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The Elusive (but Worthwhile) Quest for A Diverse Bench in the New Millennium

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The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium

Theresa M. Beiner^{*}

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^{*} Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. Many thanks to John Oakley and Carl Tobias for organizing this symposium and inviting me to participate. I am also grateful to the U.C. Davis Law Review members and staff for their help in organizing this symposium. This research was completed with the support of an off-campus duty assignment by the UALR William H. Bowen School of Law. Many thanks to Dean Charles Goldner for seeing the benefits of this research to the school and granting such leave. This article benefited from the research assistance of April Minor.

INTRODUCTION

My interest in diversification of the federal judiciary grew out of my research in employment discrimination law. During the course of this research, it became clear to me that many federal judges did not seem to understand the position of the plaintiffs. For example, the judges were looking at fact patterns that I thought would have qualified as an instance of sexual harassment. Yet, they were granting summary judgment on the ground that no reasonable person would find that such behaviors met the legal standard for sexual harassment. I began to wonder who these judges were and why they failed to understand the working situation of many of these employment discrimination plaintiffs. The effort to find out who these judges were led me to the work of political scientists, who had been studying the demographics of the federal judiciary and the effects of judicial background factors on the voting behaviors of judges for some time. I also looked closely at the work of gender and racial bias task forces and these organizations' reports. The work of these academics and legal groups was both interesting and, at times, startling to one who admittedly and naively had liked to think that law involved a set of neutral principles applied similarly by all judges.

Legal scholars have long lauded diversity on the bench as a necessary and beneficial aspect of a just judicial system, although they have had varying theories on why diversity is beneficial.¹ The difficulty in expressing the benefits of diversity stems in part from the tension that arises in arguments asserting that a more diverse judiciary might lead to different case outcomes. After all, if all judges should theoretically apply neutral principles alike, then admitting that there is a difference in how judges vote based on background factors such as their race and gender undermines the entire myth (or, perhaps, goal) of a neutral and impartial judiciary.² Indeed, the ABA's Model Code of Judicial Conduct requires

¹ See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 424 (2000); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1 (2002) (discussing potential benefits of appointment of a Latina/o Supreme Court Justice).

² See Kimberly A. Lonsway, et al., *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 L. & SOC. INQUIRY 205, 206 (2002) ("The classical view of judges is that they are disengaged and dispassionate adjudicators with little interest or involvement in the proceedings before them."); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 909 (1995) (arguing that appointing female judges to advance a feminist agenda "clashes with the long-standing goal of impartial judging"). But see L. Scott Smith, *Law, Morality and Judicial Decision-Making*, 65 TEX. B.J. 400, 407-08 (2002) (recounting instances of judges admittedly

that "[a] judge shall perform judicial duties without bias or prejudice."³ In addition, once it is proven that nontraditional judges decide certain cases differently, the status quo — based on a white male norm⁴ — is challenged. The members of this powerful group will feel uncomfortable and concerned that these nontraditional judges⁵ will favor someone else's viewpoint. Certainly, if a person is in a position of power in society, as many white males traditionally have been in this country, they will be reluctant to give up that power and not have their viewpoints enforced by the courts. As I explain below, this discomfort is reflected by those involved in the federal nominating process who have delayed, scrutinized, and at times unfairly undermined nontraditional judicial candidates.

However, because so few women and minority group members historically have been appointed to the federal courts, the effects that diversity might have in the outcome of cases has been difficult to measure by political scientists and others concerned with the impact of diversity. While it seems reasonable to believe that nontraditional judges would have a different viewpoint on certain legal issues because of their differing life experiences, it has been difficult to show empirically. Indeed, early attempts to show such an empirical relationship between race and/or gender of judge and case outcomes showed little to no relationship.⁶

The ability of political scientists to measure the impact of a diverse bench changed with the commitments of Presidents Carter and Clinton to the appointment of a diverse judiciary. President Carter, after one term in office, appointed record numbers of women and minority judges. President Clinton, holding two terms in office, had much more of an opportunity to further diversify the federal judiciary. Both presidents were true to their commitments and diversified the federal bench

deciding cases based on desired outcome, "hunch", etc.).

³ MODEL CODE OF JUDICIAL CONDUCT Canon 3B (1972).

⁴ See Ifill, *supra* note 1, at 424.

⁵ The term "nontraditional judge" is used frequently by political scientists to refer to women and minority group member (such as African American, Asian, and Latina/o) judges. I will likewise use it in this article to refer to judges who are not white males. In addition, I occasionally will refer to white males as traditional appointees or judges.

⁶ See e.g., Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328, 335 (1986) (examining impact of a judge's race); Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990) (detailing studies of gender of judge prior to 1990); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997) (noting effects of race or sex are unclear).

significantly. Carter appointees did not show all that much of a difference in voting pattern from their traditional counterparts. This could well have been the result of the smaller sample of judges that political scientists studied in this pool or because there was a great deal of commonality in judicial viewpoint in President Carter's traditional and nontraditional appointees. However, Clinton appointed far greater numbers of women and minority judges than Carter. After several years of decision making by Clinton judges, political scientists have begun to study their decision patterns. These studies reveal the effects of diversity in some key areas of federal court litigation — in particular, civil rights.

