traditional (i.e. white male) judges to be more liberal (pro-plaintiff in sex discrimination cases) than non-traditional (women and minority men) appointees. Even if one might concede that as Clinton faced a Republican-dominated Senate, he knew that women nominees faced more intense scrutiny than men, one can hardly conclude, based upon Segal’s findings, that Clinton’s women appointees spoke in a distinctive feminine or feminist voice.

In addition to casting votes which may or may not diverge from those of colleagues, women judges may influence their male colleagues. When political scientist Nancy Crowe looked for this evidence in sex discrimination cases on the US Court of Appeals between 1981 and 1996, she found no evidence of such an effect (1999). Jennifer Peresie, however, examined how, over a three-year period where the doctrine was relatively stable, the presence of female judges on three-judge federal appellate panels affected collegial outcomes in Title VII cases on sexual harassment and sex discrimination (2005). She found that plaintiffs were twice as likely to prevail when a woman judge was on the bench. The presence of a woman judge increased the probability that a man judge would support the plaintiff. Peresie criticised previous studies for failing to control for individual characteristics other than gender, thereby magnifying the gender effect, and for not controlling for significant doctrinal changes. Peresie found that judges appointed by Democratic presidents were the most pro-plaintiff and that Democratic men and Republican women were similarly pro-plaintiff. Interestingly, Peresie found men and women judges more different from each other on an individual level in sexual harassment cases but the influence of women judges greater in sex discrimination cases. Peresie lacked an adequate theoretical account of these differences. Boyd *et al.* also found that the presence of a woman on a panel hearing a sex discrimination case made it more likely that the panel would result in a pro-plaintiff decision (2007). They believe the effect to be deliberative and to result in men changing their behaviour.

3.5. *Outputs in divorce cases*

Elaine Martin's more recent work examines state supreme courts and rulings in divorce cases (2004a). Martin zeroed in on divorce cases as the place where we might most expect gender rather than feminism to lead to differences in behaviour on the part of men and women judges, and examined the non-unanimous case decisions of the Michigan State Supreme Court over 13 years. She found Democrats to be more liberal than Republicans, African-Americans different from whites on one issue only, discrimination, and men and women to differ from each other but in the opposite direction.

Men cast 52.3% of their votes as liberals in discrimination cases while women cast only 38.3%. The reason for this result may simply be that during most of the time period under study there was only one Democratic woman justice, who, as a former prosecutor and criminal trial court judge, was somewhat less liberal than her fellow male Democrats in two of the three issue areas (Martin, 2000, p. 1225).

This comment reveals what I find problematic about this line of research. The researcher is drawing on the tools of social science to look for patterned behaviour rather than telling idiosyncratic stories of individual judges and courts and why they decided as they did—either by reading opinions, or by drawing on history, biography, and journalism. But although we are looking at the Michigan Supreme Court over time, we are still explaining variance of a small number of people and a small number of women and minority men. So we assume gender (not feminism) leads to a difference in votes in discrimination cases, and when we do not find it, we explain it away by referring to the particular details of the case itself. The gender assumption remains even though the evidence forcefully not only fails to support it, but contradicts it.

Martin first added Minnesota and Wisconsin to her study, then all state high courts, to examine her hunch that although other studies found few gender differences, divorce cases would provide “the most fertile ground for discovering the impact of judicial gender” (2004a, p. 2). This telling phrasing reveals her belief that, finally, women's true difference from men in the form of their gendered life experiences will be evident in their decision making. Martin labelled what she hopes to find: the representative voice. She found that women judges are more likely than men to support a woman litigant in divorce cases. This difference is more pronounced if there are three women on the court but LESS if there are two—a non-linear relationship Martin cannot explain. Men are more supportive of women litigants when they serve with only one other woman and less likely if they are chosen by merit systems. Women who have more trial court experience are more supportive of women litigants.

