III. Sex, Race, and Other Characteristics

In the last Part we looked at the effects of ideology on judicial decisionmaking. But ideology is not the only feature of judges' identities that might shape how they resolve difficult legal questions. In this Part we turn to studies that look at other personal characteristics and life experiences to see whether they also influence judging.

A. Of Judicial Identity and "Bias"

It seems inevitable that the identities of the judges beneath those black robes will affect their decisionmaking, at least in some cases. Isn't that what Justice Cardozo's candid views on the subject would suggest? But which cases, and how much? If a judge's personal characteristics shape how she approaches a particular legal question, should we worry that the judge is unable to decide the case fairly? If so, is there any way to avoid the problem? If judges cannot help but see cases through their own eyes, does that mean that all judges are improperly biased?

1. Personal Characteristics as Improper Bias

In any litigation, the parties have a right to ask the judge to step down on the ground that the judge is unable for reasons of bias to judge the case fairly. That is the subject of the following decision.

BLANK V. SULLIVAN & CROMWELL

418 F. Supp. 1 (S.D.N.Y. 1975)

MOTLEY, J.

This is an action brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). Plaintiff, who applied for a position as an attorney with defendant firm and was rejected, claims that defendant discriminates in the employment of lawyers on the basis of sex. The instant action has been certified as a class action by this court. (See Memorandum Opinion and Order, July 14, 1975.)

Defendant has filed an application and affidavits pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455 requesting this Judge to disqualify herself on the grounds of personal and extrajudicial bias against defendant and in favor of plaintiff and her cause. (Affidavit of Arthur Dean at 4). The primary evidence of this purported bias is the court's ruling that this action be maintained as a class and "more importantly the manner in which (this and other) ruling have been issued." (Affidavit of Arthur Dean at 3). These affidavits are, as a matter of law, clearly insufficient to justify my disqualification. Defendant's motion for disqualification is, therefore, denied.

It is well settled that in determining a motion to disqualify under 28 U.S.C. § 144, the facts stated in the affidavit as the basis for the belief that prejudice exists must be accepted as true by the judge, even if he or she knows the statements to be false. *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1931); *Hodgson v. Liquor Salesmen's Union Local No. 2 of State of New York*, 444 F.2d 1344 (2d Cir. 1971); *Rosen v. Sugarman*, 357 F.2d 794 (2d Cir. 1966). If, however, those facts as stated are insufficient as a matter of law, the judge shall not be disqualified, for there is an equal duty on the part of the judge not to recuse himself when there is no occasion to do so as there is for him to do so when there is. *Rosen*, *supra*, at 799; *Hodgson*, *supra* at 1348; *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968).

Section 144 provides for disqualification if the affidavit "give(s) fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger*, *supra*, 255 U.S. at 33-34, 41 S.Ct. at 233. In order to remove a judge, the bias shown must be a "personal" prejudice, from an extrajudicial source and resulting in an opinion on the merits not warranted by the facts or issues presented in the case. *Wolfson*, *supra* at 124; *U.S. v. Grinnell*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966). Defendant's affidavits clearly fail to show the extrajudicial, personal bias, or even the inference of such bias, required for disqualification by § 144.

[The court first discussed and disposed of Defendant's claims that the court had indicated bias in prior rulings, and in failing to give the Defendant an opportunity to be heard. The Court pointed out that Defendant had been given ample opportunity to be heard, and explained that prior rulings were all in accord with legal precedents.]

Defendant further seeks my disqualification on the ground that I "strongly identified with those who suffered discrimination in employment because of sex or race" . . . . This court has ruled against plaintiffs in civil rights cases and has denied class action status to a woman plaintiff alleging discrimination in employment.[*]

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, *ipso facto*, indicate or even suggest the personal bias or prejudice required by § 144. The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with

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[*] See *Marina Voustis v. Union Carbide Corp.*, Docket #70 Civ. 3435 (May 23, 1975); *cf. Mullarkey v. Borglum*, 323 F. Supp. 1218 (S.D.N.Y. 1970); *Wilson v. Follette*, 438 F.2d 1197 (2d Cir. 1971), *cert. denied* 402 U.S. 997, 91 S. Ct. 2182, 29 L. Ed. 2d 163 (1971); *Coleman v. Mery*, 72 CIV. 1455 (Nov. 1, 1972).

distinguished law firm or public service backgrounds. (Cf. Letter of Harriet Rabb, attorney for plaintiff, dated April 17, 1975.) *See* lengthy opinion by Higgenbotham, J. (E.D. Pa.) denying defendant's motion to disqualify him in a race discrimination case because he is black. *Commonwealth of Pa. v. Local Union 542, Int. U. of Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974).