In this essay, I examine three things. First, I briefly describe several recent empirical studies of decision making patterns of nontraditional judges. Emphasis is placed on studies of Clinton appointees, because they form the best and most recent data set and will have the longest impact on the federal courts until President Bush has the opportunity to nominate a significant number of judges. Second, I point out ways in which nontraditional judges might make differences that, although seemingly intangible in terms of case outcomes, might well have an effect on them. For example, I review a study that discusses the possible effects of nontraditional judges' presence on a three judge panel as well as potential differences in how they might approach a case. Finally, I address some obstacles nontraditional candidates have met in the Senate during the confirmation process. I attempt to reconceptualize the role of the federal judge and show that diversity in the judiciary is necessary for the fair administration of justice.

I. THE STATISTICS ON DIVERSITY

A. Political Science Theory on Judicial Decision Making

Political science research has focused on what is known as the "attitudinal model" of judicial decision making.⁷ Under this model, judges make decisions based not on the neutral application of precedent, but instead on "each judge's political ideology and the identity of the parties."⁸ This theory is consistent with both the Critical Legal Studies as

⁷ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

⁸ Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265 (1997).

well as the Legal Realism movements in legal philosophy.⁹ Thus, according to some studies, whether someone is a Democrat or Republican or appointed by a Democratic or Republican president predicts that judge's political philosophy and how he or she will decide a particular case. Extending this analysis to race and gender, it is thought that if a judge's political philosophy is shaped in part by life experiences, women and members of minority groups would have different political philosophies because of the impact of gender and race on their lives.¹⁰

While early research on the attitudinal model focused on political affiliations of judges or of their appointing president, more recent research has focused on race and gender and the intersection of these factors. The increase in numbers of women and minority group members on the bench since both President Carter's and President Clinton's judicial appointments has made it statistically possible to assess whether gender and race actually affect case outcomes. For example, the Clinton administration successfully appointed fifty-one women and forty-two judges of color, for a total of 29% and 24%, respectively, of its 174 appointments.¹¹ Nevertheless, the majority of sitting judges remain white males, many of whom were appointed by Republican presidents.¹²

As for the influence of the judge's gender, initially legal theorists latched onto Carol Gilligan's theory that women reason differently than men. Gilligan explained that women have a "different voice," that resulted in women judging differently than men.¹³ Based on the idea that women engaged in an ethic of care and concern for the community, Suzanna Sherry and others sought to show how this would affect the legal reasoning, and in some cases the outcomes, of cases decided by women. Since Sherry's initial work, this approach has been criticized —

⁹ *Id.* at 267.

¹⁰ See SEGAL & SPAETH, *supra* note 7, at 64-73.

¹¹ Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159, 181 (2001).

¹² Sheldon Goldman, et al., *Make-Up of the Federal Bench*, 84 JUDICATURE 253, 253 (2001). While there was a slight Democratic majority as of January 1, 2001, in the federal district courts, this bare majority will be short-lived as President George W. Bush has fifty-seven vacancies to fill. *Id.* With President Bush's appointments to the Courts of Appeal, Republican appointed circuit court judges will have a "solid majority." *Id.*

¹³ CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); CAROL GILLIGAN, IN A DIFFERENT VOICE: WOMEN'S CONCEPTION OF SELF AND OF MORALITY (1977); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Carol E. Garner, *Judges' Gendered Voices: An Empirical Study of Decision Making by the Women of the U.S. Courts of Appeals for the Ninth Circuit*, Case Western Reserve U. School of Law (1994).

sometimes by the subject of the work itself (in one case, Justice O'Connor disagreed with Sherry's assessment of her judging).¹⁴ While some female judges have embraced the notion that they judge differently,¹⁵ others have fought it.¹⁶

The opinion of female judges aside, proof of the validity (or invalidity) of Gilligan's different voice theory might be found in the studies of political scientists. While some have criticized her findings based on the design of her study,¹⁷ her theory no doubt continues to be taught, discussed, and tested because something about it rings true, or at least true based on some stereotyped notion of the way in which women behave. The difference in men's and women's decision making processes, one way or another, might emerge in the outcomes of actual cases. Enough women judges have finally been appointed so that political scientists can study voting behaviors and determine whether women vote differently than their male counterparts in certain types of cases. Many of these studies have focused on what are termed "women's cases," or cases in which it is thought that women and men might have a different perspective. Such studies have looked at, for example, employment discrimination cases, including sex and race discrimination,¹⁸ criminal cases,¹⁹ family law cases,²⁰ and abortion rights cases.²¹ Similarly, studies have sought to show differences based on race

¹⁴ See Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232 (1995); Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553-54 (1991).

¹⁵ See, e.g., Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492-96 (1984); Christine Durham, *President's Column*, 8 NAWJ NEWS AND ANNOUNCEMENTS 1, 3 (1987); Marion Zenn Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, 26 TRIAL 108 (April 1990) (quoting Judge Judith S. Kaye).

¹⁶ See Solimine & Wheatley, *supra* note 2, at 905 n.111 (citing articles in which women judges stated that they did not judge differently than men).

¹⁷ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 871 n.174 (1990) (citing criticism of Gilligan's work); see also Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1301-02 (discussing and citing feminist criticism of Gilligan's work).

¹⁸ See e.g., Garner, *supra* note 13, at 25 & tbl. 3; Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996*, dissertation, Dept. of Political Science, University of Chicago (1999).

¹⁹ See e.g., Garner, *supra* note 13; Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000); Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163 (1999).

²⁰ See e.g., Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?*, 18 GENDER ISSUES 59, 67-72 (Fall 2000).

