

# **Gender and Justice**

Why Women in the Judiciary  
Really Matter

**Sally J. Kenney**



Perspectives on Gender

# GENDER AND JUSTICE

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Why Women in the Judiciary *Really* Matter

Sally J. Kenney



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# **GENDER AND JUSTICE**

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Intended for use in courses on law and society, as well as courses in women's and gender studies, women and politics, and women and the law—here is a book that takes up the question of what women judges signify in several different jurisdictions in the United States, the United Kingdom, and the European Union. In so doing, its empirical case studies offer a unique model of how to study gender as a social process rather than merely studying women and treating sex as a variable. A gender analysis yields a fuller understanding of policy diffusion and emotions and social movement mobilization, backlash, policy implementation, agenda-setting, and representation. Lastly, the book makes a nonessentialist case for more women judges—that is, one that does not rest on women's difference.

**Sally J. Kenney** is the Newcomb College Endowed Chair, Executive Director of the Newcomb College Institute, and Professor of Political Science at Tulane University.

## PERSPECTIVES ON GENDER

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# FOREWORD

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Myra Marx Ferree

The Perspectives on Gender series, to which this volume belongs, has included many distinguished contributions over the years. I have had the privilege of working with authors such as Patricia Hill Collins, whose *Black Feminist Thought* has become a mainstay of feminist theorizing, and Patricia Yancey Martin, whose *Rape Work* represents a deeply insightful integration of decades of her own path-breaking empirical work. I am pleased to now be able to include Sally Kenney in this list. This present volume offers both an important challenge to conventional thinking about gender and an integration of her many comparative empirical research projects on women judges and judging. Rather than a collection of discrete studies, this book pulls together a diversity of cases where gender was and is more or less controversial and offers a new and powerful argument for why and how gender representation matters.

Rather than assuming that there must be some consistent and identifiable difference between women and men in the abstract, Kenney argues that social inclusion of diverse people and perspectives must include gender as a social division with at least potential impact in particular cases. In other words, when the usual argument for the importance of changing the gender composition of the courts is that men are from Mars and women are from Venus, Kenney argues that it is quite enough to suggest that men are from North Dakota and women are from South Dakota—not inherently different as people but at least sufficiently differently positioned that there are cases where their perspectives and interests might diverge. Thus, just as court systems work to include geographic variation, they should work to include gender variation. She traces the variety of instances in which gender difference in the court appointments is seen to matter and the political mobilizations that draw attention and concern to the gender of individual justices as a matter of overall gender justice.

This volume thus stands in a series tradition of paying attention to gender as a matter of political mobilization, a subject position that is made more or less important for both individuals and societies by social movements. Like the earlier books in the series by Verta Taylor, Cheryl Hercus, Patricia Yancey Martin, Angela Miles, and Millie Thayer, this work is a study of the capacity of social movements to construct meanings and make them effective in social relations of power. It also is a model of comparative political research, taking the theoretical problem of gender and representation and tracing it through a variety of levels and systems. Her empirical material ranges from norm-setting policies and practices in the EU and US federal courts to local scrimmages over specific judicial appointments in Minnesota, California, and the UK. The strongly comparative lens brought to questions of gender representation in just judging places Kenney in the good company of other series books such as Bose and Kim's *Global Gender Research* and Luttrell's *School-Smart and Mother-Wise*. By finding both similarities and differences across contexts that vary, whether by nation or by race and locality, these books approach gender as a structural category of analysis rather than a personal attribute.

Sally Kenney also makes an important contribution to the series' focus on intersectionality—that is, the ways that gender, race, class, sexuality, age, nation, and other processes of defining and exercising the power of difference matter in particular contexts. While many see intersectionality primarily in terms of the persons located at the points where exclusions multiply and reinforce disadvantage, a process-based understanding of intersectionality draws attention instead to the historical moments of struggle in which particular subject positions become salient sources of identity and thus able to overcome otherwise divisive differences. Kenney brings such moments forward in her analysis, making the process of women recognizing that gender does matter to them visible in its political particulars.

