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Evaluating Judicial Performance and Addressing Gender Bias

ANGELA MELVILLE*

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Abstract

Elek and Rottman argue that judicial evaluation is often biased against women and minority judges. The need to address bias is important, however often the desire for diversity seems so self-evident as to belie deeper analysis. This paper examines the two main rationales for gender equality on the bench. First, female judges are often considered necessary in order to bring a gendered perspective to judging, however it is argued that this rationale is flawed. Second, an alternative rationale based on equality and legitimacy is offered which avoids gender essentialism. While debates typically focus on these two rationales, a third rationale embraces both difference and equality/legitimacy. The presence of female judges has an important symbolic value which destabilises existing fraternal legal norms. Finally, increasing the number of female judges may not necessarily change judging, and this paper also analyses how the transformative potential offered by judicial diversity can work in practice.

Key words

Gender and judging; gender difference; judicial diversity

Resumen

Elek y Rottman defienden que la evaluación judicial suele estar sesgada en contra de las mujeres y los jueces pertenecientes a minorías. La necesidad de abordar el sesgo es importante, sin embargo a menudo el deseo de diversidad parece tan evidente como para contradecir un análisis más profundo. Este artículo examina los dos motivos principales para la igualdad de género en el banquillo. En primer lugar, las mujeres jueces a menudo se consideran necesarias para aportar una perspectiva de género al hecho de juzgar, sin embargo, se defiende que este razonamiento es erróneo. En segundo lugar, se ofrece una alternativa lógica basada

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* Dr. Angela Melville is Senior Lecturer in the Flinders Law School. Her research interests include the sociology of the legal profession, including the position of women within the profession. Flinders University. Flinders Law School. GPO Box 2100, Adelaide 5001, South Australia. angela.melville@flinders.edu.au

en la igualdad y la legitimidad que evita el esencialismo de género. Mientras que los debates suelen centrarse en estas dos razones, una tercera justificación abarca tanto la diferencia como la igualdad/legitimidad. La presencia de mujeres en la judicatura tiene un importante valor simbólico que desestabiliza las normas legales fraternales existentes. Por último, aumentar el número de juezas no puede cambiar necesariamente el hecho juzgar en sí, y este artículo también analiza cómo el potencial transformador que ofrece la diversidad judicial puede funcionar en la práctica.

Palabras clave

Género y hecho de juzgar; diferencia de género; diversidad judicial

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1. What difference will gender-balanced evaluations make?

This paper is conceived as an extension to Elek and Rottman's contribution to this special issue entitled *Methodologies for Measuring Judicial Performance: The Problem of Bias*. Elek has previously argued that performance-related judicial evaluations are biased against women and judges from minority groups (Elek *et al*. 2012-2013, Elek and Rottman 2012). In this special issue, Elek and Rottman (2014) have explained the development of methodologies designed to counter this bias.

The development of methodologies for evaluation that eliminate bias is both innovative and important. These methodologies will allow judges to be evaluated according to their merit, and not according to gender, class, race or ethnicity. In turn, the number of female judges and those drawn from minority groups that are under-represented may increase. However, Malleson (2003, p. 1) warns that the need to address bias within the judiciary may appear to be so self-evident that the issue of why diversity on the bench is important is not always examined. Malleson's (2003) work focuses specifically on the position of female judges, and this article will also take this approach. She offers three reasons for exploring the need for gender equality on the bench. First, it is necessary to show that the rationale for equality is theoretically sound and empirically grounded in order for it to be successful as a strategy for change. Second, a clear idea of what actions may be deemed legitimate is needed in order to inform how gender equality is to be achieved. Finally, the way in which gender equality is justified determines what level of participation will be required by women.

This paper follows Malleson's (2003) argument that the need for gender equality needs to be proven, rather than assumed. As such, it provides a further justification for Elek and Rottman's efforts, in that it provides an analysis of why tools that will ultimately increase diversity on the bench are so important. Feminist justifications for greater judicial diversity have tended to fall into two camps: the difference rationale (Rackley 2006, 2007); or a rationale based on equality and legitimacy (Malleson 2003, Kenney 2013). First, it examines the difference rationale, which asserts that female judges bring different life experiences, and that this difference improves the quality of judgments. While some feminist researchers have rather uncritically accepted this 'gender difference' rationale, others (eg Malleson 2003, Kenney 2013) have argued that it has little support from empirical findings, has serious theoretical flaws, and provides little strategic value to feminists wanting to address gender bias.

