

# Public Perceptions of Gender Bias in the Decisions of Female State Court Judges

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*How are women on the bench, and their decisions, perceived by the public? Many scholars find that gender influences the voting behavior of judges and the assessment of judges by state judicial systems and the American Bar Association. However, few scholars have examined how judge gender affects the way in which the public responds to judicial outcomes. Does the public perceive the decisions of female state court judges as being “biased” by their gender identity, particularly in cases involving reproductive rights/family law? Also, does the public view female judges on state courts as more likely to rely on ideology when ruling in cases? Using a survey experiment that varies judge gender in a state child custody case, we examine whether respondents exhibit less support for judicial decisions authored by female state court judges. Additionally, we test whether respondents are more likely to perceive the decisions of female state court judges as ideologically biased or as a product of gender influences (as compared to male judges). Finally, we assess whether these effects are conditional on or exacerbated by respondent characteristics such as gender, race, and religiosity. The influence of gender on public response to state court decisions has important implications for our understanding of why certain court decisions find public support and acceptance.*

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## INTRODUCTION

Does judge gender affect how the public responds to state court decisions? The judicial community has long identified the existence of gender bias in the legal system and has made some progress in understanding and addressing this issue, partially through the use of gender bias task forces in many states and federal circuits in the late twentieth century.<sup>1</sup> Additionally, over the past two decades, state courts of all levels have seen increases in gender diversity.<sup>2</sup> Multiple factors underlie the call for increasing gender representation of the judiciary. Enhancing descriptive representation<sup>3</sup> on the bench, at the very least,

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1. See, e.g., Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (1997) (discussing court decisions and task force studies that highlight biased treatment of women); Kimberly A. Lonsway et al., *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 LAW & SOC. INQUIRY 205 (2002) (studying gender bias in the federal court system).

2. Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 65 (2008).

3. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967) (reasoning that descriptive representation “depends on the representative’s characteristics, on what he *is* or *is like*, on being something rather than doing something”).

suggests that judicial institutions are accessible to women seeking to hold office<sup>4</sup> and “reflects a degree of openness in the political process.”<sup>5</sup> More broadly, the presence of a judiciary that reflects the composition of the population potentially aids in conferring legitimacy on court decisions and authority. As Professor Linda Maule states: “A court system that does not reflect the membership of society breeds increasingly higher levels of disaffection and disillusionment. Thus, as more women are placed on the bench, the democratic regime is strengthened.”<sup>6</sup>

Beyond descriptive representation, scholars and judges explain that women can provide a unique perspective, or “different voice,” traditionally missing from state and federal judiciaries.<sup>7</sup> Specifically, Professor Carol Gilligan suggests that differences in the way in which men and women conceptualize morality and navigate moral predicaments/dilemmas are seen as early as childhood, with women more likely to express an “ethic of care” reflecting values such as empathy, communication, and “connectedness.”<sup>8</sup> Building from Professor Gilligan’s work, scholars have argued that female jurists, given differences in socialization, background, and experience, “will employ different legal reasoning, and will seek different results from the legal process.”<sup>9</sup> These differences can emerge in the legal reasoning and rationale used by women on the bench even when observable differences in the voting behavior of male and female jurists are not apparent.<sup>10</sup>

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4. Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 425 (1994).

5. Sally J. Kenney, *Infinity Project Seeks to Increase Gender Diversity of the Eighth Circuit Court of Appeals*, 92 JUDICATURE 131, 132 (2008); see Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 597 (1985) (explaining that diverse participation reflects an openness in the political process).

6. Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFF. WOMEN’S L.J. 295, 296 (2000).

7. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 391 (2010); Sue Davis, *Do Women Judges Speak “In a Different Voice?” Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN’S L.J. 143, 144 (1993).

8. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 74 (1982); see also Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665, 667 (2002) (arguing that men and women have different judicial “standpoints”).

9. See, e.g., Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 926 (2005) (arguing that the presence of female judges will achieve meaningful sexual equality in American law); see also Kjersten Nelson, *Double-Bind on the Bench: Citizen Perceptions of Judge Gender and the Court*, 11 POL. & GENDER 235, 255 (2015) (explaining that female judges enjoy an advantage due to unique perspectives).

10. See Susan L. Miller & Shana L. Maier, *Moving Beyond Numbers: What Female Judges Say About Different Judicial Voices*, 29 J. WOMEN POL. & POL’Y 527, 545 (2008) (finding, through interviews with female judges, that female jurists sometimes approach cases and fact patterns

Finally, depending on the content of their jurisprudence, the inclusion of female judges can also promote the substantive representation of women's interests<sup>11</sup> and create a court more "receptive" to the concerns of women.<sup>12</sup> In the legislative arena, this substantive representation can manifest through emphasis on issues such as education, childcare, maternity politics, and policies that promote pay and workplace equality.<sup>13</sup> In the courtroom, scholars consider votes in favor of the "women's position"<sup>14</sup> in sex discrimination cases, family law, and reproductive policies, along with more liberal votes in general, as indicative of some degree of substantive representation in the judicial arena.<sup>15</sup>

Even though "perception of gender bias in a judge is more harmful to the legal system than its appearance in other participants,"<sup>16</sup> we currently know very little regarding whether, or how, gender diversity of judges and judicial panels affects public opinion in the aftermath of state court rulings.<sup>17</sup> Did this recognition by gender bias task forces mediate potential public perceptions of judicial decisions? Does the presence of more women on the bench provide court outcomes with greater legitimacy among the public as scholars suggest, or, given that women are generally considered "nontraditional" judges,<sup>18</sup> is the public more likely to view the decisions of state female judges with greater uncertainty or scrutiny? In this Article, we examine how state judge gender affects the public's support of judicial outcomes and perceptions of judicial bias. Specifically, we explore whether

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from distinct perspectives; however, the judges she interviewed also explained that judge gender should not dictate case outcomes); see also Brian McNeill, *More Women Judges Needed, Gertner and Lithwick Say*, U. VA. SCH. L. NEWS & MEDIA (Oct. 27, 2011), [https://content.law.virginia.edu/news/2011\\_fall/women\\_in\\_the\\_judiciary.htm](https://content.law.virginia.edu/news/2011_fall/women_in_the_judiciary.htm) [<https://perma.cc/2U6G-G4QL>] (statement of U.S. District Court Judge Nancy Gertner) ("I can tell you that what's plausible to me may be very different from what's plausible to my male colleague. . . . The law, in fact, invites us to consider and make judgments about life experiences." (internal quotation marks omitted)).

11. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 627 (2011) (explaining that judicial diversity ensures that minorities' interests are considered in the decisionmaking process).

12. Walker & Barrow, *supra* note 5, at 598.

13. See Sue Thomas, *The Impact of Women on State Legislative Policies*, 53 J. POL. 958, 961 (1991) (highlighting that women will, more often than men, consider issues of women, children, and family).

14. Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 752 (2000).

15. Nelson, *supra* note 9, at 244.

16. Jackson, *supra* note 1, at 16.

17. *But see* Nelson, *supra* note 9, at 258 (noting that, in certain circumstances, judge gender matters to citizens as they evaluate court decisions).

18. Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 69 (1994).

respondents are more likely to perceive that gender and ideology influence the decisionmaking of female state judges (when compared to their male counterparts). Given gender stereotypes that can surround women in public office, and the act of judging specifically, we argue that the public is likely to perceive the decisions of male and female judges differently. This difference in perceptions, however, is conditional on a variety of factors, including the issue(s) in the case and the gender of the respondent.

Exploring how judge gender affects public response to state court decisions is particularly important given that over 90% of litigation takes place at the state level.<sup>19</sup> In addition, given that the majority of states elect their judges, variation in public response to court decisions could potentially affect whether judges remain on the bench and hence overall levels of gender diversity across state judiciaries.

