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**Male and Female Judges: Does Sex Make a Difference in
Decision-Making?**

Undergraduate Honors Thesis by
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Do women serving in elective office behave differently than men? Are women influenced by the presence of other women? Much research has been done on women in legislative settings. While the evidence is overwhelming that there are sex differences in behavior, the conditions under which such differences are most marked are unclear. Surprisingly little research has been done, however, on female judges.

Descriptive and Substantive Representation. Generally, scholars argue that it is important to increase diversity in political institutions because descriptive representation may lead to substantive representation. Descriptive representation refers to how the legislator looks, while substantive representation refers to how the legislator acts. This distinction has been most often applied to the legislative setting. “There are many reasons to expect that descriptive representation translates into substantive representation, and that African-American and female representatives would indeed introduce new issues to the legislative political agenda” (Bratton, Haynie 1999, 659). Studies have shown that women and black people have distinct health concerns, and are more likely to face poverty and employment discrimination (along with many other issues) than white males. One may reasonably expect, therefore, that women and black representatives have significant public issues to address. In other words, the different experiences and opinions of African-Americans and women are likely to translate into different political behavior than white men (Bratton, Haynie 1999, 660).

It seems that a judicial setting would be an excellent context in which to observe whether sex plays a role in the decision-making processes of female judges and in their interaction with other judges. After all, judges are supposed to be impartial, unbiased, and uninfluenced by personal beliefs, preferences, or emotions. This is the implication of

the *legal model* of decision-making, which is the traditional way of explaining how judges make decisions. This model was central to the judicial process until the 1920s, when the attitudinal model came about as a reaction against the idea that judging was more like finding than making, a matter of necessity rather than choice (Segal a 1993, 65). One should keep in mind, however, that judges are subject to the descriptive/substantive distinction as well. Many state supreme court judges are elected, and as elected officials they do have a constituency they represent.

An important advantage in measuring sex differences in court settings is that in court settings, one can measure behavior by dissents; in legislative settings there is no readily accessible measure so distinct. In legislative settings, researchers often study female and minority behavior in terms of what legislation they sponsor. For example, women may sponsor more bills than men regarding children or healthcare, which says something about the different interests of men and women. While this information is significant, it does not indicate the extent to which women are willing to disagree with their male peers. After all, their male colleagues may support such legislation, even if they are less likely to bring it to the legislative agenda. In a court setting, a dissent is a clear indication that a judge is willing to disagree with her colleagues. Furthermore, one can measure whether dissents increase, decrease, or remain the same when there is more than one woman on a court, which helps to determine whether women are influenced by the presence of other women. This makes dissents an excellent dependent variable for studying sex differences.

In this study, I will seek to determine whether female judges are willing to behave differently from male peers, and whether a woman's behavior changes when there is

more than one woman present on the court. I will present an overview of dissenting behavior of the U.S. Supreme Court by examining the dissent patterns of all of the justices, and also discuss the two most famous female justices in the world today—Justices Ginsburg and O'Connor. I will then do a more thorough analysis of dissenting behavior on state supreme courts.

The Decision-Making Process. Many scholars today describe judicial decision-making in one of two ways: the *legal model* or the *attitudinal model*. According to the legal model, the decisions of the Court are based on the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of social interests (Segal *a* 1993, 32). The attitudinal model, on the other hand, suggests that the decisions of the Court are based on the facts of the case in light of the ideological attitudes and values of the justices (Segal *a* 1993, 32). “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (Segal *a* 1993, 65). If the attitudinal model is correct, and I believe it is (or at least more accurate and realistic than the legal model), then gender may play a role in decision-making. Jeffrey Segal, who analyzes decision-making through the attitudinal model, says that while justices claim that they do not make public policy and that they merely interpret the law, Chief Justice Charles Evans Hughes’ said it best when as governor he said, “We are under a Constitution, but the Constitution is what the judges say it is” (Segal *a* 1993, 1).