²¹ See e.g., Garner, *supra* note 13.

in, for example, sex and race discrimination cases,²² criminal cases,²³ and family law cases.²⁴

B. How Judges Vote Based on Gender, Race, and Political Affiliation

Because this symposium focuses on federal judicial selection in the twenty-first century, I will focus on recent studies that have evaluated voting patterns of federal district and circuit court judges based on race and gender with an eye toward the implications of these studies on future judicial selection.

The first study is by political scientist Nancy Crowe. Professor Crowe examined race and sex discrimination cases decided by the United States Courts of Appeals between 1981 and 1996.²⁵ Her study focused on non-consensual cases, i.e., cases in which there was not unanimity in the result among the particular panel members involved.²⁶ Others have criticized the focus of political scientists on non-unanimous cases,²⁷ but these cases seem a natural focus of study. In the typical case in which there is unanimity and, therefore, little room for disagreement among the judges, one would not expect judicial ideology to play such a significant role in the outcome. Ideological factors are more likely to find expression in cases in which there is room for disagreement about the outcome. Certainly, employment discrimination cases involving sex and race likely would be the types of cases in which the race or gender of the judge would have an impact.

Professor Crowe's extensive study examined the effects that race, gender, and political party have in sex discrimination case outcomes. These factors were found to have the expected effects in several instances: women and African American judges were more likely to vote

²² See, e.g., Crowe, *supra* note 18.

²³ See, e.g., Linda A. Foley, et al., *The Effect of Race on Decisions by Judges and Other Officers of the Court*, 26 J. APP. SOC. PSYCH. 1190 (1996); Jon Gottschall, *Carter's Judicial Appointments: the Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164 (1983); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749 (2001) (presenting results of study attempting to assess differences in incarceration and sentencing decisions).

²⁴ See, e.g., Elaine Martin & Barry Pyle, *Gender, Race and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1222-36 (2000) (explaining study of effects of race and gender of judge on discrimination, divorce and cases involving feminist issues).

²⁵ Crowe, *supra* note 18.

²⁶ *Id.* at 56.

²⁷ See e.g., Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 260 (1990).

for a sex discrimination plaintiff than their white male counterparts.²⁸ The effects of partisanship were strong and larger for men than for women. Thus, while a white male Republican judge voted for the plaintiff only 28% of the time, a white male Democratic judge voted for the plaintiff 76% of the time.²⁹ There was a similar effect, although not as large, for political party affiliation for both African American men and white females. Republican females voted for the plaintiff 53% of the time, while their Democratic counterparts voted for the plaintiff 90% of the time. Additionally, African American Republican judges voted for the plaintiff 61% of the time, whereas their Democratic counterparts voted for the plaintiff 93% of the time.³⁰ Interestingly, African American Democratic judges were slightly more sympathetic to sex discrimination plaintiffs than white Democratic female judges. The results of Professor Crowe's study are summarized in Table 1 below.

Table 1: Chance of a vote for a sex discrimination plaintiff based on race, gender and political affiliation.³¹

	White Male Judge	White Female Judge	Black Male Judge
Republican	28%	53%	61%
Democrat	76%	90%	93%

This same pattern, however, did not emerge in the race discrimination cases studied. In those cases there was not a statistically significant difference in the voting patterns of white male judges and white female judges, although there was a difference based on political party affiliation. White male Democratic judges voted for race discrimination plaintiffs 49% of the time, whereas white female Democratic judges voted for the plaintiffs in these cases 51% of the time.³² There was, likewise, no statistically significant difference between white male Republican judges and their white female counterparts, who voted for

²⁸ Crowe, *supra* note 18, at 80.

²⁹ *Id.* at 83, fig. 3.1.

³⁰ *Id.* Another study assessed plaintiff win rates in sexual harassment cases in particular. Ann Juliano and Stewart J. Schwab studied the federal judiciary's decision making in sexual harassment cases from 1986 to 1996. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 575 tbl. 4 (2001). They found that, overall, plaintiffs win in 45.2% of appeals in sexual harassment cases that result in a published opinion. The win rate for plaintiffs drops to 39% when other unpublished dispositions are added. See *id.*

³¹ Crowe, *supra* note 18, at 83 fig. 3.1.

³² *Id.* at 114 fig. 4.1.

race discrimination plaintiffs 20% and 21% of the time, respectively. These statistics reveal an obvious difference based on the political party affiliation of the judge. In addition, race made a significant difference in voting patterns. African American male Republican judges voted for plaintiffs 60% of the time and their Democratic counterparts voted for the plaintiff 85% of the time.³³ Thus, while white women were no more likely than their white male counterparts of the same party to vote for a race discrimination plaintiff, African American male judges clearly were more likely to vote for a race discrimination plaintiff. Indeed, an African American male Republican judge was more likely to vote for a race discrimination plaintiff than a white male or female Democratic judge. Table 2 summarizes these findings.

Table 2: Chance of a vote for a race discrimination plaintiff based on race, gender and political affiliation.³⁴

	White Male Judge	White Female Judge	Black Male Judge
Republican	20%	21%	60%
Democrat	49%	51%	85%

The implications of these voting patterns are even more telling given the demographics of the federal judiciary. As of the last year included in this study, 1996, the chance of drawing an all male panel was 59%. The chance of drawing a panel with one female was 34%.³⁵ The chance of drawing a panel with two women was 6%. In the case of race, the chance of drawing an all white panel as of 1996 was 80%.³⁶ The chance of drawing one African American judge was 19%, and the chance of two African American judges sitting on a panel was 1%.³⁷ While the chance of drawing a panel with a nontraditional judge would be somewhat higher today due to Clinton's later appointments, these numbers show a steep hill that an employment discrimination plaintiff must climb. This difficulty plaintiffs face is supported by other studies of employment discrimination cases.³⁸

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 94 fig. 3.2.