Nowhere in their affidavits do defense counsel or defendant indicate that I have any relationship or personal association or interest in this litigation. They merely point to my general background and the obvious facts of my race and sex as evidence of extrajudicial prejudice.

. . .

As noted above, none of the facts included in the affidavits of defendant or defense counsel are sufficient, under the statutes, for disqualification. Defendant's motion for disqualification is, therefore, denied.

So Ordered.

* * *

FOR DISCUSSION

1. Constance Baker Motley was the judge in *Blank v. Sullivan & Cromwell*. She was born in New Haven, Connecticut to immigrant parents from Nevis.[1] As she notes in the opinion, she is both a woman and African-American. After attending Fisk University (a historically black university) and New York University as an undergraduate, Motley graduated from Columbia University School of Law in 1946. Following law school she worked for the National Association for the Advancement of Colored Persons (NAACP), first as a clerk for Thurgood Marshall and later as a leading litigator in her own right. She wrote the first draft of the complaint in *Brown v. Board of Education*. She prevailed in nine of ten cases she argued before the Supreme Court, including James Meredith's successful challenge of his denial of admission by the University of Mississippi. After wide engagement in the civil rights movement, and a string of firsts in political positions, she was appointed to the federal bench by President Lyndon Johnson in 1966, the first African-American woman to take the bench.

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[1] These biographical notes are drawn from CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY (1998); Constance Baker Motley, *Some Reflections on My Career*, 6 LAW & INEQ. 35 (1988); WOMEN AND THE CIVIL RIGHTS MOVEMENT, 1954-1965 (Davis W. Houck and David E. Dixon, eds., 2009); WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK 181 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996); and S. Res. 272, 109th Cong., 151 CONG. REC. 22642 (2005) (enacted) (resolution honoring the life of Judge Constance Baker Motley).

2. The defendant's recusal motion in Blank took *chutzpah*, a Yiddish word meaning "nerve." But was it crazy? There are two ways to think of this: as a matter of trial strategy, and on the merits. As a question of strategy, if the motion was unsuccessful, the defendant faced further proceedings before a judge who he had accused of bias by reason of her race and sex, and her prior background and career. In a part of the opinion we have edited out, the judge explained that the defendant had raised questions of bias from the outset, before any rulings were made, but had indicated he would not ask the judge to remove herself. It was apparently only after receiving initial unfavorable rulings that he decided to move forward.

How about the merits? Was it wrong to think that Judge Motley could not decide a discrimination case fairly because she was a woman and a racial minority who had made a career of litigating discrimination issues on behalf of plaintiffs? Of course, the obvious question is: if not Judge Motley, then who? Every possible judge was going to have both a gender and a racial identity. Would it necessarily have been fairer to both parties to have a judge whose career had been in, say, insurance fraud?[2]

2. Life Experience and Judging: O'Connor, Sotomayor, and the Question of a "Woman's Perspective"

Blank v. Sullivan & Cromwell raises profound questions regarding the relationship between the identity of a judge and that judge's decisions in cases that come before the court. At some level, most people (including most judges) acknowledge that the identity of the judge will influence at least some of her decisions—we saw this in Chapter Two. But which cases are most affected? Do different judges see *all* cases differently? Or do certain types of legal issues trigger more disagreements than others?

Sandra Day O'Connor was the first woman nominated and confirmed to a seat on the Supreme Court of the United States, in 1981. At the time, people wondered if having a woman on the Supreme Court would change things. (One obvious change was that in anticipation of a female Justice, in November 1980 the Justices stopped formally referring to one another as "Mr. Justice _____.") After O'Connor had been on the bench five years, law professor Suzanna Sherry wrote an article entitled "Civic Virtue and the Feminine Voice in Constitutional Adjudication," in which she argued that women had a different "world-view" from men, that woman lawyers were "a potentially innovative force in the legal community," and that although O'Connor voted regularly with her

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[2] John J. McConnell was nominated by President Obama in March 2010 to a judgeship in the federal district court in Rhode Island, despite the strong objections of the U.S. Chamber of Commerce and Republic Senators concerned that McConnell's background as a plaintiffs' attorney would give him an unsuitable anti-business bias. The 111th Senate did not confirm him. President Obama re-nominated him, and the Senate confirmed him, in 2011.

conservative colleagues, she "approaches legal issues from a different perspective than that of her male colleagues."[3]