As a series dedicated to publishing the very best of new feminist scholarship, *Perspectives on Gender* has made empirical innovation and theoretical power touchstones for inclusion. The attention to intersectional processes, to comparative analyses, and to international contexts that runs through the various books of the series has distinguished it over the years. Sally Kenney's *Gender and Justice* is just the sort of important new work that weaves these concerns together in creative ways and offers insights to all feminist social scientists interested in power, equity, and social change.

# PREFACE

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Where are the women? Why are there so few? Why have we made so little progress toward equality? Why do we continue to leave women out of our scholarship and fail to consider them fully when making policy and reforming our political institutions? Most scholars who study the judiciary fail to look at gender. Both women and politics scholars and activists seeking to increase the numbers of women in decision-making largely ignore women judges, although many state court judges are elected. Taking a close look at women judges in the United States, the United Kingdom, and the European Union forces us to reconsider core understandings of how policies diffuse and social movements mobilize, how insiders implement policy, how public agendas are set, the nature of representation, and how backlash impedes progress toward equality. When we do turn our attention to women and gender, we too often merely ask whether women judges decide cases differently from men. A query about women expands to asking about gender, but then quickly contracts to a search for essential sex differences. Using sex as a variable in research can provide useful data, but when we understand gender as a social process we go far beyond simple sex differences.

In this book, I demonstrate how to do an analysis of gender as a social process. In each chapter, I situate my inquiry in a different geographical jurisdiction—the State of Minnesota, the US federal system, the United Kingdom, the European Union, the State of California—and take up a different concept—policy diffusion and emotions and social movement mobilization, insider-outsider partnerships and policy implementation, agenda-setting, representation, and backlash. I want scholars and activists to pay attention to women and gender. I want us to move beyond using sex as a variable to understand gender as a social process. This book is also a call to arms to mobilize to



reach equality instead of hovering between 25 and 30 percent, or even regressing. To that end, I present an argument as to why it matters that women make up at least 50 percent of the judiciary.

Those who teach American politics, comparative politics, or European politics could use this book not just to cover the third branch of government but to introduce gender as an analytical concept alongside other core political science concepts. Those who teach British politics or the European Union will be particularly interested in Chapters 5 and 6, as almost no academic scholarship on those polities even explores courts, let alone gender and courts. Those who teach women and politics also need to enlarge their field of vision to include the third branch of government. They could benefit, too, from an in-depth analysis of gender as a social process that they can apply throughout the course. And those who teach women's and gender studies could use this book as an exemplar of how to do gender analyses independent of whether they are particularly interested in judges, making it a suitable text for either an introductory course or a graduate course on theory and research methods.

This book is not meant merely for scholars or for the classroom. I hope women judges will read it and use its analysis, quotes, examples, and arguments in the many public speeches they give. I hope that those individuals and groups concerned about increasing women's political power will pay more attention to courts and join the campaign for more women judges. I hope journalists and bloggers, too, will put the arguments to good use. Those interested in women's advancement more generally will see the parallels in other workplaces and benefit from thinking more deeply about the formidable obstacles to progress. And I hope women and their men allies will be inspired enough to mobilize and organize until we reach equality and vow not just to notice but vigorously to contest every reversal.

