

Gender Performance in Party Brief Success

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Party brief success is driven, in part, by the extent to which female attorneys conform with gender norms which sit in contradiction to professional norms which hold, “good” attorneys should be assertive and aggressive.

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In 1873, Justice Bradley (in)famously wrote in a concurring opinion that the “natural . . . timidity and delicacy” of women makes them unfit “for many of the occupations of civil life,” which in the context of the case included the legal profession.¹ Since then, four females have served on the Supreme Court,² the justices have employed numerous female clerks,³ and an ever increasing (though still small) number of women file briefs and argue cases before the Court.⁴ However, female attorneys are less successful than their male counterparts.

In this Article, we focus on female attorneys and the forces that account for their success before the U.S. Supreme Court. Unlike most existing studies, we do not treat gender as a male-female dichotomy. Instead we focus on whether female lawyers conform to gender or professional expectations in writing their briefs. Because female lawyers are still in the minority—only twelve percent of all counsel in recent terms—we hypothesize that those who conform to gender expectations will be more successful. The data support our hypothesis.

A NEW APPROACH TO STUDYING GENDER AT THE U.S. SUPREME COURT

The increasing presence of female attorneys appearing before the U.S. Supreme Court and other courts has been of great interest to scholars, with many studies focusing on their success relative to male attorneys.⁵ Overall, this work finds that the success of female counsel is dependent on context.⁶ For example, female attorneys are more

¹ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

² NICHOLA D. GUTGOLD, *THE RHETORIC OF SUPREME COURT WOMEN* (2012).

³ Christopher D. Kromphardt, *Evaluating the Effect of Law Clerk Gender on Voting at the United States Supreme Court*, JUST. SYS. J. XX 1–19 (2016).

⁴ Erin B. Kaheny et al., *High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada*, 36 JUST. SYS. J. 355, 365 (2015).

⁵ See John J. Szmer et al., *Have We Come a Long Way, Baby? The Influence of Attorney Gender on Supreme Court Decision Making*, 6 POL. & GENDER 1 (2010) [hereinafter Szmer et al., (2010)]; Tammy A. Sarver et al., *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238 (2007–08).

⁶ John Szmer et al., *The Impact of Attorney Gender on Decision Making in the United States Courts of Appeal*, 34 J. WOMEN POL. & POL'Y 72 (2013) [hereinafter Szmer et al.,

likely to prevail in the federal courts of appeals than in the U.S. Supreme Court. This may be due to greater diversity of the bench and bar at the intermediate courts.⁷ Other academics have found that female attorneys fare better when arguing cases involving traditional “women’s issues” because of their perceived expertise.⁸ In the U.S. Supreme Court, liberal justices are more likely than conservatives to vote in favor of parties represented by female counsel.⁹ Perhaps the liberal justices subscribe to less rigid conceptions of gender roles.¹⁰

Despite these diverse findings, existing studies all treat the gender of counsel and judges as binary.¹¹ On the one hand, this approach is intuitive; gender is a salient feature, especially when women are in the minority.¹² Logically, gender is a characteristic that judges can use as a cognitive short-cut to evaluate attorneys, whether at a subconscious level or not.¹³ On the other hand, recent work in social psychology and political science examines gender without the binary marker approach.¹⁴ This literature suggests that we can think of gender as a series of actions rather than an either-or proposition. The reasoning is that both men and women “perform” gender and society subsequently evaluates them on how well they comply with these expectations.¹⁵ Coincidentally, violating gender norms can lead to punishment or sanction.¹⁶

(2013)].⁷

Kaheny et al., *supra* note 4. Likewise, a study of the Supreme Court of Canada finds women are more successful than men, again perhaps owing to the large number of female judges and attorneys at that court. *Id.*

⁸ Szmer et al., (2010), *supra* note 5, at 74.

⁹ *Id.*

¹⁰ *Id.* at 29.