As Martin tried to make theoretical sense of these results, the fundamental flaw in these studies emerged: the researcher looked for and either found or failed to find sex differences. A story is produced to suggest why essential differences are masked, or inconsistently found, but the research does not deploy the evidence to help us

decide which story is more persuasive. A common story draws on one reading of Kanter—that women tokens, isolated on the bench, or in their profession, behave just like men. But once women reach critical mass, their true differences can emerge. The evidence that Martin and Cook have gathered on women judges in the United States suggests that the earliest women judges (particularly Republican appointees) may have been the most openly feminist, with the exception of Justice O'Connor. Davis tested for the different voice, failed to find it, and left us with the view that it is masked rather than does not exist. Peresie's theories could not explain why a woman member of a panel influenced sex discrimination cases more than sexual harassment cases. Rather than continuing to repeat the running of sex as a variable to test for the different voice, I think it is time for rethinking our theories of gender and judging where Cook began and Martin *et al.* developed.

4. Seeing gender one judge at a time

4.1. *Men judges' women's rights orientation*

As a judicial behaviouralist who adopted the attitudinal model long before it was identified as such, Cook did not see judges at the highest appellate levels as enmeshed in a discursive structure that constrained their decision making and shaped their arguments (i.e. as bound by law) but rather as able to pick and choose from precedent and interpretive canons to support their policy preferences. Rather than engaging in a textual exegesis of rules, precedents, and legal arguments, Cook mined legal texts for evidence of judicial attitudes and policy orientations. What mattered to her was who judges were and what they thought and believed about everything, not just law and the judicial role:

In these cases, what is important is how the Justice feels about women—women on welfare, pregnant teachers, women officers, women jurors—and their demands, in relation to how the Justice feels about the other party—industry, grade school, the military establishment, the courts—and its expectations for the female role (Cook, 1978a, pp. 54–5).

Cook plotted each of the justices based upon their votes on women's rights cases and the views they express in their opinions, other writings, and speeches. Her searing critique ended with an aside: "The paternalism of the male Supreme Court justices which shines through these cases may only be ended with their closer association with female justices" (1978, p. 78). Yet Cook's assumption that women judges will necessarily support women's rights claims more strongly than feminist men is complicated by her own later analysis of the jurisprudence of Justice O'Connor. Cook also compared two women judges' views on women's rights: Florence Allen's and Sandra Day O'Connor's. Allen, a suffragist, was part of a vast network of women's groups and saw herself as a representative of women; in contrast, men politicians picked O'Connor once Ronald Reagan had promised a seat for a woman and O'Connor looked ahead to the time when sex identity would lose its significance (Cook, 1982, p. 326).

4.2. *Doctrinal and biographical analyses of Justice O'Connor*

One of the most troubling strands of argument in the field of gender and judging has been the assertion that Justice O'Connor used communitarian, holistic, teleological and contextual reasoning, dubbed the feminine voice, rather than liberal, individualistic, atomistic, non-teleological, abstract and rule-based reasoning (Davis, 1993, p. 136). No one could credibly argue that Justice O'Connor had a distinctly feminist voice, although she did take a feminist position on some issues, particularly relative to her more conservative colleagues, but her gender arguably mattered because she deployed a distinctly 'feminine' style of reasoning. This argument was put most fully by legal academic Suzanna Sherry (1986), but several others advanced it as well (Behuniak-Long, 1992; Sullivan & Goldzwig, 1996). When political scientist Sue Davis put these claims to a rigorous empirical test, however, she found little evidence to support them, finding merely that Justice O'Connor was less conservative than Justice Rehnquist on some issues and showed greater support for equality claims than other conservatives (1993). It was hard to argue that O'Connor's reasoning is distinctly feminine, when her positions were shared by Justices Souter and Kennedy and not Ginsburg. Political scientist Jilda Aliotta (1995) reached the same conclusion.