In another of Segal’s articles, he discusses the way human beings make decisions, and therefore, how judges make decisions. He quotes Steinbruner, saying that the decision-maker focuses “on a few incoming variables while eliminating entirely any

serious calculation of probable outcomes.” That is, humans have a limited ability to consider all the factors involved and possible outcomes when making decisions. He says that for this reason, people tend to follow heuristics—intuitive and judgmental rules of thumb—rather than exhaustive analysis when making decisions. This means that Supreme Court justices make decisions this way, too (Segal *b* 1986, 941). Segal quotes Herbert Simon, who in a speech made before the American Political Science Association, argued that “humans are endowed with very narrow capacities for simultaneous attention to different pieces of information. At any given moment, only a little information...can be held in the focus of attention...Of all the things we know, or can see or hear around us, only a tiny fraction influences our behavior over any short interval of time.” Segal argues that since the Supreme Court justices deal with hundreds to thousands of pieces of information in a given case, they must rely on cues to guide their decisions (Segal *b* 1986, 953).

Still others argue that judges are subject to the influence of their colleagues, which means that one justice’s decision is affected by the others on the court. It is argued that judicial decision-making is fluid, situational, and shaped by bargaining, persuasion, bids for leadership, and the effects of friendships and rivalries. These effects may be more influential in the decision-making process than psychology, social backgrounds, political ideology, and role perceptions (Fitzpatrick 1999, 10). Gerald Fitzpatrick argues that judicial scholars need to “cross-fertilize” in terms of the methodologies they use, not just to achieve as full an understanding of a particular justice as possible, but to develop a more inclusive model of judicial behavior generally (9).

Of course, attitudes are not the sole determinant of judicial behavior. Baum and Hausegger (1999), for instance, conclude that “justices have an interest in achieving both good policy and good law” (Baum and Hausegger 1997, 162). Baum and Hausegger find that this balance of goals helps explain the Supreme Court’s occasional “invitations” to Congress to reverse the Court’s decisions.

A Look at Two Female Judges: Ginsburg and O’Connor. The two most famous female judges in the world today are Supreme Court Justices Sandra Day O’Connor and Ruth Bader Ginsburg. President Reagan nominated O’Connor to the Court in 1981, and President Clinton nominated Ginsburg in 1993. While these two women have made it to the top, and have clearly held their own among their colleagues, getting there proved to be a long, tough road often blocked by stereotypes and sexual discrimination. After graduating in 1952 from Stanford Law School with an exemplary academic record and as an elected member of the Order of the Coif, *the* honorary society for outstanding law students, O’Connor could not find a law firm that would hire her as an associate, and was offered secretarial positions instead. She was extended one such offer by William French Smith, who, ironically, was Reagan’s attorney general at the time of O’Connor’s appointment. At the firm’s 1990 centennial celebration, O’Connor displays a good sense of humor about the situation. She jests: “I want to thank Bill Smith. I can remember as if it were yesterday when he telephoned me on June 26, 1981, to ask if I could go to Washington, D.C., to talk about a position there. Knowing his former association with your firm, I immediately guessed he was planning to offer me a secretarial position—but would it be as Secretary of Labor or Secretary of Commerce?” (Maveety 1996, 14). Ginsburg, who also had an exemplary academic record, graduated

first in her class in 1959 from Columbia Law School with a spot on the law review, and she, too, had difficulty finding a position in a private firm despite her outstanding achievements. At a reunion many years later, she and her female classmates recall being asked during law school why they were taking a man's place there, as well as an incident when a law professor argued that married women were like dogs because men were masters over both (Perry 1999, 116).

How do these two female judges behave on the bench? According to Nancy Maveety (1996), O'Connor's decision-making behavior can best be described and her impact analyzed according to three distinguishable but interrelated tendencies. The first is contextual conservatism, or her approach to fact-finding and fact-based decision-making. She is conservative when it comes to overturning precedent, but her conservatism is not rigid and rule bound. Rather, she pays attention to the specific elements and particulars of each case. Second, O'Connor tends to be on the winning side of 5-4 majorities on the Court. Maveety argues that this is a tactical maneuver that gives O'Connor the advantage of influence through bargaining, a strategy she has probably picked up through her experience as a legislative majority leader for the state of Arizona. This simply means that she knows the value of compromise to achieve results. Third, she takes a pragmatic centrist approach by writing concurring opinions to shape the development of legal doctrine. This shows leadership because she can still put forth her own ideas about the decision and its meaning, while still achieving the end result through compromise (Maveety 1996, 4). All of these tendencies, as well as her tendency to emphasize the context of cases over ideological agendas and precedents, mark her as a

“sensible conservative” who knows the difference between legislating and judging (Maveety 16).

