
Book Reviews

Kathleen E. Hull, Editor

Gender & Justice: Why Women in the Judiciary Really Matter. By Sally J. Kenney. New York and London, UK: Routledge, 2013. 310 pp. \$35.95 paper.

Reviewed by Theresa M. Beiner, William H. Bowen School of Law,
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Political scientist Sally J. Kenney's recent book, *Gender & Justice: Why Women in the Judiciary Really Matter*, does more than simply make the case for a gender diverse judiciary. She also suggests how to accomplish this by using case studies from a variety of countries as examples of what has and has not worked. Ultimately relying on arguments used to diversify American juries, Kenney criticizes some feminists' strategies, including reliance on arguments that women will somehow judge cases differently. Instead, Kenney persuasively makes the case that using arguments that gender diversity strengthens the legitimacy of the judiciary is more effective and does not lead to the same essentialist pitfalls that result from arguments regarding differences between male and female judging.

Kenney suggests that gender is best understood as a social process (p. 41). Arguments about differences between men and women are both essentialist and not supported by the work of political scientists who examine American judges' voting patterns. As Kenney's painstaking review of the literature shows, she is correct in this assessment. Aside from sex discrimination cases, there is little evidence that women decide cases differently than men. Yet, political scientists and other feminists continue to focus their efforts on this difference. Kenney acknowledges concerns that if women do not make a difference in case outcomes, why bother appointing them (p. 43)? It takes Kenney several chapters to address this question.

Kenney takes the reader through some examples of attempts to diversify the bench, including the experience of state and federal court judges, and judges in the United Kingdom and European Court of Justice (ECJ). Kenney begins with Rosalie Wahl, the first woman justice appointed to the Supreme Court of Minnesota.

Wahl's case marshaled the emotions of women in Minnesota, creating a harmonic convergence whereby the governor, who was committed to appointing a woman, had the backing to make Wahl's appointment a reality. Kenney's reliance on emotions as a rallying point is somewhat ironic. While eschewing essentialism, Kenney suggests that women candidates are most successful when they emotionally connect with other women and feminist men. This plays into stereotypes that women are more emotional and less rational, a misperception (along with the myth that women are less qualified) often used to keep women off the bench.

Using the Carter Administration as an example, Kenney's chapter on the federal bench is particularly edifying in identifying a successful strategy for appointing women. President Carter appointed a record number of "non-traditional" judges. The combination of an executive branch that was dedicated to diversity, including insiders within the administration who persistently pushed for women judges, along with pressure from outsider feminist groups, led to these successes. Kenney is clear that feminists who argue against becoming insiders, because the inside is inherently patriarchal, are wrongheaded. As the Carter example shows, insiders can act as valuable allies in bringing about feminist reforms, including diversifying the bench.

In Chapters 5 and 6, Kenney moves to the experience of the United Kingdom and the ECJ. These chapters are somewhat confusing to read because Kenney jumps back and forth in time in describing various attempts to appoint female judges. Efforts to appoint women in the United Kingdom were stymied by an opaque process that favored cronyism and limited paths to the judiciary. While feminists had some success in reframing diversity in terms of modernization of the judiciary, and indeed the system of appointment was eventually changed, the results were still disappointing.

The European Union (EU)'s experience provided Kenney a means to reframe the issue of gender diversity on the bench in a manner that has more possibility for success. The ECJ has a custom of geographic/political representation, whereby each member state appoints a justice. Kenney convincingly argues that representation of women is analogous. She asks why it would be reasonable for Italy to be outraged if all the ECJ justices were from Germany, but women in the EU are supposed to be fine with an all male ECJ (p. 128)? Kenney ultimately makes her arguments about representation explicit. The judiciary gains legitimacy if it reflects the larger society. As she puts it, "Justice must not only be done; it must be seen to be done" (p. 127). She also convincingly argues that, contrary to the views of many political theorists, the judiciary is a representative branch of sorts. If it were not, why do member states insist on equal representation on the ECJ?

At various times in the book, I wondered where exactly Kenney was going. Indeed, the chapter on California Justice Rose Bird seems more like a cautionary tale about what not to do if appointed or elected rather than a roadmap to appointment or election. The final chapter of the book, however, tied everything neatly together. Kenney carefully lays out her alternative arguments for a diverse bench. Her support comes from an interesting source—federal case law on exclusion of women and people of color from juries. Kenney describes two common arguments used in these cases. First is the right of the accused to have a jury of his or her peers. This argument entails difference—that women or African Americans will decide cases differently than their male or white peers. The second argument is based on representation—that women and members of minority groups are stigmatized and told that they are less than full citizens when they are not permitted to engage in this civic duty. Kenney argues that advocates for a diverse bench should use the latter argument because it is more persuasive and avoids the stereotypes and essentialism that plague the former. Kenney devotes the final pages of the book to her most compelling arguments in favor of a diverse bench, namely “representation, merit and non-discrimination” (p. 179). In true non-essentialist style, Kenney also advocates for the appointment or election of all types of women—feminists and conservatives.

This book is a must read for anyone interested in diversifying the judiciary or feminist legal and social theory. Kenney makes a convincing case for women on the bench that avoids the essentialism resulting from arguments relying difference. Does Kenney risk sacrificing what binds women as an advocacy group by ignoring areas of commonality? It’s not clear. In any event, for feminists and non-feminists alike, the data, descriptions, and experiences of several countries Kenney provides should prove helpful in developing future strategies.

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Punishment, Participatory Democracy, and the Jury. By Albert W. Dzur.
New York: Oxford University Press, 2012. 221 pp. \$55.00 cloth.

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I am not a political theorist. In one reading of Albert Dzur’s wonderful book, *Punishment, Participatory Democracy, and the Jury*, my