

# Judging in the Shadow of Gender

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Jeffrey J. Rachlinski & Andrew J. Wistrich, [Benevolent Sexism in Judges](#), 58 **San Diego L. Rev.** 101 (2021).

Jeffrey Rachlinski and Andrew Wistrich begin their article, *Benevolent Sexism in Judges*, with an epigraph that, in its pithiness, cannot be improved upon: “The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.” Perhaps the most infamous proof of this claim can be found in Justice Joseph Bradley’s concurring opinion in [Bradwell v. Illinois](#), which points to “the natural and proper timidity and delicacy which belongs to the female sex,” as well as her “paramount destiny . . . to fulfil the noble and benign offices of wife and mother,” as reasons to deny Myra Bradwell a license to practice law in Illinois. The stereotypes that women are natural caregivers, more nurturing and attentive to their children than men, persist to this day, undergirding unequal treatment in the workplace, burdening nonconforming individuals, and discounting efforts of men who are excellent parents.

In some instances, however, these same stereotypes may favor women. Rachlinski and Wistrich set out to test this phenomenon, which they term “benevolent sexism.” They study whether judges are affected by gender bias in two contexts where women regularly experience better outcomes than men: child custody disputes and criminal sentencing. Judges are supposed to be impartial in their decisions and are typically forbidden from relying on gender when determining outcomes.<sup>1</sup> The confirmation of gender bias would therefore be an important (albeit unsurprising) finding.<sup>2</sup>

As the authors note, the mere fact that women experience systematically better outcomes in some contexts, like custody disputes, cannot prove the existence of gender bias among judges, as other factors unique to those individual cases might influence outcomes. For instance, women seek sole custody more frequently than men, which partially explains why they get sole custody more of the time. Moreover, any given mother might be better situated to assume custodial responsibilities than the child’s father. Controlling for individual differences between male and female parents in real cases is practically impossible. (Pp. 112, 121.)

To tease out gender bias in the custody context, the authors presented judges with a hypothetical child relocation case. In the hypothetical, a parent with primary custody over two young children (ages four and six) petitions to relocate, with the children, to a city two-hundred miles away to pursue a work opportunity. The other parent, who spends three weekends per month with the children and sees them several times per week, opposes the move. Half of the judges received a version in which the parent seeking to relocate was the mother; the other half received a version in which the parent seeking to relocate was the father. A total of 355 judges in the United States and Canada participated in the study while attending four different judicial education conferences. Because some of the judges were generalists and were coming from different jurisdictions, the authors provided a rough summary of the law governing relocation decisions.

To test gender bias in the sentencing context, the authors provided two groups of judges, 141 trial judges from Ohio and 210 federal judges, a one-page sentencing hypothetical in which the defendant, either “Frank” or “Lisa,” sends a threatening letter to a caseworker who denied the defendant disability

benefits. The defendant, who had told the caseworker that he or she could not work and needed the benefits to remain in the home and to keep his or her child from starving, is charged and pleads guilty. The Ohio materials told the judges that the defendant pleaded guilty to the felony of retaliation against a public official, which carries a prison term of one to five years. The federal materials told the judges that the defendant was charged with sending threatening communications through the U.S. mail, and provided the relevant federal sentencing guidelines.

The authors found bias in favor of women in both contexts. Regarding custody, in the combined sample of 355 responses, 56% of the judges allowed the female parent to relocate in contrast to 42% of judges who allowed the male parent to relocate. This difference was statistically significant. Regarding sentencing, the authors found that judges sentenced a male defendant to an average of 14.2 months, whereas judges sentenced a female defendant to 11.3 months, again a statistically significant disparity.

In their discussion of these findings, the authors observe that custody and sentencing law permit the exercise of a significant amount of judicial discretion, which increases the possibility that stereotypes may influence decision making. Rather than proposing to constrain discretion, a solution amply explored in the family law [literature](#), they assume the good faith of judges and propose a series of debiasing techniques. For instances, judges can remind themselves of stereotype-incongruent models “such as esteemed professional women and devoted fathers”; engage in thought experiments in which they change the gender of the litigants; keep themselves honest by tracking of the outcomes of male and female litigants; and implement practices to facilitate deliberate thinking at the expense of intuitive thinking, like adhering to checklists or rubrics. (P. 135.)

These suggestions seem sensible and easy to implement through judicial education programs. What interested me most, however, were several aspects of the authors’ findings that did not merit sustained attention in the article but beg to be studied in greater depth.

When examined more closely, the data show that family court judges exhibit less gender bias than the overall results suggest. Of the overall pool of 355 judges presented with the custody relocation problem, approximately one third were family court judges attending either the National Council of Juvenile and Family Court Judges annual conference in 2015, or the New York State Association of Judges of the Family Court of New York conference in 2019. In other words, one-third of the judges were family court specialists and two thirds were generalists. 70% of the generalists would have allowed the mother to relocate while only 48% would have allowed the father to do so: a significant disparity. However, the specialists were much less likely to be affected by the gender of the relocating spouse: 30% would have granted the mother’s request, compared to the 26% who would have granted the father’s. (P. 125) The parent’s gender did not have a statistically significant effect on the specialists. (P. 126) These findings suggest that family court judges, by virtue of their training, experience, or other factors, may be reassuringly gender egalitarian.

In another interesting wrinkle, female judges exhibited less bias in both the custody and sentencing contexts. When it came to sentencing, male judges imposed an average sentence that was 3.7 months shorter for female defendants. Female judges, however, imposed an average sentence that was only 0.7 months shorter for female defendants. In the custody context, male judges granted a mother’s relocation request 61% of the time, in contrast to 43% of the time for the father. Female judges showed a smaller spread, granting a mother’s request 51% of the time in contrast to 43% for the father.<sup>3</sup> These results indicate that female judges might be less inclined to exhibit bias in favor of women in these contexts. It would be interesting to see whether further studies could confirm this result, and also whether they might reveal the reasons why female judges are less susceptible to unequal rulings.<sup>4</sup>

The law has come a long way in eliminating explicit sex-based classifications in the family context. Yet

stereotypes and social norms continue to produce unequal outcomes. *Benevolent Sexism in Judges* is a reminder that gender bias can be documented, quantified, and better understood.

1. As the authors point out, the Model Code of Judicial Conduct prohibits judges from “manifest[ing] bias or prejudice” based upon sex or gender. (P. 103) (citing **Model Code of Judicial Conduct** r.2.3(B) (Am. Bar Ass’n 2020)).
2. The authors speculate that stereotypes related to caregiving may produce results that favor women, but they also note that a woman who moves to take a better job or pursue a new relationship may provoke unconscious judicial retaliation in contexts like child relocation disputes, which is one of the two hypothetical scenarios they tested in their study. (P. 110-11.) There may also be additional stereotypes that judges in their study brought to the table. The studies in this article did not test the existence or influence of particular stereotypes, just outcomes.
3. The authors note that the disparity between male and female judges in this context was not statistically significant.
4. For instance, the result could be explained by the mitigating effect of countervailing stereotypes or biases rather than an imperviousness to stereotypes.

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