Ginsburg had this to say about herself and her judicial style during her confirmation hearings: “...my approach, I believe, is neither liberal nor conservative...As Justice Oliver Wendell Holmes counseled, one of the most sacred duties of a judge is not to read her convictions into the Constitution. I have tried and I will continue to try to follow the model Justice Holmes set in holding that duty sacred.” Furthermore, she promised to judge rather than legislate; that her views on all matters pertaining to the meaning of the Constitution would not affect her views concerning the Constitution’s meaning; that this paradoxical task was not only possible but indeed a sacred trust best illustrated by the restrained judicial activism manifested in the constitutional jurisprudence of Oliver Wendell Holmes; that she was not liberal or conservative, but would be both or neither as her oath of service to the law required (Campos 1994, 1).

While both women seem to take a moderate, cautious approach to their method of decision-making, they do seem to differ a little in their approaches. O’Connor seems to be conservative when it comes to making law from the bench and carefully distinguishes between legislating and judging; she does, however, try to shape legal doctrine, and is, therefore, not afraid to overturn precedent if she feels it is necessary, and is willing to compromise in the name of progress. Ginsburg seems to take a bit more rigid approach, adhering to Justice Holmes’ standard, and believes it is possible to make decisions without injecting personal bias. These differences, while subtle, lead me to question how much these two Supreme Court Justices have in common. Clearly they have shared

many similar experiences (such as difficulties early on in their careers), and they may hold some comparable beliefs and attitudes (for example, both women are pro-choice).

To what extent are these two women willing to disagree with their colleagues? I searched a website of the Legal Information Institute (LII), particularly their “Supreme Court Collection,” for information about the Court itself as well as all the Justices. I was able to see how many times each Justice dissented from approximately 1992 to 2000 (for some Justices they provided dissents from only 1994 or up to 2001). Between 1994 and 2000 Ginsburg dissented 33 times; from 1992 to 2000 O’Connor dissented 32 times. Stevens, on the other hand, dissented 126 times between 1992 and 2001, while Kennedy dissented only 26 times between 1992 and 2000. The number of dissents for the other Justices varies as well. There seems to be no correlation between the number of dissents and gender. That Ginsburg and O’Connor had roughly the same number of dissents appears to me to be merely a coincidence. Nor does there appear to be a correlation between the time the Justice has been on the Court and the number of times he or she dissents. Rehnquist, who has been on the Court since 1972, dissented 30 times between 1992 and 2000, while Scalia, who has been on the Court since 1986, dissented 61 times between 1992 and 2000. Breyer, the newest member of the Court (appointed in 1994), dissented 39 times between 1995 and 2001 (LII 2002).

More extensive research could certainly be done to further examine the degree to which the two female Justices differ from their peers. Concurring opinions, for example, are significant in that the Justice, while agreeing with the Court’s final decision, may have an alternate reason for the decision, which he or she expresses in a separate opinion. O’Connor is well known for her separate opinion writing. Ginsburg, on the other hand,

writes fewer separate opinions than O'Connor. One thing is clear, however. Both women have held their own throughout their careers in a male-dominated arena, and both prove to be confident, competent members of the Supreme Court, as able as any of their male peers.

Influence of Gender on Elite Political Behavior

One purpose in studying gender is to determine whether different genders behave differently, have different attitudes, and/or provide different viewpoints. There have been several studies that attempt to determine whether significant differences exist between the behavior and viewpoints of women and men—particularly in the workplace and in legislative settings. Works by Kanter, Thomas, Yoder, Kathlene, Martinek, and Bratton have provided some insight into this subject. The results of their studies, however, are mixed. The studies all have different settings—one focuses on a corporate business, one a state legislature, one on committee meetings—which explains how they would have mixed results. In a particular setting, like a business office, women (and men) may act a certain way, and in another setting, like a committee room, they may be inclined to act a different way. I think further studies must be done, and some studies would need to be repeated by a different researcher with the same setting, in order to draw more accurate conclusions.

