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# Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions

*Pat K. Chew\**

*Why did we think that women would transform institutions without simultaneously—or alternatively—being transformed by them . . . ? Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo?*<sup>1</sup>

## I. INTRODUCTION

Both the legal community and society have become particularly intrigued with the topic of women judges. In part, increasing visibility and number of women judges,<sup>2</sup> jump-started by numerous judicial appointments of women in the Carter, G.H. Bush, and Clinton Administrations, explain this interest.<sup>3</sup> Recent high-profile events brought attention to women in political life generally. The presidential campaigns of both Hillary Clinton and Sarah Palin highlighted their remarkable, but still novel, roles as female candidates for national office. And certainly Justice Sonia Sotomayer's confirmation hearings and the uproar surrounding her "wise Latina"

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1. Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT'L J. LEGAL PROF. 7, 7-8 (2008).

2. *Judges of the United States Courts*, FED. JUDICIAL CTR., <http://www.fjc.gov/public/home.nsf/hisj> (last visited Oct. 25, 2010) (showing that female judges now constitute approximately twenty percent of the federal judiciary).

3. Jennifer A. Segal, *Representative Decision-Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 139 tbl.1 (2000) (showing that 19.6% of Carter's appointees, 18.9% of Bush's appointees, and 28% of Clinton's appointees to the federal appellate courts were women).

comment confirmed that both the gender and ethnicity of judges remain hot-button issues.<sup>4</sup>

The increase of women on the bench has intrigued legal and social science researchers. It has prompted theoretical and empirical explorations of the importance and consequences of the increasing presence of women on the bench.<sup>5</sup> Some have considered the *symbolic value* of more gender diversity in the judiciary,<sup>6</sup> while others have noted the *substantive value* of women judges.<sup>7</sup> While the symbolic value of a more diverse judiciary can be very meaningful, it is distinguishable from the substantive effect women judges may have through different interpretations of legal principles, resulting in different case outcomes.

Researchers utilizing different models of judicial decision making put forth different predictions about whether the gender of judges will make a substantive difference in case outcomes. In particular, the legalistic and professional-socialization models contrast with the realistic and personal-attribution models. Those who subscribe to the legalistic model<sup>8</sup> think that judicial decision making is largely a mechanical and essentially formulaic process, and would likely predict that judges' gender or other personal attributes are unlikely to make a difference. The professional socialization model<sup>9</sup> further complements this legalistic model. It argues that judges, through their legal and judicial training, are repeatedly socialized to the profession's norms and that this socialization prevails over any personal attributes or experiences. Thus, a judge's gender would not likely affect the decision-making process.

In contrast, those who believe that the judicial decision-making process involves some personal discretion (realistic model)<sup>10</sup> are more likely to

4. Carolina M. Miranda, *Just What is a 'Wise Latina,' Anyway?*, TIME, July 14, 2009, [www.time.com/time/politics/article/0,8599,1910403,00.html](http://www.time.com/time/politics/article/0,8599,1910403,00.html); Charlie Savage, *A Judge's View of Judging is on the Record*, N.Y. TIMES, May 14, 2009, [www.nytimes.com/2009/05/15/us/15judge.html](http://www.nytimes.com/2009/05/15/us/15judge.html).

5. See *infra* Part III. Researchers, including the Author, are cognizant of the risks of over-generalization about female or male judges, as well as being presumptuous about how a specific female or male judge might decide.

6. See Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 301 (2004) (calling symbolic value "descriptive representation"); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging 2* (2009) (unpublished paper) (on file with *The Journal of Gender, Race & Justice*) (calling symbolic value "social legitimacy").

7. Farhang & Wawro, *supra* note 6, at 301–02; Boyd et al., *supra* note 6, at 3–5 (calling substantive value "participation and perspective" among other descriptives).

8. JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 22–23 (2005).

9. Boyd et al., *supra* note 6, at 4 (describing the professional socialization model as an "organizational accounts" approach).