Second, it considers an alternative rationale for increasing the number of women on the bench. This rationale asserts that it is necessary for the composition of the bench to reflect the demographics of society in order to support the principle of equality. In turn, it is necessary to support equality in order to ensure that the judiciary and the rule of law are legitimised. Female judges should not be expected to represent the interests of their own social group, or indeed other group groups. However, this does not mean that their presence is not essential. Instead, their presence is necessary for symbolic reasons, and that the public will lose confidence in the judiciary and the rule of law unless the makeup of the judiciary reflects the descriptive makeup of society (Malleson 2003).

Malleson (2003) argues that the difference/equality and legitimacy rationales cannot be reconciled. Third, this article acknowledges the problems with the difference rationale, however it is then argued these problems do not necessarily mean that difference should be entirely rejected as a justification for gender equality on the bench. It is asserted that the symbolic value of judicial diversity extends beyond arguments for equality and legitimacy. Greater diversity disrupts the homogeneity of the bench, and provides a visual reminder that the law, which is often presumed to be completed and unified, is in fact contingent and contextual

(Rackley 2006). Rackley (2013, p. 29) argues that in order for there to be genuine equality, different perspectives and legal norms need to be considered.

Finally, this article examines how the difference argument could be put into practice. Many feminists have asserted that there is a need for judging to be improved, and that judges often lack the skills that will make a difference to the quality of judicial decision-making. These include an appreciation for context, more empathic communication styles, and greater mediation skills. If we reject, however, that female judges do (or should) bring difference, then the question remains how can judging be improved? In this section, it is argued that there needs to be a move away from the usual focus on *who judges are*, and instead examine *what judges do*. Conceptualising judging as social practice opens up questions about what judicial skills, norms and values are most desirable, and then what types of selection and evaluation tools are necessary in order to promote these practices. The transformative potential of different norms, values and skills is not merely speculation. This section also draws on the various rewriting judgment projects to give a concrete example of what difference can be made if judicial decision-making embraces the need for change.

2. Gender difference

2.1. Does gender matter? Empirical findings

There are two main arguments used to justify gender equality on the bench. The first is centred on concepts of difference. Female judges are assumed to bring experiences and perspectives that are different from their male counterparts, and that their presence will make a difference to judging. The argument for difference has been the strategy of choice in feminist efforts to increase the number of women in the judiciary (Malleson 2003). It appears in much of the academic literature about gender and judging. For instance, Sherry (1986, p. 160-161) states:

> Although both men and women may - at an unconscious level - accept some of society's sexist ideology, women have a greater incentive to overcome their own unconscious gender bias: membership in a victimized group confers an additional ability and impetus to identify and combat the most subtle forms that victimization might take. Thus we can expect that an influx of women into the judiciary will result in a corresponding decrease in gender-biased decision making.

Similarly, the discourse of difference is often asserted by female judges. For instance, Justice Arden (2007, p. 2):

> Women bring new perspectives to bear as well as their intellectual skills and knowledge of the law. They have different life experiences. They have in some respects different approaches.

Likewise, Chief Justice Beverly McLachlin of the Supreme Court in Canada has stated:

> For cultural, biological, social and historic reasons, women do have different experiences than men. In this respect, women judges can make a unique contribution to the deliberations of our courts. Women judges are capable of infusing the law with the unique reality of their life (cited in Hedlund and Grazebrook 2010, p. 5).

Surveys have indicated that many judges believe that female judges bring unique perspectives, experiences and gendered values to the bench (Martin 1993, Barwick *et al.* 1996). Qualitative research also shows that judges perceive that gender makes a difference. For instance, interviews with female judges in the US found that female judges were seen to be more patient, compassionate and humane than male judges. Female judges were also thought to make greater use of open styles of communication and mediation (Miller and Maier 2008, p. 542).