¹¹ See, e.g., Kaheny et al., *supra* note 4; Sarver et al., *supra* note 5; Szmer et al., (2010), *supra* note 5; Szmer et al., (2013), *supra* note 6.

¹² CHRISTOPHER F. KARPOWITZ & TALİ MENDELBERG, *THE SILENT SEX: GENDER, DELIBERATION, AND INSTITUTIONS* (2014).

¹³ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007). As Szmer et al. (2013) notes, gender schemas are at play at the Court. Additionally, Jones (2016) notes gender is a salient feature of any political environment which shapes evaluations of men and women. Therefore, it is reasonable that gender operates as a cognitive shortcut.

¹⁴ Jennifer J. Jones, *Talk “Like a Man:” The Linguistic Styles of Hillary Clinton, 1992-2013*, 14 PERSPECTIVES ON POL. 625 (2016)

¹⁵ *Id.* at 627. See also JUDITH BUTLER, *GENDER TROUBLE* (2d ed. 1999).

¹⁶ D.L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L.R. 39 (1994).

Gender norms are subtle expectations that govern how men and women can and should behave which operate at all levels of society.¹⁷ They are particularly pronounced in highly gendered environments and professions—including the law.¹⁸ Especially relevant is the legal profession's norm that an effective attorney, male or female, should communicate in an assertive and masculine manner.¹⁹ Judges admonish attorneys to adhere to this expectation, urging them to make arguments devoid of “facts and emotion[] . . .” in favor of “arguing legal theor[y].”²⁰ Recent empirical work demonstrates judges enforce this rule: attorneys that use too much emotion in their briefs are less successful than those that present more detached legal reasoning.²¹

The problem is that while the expectation of assertive and unemotional communication conforms with male gender norms, it does not fit with female gender norms.²² Accordingly, women are expected to be emotional and interpersonally warm, whereas men are expected to be more detached and abstract.²³ This norm poses problems for female counsel because it necessarily requires them to violate gendered expectations to meet professional norms. Particularly since the common-law system is inherently confrontational, women are caught between competing professional and gender norms before the Court.²⁴

Women often must balance professional and gender norms.²⁵ To do so they tend to err toward more masculine styles of

¹⁷ Alice H. Eagly & Antonio Mladinic, *Gender Stereotypes and Attitudes Toward Women and Men*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 543 (1989).

¹⁸ JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS (1995).

¹⁹ E.g., Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 L. & SOC'Y REV. 677 (1997); PIERCE, *supra* note 18; Rhode, *supra* note 16.

²⁰ SANDRA DAY O'CONNOR, OUT OF ORDER: STORIES FROM THE HISTORY OF THE SUPREME COURT 91 (2013).

²¹ Ryan C. Black et al., *The Role of Emotional Language in Briefs Before the U.S. Supreme Court*, 4 J. LAW & CTS. 377 (2016).

²² Rhode, *supra* note 16.

²³ Amy Cuddy et al., *Warmth and Competence as Universal Dimensions of Social Perception: The Stereotype Content Model and the Bias Map*, 40 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 61 (2008); Eagly & Mladinic, *supra* note 17.

²⁴ E.g., Rhode, *supra* note 16, at 67.

²⁵ Rhode, *supra* note 16.

communication. This is often done when they are in the minority in a given context as a way of downplaying their status as outsiders.²⁶ This is not especially surprising, because minority groups with “token” status tend to adopt the norms and characteristics of the majority group.²⁷ In the legal realm, research suggests that when female judges on district and appellate have token status they do not behave much differently than male judges.²⁸ But once female judges reach critical mass on a particular court they exhibit a “different voice.”²⁹

What of female lawyers? Though their numbers have increased, they remain relative outsiders. During the 2010 through 2013 terms, they made up just 12.1% of the counsel of record in the Supreme Court—below a critical mass by any metric.³⁰ This means that the justices likely continue to view female lawyers through the defining characteristic of gender, which in turn suggests that females will be more successful when they conform with gender norms. Accordingly, we hypothesize that female lawyers who adopt male styles of communication will be less successful than females who do not—despite professional norms to the contrary.