Justice O'Connor dissented. In a speech given in 1991 at New York University School of Law, O'Connor dismissed the entire line of inquiry as pernicious.[4] This view "is interesting, but troubling," said O'Connor, "precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long. It is a little chilling to compare these suggestions to Clarence Darrow's assertion that women are too kind and warm-hearted to be shining lights at the bar."[5] She then took up the question "Do women judges decide cases differently by virtue of being women?" Her response: "I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that 'a wise old man and a wise old woman reach the same conclusion.'"[6]

Fast-forward another ten years. When giving a speech at the Berkeley School of Law, then-Judge Sotomayor said that, "[w]hether born from experience or inherent physiological or cultural differences, . . . our gender and national origins may and will make a difference in our judging."[7] In other words, Judge Sotomayor asserted that factors like sex and race do in fact matter to judging. (In that same speech, she went on to claim, provocatively, that "a wise Latina woman" like herself would reach better legal conclusions precisely because of her life experience.)[8] Although as a nominee to the Supreme Court, Judge Sotomayor backed away from this strong statement under

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[3] Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 86 VA. L. REV. 543, 580, 581, 613 (1986). Sherry's views were based in part on research performed by Carol Gilligan suggesting that women approach moral questions differently than men do. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's empirical methodology has been criticized, and Gilligan herself later softened her thesis somewhat. For criticism of Gilligan, *see, e.g.*, John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983) (suggesting that some of Gilligan's own subject interviews actually problematize the notion of a strict male/female duality); Owen J. Flanagan Jr. & Jonathan E. Adler, *Impartiality and Particularity*, 50 SOC. RES. 576 (1983) (highlighting Gilligan's focus on individual dilemmas of fact rather than abstract moral reasoning about justice); Debra Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 Soc. Res. 643 (1983) (looking critically at Gilligan's interview procedures and data presentation); Lawrence J. Walker, *Sex Difference in the Development of Moral Reasoning: A Critical View*, 55 CHILD DEV. 677 (1984) (pointing out that Gilligan's claim is based almost entirely on anecdotal evidence, without any experimental, longitudinal, or cross-sectional evidence). For Gilligan's later, somewhat softer version of the thesis, *see, e.g.*, Carol Gilligan & Jane Attanucci, *Two Moral Orientations, in Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* 73, 82-85 (Carol Gilligan et. al., eds. 1988).

[4] The speech, delivered at New York University School of Law on October 29, 1991 as the twenty-third James Madison Lecture on Constitutional Law, was later reproduced in the NYU Law Review. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991).

[5] *Id.* at 1553.

[6] *Id.* at 1558.

[7] Sonia Sotomayor, *A Latina Judge's Voice,* 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

[8] *Id.* at 92.

pressure, she is hardly alone in her conclusion. Bertha Wilson, the first female justice of the Canadian Supreme Court, claims: "Studies show overwhelming evidence that gender-based myths, biases and stereotypes are deeply embedded in the attitudes of many male judges…Researchers have concluded that gender difference has been a significant factor in judicial decision-making."[9]

So, here is the question: If Justice Sotomayor is correct that personal characteristics like gender and race will "make a difference in . . . judging," do you think that is because women and racial minorities have a different "world-view" than white men? Do you expect the differences (if any) to show up across all classes of cases, or only those that touch directly on issues of race and gender?

B. Empirically Studying Race, Sex, And Other Characteristics

Before we can present what we know—and don't know—about the effects of sex, race, and other characteristics on judging, let's think about how we would go about studying these questions. Do you think this will be easier, or more difficult, than studying ideology?

To begin, we need a dataset—a set of cases to study. We might choose to study different types of cases, or a particular issue area where we think personal characteristics might matter, such as discrimination cases. Either way, the method we'll use to select cases will essentially be the same as we saw in the previous Part.

Then we'll code a dependent variable of interest. This, too, is exactly the same as before. (Including the fact that studies overwhelming tend to focus on dispositions rather than written opinions.) As an example, in most studies of sex discrimination cases, the dependent variable is whether or not the party alleging discrimination (the plaintiff) gets relief or not.

The next step is to measure the independent variable. This was really a challenge when studying ideology. Because ideology is unobservable, proxies must be used instead. Measuring the independent variable is much easier in most "personal characteristics" studies because the characteristics in question—race, gender, etc.—are relatively observable and can be measured directly.

Once we have our dependent variable and our independent variable, the final thing to do is to compare behavior. For example, we could compare the percentage of times when male judges found for the plaintiff in discrimination cases with the percentage of times when female judges found for the plaintiff, and then use statistical

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[9] Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 512 (1990).

analysis to determine whether or not the differences are significant. The task seems straightforward. But—as we saw with ideology—there are many ways a study like this can go awry.