# ACKNOWLEDGMENTS

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It is much easier to attach coherence to a trajectory of a project in retrospect. Those interested in scholarly productivity would be advised against directing a Center on Women and Public Policy, launching a project to secure greater gender diversity on the Eighth Circuit Court of Appeals, or uprooting themselves to take up a demanding new administrative position. As a feminist political scientist in the field of comparative public law, I wanted to do something different from the more doctrinal or institutional analyses I had done in the past—something that reflected my growing interest in social movements. The late political scientist Beverly Blair Cook was an anonymous reviewer for my first submission to *Women and Politics* and her helpful comments, and willingness to be identified, began a correspondence that led to a friendship that meant a great deal to me. When she moved into assisted living, she sent me all of her original questionnaires of women judges and urged me to carry the torch. Serendipitously, when she died, Tulane Political Science Professor and my new colleague, Nancy Maveety, collected her papers for the Newcomb Archives. Cook was the first scholar to study women judges systematically, and her research was a catalyst for the formation of the National Association of Women Judges. Most questions I think to ask, Bev already investigated. She did so, however, when university nepotism rules prevented her from being on the same faculty as her husband and with little support for women's studies or women within the discipline. Unlike political science as a whole, I found the subfield of public law to be a relative oasis of nondiscrimination and benefited enormously from the support of senior scholars, such as Martin Shapiro, Joel Grossman, Sam Krislov, and Elliot Slotnick, as well as those with more explicit feminist research orientations, such as Karen O'Connor, Lynn Mather, Kim Scheppele, and Marie Provine.

My first memory of discussing this project was with Martha Chamallas. At the time, I envisaged a comparative study of agenda-setting and was looking forward to perhaps returning to my research in the United Kingdom. She opened the door for me to the National Association of Women Judges, where I made valuable contacts with Judith Resnik and Lynn Hecht Schafran. My friendship with Judge Harriet Lansing and connections with Justice Rosalie Wahl had a huge influence on what I cared about and how I thought about it. Both Harriet and Rosalie had a high regard for the sociologist Norma Wikler, who pioneered the gender taskforce movement. Because Norma had taught them the clear benefits of scholars and social scientists working together for social change, I benefited enormously from the path she had cleared.

My colleague Kenneth Keller actively encouraged me not to give up on my commitment to do comparative research and to hold fast to my belief that one should do comparative work embedded in the community, rather than from afar. I am tremendously grateful to the British Government for their support of this work through the Atlantic Fellowship. At first, I was unsuccessful in winning an Atlantic Fellowship. The selection committee questioned the importance of studying judges and, more importantly, questioned whether it was possible for a scholar to penetrate the secret world of judicial selection. Having already studied the internal workings of the European Court of Justice, I was confident it could be done. When I reapplied, that week's *Sunday Times* had a front-page article alleging the current Lord Chancellor sold judgeships to secure contributions to the Labour Party. How judges were selected in the United Kingdom suddenly seemed a much more important topic to the selection committee than it had the previous year. The scholarly collaboration and friendship I developed with Kate Malleson at the London School of Economics continues to pay dividends in the quality of my work. Several years later, a Fulbright Fellowship to Queen's University, Belfast, allowed me to reconnect with the new Association of Women Judges and I began to update and polish the work I had done.

Two Grant-in-Aid fellowships from the University of Minnesota made parts of this work possible. I was able to spend time at the European Union Institute in Florence and work in its library. I was also able to spend time in the Carter Presidential Library in Atlanta. I am grateful to the University of Minnesota and the Hubert H. Humphrey Institute of Public Affairs for sabbatical support, and to Tulane University, Molly Travis, and especially Michael Bernstein for their support of this project. Tulane paid for my payback year; Molly stayed on as interim director of the Newcomb College Institute so that I might finish a draft of the book; and Michael, a master negotiator and problem-solver, provided the financial support to allow me to complete my sabbatical. Perhaps even more valuable has been Michael's belief in the importance of the project, his commitment to my completion of it, and his frequent encouragement.

I am deeply grateful for the existence and support of the Collaborative Research Network of the Law and Society Association that I co-chair with

Ulrike Schultz. The association is my primary intellectual and political community and I value it immensely. The 140-plus scholars we have found from 17 countries have, through the work of the CRN, developed closer and closer ties, strengthened by LSA annual meetings and conferences in Argentina, organized by Beatriz Kohen, and Oñati, Spain.