METHODS

We test this expectation using all orally argued non-per curiam cases in which a female counsel of record faces a male counsel of record during the 2010 through 2013 terms. We obtained these cases from the Supreme Court Database.³¹ Because women remain a distinct minority at the Supreme Court Bar, our dataset contains

²⁶ Jones, *supra* note 14, at 637. KARPOWITZ & MENDELBERG, *supra* note 12.

²⁷ Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Response to Token Women*, 82 AM. J. SOCIOLOGY 965 (1977).

²⁸ Paul M. Collins et al., *Gender, Critical Mass, and Judicial Decision Making*, 32 L. & POL’Y 260 (2010); Susan W. Johnson et al., *The Gender Influence on U.S. District Court Decisions: Updating the Traditional Judge Attribute Model*, 29 J. WOMEN POL. & POL’Y 497 (2008).

²⁹ Katherine Felix Scheurer, *Gender and Voting Decisions in the U.S. Court of Appeals: Testing Critical Mass Theory*, 35 J. WOMEN POL. & POL’Y 31, 35 (2014).

³⁰ *E.g.*, Scheurer, *supra* note 29.

³¹ Harold J. Spaeth et al., *The Supreme Court Database*, WASH. U. LAW, <http://supremecourtdatabase.org> (last visited Mar. 27, 2017).

seventy-nine observations.³² We chose the 2010-2013 terms because they coincide with the confirmation of Justice Kagan and the start of an era in which three of the Court's nine members are female, a historical high which allows the female justices to move beyond token status³³ and allows us to focus more fully on the success of female attorneys.

We are interested in the success of each female attorney's argument in the case relative to a male opponent, and so the unit of analysis is the majority opinion:brief dyad. The dependent (outcome) variable is the success of the female attorney's argument. We measure success using Corley's approach, which relies on the extent to which the Court incorporates content from the attorney's brief into the majority opinion.³⁴ To execute the approach, we obtained each majority opinion and party brief from Westlaw and use automated textual analysis to measure the percentage of the Court's opinion which is "plagiarized" from the female counsel's brief into the Court's opinion.³⁵

The primary independent (input) variable is the affective content of the female counsel's brief. The idea is to measure the extent to which the language in the brief conforms to feminine gender norms. To develop the measure, we processed each brief using the Linguistic Inquiry Word Count (LIWC) software developed by Pennebaker et

³² In some consolidated cases, multiple party briefs are filed. Black et al., *supra* note 21. We exclude these cases from analysis and only examine those cases with two total briefs, one each for the petitioner and the respondent. We instead opt to incorporate the full universe of party briefs by creating every possible dyad of male:female briefs. For example, in a case with one male petitioner and two female respondents, we pair the male respondent with each of the female petitioners in order to create two observations. Since this technically enters the same observation into the data several times as parts of multiple dyads, it is possible our results are driven by a handful of cases. To guard against this possibility, we reran the analysis with Black et al.'s approach. Black et al., *supra* note 21. While this lowers the total number of observations to forty-six, the results are substantively unchanged.

³³ E.g., Collins et al., *supra* note 28; Kanter, *supra* note 27; Madhavi McCall & Michael A. McCall, *How Far Does the Gender Gap Extend? Decision Making on State Supreme Courts in Fourth Amendment Cases, 1980-2000*, 44 SOC. SCI. J. 67 (2007).

³⁴ Pamela C. Corley, *The Supreme Court and Opinion Content*, 61 POL. RES. Q. 468 (2008).

