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GENDER AND JUDGING

THE HONORABLE DIANE S. SYKES*

On Monday, October 4, 2010, Elena Kagan heard her first case as the 112th Justice of the United States Supreme Court, replacing Justice John Paul Stevens, who retired in June after an extraordinary thirty-four-year tenure on the Court. It was often noted when she was nominated, and was emphasized again when she took the bench, that Justice Kagan is the fourth woman to serve on the Supreme Court, and for the first time in the Court's history, three women are now serving together.

In that sense Elena Kagan and I have a little something in common. I was the fourth woman to serve on the Wisconsin Supreme Court—and one of three during most of my tenure there because Justice Janine Geske (who was the court's second female justice) left the court the year before my appointment in 1999. Justice Patience Roggensack was later elected in 2003, and together with Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley, we became the first-ever female majority on the court. After I was confirmed to the Seventh Circuit in 2004, Judge Barbara Crabb, the first woman to serve as a federal district judge in Wisconsin, sent me a wonderful note; among other things, it said: "Congratulations on becoming the fourth woman and second Diane on the Seventh Circuit!" (There's that Number Four again.) The other "Diane" of course is Judge Diane Wood, who was right up there with Solicitor General Kagan among the top contenders to replace Justice Stevens.

Both Judge Wood and Solicitor General Kagan had been high on President Obama's Supreme Court "short list" in 2009, when Justice Souter announced his retirement from the Court. Shortly before that announcement, Dahlia Lithwick, the popular legal columnist for the online magazine *Slate*, had this to say about the much-anticipated Supreme Court vacancies that President Obama would have the opportunity to fill:

* Circuit Judge, United States Court of Appeals for the Seventh Circuit. This is a revised version of a speech delivered at several lawyer and law-student events in 2010 and 2011, including the Association for Women Lawyers' annual Women Judges' Night in Milwaukee.

It's almost an article of faith among Supreme Court watchers that President Obama will fill the bench's next vacancy—and perhaps the one after that, too—with a woman. The current court's sole female member, Ruth Bader Ginsburg, has said she is “lonely” there, and even if she's not the next to step aside and another [woman] joins her, that's still just two out of nine. Americans seem quite certain that isn't enough.¹

Lithwick was not alone in this prediction, and we now know it turned out to be right: With Justice Sonia Sotomayor replacing Justice Souter last year and Justice Kagan replacing Justice Stevens this year, President Obama has indeed used his first two appointments to the Court to boost its female membership. After the Kagan confirmation vote this past summer, David Broder of *The Washington Post* wrote a column suggesting that “[w]ith another woman, the Supreme Court can't help but change”; he predicted that having three women justices “will change the high court in ways that no one foresees.”² After Justice Kagan was sworn in, there *was* a change: The Court altered its oral argument calendar for the first Monday in October; the schedule was adjusted to make sure that Justice Kagan would be on the bench when the new term began. First up on the First Monday was a federal sentencing case, but the former Solicitor General was necessarily recused. The Court switched the order of the day's call so that a bankruptcy case led off instead. This permitted Justice Kagan to make her high-court debut when the Court officially opened its new term. Tony Mauro, the Supreme Court reporter for the *Legal Times*, saw some gender significance in this move. In an anticipatory column, he reminded us that “[t]he first day of the fall term . . . will be historic because for the first time in history, and because of Kagan's arrival, three of the nine justices who emerge from behind the velvet curtains at the start of the session will be women.”³ This “is a moment that could have been destroyed,” he said, “or made awkward” by Kagan's recusal

1. Dahlia Lithwick, *The Fairer Sex: What Do We Mean When We Say We Need More Female Justices?*, SLATE, Apr. 11, 2009, <http://www.slate.com/id/2215833>.

2. David S. Broder, Op-Ed., *With Another Woman, the Supreme Court Can't Help But Change*, WASH. POST, July 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072104065.html>.