Our Article proceeds as follows: First, we discuss the current state of gender diversity in U.S. courts and the existing literature on gender, judicial behavior, and judge evaluations. Next, we present our argument and hypotheses regarding public response to state court decisions contingent on judge gender and case outcomes. The basis of our argument is twofold. If traditional gender stereotypes continue to dominate public perceptions of male and female judges, we expect to find that individuals will be more likely to agree with case outcomes when a male judge decided the case and to perceive greater reliance on gender and ideological considerations when a female judge decided the case. Conversely, if the public eschews traditional views of gender roles in the judicial context, then we should see individual agreement with the case outcome, and perceptions of extralegal influences should reflect respondent preferences independent of judge gender. Using data from approximately four hundred respondents, we then present the results of our experiment that varies the gender of state judges in a fictional child custody case. Overall, we find that the perception of judicial bias stemming from judge gender is conditional on the gender of the judge *and* the gender of the winning litigant. Specifically, respondents are more likely to state that gender influenced a judge's decision when a female judge authored a majority opinion awarding custody to the mother in the dispute. However, respondents also stated that judge gender influenced a male judge's decision to award custody to the father in the dispute. We also find evidence that respondents view female

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19. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGEMENTS ON STATE COURTS? 3, <http://gavelgap.org/pdf/gavel-gap-report.pdf> (last visited Oct. 8, 2017) [<https://perma.cc/VJ26-5C3S>].

judges as more likely to rely on ideology than law, yet this also appears to be conditional on specific case facts. After discussing the implications of our results, we also propose additional methods to examine how the public responds to gender diversity throughout the U.S. judiciary.

## I. GENDER DIVERSITY, JUDICIAL BEHAVIOR, AND JUDGE EVALUATIONS

Within the past thirty years, women have made substantial gains in terms of representation in federal and state judiciaries.<sup>20</sup> The number of female federal judges increased by over 60% between 1999 and 2009 (from 302 to 496),<sup>21</sup> and currently nearly 33% of active Article III federal judges are women.<sup>22</sup> While women have made impressive gains at the federal level, substantial disparities exist between their rate of participation on the federal bench and the proportion of women in the national population (51%). Similar disparities exist in the states between the proportion of women serving in state judiciaries and their respective proportions in the states.<sup>23</sup> As of December 2014, women make up approximately 30% of judges serving at the state level, with percentages varying substantially by state.<sup>24</sup> For example, Idaho and Mississippi exhibit the highest levels of gender disparity between the proportion of women on the bench and the proportion of women in the state population. Specifically, both states have approximately 66% fewer women on the bench than would be predicted based upon the proportion of women in the state.<sup>25</sup> Of all fifty states, Oregon has the lowest levels of gender disparity in terms of descriptive representation (only 12% fewer women on the bench than would be predicted based upon the proportion of women in the state population).<sup>26</sup>

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20. Hurwitz & Lanier, *supra* note 2, at 65.

21. Am. Constitution Soc'y, *Male Judges Far Outnumber Women Judges, Federal Court Graph Shows*, ACSLAW: ACSBLOG (Nov. 30, 2010), <https://www.acslaw.org/acsblog/male-judges-far-outnumber-women-judges-federal-court-graph-shows> [https://perma.cc/7Q2V-3N9L] (reporting the increase in female judges).

22. NAT'L WOMEN'S LAW CTR., *WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO* 1 (2016), <https://nwl.org/wpcontent/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf> [https://perma.cc/83MT-XFDB].

23. Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, *JUDGES' J.*, Summer 2009, at 28, 30.

24. GEORGE & YOON, *supra* note 19, at 2.

25. *See id.* at 8 ("We calculate the Gavel Gap by dividing the difference between the proportion of women and/or minorities on the bench and women and/or minorities in the general population by the proportion of women and/or minorities in the general population."). For Mississippi and Idaho, the gavel gap is -0.6568 and -0.6599, respectively. *Id.* at 21 tbl.A-12.

26. *See id.* at 22 (stating that for Oregon, the gavel gap is -0.1228); *see also* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 505 (2002) (arguing that descriptive representation is desirable because it translates into more effective

*A. Gender, Judicial Behavior, and State Courts*

Given differences in socialization, background, and experience as compared to their white male counterparts, many scholars suggest that female judges will exhibit liberal voting behavior and render decisions more likely to favor the interests of women and minorities.<sup>27</sup> Researchers also typically expect to find the most evidence of gender differences in legal issues where gender is salient, such as employment discrimination, reproductive rights, and child welfare.<sup>28</sup> Although most studies of gender and judicial decisionmaking focus on federal courts,<sup>29</sup> a number of studies find evidence of gender effects in state courts (though these results are not always in the hypothesized direction).<sup>30</sup> Professors Elaine Martin and Barry Pyle search for gender effects in

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substantive representation); Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW & SOC'Y REV. 761, 777 (2011) (noting that descriptive representation enhances perceptions of institutional legitimacy among minorities); Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329, 330 (2003) (explaining that descriptive representation is a function of a variety of factors that are contingent upon time, level of court, and type of political minority aspiring to the bench); Songer & Crews-Meyer, *supra* note 14, at 760 (discussing the difference in background, education, and legal experience of male and female judges); Margaret Williams, *Women's Representation on State Trial and Appellate Courts*, 88 SOC. SCI. Q. 1192, 1198 (2007) (discussing factors that affect gender and racial diversity in state courts).

27. See Bratton & Spill, *supra* note 26, at 506 (discussing the differences in judicial behavior between male and female judges in certain contexts); Davis, *supra* note 7, at 171 (discussing theories that suggest sexual differences in decisionmaking); Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990) (suggesting that female judges may be more attuned to liberal issues than male judges); Walker & Barrow, *supra* note 5, at 614 (noting the public's assumption that women are more sympathetic to liberal policy goals).

28. Songer et al., *supra* note 4, at 429; see also SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 47 (2015) (reporting that women judges are more likely to support plaintiffs in sex discrimination cases); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 138 (2000) (suggesting that a judge who is a member of a certain group would exhibit greater support for that group).

29. Boyd et al., *supra* note 7; see also Bratton & Spill, *supra* note 26, at 505; Paul M. Collins, Jr. et al., *Gender, Critical Mass, and Judicial Decision Making*, 32 LAW & POL'Y 260 (2010); Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219 (2007); Davis, *supra* note 7; Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004); Haire & Moyer, *supra* note 28; Susan W. Johnson and Donald R. Songer, *Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts*, 30 JUST. SYS. J. 265 (2009); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77 (1977); Martin, *supra* note 27; Laura Moyer, *Rethinking Critical Mass in the Federal Appellate Courts*, 34 J. WOMEN POL. & POL'Y 49 (2013); Laura P. Moyer & Susan B. Haire, *Trailblazers and Those That Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC'Y REV. 665 (2015); Segal, *supra* note 28; Songer et al., *supra* note 4; Walker & Barrow, *supra* note 5.

30. David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232, 241 (1987).

cases involving “women’s issues” such as divorce and family law.<sup>31</sup> Focusing on the Michigan Supreme Court, Martin and Pyle examine decisionmaking in cases involving divorce litigation, discrimination, and “feminist issues” (e.g., sexual harassment and reproductive rights). Martin and Pyle find that male judges vote more liberally in discrimination cases (male judges voted liberally at a rate of 53.2% whereas female judges’ rate of liberal voting was 38.3%). However, as expected, Martin and Pyle find that female judges were more likely to vote in favor of the woman’s position in divorce cases (an area of law where gender is particularly salient). In cases involving discrimination, party effects appeared to trump the influence of gender in explaining vote outcomes.<sup>32</sup>

In a subsequent analysis of divorce cases in thirty-seven states, Martin and Pyle find additional evidence that female judges are more likely to vote in favor of the women’s position in divorce cases (this includes disputes surrounding child support, spousal support, and property division).<sup>33</sup> A bivariate analysis reveals that female justices voted in favor of female litigants approximately 75% of the time whereas male justices supported female litigants at a rate of 54%.<sup>34</sup> Martin and Pyle also find that male justices are more likely to vote in favor of women in divorce cases when they sit on a state supreme court with either one or three female justices.<sup>35</sup>

Similarly, Professor Maule’s examination of the Minnesota Supreme Court (between 1985 and 1994) found that women on the court were unified in nonunanimous family law cases approximately 90% of the time, but less unified in criminal cases.<sup>36</sup> Interestingly, in her analysis of opinion language, Maule identifies distinct differences in the prose used by men and women on the Minnesota court. Maule states:

In each of these cases the majority opinion—authored by men—tended to focus on rules, processes and regulations. In contrast, the dissenting opinions focused either on the responsibility of a husband to a wife even after the marriage had been dissolved or on an obligation of a father to abide by the original intent of a child support contract even after his wife’s circumstances had changed.<sup>37</sup>

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31. Martin & Pyle, *supra* note 9; see also Maule, *supra* note 6, at 301 (discussing studies that have examined the voting behavior of female judges on “women’s issues”).

32. Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1225 (2000).

33. Martin & Pyle, *supra* note 9, at 936.

34. *Id.*

35. *Id.* at 938.

36. Maule, *supra* note 6, at 307.

37. *Id.* at 313.



Maule explains that this finding supports the existence of a “different voice” in that male and female judges seemingly address family law disputes using distinct moral frameworks.

In her work, *Gender, Judicial Dissent, and Issue Salience*, Professor Madhavi McCall argues that scholars should also consider the broader political environment when attempting to uncover gender effects in judicial outcomes.<sup>38</sup> In her examination of state supreme court decisionmaking in sexual harassment cases (between 1980 and 1998), she finds that the 1992 Anita Hill–Clarence Thomas Senate hearings served as an important watershed moment.<sup>39</sup> Prior to 1992, she shows that female justices were more likely than men to dissent in sexual harassment cases and more likely to vote in a liberal (i.e., pro-woman) direction.<sup>40</sup> However, after 1992, with the issue of sexual harassment much more politically salient, she finds that men and women did not exhibit a statistically significant difference in their dissenting behavior.<sup>41</sup>

While many analyses focus on issues where gender is salient, a number of scholars examining the state environment examine the influence of gender on legal questions outside of women’s issues. In their analysis of almost 40,000 cases, Professors John Gruhl, Cassia Spohn, and Susan Welch find that female metropolitan trial judges were less likely to find defendants guilty (when compared to their male counterparts).<sup>42</sup> Interestingly, female judges were more likely to sentence those defendants found guilty to prison and to hand down slightly longer sentences. In addition, male judges sentenced women to prison at lower rates than female judges.

Professors Madhavi McCall and Michael A. McCall, along with Professors Donald R. Songer and Kelley A. Crews-Meyer, find evidence that female state supreme court judges are more likely to vote liberally in search and seizure cases and death penalty and obscenity cases,

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38. See Madhavi McCall, *Gender, Judicial Dissent, and Issue Salience: The Voting Behavior of State Supreme Court Justices in Sexual Harassment Cases, 1980–1998*, 40 SOC. SCI. J. 79, 80 (2003) (noting that the salience of a political issue might lead justices to render decisions that are more consistent with public opinion, regardless of their personal standing with respect to the matter).

39. *Id.* at 79.

40. *Id.*

41. *Id.*

42. See John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 314 (1981) (failing to confirm the authors’ hypothesis that female judges would be more lenient than male judges in determining guilt and assigning sentences, as the differences in convicting and sentencing behavior between male and female judges were not large and not consistently in the direction that the authors predicted).

respectively.<sup>43</sup> Prior to 1980, McCall and McCall find little evidence of gender effects in search and seizure cases; however, they surmise that gender effects may not emerge until the number of women on individual courts increases (i.e., until a “critical mass” is achieved). Post-1990, as the number of women on state supreme courts increased, they find that the probability of a woman voting in favor of a defendant increases by approximately thirty points (however this probability decreases if the justice is elected). McCall and McCall’s analysis also shows that the presence of another woman on the court increases the likelihood that a woman will cast a liberal vote. Similarly, Songer and Crews-Meyer not only find that women are more likely to vote liberally in death penalty and obscenity cases, but their results also show that the presence of a woman on a panel increases the likelihood that a male justice will vote in a liberal direction as well.<sup>44</sup> Overall, scholars find consistent evidence of gender effects in state courts and evidence that women are more likely to vote liberally across multiple legal areas including those not traditionally classified as women’s issues.

Given the findings of gender influences and differences in the decisionmaking of male and female judges across the U.S. judiciary, an important question is whether gender affects how judges are perceived and evaluated. Although few scholars have directly examined how judge gender affects the way in which the public responds to court outcomes, several researchers find that gender affects the way in which judicial candidates for federal vacancies and state judges are evaluated by professional, state, and private organizations.<sup>45</sup>

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43. See 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, 68 (2007) (adapting social psychology’s critical mass theory, suggesting that women are only able to exert influence after they “constitute approximately 15–25% of an institution’s membership”); Songer & Crews-Meyer, *supra* note 14, at 757 (suggesting that “replacing male judges with women from the same party on a given court would produce substantially greater probabilities of liberal votes”).

44. See Songer & Crews-Meyer, *supra* note 14, at 757 (“The strong, statistically significant coefficients for having a woman colleague suggest that judges with at least one female colleague are substantially more likely than judges with only male colleagues to cast liberal votes in both areas.”).

45. See Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 LAW & SOC’Y REV. 731, 750 (2011) (noting that with all control variables equal, female judges in Clark County, Nevada, were found to score 11.27 points lower than their male colleagues on attorney judicial performance surveys); Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 1, 8 (2001) (finding that even after controlling for other judicial qualification indicators, females were more likely to receive lower ABA ratings).

*B. Gender and Judicial Evaluations*

When controlling for differences in experience and legal training, researchers find that federal and state female judges receive lower assessment ratings and performance evaluations on average than their male counterparts.<sup>46</sup> Like research on gender and judicial outcomes, most research on judicial evaluations focuses on federal judges. Since 1953,<sup>47</sup> the White House, in conjunction with the Department of Justice, routinely forwards its “short list” of potential nominees for federal court vacancies to the American Bar Association’s Standing Committee on the Federal Judiciary to evaluate candidates on their “integrity, professional competence and judicial temperament.”<sup>48</sup> Based on responses to candidate questionnaires and interviews, the American Bar Association (“ABA”) rates potential nominees as either “well qualified,” “qualified,” or “not qualified.”<sup>49</sup>

In her analysis of U.S. Court of Appeals judges appointed between 1977 and 1994, Professor Susan B. Haire finds that women and minorities were more likely to receive lower ABA ratings, even when controlling for legal experience.<sup>50</sup> Specifically, the probability that a white male received a “well qualified” rating is approximately 76%,

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46. Haire, *supra* note 45, at 8; see also Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 JUST. SYS. J. 271, 282 (2014) (finding that upon instituting data controls, women scored approximately 12 points lower out of 100 than men and were “significantly less likely to receive ‘more than adequate’ ratings”); Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J.L. & CTS. 33, 44 (2014) [hereinafter Sen, *Judicial Qualifications*] (noting that being a female is one of three traits that are consistently linked with lower ABA ratings); Maya Sen, *Minority Judicial Candidates Have Changed: The ABA Ratings Gap Has Not*, 98 JUDICATURE 46, 51 (2014) [hereinafter Sen, *Minority Candidates*] (finding that female candidates are less likely to receive one of the higher ABA ratings); Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 1*, 66 JUDICATURE 349, 356 (1983) (stating that ABA rankings were “considerably lower” for women than for white males during the Carter era, likely due to the fact that women were relatively new to the legal profession and were thus less likely to receive a “well qualified” experience score); Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 2*, 66 JUDICATURE 385, 387 (1983) (finding that “males were nearly three times more likely than females to receive one of the ABA’s two highest designations”). *But see* Susan Navarro Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RES. Q. 827, 833 (2012) (finding only modest statistical evidence of gender differences in ABA ratings).

47. AM. BAR ASS’N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2009), [http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal\\_judiciary09.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf) [https://perma.cc/KSZ5-775H].

48. *Id.*

49. See Haire, *supra* note 45, at 3 (noting that the candidate questionnaire asks about a range of topics, such as employment history, experience, pro bono, and membership in professional associations, and that the ABA interviews potential judicial nominees and those in a position to assess the judicial nominee).