Despite all the differences in research, however, many studies do hold one finding in common: women do behave differently than men, although the extent of this difference is not clear. Thomas' study (1991) indicates that women focus on some policies more than men. Bratton and Haynie (1999) find that women and black people share a set of distinctive policy interests. Welch (1985) finds that women are slightly more liberal than

men. All of these conclusions indicate a difference in behavior among women and men. Why do these differences occur, how significant are these differences, and to what degree are women willing to differ from male peers are all still unanswered questions.

Kanter. The first work I looked at is Kanter's (1977) *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*. In her work, she asserts that proportions, or *relative* numbers of socially and culturally different people in a group, are critical in shaping the dynamics of interaction in the group. She identifies four group types on the basis of varying proportional compositions (*uniform, skewed, tilted, and balanced*), and develops a framework for conceptualizing the interaction that occurs between two general groups, the "dominants" and the "tokens." She also identifies three perceptual phenomena associated with tokens: visibility, polarization, and assimilation. She draws her information and illustrations from a field study in a large industrial corporation, and extends her concepts to tokens in all situations.

The *uniform* group has only one kind of person, one significant social type. The group members may have different personalities and other such differences, of course, but they are homogeneous with respect to salient external statuses such as sex, race, or ethnicity. In *skewed* groups there is a large proportion of one social type over another (with a ratio of about 85:15). This is where Kanter uses the terms "dominants" and "tokens." The dominants are the dominant number, and they also control the group and its culture. The tokens are the few, and are labeled "tokens" because they are often treated as representatives of their category, not as individuals. In *tilted* groups, the dominants are just a majority, and the difference between the groups is less extreme (with

a ratio of about 65:35). The minorities in the group may create alliances or coalitions, and even exert some influence on the culture of the group. When the ratio finally gets to 50:50 or even 60:40, the group is considered *balanced*.

In her article, Kanter focuses mainly on tokenism and the three perceptual phenomena she associates with it. First, tokens have higher visibility than dominants; group members tend to be more aware of tokens and their actions than they are of dominants. The second tendency is polarization. Group members are more aware of commonalities and differences among themselves and tokens, and tend to exaggerate the differences. The token(s) may be perceptually isolated or cut off from the group. “Assimilation, the third tendency, involves the use of stereotypes or familiar generalizations about a person’s social type” (971). People distort the characteristics of the token(s) to fit the generalization. The focus on tokenism and these phenomena leads Kanter to question: “how many of a category are enough to change a person’s status from token to full group member? When does a group move from skewed to tilted to balanced?” (986). She concludes that a sufficient amount of members of the token group must be added to the group to counter the effects of tokenism in order for tokens to be effective.

Thomas. In her article, *The Impact of Women on State Legislative Policies* (1991), Thomas asks whether women in public office make a difference. She seeks answers by examining the relationship between the percentage of women in state legislatures and their policy priorities, as well as the impact women legislators have on overall legislative policy. She first reminds the reader of Kanter’s research on the effects of minority status on behavior of those in the minority. With this in mind, she focuses

her research on the methods by which legislators fulfill their political goals, and the policy priorities upon which they concentrate. Her fundamental expectations of this study were that increased representation of women in state legislatures will provide increased support for women, which will, in turn, result in the emergence of distinctive gender-based political priorities. Furthermore, and most importantly, she believed that these distinctive priorities would be most evident and most successful in states with the highest proportion of female representatives.