3. Tony Mauro, *Supreme Court Rearranges Schedule with Kagan in Mind*, BLT: THE BLOG OF LEGAL TIMES (Aug. 9, 2010, 11:16 AM), <http://legaltimes.typepad.com/blt/2010/08/supreme-court-rearranges-schedule-with-kagan-in-mind.html>.

from the first case.⁴ The schedule was changed, he suggested, so that “[t]he historic moment will be preserved.”⁵ Apparently it didn’t occur to him that the Court would extend this sort of first-case courtesy to *any* newly arrived justice, regardless of gender.

All this focus on the fact that our newest justices are women raises some important questions about gender and judging. I’ve always been a little uncomfortable with the implications and consequences of gender-identity politics—or *any* identity politics, for that matter—and particularly so in matters of judicial selection. But mine may not be the prevailing view. Dahlia Lithwick noted in her column that “with women claiming a large share of responsibility for Obama’s victory over John McCain, the demand for a more gender-balanced [supreme] court is stronger than ever.”⁶ She suggested as well that there might be “something about the way [that women] decide cases . . . that makes the need for more of them . . . urgent,” and went so far as to say that President “Obama owe[s] us another woman justice.”⁷

I suppose there’s a purely political explanation for the conventional wisdom that the recent vacancies on the Supreme Court would be filled by women. But I’m less interested in the symbolic aspects of this issue than the substantive—the extent to which gender *does*, or *should*, make any difference in judging. If the case is being made for the appointment of women judges *just because* they are women, then I think we are making a mistake about the qualities necessary in a good judge, which of course are not gender-specific. If the case is being made for the appointment of women judges because they subscribe to a gender-based brand of judging, then we are making an even bigger mistake about the nature of the judicial role. To assign gender a kind of qualifying significance risks diminishing the contributions of women judges by emphasizing their gender as if it has something to do with their qualifications for judicial office or has substantive significance in their work.

During my five-year tenure at the state supreme court, there were only three cases that divided the court along gender lines. The first two were *State v. Huebner*⁸ and *State v. Franklin*,⁹ which raised related issues

4. *Id.*

5. *Id.*

6. Lithwick, *supra* note 1.

7. *Id.*

8. 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727.

9. 2001 WI 104, 245 Wis. 2d 582, 629 N.W.2d 289.

regarding the use of a six-person jury in misdemeanor cases. The court had recently held that the statute authorizing a jury of six in misdemeanor cases was unconstitutional; the issue in *Huebner* was whether a defendant who had not objected to the six-person jury at trial could obtain relief on appeal, and *Franklin* raised the question of whether a defense attorney's failure to object was ineffective assistance of counsel. The court held in *Huebner* that the failure to object was a forfeiture that the court would not remedy.¹⁰ In *Franklin* the court held that counsel's failure to object was not ineffective assistance of counsel.¹¹ I joined Chief Justice Abrahamson's dissent in both cases, as did Justice Bradley.¹² The Chief Justice and Justice Bradley, I should note, anchored the court's liberal wing. In split decisions we did not usually vote together. On these cases the gender split among the justices went unnoticed.

The same cannot be said of the third case. *State v. Oakley*¹³ was a case about a deadbeat dad who was hopelessly and criminally in arrears on his child support. David Oakley had fathered nine children by four women and owed more than \$25,000 in back child support. He was charged with nine counts of felony intentional nonsupport and pleaded guilty to three of them, facing a possible fifteen years in prison. The trial-court judge imposed a short prison term followed by lengthy probation, and as a condition of probation, barred Oakley from having any more children unless he could demonstrate to the court that he was supporting those he already had and had the financial ability to support another. The judge imposed and stayed a sentence of eight years, so a violation of the no-procreation condition would mean eight years in prison. As will be obvious by now, Oakley challenged the constitutionality of the ban on procreation, and his case deeply divided our court.

In a majority opinion by Justice Jon Wilcox, the court concluded that the no-procreation probation condition was constitutional.¹⁴ Justice Bradley and I separately dissented, and Chief Justice Abrahamson joined us.¹⁵ Justices William Bablitch and N. Patrick Crooks each wrote

10. 2000 WI 59, ¶ 26, 235 Wis. 2d 486, 611 N.W.2d 727.