At this point, it is customary for men scholars to thank their long-suffering spouses for doing the lion's share of household labor so that they might complete their noble work, unfettered by minutiae. For a woman scholar, arrangements always seem to be different. I am especially grateful to a team of people who support me in all sorts of ways—physical, emotional, logistical—that my husband refers to simply as “my people.” They keep this car on the road, so to speak, and I could not do it without them.

I am also grateful to the sustained intellectual support, friendship, and sage academic advice of my dear friend, Kathryn Sikkink, and for the high standard of scholarship and scholarly productivity to which she aspires. She sets the bar high. I am also profoundly grateful to my husband, Norman S.J. Foster, the hardest-working and smartest person I know. Thank you for moving so many times to accommodate my academic career, for your belief in the value of what I do and my ability to do it, for your support in helping me do it “my way,” whatever the cost, for your humor, and for your loving support.

I have worked on this project for nearly ten years. Because of my substantial administrative responsibilities, I endeavored to publish pieces of the work as I finished them in case my duties prevented the sustained focus such a book requires. At the eleventh hour, with the encouragement of Myra Marx Ferree, I moved this book to Routledge Press to appeal to a wider audience interested in gender, to benefit from Myra's wisdom as series editor, to be able to reach readers in the United Kingdom and the rest of the European Union, and to work with an editor, Stephen Rutter, with whom I had great confidence and rapport. The manuscript benefited enormously from the scalpel of Susan Mannon as Stephen and I worked toward our goal of making this book accessible to a wider audience, beyond political science and academia. One of my deepest fears is that in an effort to be accessible, readable, and brief, I may have omitted a scholarly citation that helped my thinking as we condensed reviews of the literature. Consequently, I would be happy to share longer drafts of any of the chapters with specialized scholars. For those inadvertently omitted, I apologize.

I have benefited from many readers and research assistants over the years. I presented an earlier version of Chapter 2 to the international meeting of the Law and Society Association in Berlin in 2007, and this paper was subsequently published in the *International Journal of the Legal Profession* 15, nos. 1–2 (2008): 87–110. Thanks to the Taylor & Francis Group for permission to use parts of that earlier publication. I would like to thank Myra Marx Ferree and Patricia Yancey Martin for their helpful comments and Amber Shipley and Lura Barber for research assistance. Thanks, too, for the helpful comments from the Gender

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Thanks to Ron Aminzade, Susan Bandes, Karlyn Kohrs Campbell, Harriet Lansing, Kathleen Laughlin, Mary Lay Schuster, Patricia Yancey Martin, David Meyer, Mary Jane Mossman, Joe Soss, and Judith Taylor for their helpful comments on the many drafts of Chapter 3 as well as those who critiqued drafts of the public policy teaching case—Kathryn Sikkink, Barbara Frey, Cheryl Thomas, and Justice Rosalie Wahl. Thanks, too, to Lura Barber, Rachel Estroff, Rebecca Moskow, Amber Shipley, and Jaquilyn Waddell Boie for their research assistance. I benefited enormously from the opportunity to present early versions of this paper at Washington University, New York University, the Law and Society Association annual meeting in St. Louis, and the Western Political Science Association annual meeting in Las Vegas. I published an earlier version of this paper in *Mobilization: An International Journal*: “Mobilizing Emotions to Elect Women: The Symbolic Meaning of Minnesota’s First Woman Supreme Court Justice,” 15, no. 2 (2010): 135–158. Thanks to the journal for permission to use parts of that earlier work.

I received a Grant-in-Aid grant from the University of Minnesota Graduate School to spend a week at the Carter Presidential Library in Atlanta to begin the research for Chapter 4. I presented earlier versions of the chapter at the 2007 Law and Society Conference in Berlin and the 2009 European Conference on Politics and Gender in Belfast, and I benefited from comments made during the panels, especially from Lee Ann Banaszak and Celia Valiente. I also presented it to the Gender and Women’s Studies Program at the University of Texas at Austin. Margaret McKenna, Barbara Babcock, Patricia Wald, Virginia Kerr, Phyllis Segal, Nancy Stanley, Rachel Brand, and Eleanor Acheson all provided helpful information, as did Sheldon Goldman, Rorie Solberg, and Elliot Slotnick. Elizabeth Meehan, Mary Lee Clark, Kathleen Laughlin, Susan Hartmann, Cynthia Harrison, Lynn Hecht Schafran, Marian Sawyer, Elizabeth Beaumont, and Dara Strolovitch all made helpful comments on drafts. Thanks, too, to Piyali Dalal, Lura Barber, Stephanie Short, and Laura Wolford for research assistance.