She did her study on state legislatures because they allowed her to examine women's legislative behavior as well as general legislative behavior under a range of conditions. "Data were gathered from a 1988 survey of members of the lower houses of the state legislatures of 12 states: Arizona, California, Georgia, Illinois, Iowa, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Vermont, and Washington" (964). After one section of analysis, Thomas found that women do have distinctive priorities that concern issues of women, children, and the family; and that women introduce bills based on these priorities more often in states where they find the most support. In another section of the study, she found that 25%-30% female membership in legislative chambers does not constitute a critical mass able to affect overall policies and priorities, and that at least 10% female representation is necessary for women's distinctive interests to appear. Further into the study, she found that overall, women tend to have higher ratios of introduction to passage of priority bills in the areas of women's, children's, and family legislation, and that women in nine of 12 states were more successful than men in passing priority bills dealing with women, children, and families. In conclusion, "findings reveal that women in states with the highest

percentages of female representatives introduce and pass more priority bills dealing with issues of women, children, and families than men in their states and more than their female counterparts in low representation legislatures” (958). Findings also show that women can diffuse their priorities throughout the legislative process either through higher percentages of women in office, or through the presence of a formal women’s legislative caucus. “These findings suggest that women do indeed make a difference and that their capacity to do so is related to the level of support from colleagues” (958).

Bratton. In Bratton’s article, *‘Critical Mass’ Theory Revisited: Gender Differences in State Legislative Behavior and Success* (n.d.), she argues that women in *skewed* legislatures (from Kanter) may actually be encouraged to develop legislative agendas that are distinct from those of their male colleagues, and that they may be successful as their male counterparts. She identifies three main problems with Kanter’s research, and discusses the backlash theory suggested by other researchers such as Yoder and Kathlene. Bratton identifies three purposes of her research and paper. They are: to examine whether gender differences in sponsorship are minimized when women make up a small proportion of legislators (she argues that there is a link between descriptive and substantive representation, particularly in skewed legislatures); to examine whether the gender composition of the legislature affects the success of individual women; and to examine the effect of the gender composition of the legislature on overall sponsorship and passage. She focuses her examination of the experience of female legislators at two main points in the legislative process: agenda-setting and success.

Analyzing data from three state legislatures in four years, Bratton finds that even in extremely skewed legislatures, women are often more active than men in sponsoring

legislation that focuses on women's interests. She also finds that women are generally as successful as men in passing the legislation that they sponsor, and in very homogeneous settings may be even more successful than men. Furthermore, Bratton claims that increasing gender diversity within a legislature is accompanied by a greater overall focus on women's issues. She concludes, "a 'critical mass' is not necessary for substantive representation on the part of individual female state legislators, but that increased diversity may indeed bring about changes in policy outputs" (abstract).

In sum, Kanter and Thomas argue that women in male-dominated situations may minimize gender differences when numbers are low. Bratton, on the other hand, argues that women may be more likely to play up gender differences when their numbers are low. I think courts are a good setting to study these competing claims. One reason is that in courts there is a clear measure of disagreement—dissent. Second, the number of women on courts varies significantly. Some courts still have no women, some have one woman, and some have more than one. Therefore, one may actually calculate how often and/or to what degree women are willing to disagree with male peers. Also, one may determine whether a woman is influenced by the presence of another woman or other women on the court. Does she dissent at all if she is the only female on the court? Does the likelihood that she will dissent increase, decrease, or remain the same if there are other women on the court?

Yoder. In "Looking Beyond Numbers; The Effects of Gender Status, Job Prestige, and Occupational Gender Typing on Tokenism Processes," (1994) Janice Yoder points out that in previous studies, such as Kanter's, tokenism processes were documented when the targets of study were women in male-dominated, normatively

masculine occupations who were underrepresented within their work unit, and that many of the studies focused on occupations which sizable numbers of women had recently entered. Yoder argues that where Kanter attributed certain processes (visibility, polarization, assimilation) to skewed proportions in the work group, the cause of these processes may be any one of, or a combination of, the four factors mentioned above (150-151).

For this reason, Yoder conducted a study with the purpose of disentangling these four possible causes of tokenism: token proportions in a work group, gender status, occupational gender-appropriateness, and occupational prestige. She predicts that token numbers alone are not sufficient to cause visibility, polarization, and assimilation, and that these processes will result only from a three-way interaction involving token numbers, gender status, and occupational appropriateness. Her reasoning behind this expectation is that thus far, tokenism processes have been documented consistently only when all three variables were present. She predicts specifically that negative tokenism processes and denigration of the target will occur only for token women in masculine occupations (that even occupationally deviant token men will not experience this). Furthermore, she predicts that negative tokenism processes will be exaggerated for occupationally deviant token women in high prestige, but not low prestige occupations (151).