11. 2001 WI 104, ¶ 27, 245 Wis. 2d 582, 629 N.W.2d 289.

12. 2000 WI 59, ¶ 86, 235 Wis. 2d 486, 611 N.W.2d 727 (Abrahamson, C.J., dissenting); 2001 WI 104, ¶ 80, 245 Wis. 2d 582, 629 N.W.2d 289 (Abrahamson, C.J., dissenting).

13. 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200.

14. *Id.* ¶¶ 20–21.

15. *Id.* ¶¶ 40–64 (Bradley, J., dissenting); *id.* ¶¶ 65–76 (Sykes, J., dissenting).

concurrences responding to different points in the dissents.¹⁶ The issue was novel, so we were in uncharted legal territory and the case was difficult for the court. It was agreed that the no-procreation condition implicated a fundamental right; we also agreed on the severity of the crime and the strength of the state's interest in protecting women and children from the harsh consequences of chronic deadbeat dads like David Oakley. We disagreed over whether the no-more-children condition was an overbroad encumbrance on the procreation right in light of the conditional nature of the defendant's liberty interest. There was a lot of back-and-forth in the opinions about how to characterize the no-procreation condition and how the constitutional inquiry should be framed. For the all-male majority, it was the defendant's intentional and ongoing disregard of the rights of his children and their mothers that mattered most. For the all-female minority, banning the birth of a child was an unconstitutionally overbroad response to the problem.

Now, as you might imagine, the court's decision in *State v. Oakley* made some news—in the conventional media and beyond. The case was tailor-made for talk radio and television and was picked up by local and national talk shows. This is where the court's gender split was noticed. A few days after the court's decision in *Oakley* was released, I was at home in the evening folding laundry in my kitchen. The television was on in the background, tuned to the Fox News Channel. (Surprise! You were expecting maybe MSNBC?) I was only half paying attention, but I heard Bill O'Reilly's voice saying: "Coming up on the Factor, the case of a Wisconsin deadbeat dad with nine kids ordered not to have any more children!" So I started to pay attention, and after the commercial break, Bill O'Reilly came back on and introduced the story this way: He put photos of the three dissenting justices up on the screen—the Chief, Justice Bradley, and me—and alongside our photos was David Oakley's mug shot. Now, David Oakley was kind of a creepy-looking guy, so I could sense where this was going. With these photos on the screen, Bill O'Reilly said: "Why do *these* women want *this* man to have more children?"

Well, of course that's *not* what we had said, but there it was, on national television, on a show watched by millions of people. This was not going to be a problem for Shirley and Ann, of course, because they don't know anyone who watches the Fox News Channel. But I know a lot of people who watch the Fox News Channel, and as Bill O'Reilly continued to discuss the David Oakley case, my phone started ringing,

16. *Id.* ¶¶ 25–35 (Bablitch, J., concurring); *id.* ¶¶ 36–39 (Crooks, J., concurring).

and I spent the rest of the evening explaining to family members what the case was really about.

Our court returned to the *Oakley* case in a different forum a couple of years later. Every year our state supreme court goes on the road and hears a day or two of oral arguments in one of Wisconsin's seventy-two counties. The court's traveling sessions are always accompanied by a visit with the local bar association and area civic and school groups. A year or two after the *Oakley* case was decided, we heard arguments in Portage County and during a break went to visit with the students at the Stevens Point Area High School.

We were all seated at a long table on the stage in the high-school auditorium, and there were thousands of students present—Stevens Point is the largest high school in the state—and after an introduction and initial presentation about the court by the Chief, we took turns answering questions from the students. When it was my turn, a student asked what was the most interesting case the court had recently decided. I explained that many (though not all) of our cases were interesting because we only accepted cases that had statewide importance, but that even so, most of the time our decisions did not get a lot of attention outside the legal profession. I was buying a little time trying to think of a case that would be sufficiently interesting and explainable to the students. I decided to go with the *Oakley* case.

