

Do women judges judge differently?

What the studies tell us may surprise you

By Hon. Dalila Lyons (Ret.)

When Sandra Day O'Connor was appointed to the U.S. Supreme Court in 1981, it was as if the tectonic plates of justice had shifted. Never before had a woman's voice been heard from the nation's highest bench, and many feared that the legal system would be forever changed.

Fortunately, those fears have been borne out. Today, women sit on the Supreme Court and occupy judgeships at every level across the country, and they have changed the way justice is done – all for the better. Their unique experiences and perspectives have enriched the legal system and have opened society's eyes to new and different ways of looking at the law.

Justice O'Connor took pains to assure her detractors that her foremost duty would be to uphold the law, and that her decisions would be fair and equitable: "I've always said that at the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the same conclusion."

In contrast, Ruth Bader Ginsburg played up the fact that she was only the second woman on the top court. "So now the perception is, yes, women are here to stay. And when I'm sometimes asked when will there be enough [women on the Supreme Court]? And I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that."

How things have changed. When O'Connor retired from the Supreme Court in 2006, women still comprised less than five percent of all law school students and relatively few were serving as judges. Today more women than men are enrolled in law schools across the country, according to the American Bar Association (See https://www.enjuris.com/students/law-school-women-enrollment-2023/). They occupy every legal position and issue rulings from every level of the bench. Three Supreme Court justices are now of the female persuasion.

The heightened presence of women in the legal profession has necessarily changed the way we think and talk about the law. It is no longer exclusively an old boys' network, with deals made on golf courses and over drinks at private clubs. Women manage law firms, run ADR enterprises, and bring in seven-figure verdicts in every area of the law.

But women as judges raise unique and complicated questions within the profession. Do they judge differently than their male peers? If so, is this cause for concern or celebration?

The numbers

Women judges play a significant role in California's court system. Data provided pursuant to California Government Code section 12011.5(n)) (https://www.courts.ca.gov/documents/2023-JO-Demographic-Data.pdf) shows that as of December 31, 2022, approximately 40 percent of the state's judges were female. However, female judges in the California trial courts increased only 7.5 percent from 2014 to 2022, not a significant increase. The demographic data reflects responses from justices and judges who were active and serving as of that date, and it breaks the numbers down to the court level.



At the end of 2022, more women than men occupied seats on the state's Supreme Court and on many other courts within the state. But several counties – primarily those with only one or two judges – had no women serving as judges. Governor Newsom announced that as of March 2023, 51 percent of his judicial appointments were women.

The overall numbers in California are promising and perhaps a little surprising. They may predictively show progress toward judicial parity between the genders. They may also underscore the significance of women's contribution to the science and art of judging. Women justices on the California Supreme Court and on the state's appellate courts are regularly reviewing and ruling on fundamental principles of law. Their decisions are having and will continue to have a deep and long-standing impact on both the profession and the general public.

Given the indisputable imprimatur of women on the law, it is important to understand whether the law – as embodied in court decisions – is now different than it would have been had only men been making those decisions. Do women read facts, interpret laws, or respond to litigating parties differently than do their male counterparts?

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Just the facts, Ma'am

The idea that women may view the law, or the facts to which the law is applied, differently than men is, at first glance, troubling. The law is the law; the facts are the facts. There should be little room for wiggle.

In fact, both Chief Justice John Roberts and Justice Clarence Thomas told Congress during their confirmation hearings that judges should be no different than neutral baseball umpires. Just as an umpire assesses pitches and tags based on clearly defined lines and boundaries, so too should judges frame their decisions against clear lines drawn in the dirt or placed around the batter's/litigant's torso.

This may be wishful thinking. As in the classic Japanese film Rashomon, there are always more than one way to look at those lines. A single story told from different viewpoints is likely to yield multiple stories. Every judge – male or female – comes into the courtroom with unique experiences and perspectives. It is unrealistic, and perhaps naive, to assume that he or she can simply erase those experiences and perspectives.