Consider the study by Professors Pat Chew and Robert Kelley in the *Washington University Law Review*.[10] These authors were interested in studying how the race of judges affected the outcomes of workplace racial harassment cases. Here's how they describe what they did:

> Noting the absence of research on the subject, we conducted the first study of the relationship between judges' race and the outcomes in racial harassment in the workplace cases... We designed a research process to identify representative cases and judges so that any inferences we drew from the data would be as generalizable as possible. We randomly selected forty percent of all reported racial harassment cases from six federal circuits between 1981 and 2003. From these judicial opinions, we collected information on each case (including characteristics of the parties, the nature of the alleged harassment, and the outcome of the proceeding). We also collected detailed biographical information on the presiding judge in each case (including her or his race, gender, and political affiliation). A single judge presided in district court cases, and a panel of three judges typically sat in appellate court cases. Our study included a total of 256 different judges, some of whom heard more than one case. Pairing each case with each judge hearing the case yielded a total sample of 428 judge/case pairs.[11]

For each judge vote in the dataset they coded whether or not the person alleging racial harassment (the plaintiff) was successful. This was the dependent variable.

One independent variable in the study is the race of the judge. Here is what the authors found when they looked at that variable:

> Our multiple statistical analyses clearly indicate that judges of different races do exhibit significantly different decision-making patterns. White judges are more likely than their African American counterparts to favor employer defendants, often granting their motions for summary judgment. African American judges are more

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[10] Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases,* 86 WASH. U. L. REV. 1117 (2009).
[11] *Id.* at 1129-1138.

likely to believe that employees have credible grievances of racial harassment.[12]

To see this difference in practice, look at Figure XX. This figure summarizes the observed difference between Black and White judges in this study. Take a look at the top panel. The difference in probabilities of finding for the plaintiff is around twenty-five percent. The horizontal line represents the uncertainty we have about the finding. Since this line doesn't cross zero, we can be confident that the effect is statistically significant. When just comparing Black and White judges, there are statistically significant differences. That is the bottom-line conclusion that Chew and Kelley reach in their study.

But is it the end of the story? You hopefully remember something called "omitted variable bias" from the last Part. If you don't control for relevant variables, you sometimes can get the wrong answers. This is especially the case when two independent variables are related to one other. Is there something else that might affect judging?

Ideology, of course! We know that ideology is probably related to race and sex since minority judges are more likely to be liberal, as are female judges. Moreover, many (though not all) female judges in the federal courts were appointed by Democratic presidents; so, too, for minority judges. Any study of the effects of a background characteristic must, therefore, simultaneously control for political ideology in some fashion. If not, any findings might just be an artifact. Suppose, hypothetically, that a court had a large number of female judges, all but one of whom was liberal, and further suppose that the men who sat on the same court were almost all conservative. If we just compared the behavior of the men and the women, we might want to conclude that their sex explained the difference. But without *controlling for* their ideologies, it's impossible to know whether sex or ideology was truly the factor that mattered most.

What happens to the findings from the Chew and Kelley study when you control for ideology? It turns out that in their article they estimated models that included the party of the appointing President. These models were reported in the Appendix. What do they find? Take a look at the bottom panel in Figure XX. Two things should be apparent in that panel. First, the effect size is smaller. Second, and more important, the black line that shows how confident we are in the findings crosses zero. *This means that the relationship is statistically insignificant.* In other words, there is no reliable evidence in the data that suggests that Black and White judges behave differently. Once we control for ideology, the effects of race are no longer significant.

So if the race of the judge isn't doing the work, something else is. In Figure XX we show the estimated difference in behavior between Democrat and Republican appointees, controlling for their race. We see a roughly twenty-percentage-point difference *that is statistically significant*. This is a classic example of omitted variable

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[12] ***Id.*** **at 1161.**

bias. Had the party of the appointing President not been controlled for, we would have reached the wrong conclusion about the effects of race and judging. Indeed, the conclusion reached by Professors Chew and Kelley that relies solely on the comparison of Black and White judges without considering ideology is not the conclusion supported by the data.