I gave a brief description of the facts and the issue in *Oakley* and then explained our split decision. I told the students that the case was novel and difficult and had attracted quite a bit of attention—including commentary on the fact that the court had divided along gender lines, with the male justices in the majority and the female justices in the minority. But, I hastened to add, the issue in the case really had *nothing* to do with gender—at which point the Chief leaned into her microphone and said: “But it had everything to do with *sex!*” This had the effect you might expect on the assembled students and ended my serious discussion of the court's interesting caseload.

Now, *Huebner* and *Franklin*—the six-person jury cases—obviously had no gender-salient issues (assuming there is such a thing), and in truth *Oakley* didn't either. I suppose you could view the *Oakley* case as a clash between the interests of single mothers and their children and the rights of support-delinquent fathers, and in that sense our dissenting votes were counter-gender-intuitive. But the case was really about the limits of state power, which is a legal question; and I think the way that judges approach legal issues cannot be gender-stereotyped.

This brings me back to my broader point. Last year, when Second

Circuit Judge Sonia Sotomayor was nominated to replace Justice Souter on the Supreme Court, her now-famous “Wise Latina” comment sparked an enormous controversy and a public debate over the role of gender, race, and ethnicity in judging. In a speech titled “A Latina Judge’s Voice” delivered at the University of California–Berkeley School of Law and later published in the *La Raza Law Journal*, then-Judge Sotomayor had discussed her views on whether gender and national origin “may and will make a difference in . . . judging.”¹⁷ She noted Justice Sandra Day O’Connor’s view that “a wise old man and [a] wise old woman will reach the same conclusion in deciding cases,” and said she was “not so sure” she agreed with it.¹⁸ Then came the words that were to go viral during the confirmation process; she said: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹⁹

Justice Sotomayor retreated from this view during her confirmation hearings, calling her statement “a rhetorical flourish that fell flat,”²⁰ and also saying that “[t]he context of the words that I spoke have created a misunderstanding.”²¹ She added emphatically:

[T]o give everyone assurances, I want to state up front unequivocally and without doubt, I do not believe that any ethnic, racial, or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge, regardless of their background or life experiences.²²

Justice Sotomayor also distanced herself from the “empathy standard” President Obama has articulated for judicial decisionmaking. I’m referring to the President’s view that while 95% of the cases that come before a court can be resolved by a straightforward application of the traditional interpretive tools of text, precedent, and rules of

17. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 LA RAZA L.J. 87, 92 (2002).

18. *Id.*

19. *Id.*

20. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 73 (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:56940.pdf (statement of Sonia Sotomayor, then-nominee for the United States Supreme Court).

21. *Id.* at 66.

22. *Id.*

construction, the remaining 5% are truly difficult and can “only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”²³ “[I]n those difficult cases,” the President has said, “the critical ingredient is supplied by what is in the judge’s heart.”²⁴ At her confirmation hearings, Justice Sotomayor disagreed. She said: “I . . . wouldn’t approach the issue of judging in the way the President does. . . . I can only explain what I think judges should do, which is judges can’t rely on what’s in their heart. . . . [I]t’s not the heart that compels conclusions in cases. It’s the law.”²⁵

I think this statement is manifestly true, and to the extent that the President’s standard for deciding hard cases is meant to suggest that a judge’s empathy should determine the substantive content of the law, Justice Sotomayor was right to disagree. Empathy is a virtue, and it is also a desirable quality in a judge, who of course must interpret and apply the law in the context of real-life cases. We cannot properly decide our cases without acquiring some insight into the contextual realities of each party’s situation, and a judge’s knowledge of the human condition and capacity to identify with others is important to that endeavor.²⁶ The imperative of judicial impartiality does not require judicial indifference to the real people who come before the court; it requires evenhandedness and lack of prejudgment.²⁷ As a *judicial* virtue, empathy enables the judge to achieve a better understanding of the parties’ circumstances without being predisposed toward one side or the other.²⁸

To return to the question of gender and judging, it goes without saying that judges do not shed their life experiences when they put on the robe. But their assigned role in our system is to decide cases based on factors external to themselves: the legally salient facts of the case and the most faithful reading of the constitution and laws, applicable precedent, and accepted principles of legal interpretation. Justice Sotomayor said something to this effect later in her La Raza speech that she might have emphasized more in her hearings. She said: “I am

23. 151 CONG. REC. 21,032 (2005) (statement of Sen. Obama).