³⁶ Crowe, *supra* note 18, at 123 fig. 4.2.

³⁷ *Id.*

³⁸ See Juliano & Schwab, *supra* note 30.

What is perhaps more startling are Crowe's findings about the effects of composition of the particular panel. It has been thought that a nontraditional panel member would help bring a different perspective to such cases.³⁹ Instead, there was either no effect on outcome or a negative effect. First, having a female on the panel had no statistically significant impact on voting behavior of male judges in employment discrimination cases. However, having an African American judge on a panel had a negative impact on the decision making behavior of white male judges in race discrimination cases.⁴⁰ A panel composed entirely of white males was more likely to rule for a race discrimination plaintiff than a panel that included one African American judge.⁴¹ For white male Republican judges, the figure dropped from 27% to 14%, whereas for white male Democratic judges it dropped from 62% to 42% in favor of the plaintiff. This is the inverse of what was expected. The presence of an African American judge was thought to make the panel more likely to rule for a race discrimination plaintiff. Crowe opined that this finding may be the result of white male judges somehow compensating for the presence of an African American judge on the panel.⁴² It is interesting that the same pattern does not emerge for sex cases based on the presence of a female judge. While Crowe theorizes that this may not happen in the context of gender because white male judges are used to seeing more variety in the ideology of female judges, I suspect that white male judges might find race more salient than gender and not be as concerned with the potential power of female judges as they are with the power of African American male judges. Whatever the reasons for this result, it is disturbing.

Professor Crowe's findings are consistent with the findings of Haire, Humphries, and Songer, who studied published decisions of the United States Courts of Appeals judges from 1993 to 1999.⁴³ They studied 12,275

³⁹ For example, it is well known that Thurgood Marshall brought a different and valued perspective to the Supreme Court's deliberations. See Johnson, *supra* note 1, at 3-7; Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

⁴⁰ It should be noted that other studies have shown the opposite effect based on having a woman as a member of the particular court. In particular, Gryski, Main, and Dixon found in a study of state supreme courts that the presence of a female colleague had an impact on outcomes in gender discrimination cases. See Songer & Crews-Meyer, *supra* note 19, at 755-57 (providing results of their own study as well as citing and discussing Gryski, Main and Dixon). The liberal outcome (i.e., in favor of the plaintiff) was more likely if there was a female member on the court. *Id.*

⁴¹ Crowe, *supra* note 18, at 156 fig. 5.2.

⁴² *Id.* at 157.

⁴³ Susan B. Haire, Martha Ann Humphries & Donald R. Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001).

votes⁴⁴ in three areas: civil rights, criminal law, and labor/economic cases. In the civil rights area in particular, they found that "Clinton appointees offered substantially more support to the liberal position."⁴⁵ The same did not hold true for criminal and economic cases, in which Clinton appointees voted more akin to judges appointed by moderate Republican presidents (i.e., Nixon and Ford). The effects of partisanship differences became greater when non-consensual and non-unanimous cases were studied. In addition, the researchers did not find a statistically significant difference between voting behaviors of Clinton's traditional and nontraditional judges. However, the researchers believe such a difference might emerge in criminal and labor/economic cases once more votes are available for study.⁴⁶ Interestingly, non-unanimous cases represented only approximately 10% of the total number of cases studied.⁴⁷ Thus, much of the time, all panel members agreed on the outcome.

Professor Jennifer Segal likewise did a study assessing the effects of race and gender of judges, but her study focused on the federal district courts. Unlike Crowe, she set up pairs of Clinton appointees to see if there were differences in voting behavior based on race and/or gender.⁴⁸ Using cases published in the *Federal Supplement*, she ultimately studied 799 cases for the gender pairs and 701 cases for the race pairs.⁴⁹ Unlike Crowe, her pairs were designed to avoid the effects of political affiliation. Segal studied cases in which she expected a difference based on race or gender of the judge. In the case of impact based on gender, she studied "women's issues," including cases of "gender discrimination, sexual harassment, abortion rights and maternity rights, custody battles, and equal pay."⁵⁰ The cases studied for race included what she termed "black issues," including cases based on "race discrimination, voting rights, school desegregation, and affirmative

⁴⁴ The term "vote" is used here because the authors of the study counted each individual judge's vote in a particular case included in the study. Thus, the terms "ruling" or "decision" are not precisely appropriate in this context. Instead, the measure is whether the particular judge voted for the liberal position on the issue being studied.

⁴⁵ Haire, et al., *supra* note 43, at 278.

⁴⁶ *Id.* at 279 tbl. 4 & 280.

⁴⁷ *Id.* at 279. But see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 237 (1999) (noting that non-unanimous decisions are usually less than 30% of high court activity).

⁴⁸ Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 142 (2000).

⁴⁹ *Id.* at 143.