In order to test her hypotheses, Yoder presents participants (males and females of a wide range of ages and backgrounds) with one of 16 vignettes describing a token or dominant female or male target in a skewed work group. "The 16 scenarios resulted from a 2x2x2x2 factorial design crossing target's gender, token proportions, job prestige, and

occupational gender appropriateness” (152). The study focuses on differences among raters’ expectations for different targets, all of which share similar biases. Yoder points out that there is evidence that raters are predisposed toward stereotyped responses when they rate unknown, sketchy targets. She also mentions that although this procedure allows for the control and complete crossing of factors within a single study, it is still limited in that it measures expectancies rather than real-life token experiences (152).

After the study, Yoder reports that respondents’ projections across occupations were consistent with studies of actual token women in masculine-typed occupations. Findings also suggest that occupational deviance does not contribute to tokenism processes or to the devaluing of workers’ competence. Upon examining these results, Yoder makes some suggestions for future research. First, she says that in order to definitely test the impact of occupational gender appropriateness on tokenism processes, further work is needed with two groups of women, all of whom are employed as token members of their immediate work groups, but half of whom work in a female dominated field, and half in a male dominated occupation. She also suggests that future researchers may want to consider broader outcomes, such as wage inequities, harassment, and limited opportunities for promotion, as results of occupational norms. This is because “...occupational deviance is defined at a macroscopic level by examining the gender ratio of the occupation as a whole, whereas tokenism processes occur at the level of the immediate work group.” This study and most others up to this point focus on tokenism processes at the level of the work unit, not a macroscopic level (157).

The results, Yoder claims, contribute to tokenism literature in three ways. First, this study is one of very few to fully cross token variables in a complete factorial design.

Second, this study uses a traditional paradigm from stereotyping literature, the vignette procedure, and adapts it for tokenism research. Despite risks involved in this procedure (such as variations between expectations and actual token processes), the validity of the data is enhanced insofar as the findings parallel those of prior tokenism studies. Finally, these results add to the growing body of work showing the importance of gender status in tokenism processes. Findings in tokenism studies consistently show that token women receive more negative outcomes from tokenism processes than dominant women or token men (158).

This type of study brings up an interesting question. If people expect negative outcomes for women in token settings, will women be discouraged from entering these fields? If so, the expectations of negative outcomes based on sex discrimination will help ensure continuing gender imbalances. Furthermore, if present data is correct in that tokenism cannot be gender neutral, more will have to be done to remedy tokenism processes than increasing numbers alone. Occupational stereotyping, proportional representation, and sex discrimination as a root cause of hindrances to women's participation in the work place must all be addressed (158).

Kathlene. In Kathlene's, *Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates* (1994), she analyzes the conversational dynamics of committee members, witnesses, chairs, and sponsors using the verbatim transcripts of 12 state legislative committee hearings. She finds that sex differences among committee members are highly significant, even after accounting for political factors and structural features of the hearing. "In addition, male and female chairs do not conduct hearings in the same way,

and these differences affect the behavior of witnesses and committee members” (560). She reports that as the proportion of women increases in a legislative body, men become more verbally aggressive and controlling of the hearing. Contrary to Kanter’s research, Kathlene argues that with an increase in numbers women legislators may be seriously disadvantaged and unable to participate equally in legislative policymaking in committee hearings. She also brings up Yoder’s research, which indicates that highly masculinized occupations become more, not less, resistant to rapidly increasing numbers of women, a phenomenon Yoder labels as the “intrusiveness” effect.