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Once these claims, however, are tested it appears that gender difference may be more perception than empirical reality. There is now a substantial literature aimed at testing whether female judges decide cases differently from male judges. Boyd *et al.* (2010) estimate that there have been at least 30 studies have attempted to test the influence of gender on judging. Of these, approximately a third have found that female judges make a definite difference to judging, a third have produced mixed results, and the final third have found no difference. Other reviews of empirical studies have also concluded that there is little evidence that female judges make a difference (Kenney 2008, 2013, Schultz and Shaw 2008). The majority of studies have been located in the US, however the lack of clear empirical support for gender difference extends to other jurisdictions and across different levels of court (Malleson 2003).

The main finding in support of difference is that in some specific fields of law, namely sexual harassment and discrimination cases, female judges do judge differently (eg Gryski *et al.* 1986, Allen and Wall 1993, Davis *et al.* 1993, Kruse 2004, Peresie 2005). However, even then, these differences have not been replicated consistently (Walker and Barrow 1985), and in most other types of cases gender makes little difference (Boyd *et al.* 2010).

The search for difference has not been limited to the bench. Research on the impact of increasing the number of women in other positions of power (eg women as legislators and board directors) has also produced mixed results (Childs and Krook 2006). Meta-analysis which brings together multitudes of studies aimed at assessing whether gender makes a difference in leadership style has also failed to find clear-cut differences. Female leaders self-report that they use a different leadership style, but these differences do not appear in evaluations by supervisors, subordinates or peers. There is also little evidence that female leaders are more effective (Eagly *et al.* 1992, 1995).

The lack of empirical support for the difference theory extends beyond gender. Researchers have also attempted to assess the impact of a judge's race on judicial decision making. These studies have largely concluded that a judge's race makes no (eg Spohn 1991, Steffensmeier and Britt 2001, p. 749) or little difference to judgments (eg Walker and Barrow 1985, Welch *et al.* 1988, Ward *et al.* 2009). When difference has been found, it is often for specific types of cases such as racial harassment and affirmation cases (Chew and Kelley 2008, Kastellec 2013).

2.2. Is asserting difference strategic?

Malleson (2003) argues that the assertion that female judges will act differently to their male counterparts is not only empirically weak, but it is also an ineffective strategy for addressing gender disparity on the bench. The belief that female judges will bring their distinct gendered experiences to their bench runs the risk of leaving female judges isolated in fields usually seen to be women's work, such as family and discrimination law. The reliance on gender difference also leaves female judges vulnerable to the accusation that they will ignore the principles of impartiality and consistency (Solimine and Wheatley 1994, p. 893). The appointment of a female judge is frequently accompanied by a discussion about merit, whereas merit is hardly questioned when the appointment is a man (Thornton 2007, p. 402). The difference rationale creates the danger that female judges will be expected to prove that they bring something different to the bench, and that this will then be equated to mean that they will make better judges. This leaves female judges needing to do more than their male counterparts in order to justify their positions (Malleson 2003).

The focus on difference also means that female judges are seen to be the representatives of other women, and it is clear that some female judges are reluctant to openly embrace this role. For instance, in a speech discussing efforts

by the Judicial Appointments Commission to increase judicial diversity in England and Wales, Justice Susan Crennan stated:

> I express no views about whether these developments are welcome or not - I merely wish to identify the fact that this development, like many others in the law, is part of a wide cultural movement to which litigators and judges cannot be oblivious (Crennan 2006, p. 13).

Likewise, Sally Kenney's efforts to interview Justice Fidelma O'Kelly Macken, Ireland's first female judge, were met with this reply from one of Justice Macken's staff:

> She feels that she would not be in a position to contribute anything constructive to your research and therefore an interview would not be fruitful (Kenney 2013, p. 113).

Kenney (2013) reports that Justice Macken actively discouraged her staff from framing her within gender terms. Justice Macken did eventually agree to an interview with Joseph Weiler, and in reply to Weiler's questions about the importance of gender, Justice Macken replied: "[there is] nothing to distinguish me in any way whatsoever." Justice Macken explained that she did not consider that she had been treated differently than her male colleagues, and that it did not matter if there was a woman on the panel for gender discrimination cases (Kenney 2013, p. 114).

Some authors maintain that the voice of difference will grow stronger once a critical mass has been reached (eg Menkel-Meadow 1986, p. 43). Malleson (2003), however, argues that reliance on the difference rationale may pose problems for the future. Increasing the number of women may mean that the consciousness of being different will become more diffuse, and female judges may become even less willing to accept a representative role. In addition, Malleson (2003) argues that judges are highly similar in terms of legal education and careers, and that by the time that they go to the bench, they are hardly likely to be able to identify directly with the majority of litigants.