Which is not to say that actual bias, prejudice and conflict are not present from time to time in the courtroom. All judges, regardless of gender, are obligated to disclose potential conflicts of interest and to recuse themselves from cases in which they may be conflicted. But personal backgrounds and biases are an inherent and inescapable part of being human beings, even for judges. Judges, however, must do their best to put personal biases and prejudices aside when rendering decisions. Their experiences and backgrounds certainly enrich our legal system, but they should not drive the result. Only the law and the facts should ultimately drive the result. Otherwise, the outcomes of cases could depend just as much on the gender or race or other characteristic of the decision maker as on the facts of the cases.

It may be impossible to go back in history and try to determine how cases would have been decided had women judges been involved, but it is possible to review studies and research on the subject, to look at court dynamics, and to draw some broad conclusions.

Women vs. men

Are there actual, verifiable differences in the way women and men view their world and render judgments? A 2001 paper by Heather Elliott, published in the Wisconsin Women's Law Journal, cites in a footnote a study by Shelley Taylor and others entitled "Biobehavioral Responses to Stress in Females: Tend-and-befriend, Not Fight-or-flight" (107 Psychol. Rev. 411).

According to Elliott, the cited study found concrete differences in the ways men and women deal with conflict and stress. Women exhibit a 'tend and befriend' response to stress that is far different from the 'flight or fight' response found in men. "The researchers posit that women's hormones allow a more generous and communal response to stress than do men's hormones," and these differences may be innate or may be the result of "developmental paths imposed on male and female children." ("The Difference Women Judges Make," https://api.law.wisc.edu/repository-pdf/uwlaw-library-repository-omekav3/original/a0c14ca02e5d5e-a5764ee006183e7930babd2641.pdf)

A more recent study, "Soft ways of doing hard things," examined how women conduct themselves as mediators, and it identified a host of "soft" skills that female mediators bring to the mediation process. In their 2019 work, researchers in Northern Ireland looked at the special or unique skills women bring to the mediation process. They suggested that when women are included in international peace processes, the end result is more sustainable agreements.

Women, the researchers found, tend to be more sensitive to gender inequalities, presumably because of their own experiences. As mediators, they will focus more on the relational nature of conflicts, less on the power and hierarchy issues that tend to occupy men. Rather than looking only at facts and the law, women mediators are more likely than their male counterparts to put things in context. They are able to see both the bigger picture and the emotional details of the cases before them, a skill that is less prevalent among male mediators. (See https://www.tandfonline.com/doi/full/10.1080/21647259.2019.1664369)

If there are intrinsic differences between how men and women deal with and resolve conflicts – as these studies would indicate – one must assume that these same differences will play out when reviewing the work of male and female teachers, doctors, athletes, artists, lawyers, and yes, even judges.

That a woman artist may see and express her world differently than a male artist is generally not cause for alarm. In fact, the alternative perspective may enhance the interest and potential value of her contribution. But when a judge views things differently or expresses thoughts in an alternative manner, it may be cause for concern.

Our society is founded on a belief in the rule of law, bounded by statutory texts and stare decisis. When judges interpret the law, they presumably do so within these boundaries. But they also bring inescapable backgrounds, experiences, and perspectives into the process. Even Justice O'Connor recognized the complex and multi-layered landscape against which judges issue their decisions: "We don't accomplish anything in this world alone... and whatever happens is the result of the whole tapestry of one's life and all the weavings of individual threads from one to another that creates something."

A number of studies have looked at the way women approach their role in the law and have attempted to explain why and how they may work differently.

Women as decision makers

The central question, when examining the way women judges approach their work, is whether – and how much – their gender may affect the ultimate legal

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outcome. A 2000 study by Phyllis Coontz examined data collected from state trial judges in Pennsylvania. It sought to determine whether the gender of the litigant or that of the judge affected the outcome of cases. While litigant characteristics did not appear to affect judicial decisions, the study found that the gender of the judge clearly did. ("Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?" https://go.gale.com/ps/i.do?id=GALE%7CA74494237&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=1098092X&p=AONE&sw=w&userGroupName=anon%7Eaea612b7&aty=open-web-entry)

Feminist scholars, according to Coontz, have long contended that women bring a different perspective to the law and seek different outcomes from legal processes than do their male colleagues. Conventional law, they argue, reflects a male perspective and therefore focuses on separation, individual rights, and abstract rules. A woman's perspective on the law, in contrast, will be colored by her own experience.