⁵⁰ *Id.*

action."⁵¹ In addition, other minority related issues,⁵² personal liberty cases,⁵³ criminal rights cases,⁵⁴ and federal economic regulation cases⁵⁵ were used in both the race and gender analyses.⁵⁶

Professor Segal found little difference in voting behaviors based on race or sex between Clinton appointees; and where such differences existed, they were unexpected. She found no statistically significant difference between African American and white Clinton district court appointees, except with respect to personal liberties claims, where African American appointees were less likely to support the liberty claim.⁵⁷ She found no statistically significant differences based on gender except for cases on women's issues, wherein men were more supportive of the women's position than women.⁵⁸ More problematic might be the overall lack of support for both women's and minority issues by all these Clinton appointees. This lends some credence to the assessment (and the occasional complaint) that Clinton's appointees were much more moderate than liberal.⁵⁹ Or, perhaps, President Clinton's appointees were philosophically similar regardless of the background factors of race and gender.

Professor Segal poses several different theories for these results. One explanation she suggests is that the attitudinal model — the political affiliation of these judges — explains the lack of differences in these results. Another theory is based on the lack of homogeneity of viewpoint in the African American and female communities. The diversity of viewpoint in these communities makes it difficult for these

⁵¹ *Id.*

⁵² Specifically, "ethnic, disability, age and poverty discrimination, and alien rights" cases. *Id.*

⁵³ This included "freedoms protected by the Bill of Rights and by state and federal laws." Segal, *supra* note 48, at 143

⁵⁴ This included "claims made by alleged criminals, including due process, equal protection and other civil liberties claims, petitions for writs of habeas corpus, a variety of Fourth, Sixth, and Eighth Amendment claims, and some statutory issues regarding disclosure rules and rules of evidence." *Id.*

⁵⁵ This included "challenges to the government's regulatory policies in banking, education, tax, and social security benefits issues." *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 144-45 & tbl. 2.

⁵⁸ *Id.* at 146 tbl. 3. See also Garner, *supra* note 13, at 25 tbl. 3 & 27 (study of Ninth Circuit found that "Democratic women were not substantially more likely than Democratic men to vote in favor of a discrimination claim.").

⁵⁹ See Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282 (2001).

appointees to represent their constituency substantively in the law.⁶⁰ There is a diversity of viewpoints among women, for example, who ascribe to feminism.⁶¹ That there should be a diversity of viewpoints among women who are judges in a country in which Phyllis Shafly, Camille Paglia, and Andrea Dworkin (although not all these women would describe themselves as "feminists") all participate in the public debate about equal rights should not be surprising. Indeed, the feminist movement learned of the diversity of viewpoints among women early on. It was thought among early feminists that once women received the right to vote, the condition of women in this country would improve greatly. They were surprised when they found that many women voted as conservatively on issues affecting women as their husbands did.⁶²

Segal's results are consistent with those of Carp, Manning, and Stidham, who similarly focused on the voting patterns of President Clinton's district court appointees.⁶³ Their findings also compared the voting records of Clinton's appointees to his six predecessors. In addition to reporting findings similar to those of Segal, they offer an interesting comparison to other presidents' judicial appointees. They focused on three categories of cases: (1) criminal; (2) civil rights and liberties; and (3) labor and economic relations. The data they used also came from trial cases published in the *Federal Supplement*. They found that, overall, Clinton's traditional appointees were more liberal than his nontraditional appointees. Traditional appointees voted liberally 46% of the time, whereas nontraditional appointees judges voted liberally 42% of the time.⁶⁴ This gap widened for civil rights and liberties cases to 9%, with traditional appointees voting more liberally than their nontraditional counterparts.⁶⁵ A similar 6% gap existed for labor and economic regulation cases. However, the tendency was reversed in criminal justice cases, in which nontraditional appointees voted liberally 37% of the time and traditional appointees voted liberally 32% of the time.⁶⁶

⁶⁰ Segal, *supra* note 48, at 147.

⁶¹ See Ann C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L. J. 1265 (1993) (discussing differing theories among legal feminists).

⁶² WILLIAM H. CHAFE, *THE PARADOX OF CHANGE: AMERICAN WOMEN IN THE 20TH CENTURY* 32 (1991).

⁶³ See Carp, et al., *supra* note 59, at 282.

⁶⁴ *Id.* at 286 & tbl. 3.

⁶⁵ *Id.* at 286.

⁶⁶ *Id.*

In addition, President Clinton's appointees were moderate compared to the appointees of his Democratic predecessor, Jimmy Carter. The voting records of Clinton's district court appointees are in between the more conservative voting records of Bush and Reagan appointees and the more liberal voting records of Carter and Johnson.⁶⁷ For example, overall, Clinton appointees voted for the liberal position 44% of the time. Carter and Johnson appointees voted for the liberal position 52% of the time, whereas Reagan and Bush appointees voted for the liberal position 26% and 29% of the time, respectively. Similar to Clinton's appointees, Ford's appointees voted for the liberal position 43% of the time.⁶⁸ The studies done on civil rights and civil liberties cases have similar results.⁶⁹

While these studies appear to make a compelling case for the effects of political ideology, they are somewhat equivocal when it comes to gender and race effects. Indeed, political scientists have noted that the effects of race and gender of judge are inconclusive.⁷⁰ Perhaps as more nontraditional judges appointed by Clinton get their bearings and have more of an opportunity to render judgments, effects based on race or gender will become more palpable. In the meantime, one should not discount the effects of "intangibles."