2.3. Is gender difference theoretically sound?

Despite the lack of empirical evidence and the strategic problems associated with the gender difference argument, it has still been accepted within much of the gender and judging literature. However, in recent years a number of authors have argued that there is a need to unpack the concept of difference. For instance, Malleson (2003, p. 4) argues that the difference rationale is based on assumptions that have commonsense appeal, but on deeper analysis are seriously flawed:

> The argument that the quality of justice in the courts will be improved by the differences which women bring to the bench are superficially very persuasive. The popularity of difference theories in their various guises is understandable since, if correct, they provide an almost unanswerable claim for the participation of women in the judiciary. In addition, they counter the traditional dominance of perceived masculine attributes and validate some of the traits which are designated as feminine and which have been marginalised or denigrated in public life (Malleson 2010, p. 4).

This commonsense appeal, however, means that the gender difference rationale has not always been justified, and instead has often been assumed to be sound. The gender difference rationale can be located in three theoretical perspectives, all of which have limitations. First, it draws on Gilligan's (1982) "ethic of care" theory. Gilligan's (1982) work started out as a response to Lawrence Kohlberg's cognitive-development theory, which asserts that the peak of moral development is the "ethic of justice." The ethic of justice is associated with moral thinking based on rights, abstract and formal rules, objectivity and hierarchy. Gilligan (1982) argued that Kohlberg had overlooked a second line of moral development, which she termed the

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"ethic of care." The ethics of care is based on responsibility, preservation of relationships, respect and empathy.

Gilligan and her colleagues maintained that the ethic of care was related to gender, although by a somewhat indirect route. They argued that a person's moral framework was connected to their sense of self. A person with a sense of self that was separate from others was more likely to occupy an ethic of justice worldview. Someone with a sense of self that was connected to others was more likely to occupy an ethic of care worldview. Men were more likely to have a separated sense of self, and thus to have a morality based on justice, whereas women were more likely to feel connected to others and to apply an ethic of care (Lyons 1983).

Gilligan's work has largely been interpreted to support essentialist gender differences. This appears to be also to be the case within the much of the gender and judging literature. For instance, the application of a gender difference interpretation of Gilligan is clear in the work of Suzanna Sherry. In her analysis of the judgments of Justice Sandra Day O'Connor, Sherry (1986, p. 582) asserts that men and women are located in distinct worldviews: "while women emphasize connection, subjectivity, and responsibility, men emphasize autonomy, objectivity, and rights." These differences are then reflected in the decisions made by female and male judges.

Second, the difference rationale can be located within feminist standpoint theory. Feminist standpoint theory asserts that women bring an understanding of patriarchy that is different from men's. Women have directly experienced gendered inequality, and it is only through this direct experience that it is possible to understand gender issues and the need for social change. Applied to judging, feminist standpoint theory would explain that female judges will have experienced the world differently than their male counterparts, and that these different experiences will furnish them with a different perspective in their judging (Martin *et al.* 2002)

Third, and related to feminist standpoint theory, the gender and judging literature has drawn on Pitkin's concept of substantive representation. In *The Concept of Representation*, Pitkin (1967) identifies four types of representation: formalistic; descriptive; symbolic; and substantive. Pitkin argues that only substantive representation offers the potential to achieve policy change. Substantive representation assumes that the representative of a vulnerable or minority group is responsive to the views of the group that they represent (Childs and Krook 2006). An illustration is provided by Cook:

> …the organized campaign to place more women on the bench rests on the hope that women judges will seize decision-making opportunities to liberate other women (Cook 1981, p. 216).

Each of these theoretical foundations: the feminine ethic of care theory; feminist standpoint theory; and substantive representation theory, provide perspectives that have commonsense appeal, but it is also vital to understand their limitations. Tronto (1987) argues that Gilligan herself did not offer a cohesive explanation for difference, although she did hint that gender differences reflect underlying social structures. For instance, Gilligan (1977, p. 487) stated:

> When women feel excluded from direct participation in society, they see themselves as subject to a consensus or judgment made and enforced by the men on whose protection and support they depend and by whose names they are known… The conflict between self and other thus constitutes the central moral problem for women... The conflict between compassion and autonomy, between virtue and power...