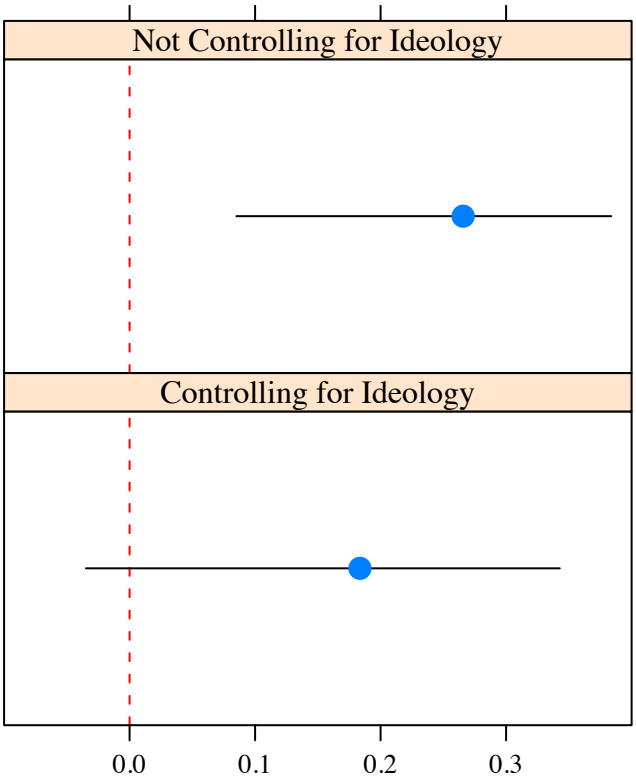

Figure XX. Estimated difference in probability of finding for plaintiff in racial harassment cases between black and white judges. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases,* 86 WASH. U. L. REV. 1117-1166 (2009). The findings come from results tables in Appendix B (Models 1 and 5). The black line is a 95% confidence interval for the difference.

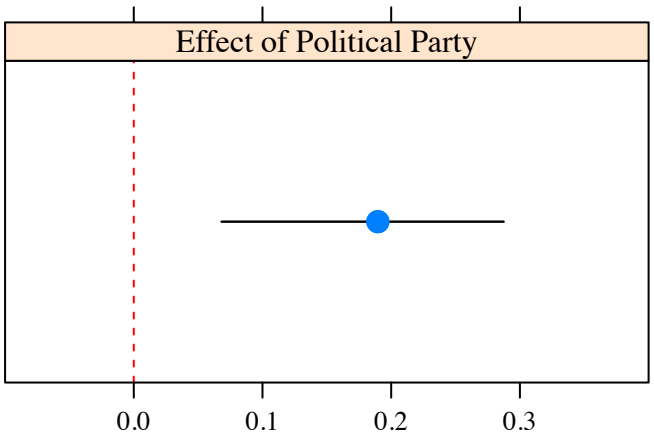

Figure XX. Estimated difference in probability of finding for plaintiff in racial harassment cases between Democrat and Republican appointees. Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases,* 86 WASH. U. L. REV. 1117 (2009). The findings come from a results table in Appendix B (Models 5). The black line is a 95% confidence interval for the difference.

FOR DISCUSSION

1. Why did we see a difference when we just compared the two groups, and then saw it go away when we controlled for ideology? One thing to remember is that this couldn't happen if ideology and race were completed unrelated to one another. So this means these two variables are related. How do you think the race of the judge and her ideology might be related?

2. One thing you will notice in the next section is that there are no studies about the effects of race and sex on judging on the Supreme Court. Why do you suppose that is the case? (Hint: Justices Thurgood Marshall and Clarence Thomas; Justices O'Connor, Ginsburg, Sotomayor, and Kagan.)

C. What We Know

The best empirical studies recognize all too well the importance of controlling for ideology when studying sex and race. What do these studies tell us about whether—and when—such personal characteristics affect judicial decisionmaking?

1. Sex

Most studies of the effects of gender on judicial decisionmaking look at the Courts of Appeals. For example, Professor Jennifer Peresie looked at all sexual harassment and sexual discrimination cases in 1999, 2000, and 2001, including both published and unpublished opinions.[13] Her dependent variable was whether or not the outcome was pro-plaintiff (the person alleging discrimination or harassment). After controlling for ideology and other characteristics of both judge and case, she found that the likelihood of a pro-plaintiff outcome increases from 22% to 41% in sexual harassment cases, and from 17% to 28% in sexual discrimination cases, when the judge is a woman.

Professor Christina Boyd and her colleagues looked at decisionmaking in the circuit courts in thirteen areas of law: abortion, Americans with Disabilities Act, affirmative action, campaign finance, capital punishment, contract clause, EPA, federalism, piercing the corporate veil, Title VII sex discrimination, sexual harassment, takings clause, and Title VII race discrimination.[14] The time periods run from the 1970s, 1980s, or 1990s through 2002, depending on the issue area.

Once they controlled for ideology, Professor Boyd and her colleagues found that in all areas of law *except* Title VII sex discrimination cases, male and female judges behaved exactly the same. They found that, "[o]n average, the probability of female judges voting in favor of the plaintif in a sex discrimination case is around .10 higher than it is for male judges—a difference with meaning."[15] This suggests that sex itself might be doing little work, except in the one area where past professional experience as a female lawyer might lead a female judge to view a particular case differently.