10. 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, 1130 (2009).

predict some relationship between judges' gender and case outcomes. The personal attribution model<sup>11</sup> similarly complements this realistic model. It argues that judges do not leave their humanness at the courtroom door.<sup>12</sup> Judges' lives, including personal attributes and experiences, consciously or unconsciously influence how they interpret case facts and legal principles.<sup>13</sup>

This Article furthers our understanding of the substantive value of women judges by analyzing a subset of the research on this topic. It offers a macro-level review of the empirical research done on judges' gender in U.S. federal courts and how a judge's gender affects the outcomes in employment discrimination cases, a research area that has attracted considerable empirical analysis. Employment discrimination is also a major subject area of litigation in the federal courts,<sup>14</sup> highlighting its importance and also providing ample databases of cases to study. Thus, this comparatively rich source of research makes it possible to draw conclusions with a clarity that would not be possible if we were comparing judicial decision making in diverse court venues or legal subjects.

To lay the groundwork for the macro review, this Article briefly identifies factors to consider when studying empirical research. A macro review of the empirical research on the relationship between judges' gender and the outcome in employment discrimination cases follows. This macro review is based on fourteen research studies, a surprisingly large number given the relatively short period in which researchers have actively engaged in this particular inquiry.<sup>15</sup> This macro review focuses on illustrative studies on (1) sex-based discrimination cases, (2) employment discrimination cases more generally, and (3) non-gender-specific employment discrimination cases such as race-based discrimination cases.<sup>16</sup>

This Article provides a status report on the reasonably clear conclusions that can be drawn from current empirical evidence in this area. To the extent that there is a difference between the way female judges and male judges resolve legal cases, the frequent hypothesis is that those differences would most likely appear in employment discrimination, particularly sex discrimination, cases. This macro review largely supports that hypothesis.

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11. Farhang & Wawro, *supra* note 6, at 302 (describing the personal-attribution model as an "attitudinal model").

12. *Id.* at 301–02.

13. *Id.*

14. *Id.*, *supra* note 6, at 312. See also ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 146–48 tbl.C-2A (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/appendices/CO2ASep08.pdf>.

15. The Author's survey of research indicated that research on this topic has occurred largely in the last fifteen years, with only a few studies prior to that time.

16. See *infra* Parts III.A–C.

Thus, it concludes that increasing gender diversity on the bench makes a substantive difference in how these kinds of cases are resolved. As the subject of the cases moves away from sex discrimination, however, the review of research indicates that the relationship of the judges' gender to case outcomes is less predictable.

## II. FACTORS IN THE EMPIRICAL RESEARCH

Determining the substantive value of women judges is difficult because judicial reasoning and decision making occurs in the judges' heads and is not subject to direct observation. Therefore, researchers typically use the following research method to gauge judges' reasoning and decision making: they compare how judges of each gender (or other characteristic) resolve the legal disputes before them as indicated in their judicial opinions.<sup>17</sup> If judges of both genders have no significant differences in their decision-making patterns (i.e., they are equally likely to hold for the plaintiff), the inference is that judges' gender does not make a substantive difference, at least not in a way that is detectable by studying case outcomes. If, on the other hand, judges of one gender have significantly different decision-making patterns (i.e., one gender is less likely to hold for the plaintiff), the inference is that judges' gender does make a substantive difference.

In the past fifteen years, numerous studies have examined whether judges' gender makes a substantive difference. Cumulatively, they provide the empirical basis for what is known. These studies, however, have different characteristics so that examiners understand each study's results with these varied characteristics in mind.

### *A. Court Venues*

Court venues are not interchangeable. Each study focuses on judicial opinions from a particular court venue. Certain previous research included only federal appellate court opinions or only district court opinions. Other researchers included opinions from only certain federal circuits, while others drew from all circuits. In contrast, some studies included only state court opinions, and again the court levels vary. Obviously, all these court venues have distinct characteristics.<sup>18</sup> For instance, the judicial selection processes in federal courts differ from judicial selection processes in state courts

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17. See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263–64 (1995) (explaining limitations of research based on published opinions and how other factors such as background influence the judicial decision-making process).