Tronto (1987) explains that Gilligan always insisted that her work did not posit gender categories, yet the way in which many feminists have sometimes interpreted her work have failed to recognise the importance of social structure and

socialisation. Instead, the predominant determinist interpretation leaves little room for change, and as it does not consider how gender identities are constructed, they also fail to allow for questions about how women practice gender and can gender identities be altered. In addition, Rackley (2006) argues that Gilligan offers different forms of legal reasoning and styles of lawyering that point towards ways of transforming the current legal norms, and that this transformation is not necessarily dependent upon women's essential difference.

Feminist standpoint theory has also suffered from a problem of essentialism. It privileges a woman's direct experience of inequality as forming the basis of their worldview. However, gender is only one component of experience, and experiences based on race, ethnicity, age, sexuality, disability and so on, and their intersections are overlooked. Consequently, gender is seen to be the single category that shapes identity. It treats women as a social group that is unified and static, and risks reinforcing stereotypes and romanticising so-called feminine traits. Whereas feminist standpoint theory critiques the privileging of a male standard, it has largely ignored the experiences of women who are not white, middle-class and from a 'first world country' (Grant 1987, Hekman 1997, hooks 2000).

Malleson (2010, p. 12) warns that a female judge is unlikely to have shared experiences of their litigants "because of the unusually narrow background from which judges are drawn compared to other institutions of power." Judges come from a highly homogeneous group in terms of characteristics other than gender, including age, educational background, wealth and class. Malleson (2010) also states that female judges will often more in common with their male colleagues than the people who appear before them in the court.

The assumption that women in leadership roles will provide substantive representation of other women also faces problems. Empirical research suggests that elite female legal professionals often fail to act as representatives of their social group. According to Rhode (1997, p. 3), women in positions often fail to recognise the extent of inequalities. When inequalities are recognised they are rationalised as being the result of individual choices that women have made. Women in positions of power also often deny responsibility for problems, and do not see that they are either part of the problem or the solution.

3. Alternative rationales to gender essentialism

3.1. Equality and legitimacy: the importance of women's symbolic presence

While the argument about difference has dominated debates about the need for gender equality on the bench, there is a second rationale that has received less attention. This second rationale is based on equality and legitimacy. It insists that the involvement of female judges is a basic tenet of democracy, and without which the judiciary will fail to maintain public confidence. This second rationale may have less commonsense appeal, but according to Malleson (2003), it provides a stronger strategic tool for addressing gender disparities.

The equality argument asserts that men do not possess any innate characteristics that make them better judges than women. Therefore the lack of women on the bench must be an outcome of gendered barriers. Elek and Rottman (2014) highlight these barriers, showing that female judges are disadvantaged by judicial evaluations which contain unacknowledged biases. In addition, there is considerable research showing the disadvantages that female candidates to the bench face (Feenan 2005), and that the glass ceiling has persisted despite the steady influx of women into the legal profession in many jurisdictions since the mid-1970s (Sommerlad 1994, Kay and Hagan 1995, Sandefur 2007, Melville and Stephen 2011).

The equality principle maintains that women are required for their own sake, rather than because they are expected to make a difference. This means that women are not required to be representatives of their social group, and the standard against which they are measured should be the same as for their male counterparts. The demands of equality are also not satisfied until there are equal numbers, and so the criterion that must be met is clear and unequivocal.

Malleson (2003, p. 17-18) acknowledges that there are some problems with the equality argument. It concentrates on the interests of individual participants, namely supporting the careers of female judges, rather than the interests of society as a whole. She argues that the solution to this problem is to supplement the equality principle with legitimacy. The legitimacy principle asserts that judging is not just another professional career, but that judges also members of a branch of government. Judges are instrumental in creating and legitimising the law, they exert considerable influence over public perception, and occupy a position of power. Traditionally, legitimacy has been seen to be based on the quality of judicial decisions, usually in terms of their fairness and impartiality, however legitimacy can also be seen to be based on the composition of the bench (Malleson 2003, p. 18).