An ongoing puzzle is why Davis, as well as Martin, and others who recognised the theoretical criticisms of Gilligan and found little empirical support in her research, continued to use Sherry's theories to frame questions about Justice O'Connor and gender and judging and further, why they gave Sherry's arguments pride of place when so many feminist legal academics dismissed her argument as nonsensical. Davis's empirical analysis demolished Sherry's argument; yet she concluded, "O'Connor does not appear to speak 'in a difference voice', but the possibility remains that other women judges do" (1993, p. 139). Justice O'Connor (echoing many of the NAWJ members that Martin surveyed) herself dismissed as absurd the idea that she employed a uniquely or distinctly feminine approach to legal reasoning (O'Connor, 1991, p. 1546). To be sure, O'Connor's jurisprudence eschewed bright-line legal rules and she seemed to revel in her power as the swing justice, questioning advocates about facts of particular cases at oral argument. With only one case, it is impossible to demonstrate a connection between her gender and her style of reasoning. What is astonishing, however, is the determination of observers to find that distinct female essence of judging, rather than ask how her experiences, including gender, have shaped her perspectives, as gender and other life experiences have shaped those of each of the men justices.

Although brief, Cook's analysis of Justice O'Connor contrasted favourably with the analysis of many of her successors. Unlike the overwhelming majority of women judges Cook had surveyed, Justice O'Connor neither self-identified as a feminist nor supported widespread access to abortion. Cook documented O'Connor's experience of sex discrimination and her work as a legislator in passing some sex equality legislation while recognising that her commitment to women's equality was weak. She reminded us that upon President Reagan's assumption of the presidency, right-wing Republicans effectively vetoed women judicial candidates as "too feminist" (Cook, 1988, p. 12)

and noted that Reagan's choice of O'Connor "offered more symbol than substance to other women" (1988, p. 15). Cook's scalogram analysis of the 18 sex equality cases O'Connor had then considered (Cook excludes abortion cases from this analysis) showed five male justices more favourable to sex equality than O'Connor.

Cook completed a fuller and more comprehensive analysis of O'Connor's role in the Burger Court in 1991. Beginning with an analysis of O'Connor's background and her confirmation hearings, she moved into an analysis of her jurisprudence and found that Justice Brennan, not Justice O'Connor, consistently took the lead in favour of gender equality. O'Connor ranked sixth (Cook, 1991, p. 248). Cook concludes:

O'Connor performed as the woman justice on the Court only in her extrajudicial activities as a speaker and writer. After her first term, when she raised her voice vigorously for a strong constitutional guarantee of gender equality but for weak remedies for gender discrimination, she retired as a spokesperson on women's rights. She never challenged a Court opinion that denied gender equality. The one attitude that could be associated with her personal experience as a mother in American culture was her sensitivity to children, which appeared in criminal, free expression, and church-state cases ... O'Connor's contributions to the Burger Court's jurisprudence were characterized by her political sensibility, driven by her structural principles, and *unmarked by her gender* (Cook, 1991, pp. 272-3, emphasis added).

Cook's choice of words is telling. Gender means feminine or feminist essence. Unlike Cook, I would urge us to see everyone as marked by gender, men and women, but in different ways and with different effects. Even Cook, the most anti-essentialist of the three scholars I examined here more closely, returned to the assumption of difference. O'Connor was a disappointment because she did not speak in a feminist voice, the voice Cook was hoping for when she criticised the all-male Supreme Court's rulings on sex discrimination.