Here is a sampling of some other findings across courts and issue areas.

- Professors Lisa Baldez, Lee Epstein, and Andrew Martin studied sex discrimination cases in state courts of last resort from 1960-1999. Controlling for case characteristics and ideology, their analysis demonstrates that, as the number of female justices on the court increases, the likelihood that the court finds in favor of the plaintiff increases as well.[16]

- Professors Elaine Martin and Barry Pyle studied the decisions of state courts of last resort in divorce cases 1998-1999. After controlling for ideology, their results

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[13] Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts,* 115 YALE L. J. 1759 (2005).
[14] Christina L. Boyd, et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).
[15] *Id.* at 401.
[16] Lisa Bladez, Lee Epstein, & Andrew D. Martin, *Does the U.S. Constitution Need an ERA?,* 35 J. LEGAL STUD. 243 (2006).

indicate that female judges tend to side with female litigants; furthermore, if a female justice is present on the court, the male members also become more likely to side with the female litigant.[17] (We discuss the issue of inter-judge effects on multi-member courts in more detail in Chapter XX.)

- Professors Thomas Walker and Deborah Barrow studied the effects of gender diversification on the decisions of the U.S. District Courts. Focusing only on judges appointed by President Carter, they found statistically different sex differences in personal liberties and federal economic regulation cases; however, they found no difference between male and female judges in cases involving women's issues.[18]

- Professor Sue Davis and her coauthors examined the decisions of the U.S. Courts of Appeals in three issue areas: search and seizure, obscenity, and employment discrimination. Their regression analysis controls for the political party of the appointing president, and they, like Boyd et al., conclude that female judges are more likely to support the plaintiff in employment discrimination cases while finding no significant differences in other issue areas.[19]

In short, except for issues like sex discrimination where female judges—regardless of their ideology—are likely to have direct personal experience, the differences in behavior between male and female judges are either nonexistent or small in magnitude once we take ideology into account.[20]

2. Race

The findings in the literature with regard to race closely mirror those for the sex studies. As one recent study reported, "[o]ver the past several decades, extensive empirical research has concluded that a judge's race has little, if any, impact on decisionmaking in a variety of criminal and civil rights litigation."[21] As with sex, however, some studies have found race-effects in areas where race may be particularly salient, or where Black judges may have distinctive experience. Such studies tend to focus on the courts of appeals, rather than the district courts. Here is a sampling:

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[17] Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender* 36 U. TOLEDO L. REV. 923 (2005).

[18] Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985).

[19] Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993).

[20] *See, e.g.*, Orley Ashenfelter, et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*. 24 J. LEGAL STUD. 259 (1995); Gregory Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning,* 73 N. Y. U. L. REV. 1377 (1998).

[21] Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). At 4-5.

- Professors Adam Cox and Thomas Miles studied a set of dispositions in cases arising under Section 2 of the Voting Rights Act since 1982, which prohibits states from adopting any "voting qualification[s] or prerequisite[s] to voting . . . which result[] in a denial or abridgment of the right of any citizen of the United States to vote on account of race . . . ." The study includes votes in cases by circuit court judges, district court judges, and a handful of cases with district court judges sitting on three-judge panels (a unique institutional feature of the Voting Rights Act). After controlling for a variety of factors, Cox and Miles found significant differences between Democratic and Republican appointees. But even after controlling for the political party of the appointing President, they found that "an African-American judge is more than *twice as likely* as a non-African-American judge to vote for section 2 liability. While the number of African-American judges in our dataset is relatively small, the size of this effect is striking…. These findings are perhaps the first to document a strong connection between a judge's race and her judicial decisions—and certainly are the first to do so in the area of minority voting rights litigation."[22]

- Professor Jonathan Kastellec examined the effects of racial diversity on the U.S. Courts of Appeals. After controlling for ideology, he found that Black judges are more likely than non-Black judges to support affirmative action programs.[23]

- Sean Farhang and Greg Wawro examined the effect of diversity on the decisions of the U.S. Courts of Appeals. Their data includes 400 published employment discrimination cases decided in 1998 and 1999. While their analysis reveals some significant differences between male and female judges, they do not find any statistically discernable race effects.[24]

Just as with the studies about sex, the race studies show that except for a few highly salient areas, like voting rights or affirmative action, any effects of the race of the judge are swamped when ideology is taken into account.

3. Social Backgrounds and Career Experience

Sex and race are two characteristics that we might expect to be related to judicial behavior. There is another literature that looks at the effects of other types of background characteristics and previous professional experiences on decision-making.