18. For a general discussion of characteristics of each court venue, see SEGAL ET AL., *supra* note 8, at chs. 7–9; Farhang & Wawro, *supra* note 6, at 304–10 (discussing institutional norms of appellate courts).

(which have variations by state); trial court judges and appellate court judges differ in the procedural issues presented; decision making as an individual judge (which is typical at the federal district court level, for instance) is distinct from the collective decision making (that occurs on federal appellate court panels); and the U.S. Supreme Court is unique in its judicial selection process and the cases brought before it.<sup>19</sup>

### B. Time Period

The time period of the cases in the study is important in gauging the generalizability of the research results. For example, cases from earlier time periods provide some historical information and insights into trends, but cases from recent time periods are more meaningful in understanding present and future judicial decision-making patterns. Studies on cases from very limited time periods, for instance two years or less, may not be as representative as studies based on cases from longer time periods. Research on the gender of federal judges began in earnest after the Carter, G.H. Bush, and Clinton administrations.<sup>20</sup> These presidents appointed a substantial number of female judges, thus providing a minimally sufficient number of judges to study. A study analyzing only Carter and Clinton appointees at a designated time period after their appointments,<sup>21</sup> while revealing about these particular judges at that point in time, may not be reflective of judges more generally in other time periods.

### C. Other Judge Characteristics

While some researchers are interested in the judges' gender, others have investigated the relationship of other judge characteristics to their decision making. Researchers have studied judges' political orientation the most;<sup>22</sup> and more recently, they have focused their attention on judges' race.<sup>23</sup> Other studies have emphasized age or experience.<sup>24</sup> Some researchers have studied the intersection of characteristics (e.g., minority women judges).<sup>25</sup> The

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19. SEGAL ET AL., *supra* note 8, at chs. 10–13.

20. See, e.g., Segal, *supra* note 3; Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985) (studying Carter appointees about ten years after their appointment).

21. See, e.g., Segal, *supra* note 3; Walker & Barrow, *supra* note 20.

22. See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

23. See, e.g., Chew & Kelley, *supra* note 10.

24. See, e.g., Fred O. Smith, Jr., Note, *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087 (2005).

25. See, e.g., Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the*

common inquiry is whether a particular judicial characteristic has substantive significance. Researchers are also sensitive to the independent significance of each characteristic and whether there is some interaction between judicial characteristics.<sup>26</sup>

#### *D. Subject of Cases*

One critical distinction is the type of cases in the study. In other words, what subject area of law is the researcher's focus? If the type of cases and the researcher's focus is, for instance, constitutional, criminal, employment discrimination, sexual discrimination, or sexual harassment law' the legal issues obviously vary, thus creating the possibility for different results. Moreover, those issues may be more or less controversial and legally conflicted, and the amount of judicial discretion in interpreting legal principles may vary.

#### *E. Research Methodology*

All researchers should follow appropriate empirical methods.<sup>27</sup> These methods include a research design that will yield reasonably valid and reliable results, sampling techniques that help assure representative judges and cases, and statistical methods that are appropriate given the research design, research inquiries, and the type of variables. Studies that do not utilize these basic characteristics have limited usefulness.

Electronic databases and advanced search tools make identifying relevant cases and judges feasible. Studying the universe of all cases is ideal, but random sampling techniques can provide a representative sample of the universe. Researchers use basic statistical methods, such as cross-tabulations, significance testing, and logistic regression modeling, to see if differences in female judges' versus male judges' decision-making patterns are occurring by chance or if there is some significant difference.<sup>28</sup> Some researchers compare all female judges with all male judges, and then isolate the effect of gender from other possible explanations (e.g., the judges' political ideology). Other researchers consider these other possible explanations in advance, by using "matched" pairs of females and males who share possibly explanatory characteristics (e.g., the same political ideology). Any significant resulting differences in case outcomes, therefore,

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*Federal Appellate Bench*, 61 POL. RES. Q. 219 (2008).