The difference rationale asserts that female judges have representative value in a substantial sense. The equality and legitimacy rationale shifts this sense of representation. Female judges take on important symbolic value, and are only expected to be representative in a descriptive sense (Phillips 1995, 2012, Kenney 2002, Malleson 2003, p. 19, Graham 2004, Grossman 2011). The composition of the bench should reflect the demographic makeup of society, and female judges are required to "stand for" rather than "act for" other women (Kenney 2002, p. 268). Symbolic representation is important as it helps ensure public confidence in the judiciary, and therefore in the rule of law, and the relationship between legitimacy and public confidence is essential for democracy. In addition, while female judges are not expected to act for the interests of women, their presence nevertheless symbolises that women are capable of participating in decisions that affect them (Phillips 2012).

Rackley (2013, p. 26) points to a further problem with the legitimacy and equality rationale: merit. One of the strongest objections to the appointment of female judges is that they are selected on the basis of gender rather than merit. This leaves female judges vulnerable to the accusation that they lack the necessary skills to perform their role. Rackley (2013, p. 26) argues that the supporters of the equality and legitimacy rationale are left little room for manoeuvre. They either acknowledge that appointments are based on criteria other than merit, or they attempt to show that the current application of the principle of merit is distorted.

Despite these problems, the strategic advantage of using the equality and legitimacy rationale has been demonstrated in a number of campaigns to appoint women to high level positions on the bench. For instance, Kenney (2008) has documented the way in which a small group of feminists largely working without support were successful in achieving Brenda Hale's appointment as a Law Lord in 2003. Judge Hale was the first woman to sit in the highest court in the United Kingdom, 25 years after comparative appointments in the United States and Canada. The successful campaign drew heavily on discourses of modernisation of the courts system centring on legitimacy, equality and representativeness. Likewise, arguments about the need for gender equality in order to ensure legitimacy have also been successful in obtaining female appointments to the European bench (Kenney 2002).

The equality and legitimacy rationale has also been successful for tackling gender disparity in other levels of the legal profession. Rhode (2003) argues that women had been traditionally underrepresented in leadership roles at the American Bar Association (ABA) until the *ABA Commission of Women in the Profession* started to release annual reports documenting the low percentage of women in leadership

positions. Once it was clear that there was a problem of gender equality then the numbers of women started to improve (Rhode 2003, p. 20).

3.2. The transformative potential of difference

Some authors (eg Kenney 2002, 2013, Malleson 2003, 2010) have argued that the problem of essentialism means that the difference rationale is not useful for feminists seeking gender equality on the bench. However, Rackley (2006) argues that many of the criticisms of Gilligan have been simplistic and reductive, leading some feminists to abandon the ethic of care rather than to more fully explore its potential. According to Rackley (2006), the call for difference highlights problems with current legal norms which construct legal reasoning as being complete and unified, when in fact the law is partial and contextual. Rackley (2006, 2007) acknowledges that it is important to avoid assumptions that women are essentially different than men, and that all female judges should not be burdened with the responsibility of difference. She has recognised that the call for otherness is dangerous, and that difference is often dismissed as being subjective. She argues, however, that these problems should not mean that difference is rejected, but instead that the value of difference be unpacked further.

For Rackley (2007), the value of women's presence on the bench is that it unsettles and destablises the fraternal values of legal culture. Even if female judges do not judge differently, their physical presence disrupts the uniformity of the bench. For instance, Rackley (2007, p. 165) claims that Judge Hale's presence on the bench was enough to reveal:

> ...the contingency of traditional accounts of legal reasoning and the possibility of alternative and diverse adjudicative voices, which are not necessarily feminist or feminist in intonation.

The value of women's presence on the bench as a mark of difference extends the symbolic value of judicial diversity. A female judge may not necessarily speak with a different voice, but her presence acts as an irritant that constantly reminds the judiciary and other legal actors that the law is founded on gendered (and other) assumptions, and that different perspectives need to be considered. This acknowledgement points towards the transformative potential of difference.

4. How can judicial decision making be improved?

4.1. Evaluating judicial merit based on judicial skills

While there is now a long history of feminist legal scholars calling for the need to change judicial decision-making, most attempts at incorporating difference have been limited. For the most part, these calls have focused on the need to bring a gendered perspective to the bench. As discussed above, the predominant way of conceptualising how this change should be bought about has been to call for more women on the bench. Yet, as also discussed, increasing the number of female judges is unlikely to produce the types of differences that are desired.