It should be unsurprising that female judges may approach cases involving gender-based discrimination and sexual abuse differently than male judges. Famously, Supreme Court Justice Sandra Day O'Connor made news when she joined a liberal majority in upholding the right to sue schools for peer-to-peer sexual harassment under Title IX. (*Davis v Monroe County Bd. of Ed.* (1999) 526 U.S. 629.) The all-male conservative dissent, from which she split, focused on states' rights. O'Connor's decision to provide a path toward equal treatment was likely influenced by her own experiences of differential treatment in her legal career.

Do female judges rule differently?

In 2009, the New York Times examined the question of whether women judges decide cases differently than male judges. The article, which included quotes from Justices O'Connor and Ruth Bader Ginsberg, as well as other highly placed women judges, referenced a recent academic study by Christina L. Boyd, Lee Epstein and Andrew D. Martin. Their unpublished paper found that female judges were more likely than male counterparts to decide in favor of plaintiffs who alleged sex discrimination in the workplace. There was no difference in the outcomes of cases involving disability law, environmental issues and capital punishment, suggesting that gender-based issues are an outlier in the spectrum of legal matters decided by judges. (See https://www.nytimes.com/2009/06/04/us/politics/04women.html?smid=nytcore-ios-share&referringSource=articleShare).

In a 2019 paper entitled "Gender, Law, and Judging," authors Susan Haire and Laura P. Moyer reviewed numerous studies conducted since the 1980s on the purported gender differential in judging. They found empirical support for the proposition that female judges who have experienced discrimination are more likely to rule in favor of plaintiffs in civil liberties, criminal justice and employment discrimination cases. But they also found that "After decades of research, including the sampling of studies highlighted above, with few exceptions scholars have largely found that the voting behavior of women and men on the bench is more alike than different." The authors concluded that increased demographic diversity in the courts should continue to fuel empirical research into the impacts of gender on judging. (See https://doi.org/10.1093/acrefore/9780190228637.013.106)

Despite the footnote referenced in the preceding section from the Wisconsin Women's Law Journal article, that article's author found little evidence to support a conclusion that women and men judge differently. In fact, she said, studies show that they make "remarkably similar" decisions in most areas of law.

Elliott, the author, made fast work of a multitude of studies over the years that had posited that an essentially female point of view permeated the decision making of female judges and that they had a different approach to moral reasoning. Any judging differences, Elliott argued, were attributable to the different experiences of women in the world, not to any innate way that women have of making decisions. "To say that women judges bring a 'uniquely female' perspective to the law… recapitulates gender stereotypes long used to oppress women."

The bottom line appears to be that, with the exception of cases involving sexual abuse, gender-based discrimination, or other such inequities, women judges decide cases not significantly differently than their male peers. This should provide comfort to those, such as Justices Roberts and Thomas, who firmly believe in maintaining clear boundaries when judging litigants' pitches.

Women as influencers

But this is not the end of the inquiry. Even if female judges arrive at the same or very similar conclusions as men when deciding cases, how they traverse the process to arrive at those conclusions is generally different. Recall the findings of the Northern Ireland mediation study, which attributed a range of "soft" skills to women mediators. Those mediators, the researchers found, generally avoided competition and isolation, striving instead for rapprochement and cooperation. Whether managing the divide between litigants or the personalities and egos of their fellow judges, women may be working with a different tool set, or they may be wielding the tools they are given in a new or different manner.

Interestingly, when reviewing the way women judges influence parties, peers and the process, there appears to be striking consensus among researchers and academics. A 2013 review of research on the subject by the University of Georgia's Christina Boyd found that female judges do tend to exert influence in ways that differ significantly from the majority of their male colleagues. ("She'll Settle It?" Journal of Law and Courts, Vol. 1,

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No. 2 (September 2013), pp. 193-219, The University of Chicago Press; https://www.jstor.org/stable/10.1086/670723?read-now=1&seq=1#page_scan_tab_contents.)