26. See, e.g., Chew & Kelley, *supra* note 10.

27. See, e.g., JACOB COHEN ET AL., *APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES* (3d ed. 2003); ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* (2010).

28. See LAWLESS ET AL., *supra* note 27, at 231–42 (describing significance levels).

are then presumably attributable to gender.

### F. Interpretations and Generalizations

After reporting the results of their statistical analyses, researchers attempt to explain those results. Researchers exercise their professional discretion in interpreting their empirical findings and discussing their meaning. Some researchers are merely descriptive while others are more evaluative and generalize their results to various contexts. However, critical consumers of their research might interpret their statistical findings differently than the study's researchers. The reader's understanding of empirical research and statistical analysis, judicial functioning, and the particular nuances of the legal area will further inform her or his own interpretation and generalizations of the data.

## III. MACRO-LEVEL REVIEW OF EMPIRICAL EVIDENCE

Using a range of sources the Author, to the best of her knowledge, identified all empirical studies on federal court cases since 1990 that focus on the relationship between judges' gender and outcome in employment discrimination cases in general, and sexual discrimination in particular.<sup>29</sup> Fourteen studies were identified, all of which are listed in the Appendix. State court cases and federal cases that are on other subject areas are not included.<sup>30</sup> While a handful of studies looked at data prior to 1990, their application to our current understanding of the relation between judges' gender and judicial decision making is limited and possibly misleading given the age of their data.<sup>31</sup> This review of studies on the effects of a judges' gender reveals that more empirical research exists in employment discrimination, particularly sex discrimination, than any other particular

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29. The Author's search builds on an independent search of research in legal and social science databases, as well as research reviews in other articles, such as the one in Boyd et al., *supra* note 6, at 2–5.

30. Judges' gender studies that are not on U.S. federal employment discrimination cases are not included in this macro review. For judges' gender studies of non-U.S. judges see, e.g., James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L. J. 315 (2007). For judges' gender studies in employment law and labor law areas more generally see, e.g., 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) (studying judges' gender in federal appellate decisions on the National Labor Relations Act). For judges' gender studies on criminal law see, e.g., Collins & Moyer, *supra* note 25; Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographics*, 34 J. LEGAL STUD. 57 (2005); and Ashenfelter et al., *supra* note 17. For judges' gender studies on state courts see, e.g., Elaine Martin & Barry Pyle, *Taking Sides: The Impact of Judicial Gender on Decisions in Divorce Law* (2004) (unpublished paper) (on file with *The Journal of Gender, Race & Justice*).

31. See, e.g., Walker & Bartow, *supra* note 20.



non-criminal law topic. The comparative richness of this existing body of work allows us to better understand the role that gender plays in judicial decision making. This macro review reveals a number of notable patterns.

A. *Judges' Gender in Sex Discrimination Cases*

To the extent that female and male judges differ in how they resolve legal cases, the frequent hypothesis is that those differences would most likely appear in employment discrimination cases, particularly sex discrimination.<sup>32</sup> The weight of the empirical evidence supports this hypothesis. For example, studies have found that female judges in the federal appellate courts have different decision-making patterns than male judges when it comes to sexual discrimination cases: namely, female judges are more likely to hold for the plaintiffs.<sup>33</sup> The recent study by Boyd, Epstein, and Martin illustrates this.<sup>34</sup> Likewise, the Crowe study, Massie study, and Peresie study on sex discrimination and sexual harassment cases reach the same conclusion.<sup>35</sup> In contrast, the Kulik study on district court cases and the Westergren study on appellate court cases did not find gender differences in the judges' decision-making patterns.<sup>36</sup>

The Boyd study is based on a data set from appellate court cases on a range of different legal subjects between 1995 and 2002, compiled by Cass Sunstein and his colleagues for their project on the effect of political ideology on judicial decision making.<sup>37</sup> Boyd and her colleagues study two questions:<sup>38</sup> Do male and female judges decide differently (individual effects)? Does the presence of a female judge on a panel cause male judges to behave differently (panel effects)?<sup>39</sup> Their paper is distinctive in part

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32. Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996*, at 25-32 (1999) (unpublished doctoral dissertation, University of Chicago) (on file with *The Journal of Gender, Race & Justice*).