This leaves an important question unanswered: how is it possible to make a difference to judicial decision-making? In order to answer this question, it is also necessary to ask: what type of judicial decision-making do we want? Feminist critics have called for judges who will ask questions about how their decisions will impact upon women as well as litigants from other vulnerable or disempowered social groups. They want judges who will appreciate context, understand the limits of their own knowledge and experience, listen to parties, are zealous about every case they hear, concerned about access to justice, and pass judgments that are fair and just (Davis 1992, Davies and Seuffert 2000, Gaudron 2002)

It has been argued by some scholars (eg Hunter 2008) that only a feminist judge can bring a gendered perspective, however this critique continues to conceptualise

judges for who they are rather than what they do. It may be more likely for female judges to possess these particular judicial skills, but it is also possible that they may be possessed by some male judges, and equally likely that some female judges will not meet the mark. By focusing on desirable judicial skills (ie on judicial practice rather than judicial identity), it is possible to create a set of factors that can be measured in order to guide judicial selection and evaluation.

A measurement tool based on skills has been developed by Shultz and Zedeck (2011), although its application is for the selection of law students in the United States, rather than judges. Law schools admission decisions have traditionally relied on a student's previous academic performance and admission tests aimed at measuring potential academic performance. However, while these measures have been useful for predicting first year performance, Shultz and Zedeck (2001) demonstrate that they have little reliability in predicting performance in the legal profession. In addition, like traditional forms of judicial evaluation, they also limit diversity.

Shultz and Zedeck's (2011) research was conducted in two parts. First, they surveyed a large number of law school alumni in the US to identify factors associated with lawyer efficiency. These factors were conceptualised as the types of skills and tasks that lawyers perform in their everyday work life, rather than other measures of efficiency such as salary or time taken to reach partner. The second phase involved developing scales that could then measure the list of factors identified in the initial phase. In sum, Shultz and Zedeck (2011) have produced a measurement tool which allows for law students to be selected based on their eventual effectiveness as a legal professional. In addition, as the measures focus on skills rather than proscribed traits, it also eliminates biases against students who are traditionally excluded from law school. It would seem that this type of tool could be adjusted as a means of selecting judges.

This type of measurement tool is also similar to Elek and Rottman's (2014) evaluative framework for evaluating judges. Both sets of tools provide a subtle and complex measurement of merit. They demonstrate that they types of skills that make up merit do not need to be fixed. Instead, the skills and tasks performed by judges are socially constructed and are likely to change over time and according to whose opinion is sought, and these tools provide enough flexibility to adjust to change.

4.2. Realising the transformative potential of judicial diversity

The development of means for identifying judges with 'different' skills points towards a method of selecting judges that would potentially increase diversity without rejecting the principle of merit. This could be a step forward, however merit is only one value upon with the fraternal legal system rests. Feminist authors have also shown that judicial behaviour is constrained by a raft of values embedded within the law itself (eg Davies and Seuffert 2000, Graycar 2009, Rackley 2013). The way in which existing legal values constrains the transformative potential of judging has been articulated by several female judges, including Judge Hale:

> I am a little worried and more than a little sceptical about arguments based upon the individual judge's ability or even willingness to make a difference… [T]he power of the system to turn any free spirit into a conforming replica of those who went before is considerable, and it is often not long before the great new hope on the bench begins to look like the old vintage (Hale cited in Rackley 2007, p. 179).

The current legal system creates a normative expectation that judges should be detached and impassive. Rackley (2008, p. 38) argues these norms are not only unattainable, they are also undesirable. In order for judicial decision-making to be improved, there also needs to be a change in fundamental legal values. The feminist critique of patriarchical legal values has been most strongly articulated by Carol Smart (1989), who argues that law is a powerful discourse that excludes and

damages women. Law does not so much ignore and devalue the experiences of women as actively delegitimises their knowledge and experiences. Through the predominance of the legal methods, judges play an active role in maintaining the power of law. The role of the judge is to locate and categorise facts, decide on relevant legal principles and apply the law in order to arrive at a conclusion. Law obtains its persuasive claim to truth by presenting judgments as neutral, objective, impartial, correct and uncontestable.