II. THE INTANGIBLES OF A DIVERSE BENCH

Professor Sherrilyn Ifill has argued elsewhere that diversity might well have more than simply an effect on case outcomes.⁷¹ While outcomes would seem to be of the utmost importance to litigants, they do not tell the whole story. With well less than 5% of federal cases actually reaching trial, most cases are disposed of before trial, and in particular by pre-trial motion practice or settlement.⁷² Judges obviously play a role and, in some instances, are responsible for these pre-trial outcomes. Indeed, the studies discussed above would include these case outcomes when they resulted in a published decision. It is less obvious how the perspective of the judge might affect settlement or other aspects of a lawsuit. Because many of these effects are not statistically measurable,

⁶⁷ *Id.* at 285 tbls. 1 & 2.

⁶⁸ Carp, et al., *supra* note 59, at 285 tbl. 1.

⁶⁹ *See id.* at 285 tbl. 2.

⁷⁰ *See, e.g.,* Coontz, *supra* note 20, at 61-62 (gender studies "limited and inconclusive"); cite race.

⁷¹ *See* Ifill, *supra* note 1.

⁷² Hope Viner Samborn, *The Vanishing Trial*, 88 ABA J. 24, 26 (Oct. 2002)(only 2.2% of federal civil cases were resolved by bench or jury trial in 2001).

they have not been studied to the same degree as reported outcomes. Although some have studied judicial reasoning in opinions to find the elusive feminine "different voice,"⁷³ I do not know of any study that examines settlement rates based on whether the judge is a woman or minority group member. Yet, a judge's race or gender likely affects how they treat litigants and attorneys in the courtroom. At this point I'd like to depart from empiricism and provide a few anecdotal examples of the way in which a judge's gender or race might make a difference in the courtroom. While I use the term "anecdotal" here, these anecdotes are fairly representative of the findings of gender and racial bias task forces, and thus there is more support for this than that term might imply.⁷⁴

Several years ago I spoke at a symposium on sexual harassment law. A female Republican appointed federal judge also was speaking at the symposium. She and I shared a ride from the airport together and had a conversation during which I suggested that outcomes of sexual harassment cases were influenced by the gender of the trial judge. She agreed that sometimes being a female judge seemed to make a difference in cases and told me the following story.

A case was before her court brought by a *pro se* plaintiff. In that case, a police officer was accused of forcing a woman he pulled over for a traffic stop to have sex with him in return for not pressing the traffic violation. The judge told me that she and her female clerks understood the woman's position, but that the opposing counsel and the woman's own attorney, who the judge appointed, did not. They apparently saw it as a simple case of consensual sex. Indeed, the judge said that it was obvious from the behavior of both the plaintiff's attorney and the defense counsel that they thought the case was bogus. As this female judge put it, "You should have seen the lawyers' faces when I found for her and awarded her damages." She explained that, after hearing the evidence, it was obvious to her and the women working in her chambers that this officer had abused his power in order to have sex with this woman.

In a similar vein, I had a conversation with an African American female state court judge after I made a presentation to a state bar committee about gender discrimination by the local bar. She told me that she understood my point and provided me with another example from her courtroom experience. She explained that it bothered her

⁷³ See e.g., Sherry, *supra* note 13; Garner, *supra* note 13, at 28-38.

⁷⁴ See, e.g., Lonsway, et al., *supra* note 2 (study showing that female judges are more likely to perceive gender bias and intervene to stop it when asked to by counsel); see *infra* note 79 and accompanying text.

greatly when attorneys referred to female and African American witnesses by their first names while referring to white male witnesses as "Mr." accompanied by his last name. In fact, she was careful always to correct any attorney appearing before her if he engaged in such behavior.

Though these stories are anecdotal, they are likewise supported by the work of gender and racial bias task forces, who have documented similar and other disparate treatment of women and minority group members in the court system.⁷⁵ For example, the Ninth Circuit Gender Bias Task Force reported that "[i]n sexual harassment or discrimination cases before a male judge, plaintiffs' lawyers report a minimization of their clients' trauma and 'an across the board lack of understanding' as to the female plaintiff's situation and point of view."⁷⁶ The female judges of the Second Circuit, like the state judge described above, "observed parties or witnesses ignored, interrupted, or not listened to by lawyers, which the judges attributed to racial or ethnic bias."⁷⁷ The Task Force noted the overall discrepancy in observations of bias between white males and women and minority group members as well.⁷⁸ Indeed, "a substantial percentage of all attorneys observed biased conduct based on gender and race."⁷⁹ A recent study of judges in the Eighth Circuit revealed that

⁷⁵ See, e.g., Eighth Circuit Gender Fairness Task Force, Preliminary Report at 89, 93 (1997) (recounting differences in treatment between male and female attorneys and litigations; 28.8% of female attorneys reported being addressed in unprofessional terms, whereas only 3% of their male counterparts reported such behavior); Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, Preliminary Draft at 28-42 (1997) (noting instances of biased conduct, though infrequent, were "especially" reported by female judges); Third Circuit Task Force on Equal Treatment in the Courts, Report at 28-29 (1996) (detailing differing perceptions of treatment between male and female attorneys as well as race based); Andrew Stepnick & James D. Orcutt, *Conflicting Testimony: Judges' and Attorneys' Perceptions of Gender Bias in Legal Settings*, 34 SEX ROLES 567, 576 (1996) (survey of judges and attorneys showed "the vast majority of women professionals have witnessed biased treatment by male judges and/or attorneys"); Lonsway, et al., *supra* note 2, at 218-19 (female judges more likely to observe incivility directed at men and women).