4.3. *Becoming Justice Blackmun*

In writing her judicial biography of Justice Blackmun, legal correspondent for the *New York Times* Linda Greenhouse had early access to the justice's newly released papers (2005). We learn that Justice Blackmun, most known as the author of *Roe v. Wade*, had a daughter who became pregnant out of wedlock, married, lost the baby through miscarriage, and subsequently divorced. All we learned from his notation after Ruth Bader Ginsburg's oral arguments on landmark equal protection cases is that she had worn a red ribbon in her hair. Greenhouse's remarkable book showed how Justice Blackmun came to feminism through the issue of reproductive freedom, and thereby came to diverge from the other Republican-appointed justices, most poignantly, his lifelong friend, Warren Burger. We learned more about gender, women, and feminism from Greenhouse's approach than from Sherry's. First, not only do men have gender, but they have experiences that mark them by gender, as well as positions on women's rights issues. Second, as feminist standpoint theory would lead us to recognise, gender consciousness is acquired, not an automatic

component of biological identity. Nor, as such, is it dichotomous. It varies among men and women and between them in ways that are perhaps patterned but which may be patterned differently across time. Third, we must trace its existence empirically rather than assume it.

4.4. *Each judge influences others, but in unpredictable ways*

In their 1990 *Women and Politics* article, O'Connor and Segal examined how the addition of one justice, Sandra Day O'Connor, to the Court may have moved Justice Rehnquist more toward the centre on sex discrimination cases. Perhaps, too, Justice Ginsburg's arguments led him to join the majority in the Virginia Military Institute case and perhaps even in *Nevada v. Hibbs* (Kenney, 2004). As intriguing as O'Connor and Segal's findings are for thinking about the difference women make in collegial courts, Barbara Palmer's analysis of Justice Ginsburg's effect on her male colleagues (2002) shows the same confounding results that Martin found as the number of women increased on state supreme courts (2004a). Palmer found that although O'Connor and Ginsburg wrote more than their share of decisions in sex discrimination cases and are the spokespeople for the Court on women, some male colleagues have become more supportive of women's rights claims because of Ginsburg's addition; others have become less so, making it difficult to argue for a clear gender effect.

5. Other effects of women on the bench

If significant gender differences exist, they may manifest themselves in other ways than in producing a dichotomous difference in votes cast in cases (Beiner, 2003; Martin, 1989). Women might conduct their trial courtrooms differently from men by refusing to allow well-documented sexist behaviour; they might act differently as administrators: for example, hiring more women law clerks.⁶ Men lawyers and men judges might moderate their behaviour, as might women jurors, lawyers, and litigants. In many but not all cases, a woman justice on a state supreme court called for the creation of a state gender bias taskforce (Martin, 1989, p. 79) and women judges were almost always leaders in establishing race bias taskforces (Resnik, 1988).

Martin surveyed the 1989 National Association of Women Judges conference attendees about the impact of women judges. Ninety-eight percent agreed that women judges were role models for women attorneys. Nearly 90% reported making a special effort to encourage other women to run for judicial office. Nearly three-quarters of women agreed that women judges in general work to heighten the sensitivity of other judges to the problem of gender bias although only one third reported that they personally had made a difference in how men judges thought about the gender impact of their decisions. More than half (52%) reported making a difference through substantive decisions. When pressed for specific examples, women judges mentioned sensitising judges to some of their most flagrant sexist practices (47%), being a role model in the sense of making women jurors or litigants feel more comfortable (35%), changing substantive law on domestic violence or divorce (30%),

engaging in equitable hiring behaviour (24%), and participating in their state's gender bias taskforce (15%). Martin's study shows the wide spectrum of women judges' views about the difference gender makes.

A 2003 study of the 15 women chief justices of state supreme courts—an all-time high—examined their state of the judiciary messages for evidence that they placed more emphasis on women's issues than male chief justices (Turner & Breslin, 2003). The authors deserve praise for looking for the significance of gender beyond dichotomous votes on cases and noting that as administrators of their state's judicial systems, chief judges can advance reforms such as those concerning juvenile courts, family courts, gender bias studies, and battered women's programmes. The study uncovered enormous variation among the chief judges, men and women, even on women's issues. While the presence of a woman chief judge positively and significantly impacted the likelihood of mentioning a women's issue, the number of mentions does not increase with an increased number of women on the court. Rather, it had the opposite effect. They found no statistical significance for the claim that women chief justices are more likely to make women's issues a priority.