Starting from the premise that female leaders are more likely than men to use an approach favoring participation, collaboration, and consensus building, Boyd compiled data from almost 18,000 civil rights and tort cases in four federal district courts over the course of nine years. She found that women judges were more likely to push for and achieve intra-court settlements than were male judges.

Boyd's data confirmed that the gender of the assigned judge did matter to the resolution of the case. This had nothing to do with a final verdict and everything to do with the way litigants and counsel reached resolution of their matter. Although settlement was common in all types of cases, Boyd found that in both civil rights and personal injury tort cases, female judges were more likely to succeed in fostering settlement for their cases than were male judges. Few would argue that settlement is not ultimately a better outcome for most legal matters than protracted courtroom litigation.

Boyd's analysis confirmed that cases assigned to female district court judges were more likely to settle and settled more quickly than those assigned to male judges. In civil rights cases, female-assigned cases settled 68% of the time; those assigned to male judges settled 63% of the time. In personal injury tort disputes, the percentages were 86% settlement for female judges, compared to 80% for male judges.

Women judges were also shown to succeed on a fairly regular basis at helping male peers view the facts and the law of cases before them differently. Women's voices, experiences, and perspectives may have introduced another way of looking at things, encouraging male judges to reevaluate and reconsider their positions. According to the unpublished paper by Boyd, Lee Epstein and Andrew D. Martin that is cited in the New York Times article, when a woman served on a panel with men, the men were significantly more likely to rule in favor of a rights litigant. (See https://www.nytimes.com/2009/06/04/us/politics/04women.html#:~:text=In%20addition%2C%20the%20study%20said,rights%20litigant%2C%E2%80%9D%20it%20said.)

In their study of women judges, Haire and Moyer concluded that those serving on U.S. courts of appeals tended to facilitate compromise. Women opinion authors, they found, were more likely to write opinions that advocated for an outcome representing the "middle ground" when compared to opinions authored by male judges.

Citing a 2007 study by S.A. Lindquist, W.L. Martinek and V.A. Hettinger (*Law & Society Review*, *41*(2), 429-456), Haire and Moyer pointed to research that suggested that "the makeup of a court with respect to gender can affect decision-making processes related to consensus on appellate courts," including "some evidence that, as individuals, female judges are more successful than their male colleagues in finding 'middle-ground' positions.

The data is meaningful, because it shows that the ability to "think like a woman" can produce a positive outcome in the legal process. Litigants who feel that their stories are heard and appreciated may be more open to settling disputes; counsel encouraged to find a solution may be more amenable to setting aside the boxing gloves and sitting down at the negotiating table. A woman judge – or any decision maker skilled or trained to build bridges – may be able to foster resolution even in the most difficult and contentious cases.

What does it mean?

As Justice Ginsberg said, women judges are here to stay. Every day, decisions are being made and opinions issued that reflect the perspectives and experiences of women. When those decisions address historic gender-based inequities or other troubling gender matters, a woman's insights and experiences may be critical to achieving a just outcome.

Beyond the case decisions and legal analyses, however, the legal process itself is increasingly reflecting the skills and attributes that have traditionally been ascribed to women. These include cooperation, consensus-building, and fostering relationships. And they are not solely the province of women.

According to Christina Boyd, the research that has been done to date confirms that the sex of a judge matters. Female judges successfully foster settlement more often and more quickly than their male colleagues. "In addition to having significance for litigants, these findings have broad implications for female decision makers across different institutions and organizations as well as the future of the judging profession and diversity appointments to the judiciary."

Not all women judges are peacemakers, and many male judges possess "soft" skills such as consensus-building and contextualization. Instead of focusing solely on potential differences in the way the genders serve as judges, the legal profession should identify and celebrate those skills – whether embodied in men or women – that generate a just outcome.



Lyons

Hon. Dalila Corral Lyons, (Ret.) is a neutral with Signature Resolution. *She served 18 years on the bench of the Los Angeles County Superior Court. During her last three years on the bench, she was a full-time settlement judge conducting mandatory settlement conferences. Judge Lyons is a voting member of the California Judicial Council.*

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