⁷⁶ Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* 127 (1993), reprinted in 67 S. CAL. L. REV. 745 (1993).

⁷⁷ Jay C. Carlisle, *Synopsis of the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 19 PACE L. REV. 431, 435 (1999); see also *Report of the First Circuit Gender, Race and Ethnic Bias Task Forces*, 9 B.U. PUB. INT. L.J. 173, 271 tbls. 2-32 & 265 tbls. 2-28 (2000).

⁷⁸ See Carlisle, *supra* note 77, at 435.

⁷⁹ *Id.* at 436. The statistics on this are compelling. Fifty-four percent of white males, 77% of white females, 79% of minority males, and 80% of minority female attorneys observed biased treatment of other attorneys based on gender. Fifty-nine percent of white males, 59% of white females, 78% of minority males, and 85% of minority females

female judges were more likely to report observing instances of “general incivility” as well as gender-related incivility than their male counterparts and more likely to observe such incivility directed at women.⁸⁰ Finally, “female judges reported having intervened at the request of counsel more frequently than their male counterparts.”⁸¹

These stories and studies, in particular, point out several ways in which a female or racial minority judge can make a difference not only in outcome, but also in how a case is treated in court. The judge in the first example above thought the case important and meritorious enough to appoint counsel for the plaintiff. Given the difficulties that nonlawyers have navigating the legal system, the outcome of a pro se plaintiff’s case can be affected by this decision alone. In addition, the judge considered the case seriously — more seriously than even the plaintiff’s own attorney did — based on her assessment of the attitudes of the lawyers involved. She considered the relative positions of the parties in reaching her outcome and brought an understanding to the power imbalance between the plaintiff and the law enforcement officer defendant that might not be as accessible to all. My guess is that the plaintiff believed throughout her case that the judge had taken her and her claim seriously (even if her own attorney did not).

These examples illustrate the ways in which the gender or race of the judge might play into other decisions that may affect the legitimacy of the legal system, while not affecting the ultimate decision of who prevails. Not only must members of the public have confidence in the outcome, but they also must have confidence in the administration of justice. There are many courtroom interactions that could manifest a sensitivity or understanding for the position of underrepresented groups in American society. The second story provides yet another example of something that cannot be found in any statistical analysis of outcomes; yet the judge’s behavior sends a message to those involved in a particular case. All people, regardless of race or gender, must be treated with respect and taken seriously in the legal system. This is something that both women and minority judges must understand better and may affect not only how justice is meted out but also how justice is perceived.

And, let us not ignore the counter-examples — situations in which a judge showed bias against a litigant because of his or her race or gender. For example, in *Catchpole v. Brannon*, the trial judge made his gender bias

observed biased treatment of other attorneys based on race or ethnicity.

⁸⁰ Lonsway, et al., *supra* note 2, at 218-19.

⁸¹ *Id.* at 216.

so obvious on the record that the California Court of Appeal reversed the trial judge's decision in favor of the defendants based on the appearance of gender bias.⁸² In that California state court case, the plaintiff, an eighteen year old college student, alleged sexual harassment as well as related tortious conduct by her supervisor at a Burger King restaurant. The trial judge himself questioned the sexual harassment victim extensively about why she brought the lawsuit and whether she understood the implications of her allegations to the harasser and other defendants, even going so far as to ask her whether she brought the lawsuit "to prove something" to her father.⁸³ Further, the judge evinced impatience toward her claim, concluding that her testimony (which was at least in part corroborated) lacked credibility. As the Court of Appeal concluded, "[t]he courts' remarks throughout trial show that its conception of the circumstances that may constitute sexual harassment were based on stereotyped thinking about the nature and roles of women and myths and misconceptions about the economic and social realities of women's lives."⁸⁴ Another example is provided by Judge Posner's tortured analysis of the terms "sick bitch" and "bitch" directed at a woman worker as somehow not being a "gendered" term because the plaintiff had once been in a relationship with her harasser.⁸⁵

Diversity will lead to a richer debate in decision making because of differing perspectives based on race and gender. For example, Supreme Court Justice Thurgood Marshall often brought a different perspective to that Court. As Professor Ifill has noted, he provided a "counter-narrative" in the deliberative process.⁸⁶ This diversity may not be based only on color, but also based on socio-economic status. As she explains:

Ironically, because African American judges, like most middle-class African Americans, will tend to be exposed to more varied experiences across race and class lines than their white counterparts, they may be better equipped than white judges to draw on and utilize a range of perspectives and values from communities throughout the society.⁸⁷

⁸² *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (1995).

⁸³ *Id.* at 249-51.

⁸⁴ *Id.* at 262.

⁸⁵ See *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1168-69 (7th Cir. 1996); see also Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741 (1997).

⁸⁶ See Ifill, *supra* note 1, at 456-57, 483-84 (discussing Marshall's impact).

⁸⁷ *Id.* at 469; see also ABRAHAM L. DAVIS, *BLACKS IN THE FEDERAL JUDICIARY: NEUTRAL*

Professor Ifill criticizes both the role model and public confidence rationales for diversity, arguing in favor of a more representative model of a diverse judiciary.⁸⁸ While Professor Ifill notes that this does not mean that a white male cannot understand differing perspectives (indeed, she gives an excellent example of such a case), coming from a traditionally disenfranchised group certainly makes this perspective easier to attain.