50. *Id.* at 8.

while the probability that a woman received a “well qualified” rating is around 60%. Similarly, Professor Maya Sen also finds that women and African-Americans are more likely to receive lower ratings when controlling for education and experience.<sup>51</sup> Interestingly, although the background of traditional and nontraditional candidates has become more similar over time (in terms of education, legal training, and experience), the ABA ratings gap persists, although to a lesser extent for female nominees.<sup>52</sup>

Scholars find that state judicial performance evaluations, usually rated by attorneys, suffer from similar biases as the ABA ratings for federal judges.<sup>53</sup> State judicial performance evaluations, which can be administrated by state, professional, or private organizations, generally serve two purposes. One goal is to “increase the ability of judges to improve themselves through constructive criticism and feedback.”<sup>54</sup> Another goal is to assist voters in making informed selections in judicial elections, in regard to factors such as judicial professionalism, legal ability, and impartiality. In their analysis of *Las Vegas Review-Journal*’s “Judging the Judges” of Nevada judges, Professors Rebecca D. Gill, Sylvia R. Lazos, and Mallory M. Waters compare the retention score ratings for Nevada judges.<sup>55</sup> The judicial performance evaluation under examination asks respondents (attorneys) whether they would recommend retaining the judge in question (with one hundred being the highest score possible). They find that male judges routinely receive higher ratings than female judges. This ratings gap (of 11.27 points in this particular analysis) is present despite the authors finding no statistically significant gender differences in reversal rates, background experience, and rate of ethical complaints.<sup>56</sup>

Overall, gender influences the U.S. judiciary in multiple ways. There is persuasive evidence that gender affects judicial behavior and court outcomes across legal issues and levels of the U.S. judiciary. In

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51. Sen, *Judicial Qualifications*, *supra* note 46, at 44.

52. See Sen, *Minority Candidates*, *supra* note 46, at 50–51 (finding that the data demonstrated a “movement by minority candidates toward the education and professional path pursued by white candidates”).

53. See Gill et al., *supra* note 45, at 738 (explaining that female judges perform stereotypically male work and are at a disadvantage due to their defiance of gender role expectations); Gill, *supra* note 46, at 276–77 (examining the unconscious impact of implicit gender and racial bias on judicial performance evaluations, as social cognition theory indicates that higher rates of bias occur in hiring decisions with stereotypical job characteristics that conflict with gender and race stereotypes).

54. Gill et al., *supra* note 45, at 733.

55. *Id.* at 733–34. The survey specifically asks about Nevada Supreme Court justices and lower court judges in Clark County. *Id.* at 748.

56. *Id.* at 750.

addition, female judges and judicial candidates receive lower performance and assessment ratings. Given these findings, an important question is whether judge gender has a significant influence over *public* perception of court outcomes and decisions. In her research, Professor Kjersten Nelson discusses the “double-bind” that women face on the bench.<sup>57</sup> Female judges who conform to masculine expectations face appearing less empathetic, yet female judges who seem empathic on the bench risk castigation for behaving in a manner at odds with stereotypes attached to a “judicial” identity.<sup>58</sup> Nelson’s experiments, involving a U.S. Court of Appeals gender-based pay discrimination case, show that respondents are more likely to find female judges more empathetic, but less knowledgeable, when the judge authors a dissenting opinion in favor of expanding the time frame in which individuals can bring a discrimination claim. Nelson’s analysis provides important insight regarding how the public juxtaposes assessments of gender, empathy, and judge knowledge. However, many questions remain regarding public opinion and gender diversity in the judiciary. Specifically, does the public perceive that female justices are more likely to rely on extralegal factors, such as ideology, in the course of their decisionmaking? In addition, how does the inclusion of certain gender-salient legal issues (e.g., abortion) affect public response to court outcomes and majority opinions authored by female jurists? Below, we present our argument regarding gender stereotypes, court outcomes, and public opinion.

## II. GENDER, JUDGING, AND PUBLIC PERCEPTION

Building from existing research on gender stereotypes and Role Congruity Theory,<sup>59</sup> we argue that the public will be more likely to perceive female judges as relying on extralegal factors in their rulings than male judges. Female judges, along with judges of color, are often

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57. See Nelson, *supra* note 9, at 238 (noting that citizens “apply gendered assessments to female judges when those judges take positions that emphasize their identities as ‘women’”); see also Scott S. Bodderly et al., Naming Names: The Impact of Supreme Court Opinion Attribution on Citizen Assessment of Policy Outcomes (July 9, 2016) (unpublished article), <https://ssrn.com/abstract=2807349> [<https://perma.cc/74BD-4YQR>] (exploring whether the gender attributed to the majority opinion writers of U.S. Supreme Court opinions affects public support for case outcomes).

58. See Nelson, *supra* note 9, at 238 (finding that both the sex of judges and the “traits and knowledge attributed to them” have an impact on citizen support for their court decisions).

59. See Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 575 (2002) (noting that in addition to the congruity, or incongruity, between gender roles and leadership roles, Role Congruity Theory also explores factors that “influence congruity perceptions and their consequences for prejudice and prejudicial behaviors”).

referred to as nontraditional judges.<sup>60</sup> This characterization as nontraditional judges represents a layered identity and concept. At the descriptive level, women are classified as nontraditional because the occupants of judicial offices were traditionally white males. Second, differences in background, education, and legal experience also mark women as nontraditional, when compared to the background of white male judges. While these experiential differences have become less pronounced over time, some important differences remain as female judges generally have less prosecutorial experience, less private practice experience, and more experience in academia.<sup>61</sup> Finally, women's gender identity and experience can produce a perspective and a legal jurisprudence distinct from that of white male judges. Several commentators argue that female judges bring a unique perspective to the bench. For example, Professor Mary L. Clark observes, "women as women, bring something different to the bench, shaping judicial outcomes in different ways."<sup>62</sup> Similarly, regarding female judges, Vanderbilt Law Professor Suzanna Sherry explains, "women's experiences *as women* give them greater empathy and insight into women's problems."<sup>63</sup> The distinct perspective that women can bring to the bench is one key reason (among many) for the call to increase descriptive representation in the judiciary. However, we argue that the "different voice" which is sometimes *ascribed* to female jurists, combined with other aspects of their gender-based identity as a nontraditional judge, can potentially affect the way in which the public responds to the decisions of female judges.

Despite significant progress, gender-based stereotypes regarding personality traits and leadership roles are still present. This is especially pronounced in public perceptions of political candidates

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60. See Hurwitz & Lanier, *supra* note 2, at 47 (examining methods of judicial selection in state and federal appellate courts and finding no relationship between the use of different selection systems and rates of judicial diversity).

61. See Haire, *supra* note 45, at 7–8 (finding that judicial appointees with more bar experience before their appointments were more likely to have a higher ABA rating); Sen. *Minority Candidates*, *supra* note 46, at 50–51 (noting that, since the Clinton era, the prior experience of minority and female nominees has become increasingly similar to that of the average white candidate).

62. Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 541 (2004).

63. Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. 159, 160 (1986).

and officials,<sup>64</sup> policy knowledge/expertise,<sup>65</sup> and ideology.<sup>66</sup> Additionally, “agentic” attributes are often assigned to men, whereas “communal” attributes are assigned to women. Agentic characteristics include “leader,” “assertive,” “confident,” and “dominant.”<sup>67</sup> Communal attributes consist of features such as “helpful,” “sympathetic,” “sensitive,” and in general “a concern with the welfare of other people.”<sup>68</sup> Scholars have also linked some of these communal attributes to a “feminine” jurisprudence.<sup>69</sup>

In their discussion of Role Congruity Theory, Professors Alice H. Eagly and Steven J. Karau explain, “[t]he potential for prejudice against female leaders that is inherent in the female gender role follows

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64. Male officials are often associated with traits such as strength, assertiveness, intelligence, and leadership, whereas women are often seen as consensus-builders and as warm, honest, and trustworthy. *See, e.g.*, BARBARA C. BURRELL, *A WOMAN’S PLACE IS IN THE HOUSE: CAMPAIGNING FOR CONGRESS IN THE FEMINIST ERA* 15 (1994) (noting that female candidates for political leadership have to overcome gender stereotypes which are seen as antithetical to the masculine leadership traits needed to hold public office); Kathleen Dolan & Kira Sanbonmatsu, *Gender Stereotypes and Attitudes Toward Gender Balance in Government*, 37 AM. POL. RES. 409, 420 (2009) (finding that gender stereotypes are related to representation preferences, as there are general beliefs about the categories of “men politicians” and “women politicians”); Leonie Huddy & Nayda Terkildsen, *Gender Stereotypes and the Perception of Male and Female Candidates*, 37 AM. J. POL. SCI. 119, 119 (1993) (finding that masculine traits increased a candidate’s “perceived competence of a broader range of issues than . . . feminine traits”); Jennifer L. Lawless, *Women, War, and Winning Elections: Gender Stereotyping in the Post-September 11th Era*, 57 POL. RES. Q. 479, 480 (2004) (explaining that citizens are more likely to see men as being “assertive, active, and self-confident,” and women as “compassionate, willing to compromise, and ‘people-oriented’”).