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[22] Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). At 4-5.

[23] Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts* (unpublished paper) (2011). Kastellec's study also finds strong panel effects: His results indicate that, if a single black judge is placed on a panel, that panel is very likely to support the affirmative action program. We discuss panel effects in more detail in Chapter XX.

[24] Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making* 20 J. LAW, ECON., & ORG 299 (2004).

The most-cited political science study on the question is Professor Neal Tate's article, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978,* 75 AM. POL. SCI. REV. 355 (1981). Professor Tate posited a social background model of decisionmaking for justices on the Supreme Court. He looked at the voting behavior of the Justices in both civil liberties and economics cases from 1946 (the start of the Vinson Court) to 1978 (the end of the first decade of the Burger Court). He collected a host of information, including: birth, upbringing, and education; past career experience; age and tenure; and political partisanship. Then, he performed an analysis to determine which of these factors were most predictive of judicial behavior.

Professor Tate's results are quite interesting. For both economics and civil liberties cases, he found strong relationships between judicial behavior and the political party of the appointing President: Justices appointed by President Johnson were likely to have higher percent liberalism scores than those appointed by Presidents Truman or Nixon in both civil liberties and economics cases. But the backgrounds of the Justices matter as well. In civil rights cases, background as a prosecutor led to more conservative decisions, while prior judicial experience led to more liberal ones. In economics cases, justices who previously served in elective office or had previously served on the bench tended to reach more liberal outcomes; those with prosecutorial experience tended to reach more conservative ones.

Professor James J. Brudney and his colleagues Sara Schiavoni and Professor Deborah J. Merritt used a similar social background model to understand decisionmaking in the federal circuit courts.[25] Their study focused on both published and unpublished cases cases reviewing unfair labor practices under the National Labor Relations Act from 1986-1993. Just like Professor Tate's study, Professor Brudney and his colleagues looked several different characteristics. The authors summarize their findings as follows:

> A number of judicial attributes . . . also make a significant difference in predicting outcomes. . . . [J]udges appointed by Democratic Presidents were significantly more likely to support the union than were their Republican colleagues. Older judges and judges who had graduated from more selective colleges were significantly more likely to reject the union's claims…Gender [also] makes a difference in NLRA cases—but only for Republican appointees…[The model] indicate[s] that Democratic men and women both are more likely than Republican men to vote in favor of the union, but that Democratic men and women do not differ significantly among themselves. Republican women, on the other hand, are significantly more likely than Republican men to support the union. The votes of Republican women,

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[25] James J. Brudney, et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999).

> in fact, are at least as pro-union as those of as those of Democratic men or women.[26]

There was one particularly surprising finding in the Brudney, et al. study:

> [J]udges with NLRA management experience were significantly more likely than their colleagues to vote for the union—but only in cases in which the Board had issued a decision for the employer. When the Board supported the union, most judges showed a high probability of voting for the union as well. . . . When holding other characteristics constant in our judicial profile, in other words, a judge with NLRA management experience was more than twice as likely as a judge without that experience to reverse a pro-employer Board outcome and support the union.[27]

Can you think of any reason this might be? Here is what the authors of the study posit:

> A possible explanation for the noteworthy effects of NLRA management experience stems from the distinctive nature of the NLRA itself. This New Deal era statute rests on two legal paradigms that have become anomalous in our contemporary legal culture. The first involves the primacy accorded to group action. The Act's emphasis on protecting collective bargaining and other concerted mutual aid activity by workers entails a subordination of traditional individualistic perspectives. Statutory recognition of collectively bargained terms and conditions of employment means that individuals give up their freedom to negotiate their own job conditions. . . . [T]his policy perspective has all but disappeared in recent decades. . . . The second anomalous aspect of the NLRA is its furtherance of anticompetitive and interventionist policy goals. By protecting unions in their effort to remove wages from competition, the Act promotes the cartelization of labor markets. This approach runs counter to basic norms of our legal system, norms that oppose restraints on private competition and accept the efficiency of markets as a means of maximizing consumer and public welfare. . . . As union power and visibility have declined, the anticompetitive thrust of NLRA union protections has become harder to reconcile with the predominantly procompetition aspirations of federal law.

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[26] ***Id.*** **at 1717-19.**
[27] ***Id.*** **at 1720.**

> Given the distinctive nature of basic policies and history underlying the NLRA, the impact of management-side NLRA experience may signify that familiarity with the Act breeds greater respect for its protective doctrinal scope--even if the familiarity is developed while representing employer interests. Attorneys who perform substantial work representing management before the Labor Board and the courts come to understand the Act's practical realities and modest policy goals. These attorneys may be better prepared to breathe life into NLRA purposes and priorities as an interpretive matter once they are separated from a client-based ideological perspective.[28]

These findings suggest that, at least in areas where judges have some discretion, social background matters. Just as with Tate's study, the political party of the appointing President matters—a lot. But so too does the age of the judge, the sex of the judge, where the judge went to college, and—perhaps most importantly—whether the judge had relevant NLRA management experience.