33. See *infra* notes 34-35 and accompanying text.

34. Boyd et al., *supra* note 6.

35. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Crowe, *supra* note 32; Tajuana Massie et al., *The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals* (Apr. 25-28, 2002) (unpublished manuscript) (on file with *The Journal of Gender, Race & Justice*).

36. Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM. BEHAV. 69 (2003) (showcasing a study of district court judges and sexual harassment cases that did not find any gender differences); Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L. J. 689 (2004).

37. Boyd et al., *supra* note 6, at 16; see also SUNSTEIN ET AL., *supra* note 22.

38. Boyd et al., *supra* note 6, at 1.

39. *Id.*

because of its elaborate discussion of research methodology in judge studies, including a description of the most dominant methodology and an alternative method that the researchers advocate.<sup>40</sup>

The Boyd study found strong significant differences in sex discrimination cases at the appellate level (although it did not find gender differences in other subject areas).<sup>41</sup> When dealing with sex discrimination suits, the study found significant differences in the way female and male judges ruled, with female judges finding in favor of plaintiffs more frequently than male judges.<sup>42</sup> Furthermore, it was more likely for a male judge to rule in favor of the plaintiff if at least one female judge sat on the appellate panel.<sup>43</sup> The difference between all-male versus mixed-gender panels had measurable consequences for litigants.<sup>44</sup>

[The probability of an all-male panel] supporting the plaintiff in a sex discrimination dispute never exceeds 0.20—not even for the most liberal of male judges. But for mixed sex panels the probability never falls below 0.20 for even the most conservative males. For males at relatively average levels of ideology, the likelihood of a liberal, pro-plaintiff vote increases by almost 85 percent when sitting with a female judge.<sup>45</sup>

### *B. Judges' Gender in Employment Discrimination Cases*

A review of the broader category of employment discrimination cases, including sexual discrimination and discrimination based on other protected statuses, revealed the pattern is significantly similar to the studies on just sex discrimination cases. Davis and her colleagues, as well as Farhang and Wawro, for example, found that the gender of the judges makes a significant difference in appellate-level discrimination cases.<sup>46</sup> Similarly, the Massie

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40. *Id.* at 13–14. They first identified cases and judges that are as similar as possible on a number of possibly confounding variables (e.g., the judges' ideology and age, the cases' year of decision). Then, using only cases and judges matched by these variables, they studied the effect of judges' gender. In contrast to more typical research methodology, as described in *id.* at 6, they used a semi-parametric matching process. *Id.* at 13, 16, 16 n.21 (to account for possibly confounding variables).

41. *Id.* at 19–21.

42. Boyd et al., *supra* note 6, at 21.

43. *Id.* at 22.

44. *Id.* at 22–23.

45. *Id.*

46. Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); Farhang & Wawro, *supra* note 6; Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994).

study of appellate cases dealing with civil liberties (including sex discrimination cases) also found gender differences.<sup>47</sup> In each of these studies, women judges were more likely to hold for the plaintiffs. In contrast, two studies of the district courts, one by Manning and one by Segal, did not find gender differences.<sup>48</sup> The Manning study sampled Hispanic and non-Hispanic judges, and the Segal study sampled Clinton judicial appointees.<sup>49</sup> Given the mixed results in appellate and district court cases, perhaps there is a difference in the collective decision making that occurs on appellate panels versus the individual decision making in district courts.