Similarly, Graycar (2009) has argued that it is not enough to simply have more female judges on the bench. Even with more female judges, the practice of judging will be presumed to be a male activity and female judges will still be assessed against this normative standard. Graycar (2009) asserts that the role of judging is gendered and implicitly male, and that these norms need to be challenged before it is possible to determine whether the presence of women on the bench will make a difference.

Feminist legal scholars have not just speculated on the need to change underlying legal norms, they have also shown the way in which different norms and values can make a real difference to judicial decision-making. The desire to challenge the traditional legal values embedded within normative judicial decision-making has spurred two projects involving feminist legal scholars re/writing judgments. The first was conducted by the Women's Court of Canada (WCC) (Majury 2006) and then second consists of the Feminist Judgments Project (FJP) in England (Hunter *et al*. 2010). A similar project is now underway in Australia (Hunter 2012). The WCC project involved feminists rewriting Supreme Court decisions, and showed that a substantive equality analysis could make a significant difference to judgments. The WCC showed that the claimants' experiences of inequality do not need to be rendered invisible during the process of judicial decision-making. It also demonstrated that judgments are not necessary final and complete, and that instead multiple and sometimes conflicting decisions can be reached (Majury 2006).

The FJP adopted a wider remit, with feminist legal academics invited to write a feminist judgment of their choice. The FJP also demonstrated that feminist values can bring about difference. There were a series of common concerns and themes in the FJP judgments, including a greater utilisation of claims to human rights, concern for the serious problems that women face such as domestic violence, acknowledgment of the role of women as mothers, and awareness of the effects of gender stereotypes (Hunter 2010). These projects highlight that judicial decision-making is not objective, value-free or neutral, and that the values and perspectives of the judge makes a different.

5. Conclusion

This article agrees wholeheartedly with Elek and Rottman's (2014) argument that methodologies for judicial evaluation must be developed that address traditional forms of bias. Such innovative tools will potentially increase the number of women on the bench, as well as judges from other under-represented groups.

The development of these methodologies provides an ideal time to re-consider why it is so important to tackle gender disparities. This article starts from the position that the need for gender equality should be fully examined and justified. Traditional arguments for increasing the number of women on the bench have largely relied on the rationale of 'gender difference.' Some researchers have argued that this rationale has little empirical support, has serious theoretical flaws, and is strategically dangerous, and therefore should be rejected (Malleson 2003, Kenney 2013). Instead, they argue that a second rationale for gender equality based on the principles of equality and legitimacy is preferred. This rationale is based on the assertion that women on the bench have important symbolic value, and is essential in order to ensure public confidence in the judiciary. This article has acknowledged the critiques of the difference rationale, but argues that it is not necessarily

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incompatible with the call for equality and legitimacy. The symbolic presence of women on the bench also acts to create a visible sign of difference, which acts as a stark reminder that judicial decision-making is not complete, unified, or uncontestable.

This article then moved on to show that it is possible to incorporate difference into judging. Much of the previous literature has conceptualised judges as possessing essentialist and fixed identities, and then examined how these identities influence judging. This conceptualisation has limited the types of questions that can be asked about judges, and for the most part, previous studies have focused on trying to measure whether increasing the number of women on the bench changes the quality of judicial decision making.

A rationale for increasing female judges based on symbolic value allows for a new set of research questions. For instance, it shifts the evaluation of judges based on their identities (who they are) to judicial practice (what they do). This shift allows for the development of more complex means of selecting judges based on merit or efficiency (Hunter *et al*. 2010). Elek and Rottman provide an excellent example of a means of evaluating judges according to a subtle and complex measurement of merit. In addition, Shultz and Zedeck (2011) provide a similar measurement approach aimed at selecting law school entrants based on their potential to become effective legal professionals. Both of these studies demonstrate that the types of skills that make up merit do not need to be fixed. Instead, the skills and tasks performed by legal professionals, including judges, are socially constructed and are likely to change over time and according to whose opinion is sought.

Finally, this article shows how difference can be incorporated into the practice of judging through projects involving the feminist rewriting of judgments. These projects suggest that it is not enough to simply have more female judges. What also needs to be changed is the very nature of the role of the judge, and the legal norms and values which this role upholds. These projects also show that feminist calls for change are not merely speculative, but that it is quite possible to reimagine legal norms, and that a feminist perspective of the law can make a substantial difference to both the selection and the evaluation of judges.

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