Martinek. In “Acclimation Effects and Separate Opinion Writing on the United States Courts of Appeals,” Virginia Hettinger, Stefanie A. Lindquist, and Wendy Martinek evaluate the extent to which freshman judges demonstrate unique behavior and separate opinion writing. While much research has been done on the U.S. Supreme Court, relatively little research has been done on the Courts of Appeals. These researchers believe it is preferable, however, to study acclimation effects on judges within a judicial setting that allows for the examination of the initial post-appointment behavior of a large number of judges with varied backgrounds rendering decisions in a variety of institutional contexts. They, therefore, evaluate Howard’s research on acclimation effects for judges on the U.S. Courts of Appeals, and expand the research. They also explore research on acclimation effects in the Supreme Court to lay foundation for their expectations of the Courts of Appeals, then compare the decision-making environment of the Supreme Court and circuit courts to determine if they should expect differences in freshman behavior of the two courts. They then specify models that predict whether a judge will write a concurrence or dissent in the circuit courts (2-3).

Hettinger, Lindquist, and Martinek hypothesize that a nontraditional judge (women and minorities) will be more likely to write a concurring or dissenting opinion. This expectation is based on past research and the notion that such judges will bring to bear fundamentally different personal histories and experiences when rendering judicial decisions (8-9). To test their hypotheses empirically, they model separate opinion authorship from 1960 to 1988 available in the U.S. Court of Appeals database, and reconfigure the database to make the judge, rather than the case, the unit of analysis (13).

They find that nontraditional judges are indeed more likely to write both dissents and concurrences (2-3). That is, “nontraditional judges are both more likely to disagree with their colleagues and more willing to express that disagreement in the form of a separate opinion” (16). This is clearly evidence that their backgrounds do influence the manner in which judges interpret the law (16). In addition, they find that other control variables, such as the existence of a constitutional claim (among other things), significantly affect the likelihood that a separate opinion will be written in any given case (abstract). Even after controlling for ideological diversity on the panel, nontraditional judges’ propensity to write separate opinions persists. Other background characteristics, however, such as an elite education or prior judicial experience, did not work as strong predictors of separate opinion writing behavior (16).

So what do all of these studies mean? Again, Kanter and Thomas argue that women need to have significant numbers to be effective, since with low numbers, they tend to minimize gender differences. Bratton argues that it may be just the opposite. Women with low numbers may work to increase gender differences, and may be as or more effective in their efforts than their male peers. Martinek’s study of courts of

appeals supports Bratton's claim in that "nontraditional" judges (which includes women) do dissent more than "traditional" judges. Yoder brings up an important point to consider in Kanter's research. Kanter's tokenism processes occur only in certain situations when several specific factors all occur. Yoder's study brings up important issues and leads the way for more research into the complex phenomenon of tokenism. Kathlene's study provides evidence contrary to Kanter's and in support of Bratton's and Yoder's. It definitely shows that sex differences are significant in legislative committee meetings, but also suggests that low numbers of women are actually more effective than greater numbers because of the defensive tendencies of males when large numbers of females are introduced to the situation. These are all interesting, important, and complicated issues that warrant further research and investigation. It is my hope that our research on women in the court system will lend further support and clarity to previous research.

RESEARCH

The purpose of this paper is to examine whether women on state supreme courts behave (i.e. make decisions) differently from their male peers. One way to measure this is to see how often women dissent relative to men. Are they willing to disagree with their colleagues? Would one woman do so if she were the only woman on the court, or would it require more than one woman to have a “critical mass?”

Data. I examined judicial decision making in 19 states in 2001. Out of those 19, ten of the courts have three women on them; four have two women; and five have one woman.¹

Table 1

State	Total Judges	Female Judges	Male Judges
Arizona	5	1	4
Kansas	7	1	6
North Carolina	7	1	6
Utah	5	1	4
West Virginia	5	1	4
Florida	7	2	5
Georgia	7	2	5
Iowa	7	2	5
Maryland	7	2	5
Minnesota	7	2	5
Vermont	5	2	3
California	7	3	4
Colorado	7	3	4
Louisiana	7	3	4
Michigan	7	3	4
New Jersey	7	3	4
New York	7	3	4
Virginia	7	3	4
Wisconsin	7	3	4

¹ Only in Maryland and New York are the highest courts called “Court of Appeals,” rather than “Supreme Court.”