Farhang and Wawro studied whether women and racial-minority judges impacted case outcomes in 400 federal appellate court employment discrimination cases from 1998–1999.<sup>50</sup> Their research inquiries included whether women and minority judges influenced the decisions of other panel members. They found male judges voted more liberally (in favor of the plaintiff) when one woman served on the panel compared to all-male panels.<sup>51</sup> Furthermore, the gender composition of the panels influenced the way *all* the judges voted.<sup>52</sup> When there was at least one woman judge on the panel, the probability of an outcome favoring the plaintiff increased by about twenty percent.<sup>53</sup> Interestingly, adding another woman to the panel did not increase the likelihood that the plaintiff would win.<sup>54</sup> The general ideological make-up of the panel also mattered, but the racial composition did not.<sup>55</sup>

Farhang and Wawro offered a contextual analysis of their empirical results by relating them to the institutional norms of appellate judicial decision making.<sup>56</sup> They determined that decisions on federal appellate panels are overwhelmingly unanimous, with dissent rates averaging only six percent to eight percent across circuits.<sup>57</sup> They suggest this norm of

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47. Massie et al., *supra* note 35; Smith, *supra* note 24.

48. Kenneth L. Manning, ¿Cómo Decide?: Decision-Making by Latino Judges in the Federal Courts (Apr. 14–17, 2004) (paper presented at the Midwest Political Science Association) (on file with *The Journal of Gender, Race & Justice*); Segal, *supra* note 3.

49. Manning, *supra* note 48.

50. Farhang & Wawro, *supra* note 6, at 311 (describing advantages of a two-year period).

51. *Id.* at 324.

52. *Id.* at 321.

53. *Id.*

54. *Id.*

55. *Id.*

56. Farhang & Wawro, *supra* note 6, at 320–24.

57. *Id.* at 306.

consensus on appellate panels is “motivated by a view among judges that unanimous court opinions promote the appearance of legal objectivity, certainty, and neutrality, which fosters courts’ institutional legitimacy, while dissenting opinions create legal uncertainty, erode courts’ credibility, and may even provoke opposition to a decision.”<sup>58</sup> The researchers describe a deliberative bargaining model among judges.

[The idea is that] judges take one another’s views seriously in the deliberative process, and this will tend to cause judges on a heterogeneous panel, who will exchange arguments and information from a wider range of points of view than will occur on a homogeneous panel, to moderate their views toward the center.<sup>59</sup>

Furthermore, according to this model, judges confer “in a spirit of ‘give-and-take’ (or accommodation) in an effort to reach a decisional consensus and thus avoid public dissension.”<sup>60</sup> Farhang and Wawro argue that their finding that mixed-gender appellate panels are more likely to hold for the plaintiff is evidence of women judges’ effect over their male colleagues.<sup>61</sup> Farhang and Wawro “conclude that under a strong norm of unanimity on federal appellate panels, elements of both deliberation and bargaining—alternative perspectives, persuasive argument, and horse-trading—explain how women on a panel are able to influence the way male judges on the panel vote.”<sup>62</sup>

### C. Judges’ Gender and Non-Gender-Related Cases

In addition to the separate analyses of studies on sex discrimination and on employment discrimination cases (including sex discrimination), the author reviewed employment discrimination studies that expressly do not include any gender-related cases (such as sex discrimination cases). This research of non-gender-related cases offers a contrasting conclusion on the effect of the judges’ gender. Namely, the judges’ gender did not make a difference in case outcomes dealing with race-related disputes.

Two studies on racial harassment cases by Chew and Kelley found that judges’ gender does not make a difference in how the cases turned out.<sup>63</sup> In

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58. *Id.* at 307.

59. *Id.* at 308 (citing Lewis A. Kornhauser & Lawrence Sager, *The One and the Many: Adjudication in the Collegial Courts*, 81 CALIF. L. REV. 405 (1993)).

60. *Id.*

61. *Id.* at 325.