³⁵ Louis Bloomfield, *WCopyfind*, PLAGIARISM RESOURCE SITE, <http://plagiarism.bloomfieldmedia.com/z-wordpress/software/wcopyfind/> (last visited Mar. 21, 2017).

al.³⁶ Higher values of this variable indicate the party brief conforms more with female gender norms, whereas lower values indicate a more masculine argument. We also control for a number of factors which previous research suggests impact brief success. These include:

1. The difference in experience between the male and female attorneys. This is noted with the difference in the number of briefs each counsel of record submitted to the Court before 2010.³⁷
2. Binary measures noting whether the case was politically salient,³⁸ whether there was disagreement in the lower courts,³⁹ and whether the Solicitor General filed an amicus brief in support of the attorney's brief.⁴⁰
3. The difference between the number of amicus briefs filed in support of the female attorney's party and the male attorney's party to indicate the degree of third party support the female attorney enjoys.⁴¹
4. Whether the female counsel's brief was for the winning party since the Court is more likely to borrow language from briefs for the winning party.⁴²
5. The median ideology of the majority coalition because --

³⁶ James W. Pennebaker et al., *The Development and Psychometrics Properties of LIWC2007*, LIWC, <http://www.liwc.net/LIWC2007LanguageManual.pdf> (last visited Mar. 21, 2017); see also Black et al., *supra* note 21. Amanda C. Bryan & Eve M. Ringsmuth, *Jeremiad or Weapon of Words? The Power of Emotive Language in Supreme Court Opinions*, 4 J.L. & CTS. 159 (2016); Jones, *supra* note 14. We standardize the resulting coefficient. Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC'Y REV. 1027 (2011).

³⁷ Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).

³⁸ Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

³⁹ Spaeth et al., *supra* note 31.

⁴⁰ Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990).

⁴¹ PAUL M. COLLINS, FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 62 (2008).

⁴² Corley, *supra* note 34.

female attorneys are more successful with liberal justices.⁴³

6. The size of the majority coalition. Smaller coalitions are more ideologically homogeneous and consequential.⁴⁴ Additionally, the justices spend more time crafting opinions with smaller winning coalitions⁴⁵ and thus may be less likely to draw upon outside material such as party briefs.

7. The percentage of female justices in the majority coalition to account for earlier work finding that female counsel are more successful before gender diverse panels at appellate courts.⁴⁶

8. A measure of the portion of cognitively complex words in the brief. Keeping with prior research, I construct a measure of the portion of words in that brief that are longer than six letters as previous work notes more cognitively complex briefs are less successful.⁴⁷

RESULTS

Because the dependent variable is continuous, we employ ordinary least squares regression with errors clustered on case citation. The results in Table 1 provide support for our expectations. Female attorneys are more successful when the language used in their briefs is consistent with female gender norms rather than the Court's strictures to avoid emotion. The results indicate that, as briefs filed by female counsel become more affective, the brief is more successful.⁴⁸ Of course, a female attorney may adopt a more

⁴³ Szmer et al., (2010), *supra* note 5.

⁴⁴ Lee Epstein et al., *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299 (2008).

⁴⁵ FOREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 125 (2000).

⁴⁶ Szmer et al., (2010), *supra* 5, at 92.

⁴⁷ Paul M. Collins Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015); Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POL. SCI. 617 (2010).

⁴⁸ We also ran a control model where we measured the impact of affective language in male attorney briefs. More affective content makes male attorney briefs less successful. This was consistent with our expectations.

masculine posture in her brief, as is often the norm in trial courts.⁴⁹ With female counsel making up just over a tenth of counsel of record before the Court in the 2010 through 2013 terms, they certainly qualify as a minority by any measure of minorities in an institution.⁵⁰ Unsurprisingly then, female counsel are actually *less* affective on average than their male counterparts. The mean level of affect in briefs filed by men is 0.34, while it is 0.08 for women. This finding may be indicative of efforts to downplay the salience of gender,⁵¹ but it has effect of harming the overall success of female arguments before the Court.