Here is some additional evidence that social background affects decisionmaking:

- Professors Theodore Eisenberg and Sheri Lynn Johnson studied all of the published federal appellate and district court opinions involving constitutional race-based discrimination claims between 1976 and 1988. In addition to controls for ideology, sex, and race, their analysis included a number of judicial background factors including prosecutorial experience, prior judicial experience, prior elected experience, the judge's age, and her level of experience. Interestingly, the results indicate that judges with prior experience as prosecutors and judges with prior judicial experience are more likely to side with the litigant bringing the discrimination claim.[29]

- In an early study of the United States Courts of Appeals, Sheldon Goldman examined voting behavior in a number of issue areas. His analysis included a number of background variables including political party of the appointing President, religion, age, and years on the Court of Appeals. He concluded: "party and age seemed to have some limited importance in explaining the variance in judicial behavior, and the other background variables appeared negligible (with the possible exception of religion)."[30]

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[28] *Id.* at 1742-45.

[29] Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?,* 76 CORNELL L. REV. 1162 (1990-1991).

[30] Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisted,* 69 AM. POL. SCI. REV. 491, 505 (1975).

These studies are interesting, but they are just about all we have in terms of positive findings. In studies of the circuit courts, the effects of social background and career experience are dwarfed by political party or ideology. A few studies look at similar factors in the district courts, but the effects just are not there. Many studies look at things like age, past professional experience, and even the type of law school attended, and systematically find little differences in the behavior of judges. As an example, the study of all filed cases in three federal districts by Orley Ashenfelter, et al. finds no effects of social background whatsoever.[31]

The literature on the characteristics and background of judges leaves us with a set of conclusions. In contentious areas of law, and especially when we look at published opinions—whether in the Supreme Court or circuit courts—the social background of judges does seem to be related to decisionmaking at the margins. But the effect size seems fairly insubstantial when we compare it to other factors, like the ideology of the judge. The findings with regard to race and sex paint a clear picture. On issues like sexual discrimination or minority voting rights—where female or minority judges may have unique experiences and insights—we find some sex and race effects. But in just about every other place we look, there is scant evidence that race and sex affects judging.

FOR DISCUSSION

1. The areas where there seem to significant effects of personal characteristics are those where individuals might have some personal experience or knowledge, e.g., women and sex discrimination in the workplace, or African-Americans and voting rights. Why might this be the case? Can you think of other areas of law where women, Blacks, or judges with various backgrounds might have law-relevant personal experiences?

2. There are a number of personal characteristics that haven't been studied very much. One is geography. Can you think of a time in our nation's history where the state from which the judge came might have mattered a lot? Do you think geography is less important today than in the past? Why or why not?

3. Religion is another area that hasn't been studied much. Why do you think that is? Can you think of areas of law where the religion of the judge might play an important role? In what areas of law might it matter that six of the nine current justices on the U.S. Supreme Court are Catholic?

4. Can you think of other personal characteristics that might we be worth studying? What areas of law would you want to look at? Why hypotheses do you have?

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[31] **Orley Ashenfelter, et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*. 24 J. LEGAL STUD. 259 (1995).**

5. All of the studies reviewed in this Part look at dispositions rather than opinions, just as with all of the studies of ideology. How does this limit what we know? Can you think of reasons why male or White judges might craft opinions differently from their female or minority colleagues? The idea of a "different voice" by female judges in particular might suggest a different use of language, which could be picked up in opinions.[32] To date no one has studied this empirically, although the tools of computational linguistics seem very promising.[33]

6. In an interesting study using data from the Courts of Appeals, Professors Maya Sen and Adam Glynn find that for male judges, having daughters causes them to approach sexual discrimination and sexual harassment cases differently from their colleagues who don't have daughters.[34] Why do you suppose that is?

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[32] Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 86 VA. L. REV. 543, 580, 581, 613 (1986).

[33] Moshe Koppel, Shlomo Argamon, & Anat Rachel Shimoni, *Automatically Categorizing Written Texts by Author Gender*, 17 LITERARY & LINGUISTIC COMPUTING 401 (2002).

[34] Maya Sen & Adam Glynn, Like Daughter, like Judge: How Having Daughters Affect Judges' Voting on Women's Issues (Havard University working paper).