62. Farhang & Wawro, *supra* note 6, at 325.

63. Chew & Kelley, *supra* note 10; Pat K. Chew & Robert E. Kelley, *The Conundrum of Color in Racial Harassment Cases* (work-in-progress) (on file with the Author) [hereinafter *Conundrum*].

contrast, the judges' race did make a difference.<sup>64</sup> Crowe's study of appellate court race discrimination cases reached similar conclusions,<sup>65</sup> as did Cameron's study of race-based affirmative action cases.<sup>66</sup>

Chew and Kelley studied racial harassment cases in both the federal district courts and the appellate courts over an extensive time period (1981 to 2002).<sup>67</sup> Judges' gender did not make a significant difference in case outcomes, with plaintiffs being successful before female judges about twenty-six percent of the time versus twenty-one percent of the time before male judges. However, other judge characteristics, such as the judges' race and political ideology, did make a significant difference in case outcomes.<sup>68</sup>

In a second study of racial harassment cases,<sup>69</sup> Chew and Kelly studied only district court cases from 2002 to 2008 to obtain a clearer picture of individual decision making (rather than the collective decision making that occurs on appellate panels) and to offer a more contemporary analysis of judicial decision making.<sup>70</sup> While the research focused on the race of judges and plaintiffs,<sup>71</sup> the research also analyzed a number of other variables, including the judges' gender. Consistent with their first study, the researchers found that the judges' gender did not make a significant difference in the case outcomes: plaintiffs before female judges had a win rate of twenty-seven percent compared to a win rate of twenty-three percent before male judges.<sup>72</sup>

Crowe's study of federal appellate judges also reveals a telling comparison of judges' gender in sex discrimination and race discrimination

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64. See sources cited *supra* note 63.

65. Crowe, *supra* note 32.

66. Charles M. Cameron & Craig P. Cummings, Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971–1999, at 18 (Mar. 30, 2003) (unpublished manuscript) (on file with *The Journal of Gender, Race & Justice*).

67. Chew & Kelley, *supra* note 10, at 1135 (finding that plaintiffs won in only 22% of the judicial opinions).

68. *Id.* at 1143.

69. Conundrum, *supra* note 63.

70. *Id.* at pt. III (analyzing the universe of cases from six representative federal circuits, rather than random sampling, to increase confidence in generalizing).

71. As further discussed in *id.*

72. *Id.* at 8, tbl.1. For purposes of this Article, the author looked at a subset of the racial harassment cases, those where the plaintiffs had concurrent sexual harassment claims. *Id.* at 5. Interestingly, the researchers uncovered some notable judge gender differences: plaintiffs before female judges were successful in their racial harassment claims 40.7% of the time, compared to a success rate of 29.3% before male judges. Conundrum, *supra* note 63, at 13 tbl.13 (showing further statistics including p values). While this is a small subset of cases, it tentatively suggests that plaintiffs bringing racial harassment claims are more likely to win in general when they bring these concurrent claims (as opposed to only a racial harassment claim). *Id.* When plaintiffs bring these concurrent claims before a female judge, their success rate improves considerably.

cases.<sup>73</sup> Her analysis indicated that female judges are more likely than male judges to vote in favor of plaintiffs in sex discrimination cases.<sup>74</sup> In race discrimination cases, however, there were no differences among judges based on the judges' gender.<sup>75</sup>

#### IV. CONCLUSION

This Article provided a macro review of the empirical research on judges' gender and the case outcomes in federal employment discrimination cases. Researchers have conducted other studies on the effect of judges' gender in other subject areas and court venues, but this research generally has not been as extensive as the research on employment discrimination in the federal courts. This research on the effect of judges' gender on case outcome typically makes one or both of the following inquiries: Do female judges and male judges make different decisions in these cases? Do female judges influence male judges in appellate panels in their decision making in these cases?

A macro review of the research indicates three general patterns. First, considerable evidence supports the hypothesis that the gender of the judge does make a difference in *sex discrimination cases*. Female judges are more likely than male judges to hold for the plaintiffs; and a mixed-gender appellate panel is more likely to hold for the plaintiff, suggesting that female judges do influence male judges in their decision making. Second, in studies of *employment discrimination cases in general* (studies that include a range of discrimination claims including sex discrimination), the pattern of gender differences is also the consensus. It may be, however, that the sex discrimination cases in those studies drive this result. A third pattern supports this possibility: in the few studies with *employment discrimination cases that were not gender related*, including race discrimination and racial harassment cases, the gender of the judge did not appear to make a difference. In other words, male judges were as likely as female judges to hold for the plaintiffs. No evidence of a significant difference in their decision-making patterns surfaced.