I enjoyed the generous support of the British Government in the form of an Atlantic Fellowship in 2002 and a Fulbright Fellowship in 2005 to work on Chapter 5. I also benefited from the comments at presentations before New York University’s Law and Society Faculty, University of Minnesota College of Law, the Humphrey Institute of Public Affairs, Queen’s University Faculty of Law, the Midwest Law and Society Retreat, and the Atlantic Fellows. I would like to thank Ed Goetz, David Meyer, Kate Malleson, Brice Dickson, Debra Fitzpatrick, K.T. Albiston, and Myra Marx Ferree for their helpful comments on drafts. Thanks also to Natalie Elkan, Sarah Taylor-Nanista, Jaquilyn Waddell Boie, Amber Shipley, Emily Warren, and Renee Klitzke for research assistance, and to Norman Foster for help with data analysis and preparing the figures. Earlier iterations of this work have appeared in the

*Journal of Politics* 70, no. 3 (2008): 717–735 and *Social Politics* 11, no. 1 (2004): 86–116. Thanks to Cambridge University Press for permission to reprint parts of this earlier publication.

I published an earlier version of Chapter 6, “Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice,” in *Feminist Legal Studies* 10, nos. 3–4 (2002): 257–270. Thanks to *Feminist Legal Studies* for permission to reprint parts of this earlier work. Thanks to the Atlantic Fellowship in Public Policy for funding. Thanks to Caroline Naome, Fionnuala Connolly, Judge Ninon Colneric, and Advocate General Christine Stix-Hackl for interviews, and Diana Faber, Carol Harlow, Kate Malleson, and the editors of *Feminist Legal Studies* for comments. Thanks to Andrew Mowbray who read a more recent version and to Noreen Burrows, Rosa Greaves, Susan Millns, Ann Stewart, Antoine Vauchez, and Erik Voeten for sharing work in progress and information. Thanks to Ann Towns for translating the Swedish legal opinions into English. Thanks, too, to the many research assistants who worked on this project over the years, most recently Laura Wolford and Stephanie Short.

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I presented an earlier version of Chapter 8 to the International Conference on Women in the Legal Professions, Law Faculty, University of Buenos Aires, Argentina; as a Leadership Lecture at Gustavus Adolphus College; at the Indianapolis meeting of the National Association of Women Judges; to the 8th Annual Workshop of the Justice at Stake Campaign; to a Women and the Law class, University of Texas at Austin; to the Center for German and European Studies, Department of Gender and Women’s Studies, and the Department of Sociology, University of Wisconsin-Madison; and to the Law and Public Affairs Program at Princeton University. Special thanks to Myra Marx Ferree and Aili Tripp for their comments and to Lura Barber for research assistance.

Lastly, I would like to thank all of my wonderful new colleagues at Tulane University, particularly the staff of the Newcomb College Institute. Without the efforts of Aidan Smith, Katherine Corbett, Rosalind Cook, Laura Wolford, and Katy Smith, this dream would not be a reality. I could not have done it without all of you.

Attending the National Association of Women Judges annual meeting in Newark in October 2011, hearing the keynote address of Justice Ruth Bader Ginsburg, and reflecting on my own emotional reaction to her, I am reminded,

once again, why women judges really matter. My hope is that this book serves as a constant reminder to those of us who have intermittently taken up this issue and as a call to arms for a new generation to complete the work and vow never to go backwards.

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