6. Conclusions

How does gender matter? Does it produce different outcomes in judicial decisions? The scholarly studies I discuss in this paper show that researchers have used sex as a proxy for feminist, that is, more likely to be concerned with children and better at juvenile justice, pro-defendant in sex discrimination cases, pro-choice, pro-woman in divorce, employing communitarian reasoning, inclined to seek mediate solutions, likely to raise women's issues in speeches, and likely to inflict harsh or lenient sentences. Only occasionally has the evidence shown that sex is a proxy for the assumed attribute. We need to examine the strength of the empirical basis for the claim of difference (what was the sample size? How representative of the judiciary as a whole? Did the researchers control for other explanatory variables?). Even when researchers uncovered a difference, it predicted different outcomes only in some cases, while other predictors, such as party or ideology, predicted differences more reliably in others. We need to take great care in how we talk about sex differences. Strangely, findings of no difference never seem to challenge the fundamental assumption of difference, nor deter the search for it.

Women and men do have different life experiences. Some, but not all, women are mothers. Some, but not all, women are in heterosexual marriages where they do the lion's share of caring labour. All experience the world as a woman, subject to the risks of sexual violence, gender devaluation, and exclusion and discrimination. Rather than identify essential sex differences, perhaps we should understand gender as producing tendencies among generational cohorts. When the women who are now senior judges entered the legal profession, they had profound experiences of exclusion. Many, such as Justice Sandra Day O'Connor and Minnesota Supreme Court Justice Rosalie Wahl, did not enter large law firms but instead worked for the government on mental health issues or, as many women did because it was one of the few places where parents could work part-time, worked for public defenders

(Kenney, 2001). We can expect women who serve on the bench in Texas, for example, who have run as Republicans, served as prosecutors, and spent their time with the victims of violent crime, to have very different outlooks and to bring to the bench different experiences than women who have worked for a public defender. The Republican women who President Bush (43) appointed might be as different from earlier Republican women appointed to the bench as they were from Democratic women appointees. Even women of the same age cohort do not necessarily share a feminist consciousness. One need only consider the differences between Justices O'Connor and Ginsburg and between Justices Marshall and Thomas for the point to be clear. We must move from an assumption of essential sex differences to a discussion of gender.

It is time to re-examine the application of Rosabeth Moss Kanter's classic work on gender and organisations, *Men and Women of the Corporation* (1977), to courts. Kanter was profoundly anti-essentialist. Her organisational analysis focused on structural conditions to predict behaviour rather than essential sex differences to explain why tokens may conform to the dominant group. On the other hand, scholars often misapply her findings to claim that once women reach critical mass their 'true' (read dichotomous, uniform, and feminist) differences can emerge. More recent studies have questioned Kanter's assumption that resistance to women's presence in male-dominated institutions would diminish as women moved from minority to parity (MacCorquodale & Jenson, 1993; Yoder, 1991). We should apply these insights to evidence of increasing challenges to women judges. Rosemary Hunter's analysis of women judges in Australia shows that behind the recent numbers of women appointments "lurks an undercurrent of hostility toward women judges, which shows no sign of abating in the near future" (2006, p. 281). According to Hunter, women judges experience what Rosabeth Moss Kanter called heightened attention: their qualifications are disputed, and their colleagues (on and off the bench) show open hostility to them. She notes that women judges' colleagues simply "hold them in contempt for simply being women" (p. 295). The assumption is that men are the natural occupants of such positions, that women obtain them through political manoeuvring, not merit, and that enough women have been appointed. Moreover, evidence from Canada suggests that women judges are far more likely than men to have their objectivity challenged and gender-based conflicts of interest asserted (Backhouse, 2003; Omatsu, 1997). Litigants seem to miss the irony that if the gender of the woman judge poses a conflict in a rape or employment discrimination case, the same goes for the gender of a male judge. We should recognise that a feminist consciousness is a political achievement, not an inevitable result of being female or living life as a woman. So, too, should we understand that the creation of a group of judges, men and women, who bring a gender lens to judging, is an organisational accomplishment and not an automatic result when a certain number of women judges join a court. In fact, the evidence suggests that women may feel less compelled to articulate 'a woman's point of view' the more women serving on a court. The question is not simply in adding more women to the mix, but in creating organisations attentive to gender devaluation.