The database includes such information as: the name of each justice and their sex; the number of times each justice dissented in 2001; the year each justice was appointed; the number of years each justice has served; the number of cases with dissents in the total court; the number of women in each court; and the proportion of women in each court.

Analysis. I calculated and compared the likelihood of male and female judges to dissent by dividing the courts in our database into three groups: courts with three women, courts with two women, and courts with one woman. For each group, I calculated how many times each justice dissented that year, then averaged the number of dissents by female judges and the number of dissents by male judges, and compared the two averages.

In all of the courts with three women serving, 1,436 combined cases were heard. There were 28 women total and 329 dissents, for an average of 11.75 dissents per woman. There were 40 men total and 364 dissents, for an average of 9.1 dissents per man.

Courts with Three Women			
1,436 cases	28 women	329 dissents	11.75 dissents per woman
	40 men	364 dissents	9.1 dissents per man

In all of the courts with two women serving, 902 combined cases were heard. There were eight women and 88 dissents, for an average of 11 dissents per woman. There were 17 men and 209 dissents, for an average of 12.3 dissents per man.

Courts with Two Women			
902 cases	8 women	88 dissents	11 dissents per woman
	17 men	209 dissents	12.3 dissents per man

In all of the courts with one woman serving, 617 cases were heard. There were five women and 37 dissents, for an average of 7.4 dissents per woman. There were 23 men and 128 dissents, for an average of 5.6 dissents per man.

Courts with One Woman			
617 cases	5 women	37 dissents	7.4 dissents per woman
	23 men	128 dissents	5.6 dissents per man

In courts with three women, women dissented on average more than men. In courts with one woman, women again dissented on average more than men. In courts with two women, however, men dissented on average more than women. Furthermore, in each case the difference in the number of dissents between women and men was not very large.

Implications. In both state supreme courts and the U.S. Supreme Court, there does not appear to be a significant difference in the dissenting behavior of female judges from the dissenting behavior of male judges. This comes as a surprise to me because of the previous research I discussed, particularly Martinek's study on courts of appeals.

Had this study produced significant findings of behavior differences, it would have provided support for the attitudinal model. These null findings, on the other hand, do not necessarily contradict the model. It appears that the sex of the justice does not

significantly affect a justice's likelihood of dissent. However, other background characteristics likely play a role. Nevertheless, I still feel strongly that the attitudinal model is more accurate and realistic than the legal model.

Moreover, not only are there no sex differences, but the existence and size of sex differences does not depend on the percent of women. This contradicts much of the earlier literature, including Kanter, Thomas, Yoder, etc.^{2, 3}

It is possible that women do behave differently, but this research was not extensive enough. Perhaps if one were to break down the cases by the type of case (for example, into "women's issues"), one would find different results. In other words, women may very well dissent more in abortion cases. This study does not take into consideration what the case is, but only the number of cases heard and the number of dissents. In general, there does not seem to be much of a difference in the patterns of dissent between men and women. I believe this study was very basic, and would best serve as a basis for further analysis. One could very easily expand the data by including more states and thereby more courts. One could look at separate opinions including concurrences, rather than just dissents, and possibly even expand the time frame to more than one year, examining how specific justices change behavior as their court diversifies. One could also break down cases into different categories to see if any patterns emerge there. Perhaps the most promising avenue of future research involves examining how

² One explanation for the discrepancy between these two studies is Martinek's definition of "nontraditional" judges. Martinek defines "nontraditional" as minorities (including minority men) as well as women. Perhaps the inclusion of minorities produce different results than if the study were on women exclusively.

³ On the other hand, when I looked at a more sophisticated analysis of the data, I found that, controlling for seniority and the overall dissent level in each state, women dissent an additional 1.48 times than men. There was a very marginal additional increase in dissents for women in very diverse courts (.08). None of the results, however, were statistically significantly greater than zero. From this more sophisticated analysis, then, I also conclude that there are no significant sex differences.

increased gender diversity on the court affects the decision-making of men and on final outcomes. As the percentage of women on a court increases, women may feel that they are in a more supportive environment, and are more free to disagree—but there may be less cause for dissent, because the perspective of male justices has changed. More research should be done to explore these possibilities.

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