65. The public views male officials as more competent with issues such as crime, terrorism, and foreign affairs, whereas women tend to be given an advantage in issue competence in regard to education, healthcare, family, and reproductive politics. *See, e.g.*, KIM FRIDKIN KAHN, *THE POLITICAL CONSEQUENCES OF BEING A WOMAN* 10–11 (1996) (noting that voter stereotypes about candidates influence the issues that candidates focus on in their campaigns, leading women to concentrate on education and health policy and men to focus on the economy and defense); Kathleen Dolan, *The Impact of Gender Stereotyped Evaluations on Support for Women Candidates*, 32 POL. BEHAV. 69, 77 (2010) (determining that a majority of survey respondents believed that women are better able to handle education and health care issues and that men are more equipped to respond to terrorism issues, but noting that 38–40% of respondents did not find a difference between the abilities of each gender to handle these issues).

66. The public also tends to view women candidates and officials as more liberal. *See, e.g.*, Deborah Alexander & Kristi Andersen, *Gender as a Factor in the Attribution of Leadership Traits*, 46 POL. RES. Q. 527, 536 (1993) (noting that voters believe female candidates to be more “compassionate, moral, hardworking, and liberal” than men by “large margins”); Jeffrey W. Koch, *Candidate Gender and Assessments of Senate Candidates*, 80 SOC. SCI. Q. 84, 86–87 (1999) (noting that of nineteen female Senate challengers from 1988 through 1992, thirteen were Democrats and six were Republicans); Monika L. McDermott, *Race and Gender Cues in Low-Information Elections*, 51 POL. RES. Q. 895, 897 (1998) (finding that liberal voters are more likely to favor female candidates due to the stereotype that women are more liberal than their “male counterparts”).

67. Eagly & Karau, *supra* note 59, at 574.

68. *Id.*

69. *See* Maule, *supra* note 6, at 297 (noting several names and forms which have been recognized as belonging to “feminine” jurisprudence); Miller & Maier, *supra* note 10, at 550 (recognizing that male and female judges often reach similar legal conclusions but follow different “gender-related” paths to do so).

from its dissimilarity to the expectations that people typically have about leaders.”<sup>70</sup> Role Congruity Theory identifies two consequences of the perceived disjunction between gender roles and leadership roles. One consequence is that women who could potentially occupy leadership roles will be viewed less favorably than potential male leadership role candidates will. The second consequence, and the one most pertinent for this analysis, is that evaluation of women’s performance in certain leadership roles can suffer when compared to the evaluation of men in leadership roles.<sup>71</sup> In regard to the judiciary, experimental research confirms that men and women are more likely to implicitly associate “male” with judge and “female” with paralegal occupations.<sup>72</sup> The perception of role incongruity can also affect women in legislative and executive offices;<sup>73</sup> however, an important distinction is that the norms (or “myths”) that surround judicial institutions and behavior include impartiality, neutrality, and a nonpolitical decision process (as compared to other political offices and positions).<sup>74</sup> If judicial

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70. Eagly & Karau, *supra* note 59, at 575.

71. *Id.*

72. See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 28 (2010) (examining the methodology and underlying results of a study on the implicit gender bias present in law students).

73. Although some of the gender-trait stereotypes seem counter to the characteristics assigned to leadership positions, and women seek office at lower rates than men, those women who do run for office generally perform at rates comparable to their male counterparts. See, e.g., Richard L. Fox & Jennifer L. Lawless, *To Run or Not to Run for Office: Explaining Nascent Political Ambition*, 49 AM. J. POL. SCI. 642, 655 (2005) (noting that women are substantially less likely to express political ambition or interest in holding high-level political office); Brian Frederick & Matthew J. Streb, *Women Running for Judge: The Impact of Sex on Candidate Success in State Intermediate Appellate Court Elections*, 89 SOC. SCI. Q. 937, 950 (2008) (stating that candidate sex does not appear to impede women, through either merit selection or judicial election processes, from being appointed to a state bench); Jennifer L. Lawless & Kathryn Pearson, *The Primary Reason for Women’s Underrepresentation? Reevaluating the Conventional Wisdom*, 70 J. POL. 67, 77–78 (2008) (concluding that while women tend to fare as well as men in congressional primaries, men continue to comprise the significant majority of candidates overall). In addition, perception of women as more empathetic and trustworthy can be advantageous when anti-incumbent sentiment is high or when issues of corruption are politically salient. See, e.g., Tiffany D. Barnes & Emily Beaulieu, *Gender Stereotypes and Corruption: How Candidates Affect Perceptions of Election Fraud*, 10 POL. & GENDER 365, 384 (2014) (finding that the presence of women in high political offices reduces public concerns about corruption and election fraud); Michael X. Delli Carpini & Ester R. Fuchs, *The Year of the Woman? Candidates, Voters, and the 1992 Elections*, 108 POL. SCI. Q. 29, 34 (1993) (stating that women are traditionally recognized as political outsiders, and are thus well-situated to challenge incumbents viewed as corrupt); see also Maule, *supra* note 6, at 297 (discussing how female legislators tend to raise different issues than their male counterparts); Miller & Maier, *supra* note 10.

74. See James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI. 139, 142 (2009) (noting how the “myth of legality” explains why those most familiar with the courts are the least likely to recognize bias within the institution).



offices are associated with a male gender identity,<sup>75</sup> the public could view female judges as more likely to *deviate* from these expected norms through a greater reliance on extralegal factors such as personal gender identity and ideology. Realistically, the public does not expect judges to completely disengage from outside influences and make judicial decisions in a vacuum (i.e., “mechanical jurisprudence”).<sup>76</sup> In fact, the public is well aware that factors such as ideology influence judicial behavior, and scholars find that public recognition of the influence of extralegal factors does not necessarily damage levels of diffuse support for, or belief in, the legitimacy of judicial institutions.<sup>77</sup> However, there is also evidence that the public expresses less support for the use of personal ideology considerations in judicial decisionmaking in comparison to legalistic factors.<sup>78</sup> Given that female judges are framed as the “other”<sup>79</sup> in relation to judicial reasoning and jurisprudence and possess an identity as nontraditional judges, they may be particularly vulnerable to public perceptions of ideologically driven decisionmaking or the perception that their decisions are influenced by other extralegal influences. This is not to suggest that male judges’ ideology and gender identity do not influence their decisionmaking. In fact, in *The Impact of Maleness on Judicial Decision Making: Masculinity, Chivalry, and Immigration Appeals*, Professors Rebecca Gill, Michael Kagan, and Fatma Marouf find that male-centered frames such as chivalry and masculinity significantly influence the voting behavior of male judges.<sup>80</sup> In addition, a Florida state task force on gender bias in the courtroom found that all-male panels were more likely to vote in favor of the father in custody cases.<sup>81</sup> However, because judicial positions and behaviors

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75. See Levinson & Young, *supra* note 72, at 28 (stating that law students implicitly associate “judge” with “male”).

76. See James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 206 (2011) (examining American perceptions of Supreme Court decisionmaking in relation to extralegal factors and their impact on impartial judicial decisionmaking).

77. *Id.*

78. See Michael J. Nelson & Steven S. Smith, Public Attitudes About Supreme Court Decision-Making: Sources of Instability in Beliefs About Legal Realism 17 (unpublished manuscript) (available online) (noting that, based on a 2011 survey by *The American Panel Survey*, Americans are less inclined to support an “ideological court”).