Table 1: Litigant Success

Variable	Coefficient	Standard Error
Female Affective		
Content	1.855**	(0.715)
Experience Difference	0.005	(0.012)
Salience	3.142**	(1.096)
Conflict	0.037	(1.336)
SG Support	1.166	(0.999)
Amicus Advantage	-0.091	(0.083)
Winning Party	0.875	(0.815)
Median Majority		
Ideology	-0.341	(2.735)
Vote Split	0.163	(0.113)
% Female Justices	1.166	(4.409)
Cognitive Complexity	-0.883*	(0.423)
Constant	4.243*	(1.813)
N	79	
R ²	0.446	
P: ** <0.01, * <0.05		

⁴⁹ Bogoch, *supra* note 19. PIERCE, *supra* 18.

⁵⁰ E.g., Scheurer, *supra* note 29.

⁵¹ Jones, *supra* note 14. KARPOWITZ & MENDELBERG, *supra* note 12.

Turning to the substantive effects from the model, the baseline success of a brief filed by a female attorney is 4.2%. That is to say that 4.2% of the content found in the female attorney's brief is *also* found in the resulting opinion. Female attorneys can either enhance or diminish that success by being more or less affective. If a female attorney moves from the mean value of affect to one standard deviation above the mean by arguing more in line with gender norms, the success of her brief rises 2.49%. This suggests that female attorneys have an incentive to ignore the Court's instructions to present dispassionate legal arguments.⁵² However, much like work on trial courts, it is not surprising that the less affective (and more masculine) female attorneys word their briefs, the less successful they are. If a female attorney files a brief one standard deviation below the mean value of affect, the success of her brief falls to 1.23%. This indicates emulating male gender norms and following the Court's instructions actually *decreases* the success of female counsel.

DISCUSSION

As of 2016, women make up 36% of attorneys and 48.7% of current law students.⁵³ While this suggests a diverse legal landscape, female attorneys tend to cluster on the lower strata of the legal profession.⁵⁴ Although there are many reasons for this, one consequence is that the elite Supreme Court Bar is overwhelmingly male and those women who do participate at the Court are a distinct minority.

Perhaps tracing to their minority status, female counsel at the Court, much like female counsel at trial courts, seek to diminish the salience of their gender by emulating more masculine professional

⁵² *E.g.*, Black et al., *supra* note 21.

⁵³ *A Current Glance at Women in the Law*, A.B.A. (May 2016), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may_2016.authcheckdam.pdf.

⁵⁴ Joe B. Baker, *Glass Ceilings or Sticky Floors? A Model of High-Income Law Graduates*, 24 J. LAB. RES. 695 (2003); Sarver et al., *supra* note 5.

norms. The net result of this emulation is that the success of female counsel falls. Should female counsel argue in a more feminine manner their success increases. In other words, we find the justices reward those female attorneys who adhere to gender norms even if it means breaking with professional norms.

This finding raises a number of questions, both normative and empirical, about the role of gender in judicial decision-making. From a normative perspective, the fact that the justices base their evaluation of counsel at least in part on conformance with gender norms raises serious questions about judicial decision-making. In the traditional narrative, attorneys are evaluated on the quality of their arguments. While recent work dispels this notion by showing that “who” the attorney is matters,⁵⁵ our results link success to how well the attorney performs her gender. This is concerning because it forces female counsel to engage in an unenviable balancing act between gender and professional norms if they wish to be effective.⁵⁶

From an empirical standpoint, the results pose new questions about how attorney conformance with gender norms emerges in a host of other contexts—including oral arguments. The role of gender norms may be further elucidated if scholars analyze direct interactions between counsel and judges during oral arguments. We recommend that future work in this area considers the more gender diverse federal appellate courts or state supreme courts, where female counsel and judges are more plentiful⁵⁷ and institutional contexts differ.

⁵⁵ Janet M. Box-Steffensmeier et al., *Quality over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446 (2013); Eve M. Ringsmuth et al., *Voting Fluidity and Oral Arguments on the U.S. Supreme Court*, 66 POL. RES. Q. 429 (2013).

⁵⁶ Rhode, *supra* note 16.

⁵⁷ This will also result in more observations. More observations may well move many of the insignificant controls into statistical significance.