24. *Id.*

25. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, *supra* note 20, at 120 (statement of Sonia Sotomayor, then-nominee for the United States Supreme Court).

26. See Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman’s The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 639–42 (1996).

27. See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 81–82 (2006).

28. *Id.*

reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives”²⁹

For her part, Justice Kagan has done nothing to signal that she considers her gender to have any particular significance in her work or her approach to the law. As *The New Republic* pointed out in a column last summer, although she has some notable “firsts” on her résumé—the first female dean of Harvard Law School and the first woman to serve as Solicitor General—she “has not taken up the helm as a leader on women’s issues, or explicitly identified herself as a *woman* leader in the law.”³⁰ When asked by an interviewer whether she was treated any differently as a female law-school dean, she said that her gender is “‘not something I think about on a daily basis, and it’s something that in many ways has seemed remarkably not relevant in the job.’”³¹

And at her confirmation hearings last summer, she too disagreed with the President’s empathy standard. By then it had been slightly reformulated, as Senator Kyl noted in his questions to the nominee. He quoted the statement the President made when Justice Stevens announced his retirement; the President said he would look for a replacement who had “a keen understanding of how the law affects the daily lives of the American people” and who “knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.”³² Senator Kyl asked then-Solicitor General Kagan whether she agreed that “judges should take into account whether a particular party is a big guy or a little guy when approaching a question of law . . . [o]r [consider] that one side is powerful or . . . is a corporation.”³³ Then-Solicitor General Kagan said this in response:

29. Sotomayor, *supra* note 17, at 93.

30. Naomi Schoenbaum, *Post-Gender Justice*, NEW REPUBLIC, July 12, 2010, <http://www.tnr.com/print/article/politics/76176/post-gender-justice>.

31. *Id.*

32. Remarks on the Explosion at the Upper Big Branch Mine in Montcoal, West Virginia, 2010 DAILY COMP. PRES. DOC. 244 (Apr. 9, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201000244/pdf/DCPD-201000244.pdf> (recording remarks by President Obama on the Retirement of Justice Stevens).

33. *Confirmation Hearing on the Nomination of Hon. Elena Kagan, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2010), *available at* <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf> (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary).

I think that courts have to be level playing fields and everybody has to have an opportunity to go before the court, to state his case, and to get equal justice. And one of the glorious things about courts is that they do provide that level playing field in all circumstances, in all cases.³⁴

Senator Kyl also questioned Kagan about the original version of the empathy standard. He asked: “[D]o you agree with [the President] that law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what’s in the judge’s heart[?]”³⁵ “Senator Kyl,” she responded, “I think it’s law all the way down.”³⁶

Of course judges have life experiences and philosophical views that affect their understanding of the cases they must decide, and some of these may be linked to gender, race, or ethnicity. Good judges will constantly check for these influences and deal with them judiciously, consistent with the obligations of the judicial oath of office. The qualities necessary in a good judge are intelligence, personal integrity, impartiality, practical wisdom, and moderation.³⁷ These are not group-identity character traits, they are individual-identity character traits.

Whatever else Justice Kagan’s presence on the Supreme Court might mean for our law, I hope it helps us move beyond gender-identity politics. *The New Republic* article suggested that Elena Kagan might turn out to be the “Post-Gender Justice.” As a judge who happens to be a woman, I certainly hope so.

34. *Id.* (statement of Elena Kagan, then-nominee for the United States Supreme Court).

35. *Id.* (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary).

36. *Id.* (statement of Elena Kagan, then-nominee for the United States Supreme Court).

37. *See generally* Solum, *supra* note 27, at 76–85 (explaining a theory of judicial virtue derived from the classical virtues).