79. See Rebecca D. Gill et al., *The Impact of Maleness on Judicial Decision Making: Masculinity, Chivalry, and Immigration Appeals*, 6 POL. GROUPS & IDENTITIES (forthcoming 2018) (noting how male behavior is typically used as a baseline from which the assessment of female judges is measured).

80. *Id.*

81. See Jackson, *supra* note 1, at 17–18 (finding that state appellate courts have overturned a number of lower court cases because of biased behavior/statements from male judges and attorneys toward female witnesses and attorneys, and concluding with concern that the gender bias exhibited threatened the impartiality of judicial proceedings).

are stereotyped<sup>82</sup> and normalized<sup>83</sup> as male, we argue that the public is less likely to perceive male judges as influenced by their personal ideology or gender. In other words, “masculinity often remains invisible and unmarked.”<sup>84</sup> We develop three key hypotheses in order to empirically examine our argument regarding public response to state judge gender and judicial decisionmaking.

**H1:** *Respondents are more likely to agree with a decision/majority opinion from a male judge (as compared to a female judge).*

**H2:** *Respondents are more likely to find that gender influences the decision/majority opinion of a female judge (as compared to a male judge).*

**H3:** *Respondents are more likely to find that ideology influences the decision/majority opinion of a female judge (as compared to a male judge).*

### III. GENDER AND PUBLIC OPINION

Gender repeatedly emerges as an explanatory factor in U.S. public opinion across a range of issues.<sup>85</sup> With issues of crime and punishment, women are more likely to express increased support for gun control and reduced support for the death penalty.<sup>86</sup> In regard to “compassion issues,” women express more support for programs to benefit the poor and elderly and increased support for educational spending.<sup>87</sup> Women are also more supportive of employment protections

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82. See Clark, *supra* note 62, at 546 (stating that the presence of women in the judiciary challenges commonly held gender stereotypes).

83. See Gill et al., *supra* note 79 (stating that theories of judicial decisionmaking generally “normalize” male behavior); Levinson & Young, *supra* note 72, at 28 (noting that in a legal setting, “male,” rather than “female,” is more strongly associated with “judge” among law students).

84. Gill et al., *supra* note 79.

85. See Carpini & Fuchs, *supra* note 73, at 30–32 (discussing how historical factors and modern social perceptions affect women seeking political office); Eagly & Karau, *supra* note 59, at 575 (examining how gender role expectations for women differ from those expectations people typically have for leadership positions); Haire & Moyer, *supra* note 28, at 30 (exploring how judicial decisionmaking approaches differ between men and women on the appellate bench); Walker & Barrow, *supra* note 5, at 599 (exploring the role of gender in relation to the policymaking behavior of judges); see also BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* (2010) (analyzing how gender may obscure data on collective public opinion); Robert Y. Shapiro & Harpreet Mahajan, *Gender Differences in Policy Preferences: A Summary of Trends from the 1960s to the 1980s*, 50 *PUB. OPINION Q.* 42, 43 (1986) (examining how the “gender gap” has affected political attitudes and voting preferences over a twenty-year period).

86. See Shapiro & Mahajan, *supra* note 85, at 50 (detailing the different responses to policy-direction polls by men and women); Walker & Barrow, *supra* note 5, at 599 (examining gender differences in attitudes toward gun control and the death penalty).

87. Shapiro & Mahajan, *supra* note 85, at 45.

and adoption rights for same-sex couples.<sup>88</sup> In addition, Professor Kathleen Dolan finds that female respondents are more likely to indicate a willingness to vote for female candidates.<sup>89</sup> We also expect that public opinion toward state judge decisionmaking will vary according to respondent gender. Overall, we expect that female respondents should be more supportive of decisions that favor the female litigant (i.e., pro-woman position), and male respondents more supportive of decisions favoring the male litigant.<sup>90</sup> Additionally, it is likely that respondents will be more apt to attribute extralegal influences to judicial decisionmaking processes when the decision results in an outcome with which the respondent disagrees.<sup>91</sup> Therefore, if respondents are less likely to support decisions that favor the opposite gender (H4), respondents should also be more likely to find that gender and ideology influenced the case outcome in those instances (H5 and H6).

**H4:** *Male (female) respondents will be more likely to agree with the outcome favoring the male (female) litigant.*

**H5:** *Male (female) respondents will be more likely to perceive the judge as being influenced by gender when the outcome favors the female (male) litigant.*

**H6:** *Male (female) respondents will be more likely to perceive the judge as being influenced by ideology when the outcome favors the female (male) litigant.*

#### IV. RESEARCH DESIGN AND METHODS

To test our hypotheses, we developed and fielded a survey experiment to examine whether the gender of judges affects public perceptions of their decisions on a number of dimensions. The treatment in our experiment is introduced through a vignette mirroring a news article summarizing a fictitious state high court decision reversing the child custody decision of a family court judge. While hypothetical, the case in our vignette is based on the 2011 decision of

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88. Gregory M. Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, 66 PUB. OPINION Q. 40, 58 (2002).

89. Kathleen Dolan, *Gender Differences in Support for Women Candidates: Is There a Glass Ceiling in American Politics?*, 17 WOMEN & POL. 27, 35 (1997) [hereinafter Dolan, *Gender Differences*]; Kathleen Dolan, *Voting for Women in the "Year of the Woman,"* 42 AM. J. POL. SCI. 272, 273 (1998).

90. See Jackson, *supra* note 1, at 21 (summarizing the findings of a Florida task force that concluded that all-male appellate panels ruled for the father more often in child custody cases).

91. Alex Badas, *The Public's Motivated Response to Supreme Court Decision-Making*, 37 JUST. SYS. J. 318, 325 (2016); Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709, 719–20 (2011).

the South Carolina Court of Appeals in *Purser v. Owens*.<sup>92</sup> In *Purser*, a family court judge granted custody of a child to the father because the thirty-five-year-old mother had an abortion after becoming pregnant during a relationship with a nineteen-year-old. In reversing that decision, the South Carolina Court of Appeals held that the family court erred in considering the abortion as a matter of law based on South Carolina Supreme Court precedent<sup>93</sup> that held a parent's moral conduct was only relevant in custody cases when it directly impacted the child's welfare, and the abortion "had no direct or indirect effect on [the child] and therefore was not relevant to the custody determination."<sup>94</sup>

Our vignette differed from the original decision in four ways. The first change was to present the appellate decision as being from the Supreme Court of South Carolina instead of the South Carolina Court of Appeals. This was simply to minimize the required knowledge of the respondents regarding appellate process, since many individuals may not be aware that many states have an intermediate appellate court, but most will recognize that the highest court in most states is called the supreme court. The next two changes were to directly facilitate our examination of the impact of judge gender on perceptions of judicial decisionmaking. We randomly varied the gender of the family court judge and the supreme court justice who authored the majority opinion, signaling judge gender by using male and female names. Specifically, respondents receiving a female family court judge treatment were told the judge's name was Mary Williams, while those receiving a male family court judge treatment were told the judge's name was John Williams. Similarly, respondents receiving a female appellate court judge treatment were told the justice's name was Lisa Smith, while those receiving a male appellate court judge treatment were told the justice's name was David Smith.

The final change was to allow us to examine whether any gender-based perceptions of judicial decisionmaking were conditional on a case involving what is traditionally viewed as a "women's issue." To do this we randomly assigned a version of our vignette to some respondents that identified the issue upon which the original custody decision was based—and upon which the supreme court reversed—as the fact that the mother had an abortion (with no mention of the fact that the abortion was for a pregnancy resulting from a relationship with a nineteen-year-old) [hereinafter "the abortion treatment"]. The other respondents received a version of the vignette that identified the

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92. 722 S.E.2d 225 (S.C. Ct. App. 2011).

93. See *Davenport v. Davenport*, 220 S.E.2d 228, 231 (S.C. 1975).

94. *Purser*, 722 S.E.2d at 228.

relationship with the nineteen-year-old as the key custody issue (without referencing the abortion) [hereinafter “the boyfriend treatment”]. A 2 x 2 x 2 factorial design was used to create eight total versions of our vignette.<sup>95</sup>

After the respondents read the vignette, they were given a series of questions about the case outcome and the judges. The first set focused on whether the respondent agreed with the custody decision of the family court judge, the decision of the family court judge to consider the abortion/boyfriend, and the decision of the supreme court justice to overturn the family court judge’s decision. Responses were given on a five-point Likert scale ranging from ‘strongly agree’ to ‘strongly disagree.’