Why does evidence of gender differences among judges diminish as the cases move from cases dealing with sex discrimination to those that do not? Numerous explanations are possible. To begin with, perhaps the gender of judges makes a difference in cases in which women and men perceive the factual situation differently. Those differing perceptions are likely to occur where gender is the focus of the underlying claim, such as in sexual discrimination or sexual harassment claims. In contrast, differing gender

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73. Crowe, *supra* note 32, at 1–2.

74. *Id.*

75. *Id.*

perceptions are not as likely to occur in cases in which gender is not the focus, such as in race-based disputes. It may also be that the gender of the judge makes a difference when one gender of judges can more readily identify with the plaintiff's assessment of the situation. For example, women judges might identify with the female plaintiff as the target of sexual harassment but not identify particularly with African-American plaintiffs as the target of racial harassment.

Thus, while research continues to evolve, current empirical evidence is beginning to answer the inquiries at the beginning of this Article:

Why did we think that women would transform institutions without simultaneously—or alternatively—being transformed by them . . . ?

Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo?<sup>76</sup>

This macro review provided substantial evidence that female judges have decision-making patterns different from male judges, at least in sex discrimination cases. Furthermore, the empirical evidence indicates that female judges also influence their male colleagues to be more pro-plaintiff in these cases. Therefore, the evidence-based conclusion is that making the federal bench more gender diverse can make a substantive difference. Increasing female judges has the plausible potential to “disturb the status quo” and “transform the institution.”<sup>77</sup>

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76. Hunter, *supra* note 1.

77. *Id.*

Appendix: Research on Judges' Gender in Employment Discrimination  
Cases

Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Casual Effects of Sex on Judging* (2009) (unpublished manuscript) (on file with *The Journal of Gender, Race & Justice*) (studying federal appellate courts 1995–2002).

Charles M. Cameron & Craig P. Cummings, *Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971–1999*, (Mar. 30, 2003) (unpublished manuscript) (on file with *The Journal of Gender, Race & Justice*) (studying federal appellate courts 1971–1999).

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 (2009) (studying federal district courts and appellate courts 1981–2001).

Pat K. Chew & Robert E. Kelley, *The Conundrum of Color in Racial Harassment Cases* (work-in-progress) (on file with the Author) (studying federal district courts 2002–2008).

Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981–1996* (1999) (unpublished doctoral dissertation, University of Chicago) (on file with *The Journal of Gender, Race & Justice*) (studying federal appellate courts 1981–1996).

Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993) (studying federal appellate courts 1981–1990).<sup>78</sup>

Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004) (studying federal appellate courts 1998–1999).

Carol T. Kulik, Elissa L. Perry & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 LAW. & HUM. BEHAV. 69 (2003) (studying federal district courts 1981–1996).

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78. This study appears to draw from the same original data set as the Songer study listed below. However, because each study used a different sample for its analysis and reached different results on the criminal procedure cases, the Author lists the two studies separately.



Kenneth L. Manning, *¿Cómo Decide?: Decision-Making by Latino Judges in the Federal Courts* (Apr. 14–17, 2004) (paper presented at the Midwest Political Science Association) (on file with *The Journal of Gender, Race & Justice*) (studying federal district courts 1968–2003).

Tajuana Massie, Susan W. Johnson & Sara Margaret Gubala, *The Impact of Gender and Race in the Decisions of Judges on The United States Courts of Appeals* (Apr. 25–28, 2002) (unpublished paper) (on file with *The Journal of Gender, Race & Justice*) (studying federal appellate courts 1977–1996).

Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (studying federal appellate courts 1999–2001).

Jennifer A. Segal, *Representative Decision-Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137 (2000) (studying federal district courts).

Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994) (studying federal appellate courts 1981–1990).

Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689 (2004) (studying federal appellate courts 1994–2000).