Gender is a relevant category for social interaction, and the absence or presence of women may change group dynamics; but that does not mean it does so in fixed,

predictable, and static ways. Particularly on collegiate courts, I think there is a strong case to be made for injecting people with different experiences of all sorts rather than for using gender as an automatic proxy for feminist, liberal, or compassionate toward the downtrodden. The gender composition of groups matters in often subtle ways, determining what comments might be intolerable and how issues are framed as well as what kinds of evidence and arguments the group considers. It matters, then, that Lady Brenda Hale is a woman, but perhaps more important is that she is an expert in family law and has championed no-fault divorce as a law commissioner. She is the author of the first text on women and the law (Hale & Atkins, 1984) and brings a sophisticated understanding of gender issues to her analysis.⁷

The work of more than 70 scholars in the Collaborative Research Network on Gender and Judging of the Law and Society Association shows the rich possibilities of a gender analysis. When done well, using sex as a variable can expose discrimination or important sex differences. When done badly, it can assume rather than discover essential sex differences in ways that are not helpful for understanding judicial behaviour. Across many methods, from statistical analysis of judicial opinions, to historical case studies of judicial campaigns to doctrinal analysis of equal protection decisions, a gender analysis, where gender is a social process, has much to offer our understanding of judging.

Acknowledgements

I would like to thank Myra Marx Ferree, Kathleen Laughlin, Judith Resnik, and Patricia Yancey Martin for their helpful comments on the paper. I would also like to thank Amber Shipley and Lura Barber for research assistance. Thanks, too, for the helpful comments from the Gender and Judging Collaborative Research Network of the Law and Society Association.

Notes

- [1] See the special issue of *Politics & Gender on Intersectionality*, 2(3), (2007).
- [2] Within political science, those who identify as judicial behaviourists adopt quantitative methods rather than qualitative methods, share the values of social science, and see judges as using legal rules to justify their policy choices rather than determining them (Mather, 1994, p. 77).
- [3] In employment discrimination law, disparate impact (known as indirect discrimination in the United Kingdom and European Union) occurs when employers use a sex neutral characteristic, such as a height or weight-lifting requirement or the requirement that one be a veteran. The requirement is formally neutral since some women are tall, some can lift heavy weights, and some are veterans, but fewer women than men can comply with any of these requirements. The burden then shifts to the employer to show that the requirement is necessary for the job. So in this case, fewer women than men may be known to the president (or senator), but is being known the best predictor of who will make a good judge?
- [4] Carroll's data show Reagan-appointed women judges to be far less supportive of the women's movement even than other Republican women politicians, while Carter's appointees were well within the range of Democratic women politicians (1985).

- [5] George Herbert Walker Bush was the 41st president of the United States from 1989 to 1993. George W. Bush was the 43rd president of the United States, taking office in 2001. To distinguish them, we tend to refer to them as Bush (41) and Bush (43).
- [6] Cook drew attention to this issue early on. The existing evidence raises interesting points about sex and feminism. Justice Brennan refused to hire women clerks on the grounds that his secretary (later his wife after he was widowed) would not permit it. Justice O'Connor made it a priority, as did Justice Marshall. Justice Ginsburg, however, does not have a good record. Blackmun hired more women law clerks than all the sitting justices combined, and during his last ten years on the Court, a majority of his clerks were women (Greenhouse, 2005, p. 208).
- [7] Erika Rackley's work on Hale (2006), like Linda Greenhouse's work on Blackmun (2005), shows how gender matters in individual cases.

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