The second set of questions directly focused on perceptions of gender bias in judicial decisionmaking. First, respondents were asked whether they agreed that the gender of Judge Mary/John Williams influenced her/his custody decision. Then, respondents were asked a nearly identical question about their perceptions of gender influences in the decision of Justice Lisa/David Smith. For both questions, responses were again given on a five-point Likert scale ranging from ‘strongly agree’ to ‘strongly disagree.’

The third and fourth sets of questions were designed to look for more subtle hints of gender bias in individual perceptions of judicial decisionmaking. First, respondents were asked about whether they thought the decision of each judge was based more on legal factors or more on ideological factors. Responses to these items were on a five-point scale ranging from ‘based solely on personal ideology’ to ‘based solely on the law.’ Finally, respondents were asked how knowledgeable they felt each of the judges were about the law in general. Here, responses were given on a five-point scale ranging from ‘extremely knowledgeable’ to ‘not knowledgeable at all.’

In addition to these survey items, we also included a series of demographic questions to allow for cross-group comparisons with respect to respondent gender, religion, and political party affiliation. The final question on the survey asked respondents to recall who was granted custody by the family court in the vignette. This question was designed to ensure that respondents actually read the vignette and did not simply respond to the other items at random or based on a misunderstanding of the case.

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95. Appendix I contains the exact wording of all survey items and additional information on the survey design.

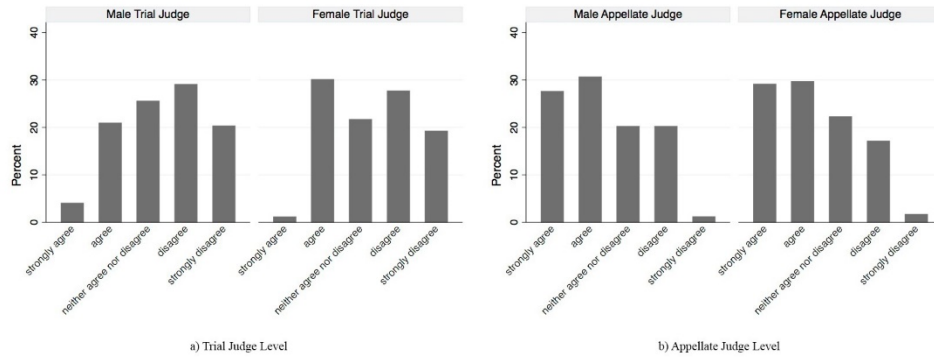
## V. RESULTS

The survey was conducted between September and November 2016 with undergraduate students enrolled in introductory political science courses at Georgia State University. A total of 484 students took the survey, but fifty-eight were dropped due to nonresponse on most of the survey items. Additionally, while most respondents (79.34%) correctly answered the recall question about the party granted custody, respondents providing incorrect answers to this item were also dropped prior to conducting any analyses of the data. This yielded a total of 338 valid responses.

### *A. Judge Gender and Perception of Judge Decisionmaking*

Examining the data from our survey results, we see that the gender of the judge appears to have little impact on respondent agreement with the custody decision at the trial or appellate level, in contrast to our first hypothesis. As Figure 1 shows, while there is significantly more agreement with the appellate judge's custody decision than the trial judge's, there appears to be little difference in the level of agreement at either the trial or appellate court level based solely on the gender of the judge. This is reinforced by examining the difference in mean responses, which is extremely small and not statistically significant (0.070,  $p = 0.288$  for the trial judge and 0.041,  $p = 0.365$  for the appellate judge). Moreover, this holds when the data is subset to look specifically at differences in respondent agreement with a male versus a female appellate judge when they are reviewing a male or female trial judge, as the difference in mean responses remains very small and again fails to achieve statistical significance (0.024,  $p = 0.226$  male trial judge and 0.110,  $p = 0.261$  female trial judge).

FIGURE 1: AGREEMENT WITH CUSTODY DECISION

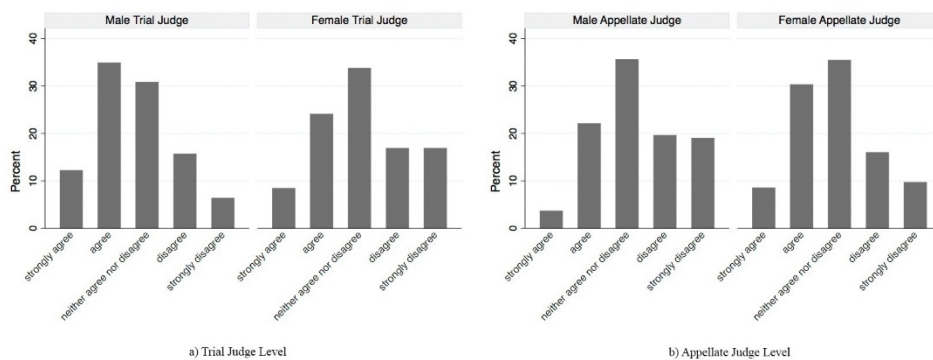


Some interesting differences among respondent perceptions did emerge in the data based solely on whether respondents received a treatment with a female judge or a male judge, providing mixed support for our second and third hypotheses. Most significantly, respondents were more likely to think that gender influenced the decisionmaking of the male trial judge than the female trial judge, as illustrated in Figure 2a. The visual differences are especially noticeable in the greater percentage of ‘agree’ responses among those receiving the male judge treatment and ‘strongly disagree’ responses among those receiving the female judge treatment. On average, these visual differences equate to a 0.405 ( $p = 0.001$ ) difference in mean responses based on the gender of the trial judge. Conversely, as Figure 2b shows, respondents were significantly more likely to think that gender influenced the female appellate judge than the male appellate judge. Almost perfectly mirroring the difference in the trial judge graphs, respondents receiving the female judge treatment responded with ‘agree’ about ten percentage points more frequently than those receiving the male judge treatment, while responding with ‘strongly disagree’ at a rate of nearly ten percentage points less. Unsurprisingly then, there is a nearly identical difference between mean responses (0.402,  $p = 0.001$ ). This difference was even greater when looking only at respondents who received the abortion treatment (0.537,  $p = 0.001$  trial judge and 0.609,  $p = 0.000$  appellate judge), but the difference was tiny and not statistically significant looking at the boyfriend treatment only.<sup>96</sup> This shows that, as expected, perceptions of gender influences in judicial decisionmaking

96. Discussion of results for the abortion treatment only or the boyfriend treatment only refers to analyses conducted looking purely at the subset of data from respondents who received that issue treatment.

are stronger when dealing with women's issues even if they are not the primary focus of the case. Additional gender dynamics may also be at play here, as there is a slightly larger difference (compared to the baseline above) in respondent perceptions that the female appellate judge was more influenced by gender when only looking at respondents whose treatments involved the review of a male trial judge (0.488,  $p = 0.002$ ) and slightly smaller difference (again compared to the baseline) when looking solely at treatments involving review of a female judge (0.301,  $p = 0.041$ ).

FIGURE 2: PERCEPTIONS OF GENDER INFLUENCES ON DECISION



In addition to perceptions of gender influences on decisionmaking, small differences show up with respect to perceptions of the influence of law and ideology on judicial decisionmaking. Curiously, while the influence of ideology on judicial decisionmaking is thought to be strongest at higher levels of the judicial hierarchy,<sup>97</sup> here respondents only perceive significant differences between male and female judges at the trial level.<sup>98</sup> Moreover, even these differences are relatively small and statistically significant at only marginal levels. Substantively, average responses indicate that respondents view the female trial judge as slightly more likely to rely on ideology than the male judge (0.131,  $p = 0.074$ ). When subset by issue, this result holds (and becomes slightly larger) when looking only at respondents receiving the

97. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 433 (2002) ("The fact remains that the ideology of the [J]ustices drives their decisions.").