III. THE TOUGH ROAD TO BECOMING A NONTRADITIONAL FEDERAL JUDGE

The current politicization of the confirmation process has a particular problematic impact on nontraditional judicial candidates. One way to get a sense of this is to look at the differences in the process for confirmation between traditional and nontraditional judicial nominees. The time differences alone are telling. Nontraditional appointees to the district courts during the Clinton administration took on average 120 days from nomination to hearings — more than six weeks longer than white males (for whom it only took seventy-seven days).⁸⁹ The time period from nomination to confirmation was likewise longer for nontraditional versus white male appointees. On average, white males were confirmed forty-six days more quickly than their nontraditional counterparts. Nontraditional appointees fared even worse at the Circuit Court level, where it took nearly two months longer from nomination to hearing, and 146 days longer from nomination to confirmation for nontraditional appointees.⁹⁰

Further, evidence has begun to come to light that demonstrates that women and minority group members, even once appointed, may have a tougher time. Once again, I will begin with an anecdote. While I was a judicial clerk working for a federal judge sitting in Chicago, I was on an elevator at lunch time and overheard a rather loud conversation that occurred between three males. One of the group was maligning vociferously the late former California Supreme Court Justice Rose Bird. This person was speaking so ill of Justice Bird that I was quite taken aback and began to ask myself who this person was. A lawyer? A judge in the same building as my judge? When one of the younger men who

ARBITERS OR JUDICIAL ACTIVISTS? at 82-88 (Wyndham Hall Press 1989) (discussing that African American judges are conscious of their roles).

⁸⁸ See Ifill, *supra* note 1, at 480-81.

⁸⁹ Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 234 (2001).

⁹⁰ See *id.* at 235.

was with him (who I now assume was his law clerk), called him by the name Judge ____, I was amazed that a judge would speak so unprofessionally and publicly about a fellow judge, albeit one sitting on a different court than him. One can only imagine that nontraditional judges must experience different treatment from both their colleagues on the court as well as other participants in the court system, including attorneys.

Gender bias task forces also show evidence of incivility directed at female federal judges. In the Eighth Circuit's report, 80% of female judges returning surveys reported experiencing incivility directed at them from fellow judges as compared to 32.5% of their male counterparts.⁹¹ As Judith Resnick aptly put it, "the intersection of women and judge turns out to equal woman a good deal of the time, and she is other."⁹²

Elaine Martin has documented the difficulties female judges have in balancing their work and home lives. In a study of Carter-appointed judges, she found that a majority of women judges (62.9%) felt conflict between their career and parenting roles, whereas a majority of men (52.9%) rarely felt such a conflict.⁹³ Further, nearly two-thirds of the female judges had primary responsibility for running their households.⁹⁴ In describing their "major" problems in law, 81% of the women judges surveyed answered by mentioning sex discrimination, whereas only 18.5% of their male counterparts referred to some racial or class-based bias.⁹⁵ This led Professor Martin to opine about the potential difference that women might bring to the bench:

Their differences might influence such things as decisional output, especially in cases involving sex discrimination; conduct of courtroom business, especially as regards sexist behavior by litigators; influence on sex-role attitudes held by their male colleagues, especially on appellate courts where decisions are collegial; administrative behavior, for example, in hiring women law clerks and as noted in the introduction, collective actions, through formal organizations, undertaken to heighten the judicial

⁹¹ See Eighth Circuit Task Force, *supra* note 75, at 93; see also Judith Resnick, *Asking About Gender in Courts*, 21 SIGNS 952, 971 (1996) (citing studies showing that women judges are treated with less respect and are thought of as less competent than their male counterparts).

⁹² See Resnick, *supra* note 91, at 972.

⁹³ See Martin, *supra* note 6, at 205.

⁹⁴ See *id.* at 206. Only 14.3% of male judges ran their households. *Id.*

⁹⁵ *Id.* at 207.

system's response to gender bias problems in both law and process.⁹⁶

CONCLUSION

So, how can these studies be reconciled with notions of an impartial judiciary? What does it mean for diversity on the bench in the twenty-first century? First, the bad news. As a practical matter, presidents likely are going to be reluctant to nominate nontraditional judges (in spite of political pressure to do so) because of the increased time for confirmation. The time delays in the confirmation process may make it impossible in some cases for the sitting president to see that nomination through by the end of his or her term in office. There is also increased pressure to appoint conservative women and minority judges with more traditional career tracks in order to avoid some of these problems in the appointments process. This is unfortunate and will likely lessen the potential for diversity to have an impact on the judicial system.

The potential for a diverse bench to have a positive impact on justice is great. It should not be too worrisome that there is some tension between the differences in perspective and, occasionally, outcome due to a more diverse bench and the notion of a neutral judiciary. They are in fact compatible. In the majority of cases — many of which are routine and resolved by settlement — race and gender of the judge likely will not affect outcomes. However, in cases that are policy-laden or difficult and in which there is room for disagreement about outcome, the different perspectives based on race or gender may affect decision making patterns and outcomes. This is as it should be. Everyone is hemmed in, to a certain extent, by life experiences — white males no less than women or members of minority groups. That these views should find expression in judicial decision making in controversial cases is natural. What is of great concern is if only one viewpoint is expressed in these cases and others are shut out. Judicial decision making in difficult cases should be about a give and take between diverse perspectives and viewpoints. Sometimes struggle and debate between various viewpoints is the best way to reach the most just decision.

⁹⁶ *Id.* at 208.