98. Respondents' average response when asked about the influence of law and ideology was over a full point more toward the ideology side of the scale for the trial judge than the appellate judge ( $p = 0.000$ ).



boyfriend treatment (0.183,  $p = 0.068$ ), but it disappears when looking only at the abortion treatment.<sup>99</sup>

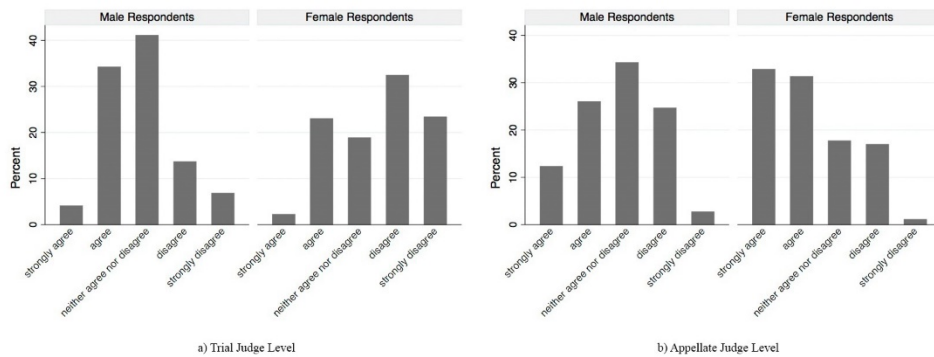
### *B. Influence of Respondent Gender on Perceptions*

While the overall differences in perceptions are interesting, looking at the influence of respondent demographic differences on their perceptions reveal finer grained insights into the factors influencing individual perceptions of bias in judicial decisionmaking. Figure 3 shows the influence of respondent gender on agreement with the custody decision at both the trial and appellate levels. At the trial level (Figure 3a), the graph for male respondents is strongly skewed to the agree side of the scale, reflecting an average agreement with the trial court judge's custody decision that is over half a point higher than female respondents (0.668,  $p = 0.000$ ). Additionally, these differences are quite similar when looking at the abortion treatment only (0.609,  $p = 0.003$ ) and boyfriend treatment only (0.559,  $p = 0.001$ ). Turning to Figure 3b, we see the opposite at the appellate level. Here it is female respondents whose responses are skewed to the left with over 30% providing a 'strongly agree' response and over 60% total falling into one of the two agreement categories. This equates to an average agreement of over half a point more than male respondents (0.572,  $p = 0.000$ ), and this is again true when looking separately at the abortion treatment only (0.488,  $p = 0.015$ ) and the boyfriend treatment only (0.549,  $p = 0.002$ ). All else equal, it appears quite clear that respondent gender highly influenced overall agreement with the custody decision in line with our fourth hypothesis. Male respondents consistently agreed more with custody decisions favoring the father and female respondents consistently agreed more with custody decisions favoring the mother regardless of the gender of the judge.

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99. In Appendix II, we explore differences in responses to additional measures of the case outcome (agreement with the trial judge's decision to consider the abortion/boyfriend) and perceptions of the judges (knowledge of the law). We also explore the impact of additional characteristics of respondents on their perceptions (religion and political party identification).

FIGURE 3: MALE VERSUS FEMALE DIFFERENCES IN AGREEMENT WITH CUSTODY DECISION



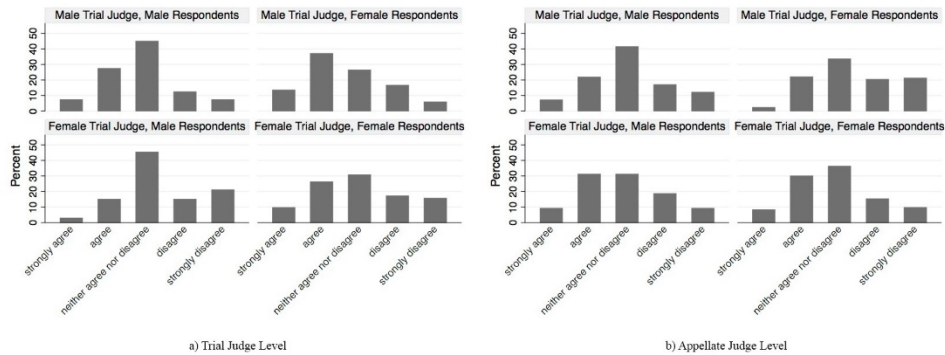
Moreover, these differences are further magnified when looking only at those respondents who received the male trial judge treatment. Here, male respondents are nearly a full point more likely to agree with the custody decision (0.954,  $p = 0.000$ ), and this difference balloons to over a full point when looking only at the abortion treatment (1.154,  $p = 0.000$ ). For the boyfriend treatment only, the difference is smaller, but still quite high at 0.649 ( $p = 0.002$ ). The differences are less pronounced between male and female respondents when looking at differences in agreement with the female trial judge's custody decision. Males still give higher average levels of agreement overall (0.345,  $p = 0.059$ ) and when looking at the boyfriend treatment only (0.461,  $p = 0.054$ ), but the differences are noticeably smaller and virtually disappear when looking only at the abortion treatment (0.050,  $p = 0.436$ ).

The same relationship between respondent gender and judge gender holds for perceptions of the appellate judge's custody decision. Mirroring the results above, the difference between female and male respondent agreement increases over the baseline when looking only at the male appellate judge (0.616,  $p = 0.001$ ), but is slightly attenuated when looking at only the female appellate judge (0.519,  $p = 0.009$ ). When broken down to the two issues, gender differences among respondent perceptions of the male and female appellate judges' custody decisions are again similar to those at the trial court level. When looking only at the abortion issue, female respondents are again significantly more likely to agree with the custody decision of both the male appellate judge (0.436,  $p = 0.050$ ) and the female appellate judge (0.481,  $p = 0.100$ ). Additionally, female respondents are more likely to agree with the decision of both the male appellate judge (0.718,  $p =$

0.006) and the female appellate judge (0.398,  $p = 0.058$ ) when looking only at the boyfriend treatment.

As respondent differences in agreement with the custody decision make clear, gender (of both the respondent and the judge) matters. But does this conditional effect influence perceptions of extralegal influences on judicial decisionmaking? When respondent perceptions of the influence of gender on the decisionmaking of the judges were broken down by respondent gender, differences between male and female respondents appear. As Figure 4 shows, these differences do not diverge substantively from the baseline finding and are partially consistent with our fifth hypothesis. Both male and female respondents continue to view the male trial judge as more influenced by his gender than the female trial judge; however, this is magnified when only looking at the responses of males. Figure 4a shows a much larger skew to the left for male respondents receiving the male trial judge treatment than for female respondents receiving the same treatment, driven largely by the fact that males provided an ‘agree’ response nearly 30% of the time compared to only about 15% for female respondents. This difference is reflected in a significantly higher difference in mean agreement that the male trial judge was influenced by gender for only male respondents (0.514,  $p = 0.020$ ) compared with only female respondents (0.386,  $p = 0.004$ ). With respect to perceptions of gender influences on the decision of the appellate court judge, the converse holds as shown in Figure 4b. While both male and female respondents view the female judge as more influenced by her gender as in the baseline, surprisingly, it is the female respondents who perceived a much larger difference between the female and male judge (0.480,  $p = 0.000$ ). For male respondents, there is a more negligible and statistically insignificant difference (0.174,  $p = 0.254$ ).

FIGURE 4: MALE VERSUS FEMALE DIFFERENCES IN PERCEPTIONS OF GENDER INFLUENCES ON DECISION



When subset by issue, these differences are virtually identical, with a few noteworthy exceptions. First, at the trial court level it appears that both male and female respondent perceptions of a large difference between the influence of gender on the male versus the female judge is being driven by the abortion treatment, as the difference is much lower and fails to achieve statistical significance when looking only at the boyfriend treatment (0.444,  $p = 0.111$  for males and 0.225,  $p = 0.140$  for females) than when looking only at the abortion treatment (0.592,  $p = 0.039$  for males and 0.535,  $p = 0.003$  for females). Second, while male respondents perceived a small, statistically insignificant difference in the impact of gender on male versus female appellate judges overall, when abortion cases are isolated, male respondent views mirror those of female respondents in finding the female judge to be more influenced by gender than her male counterpart, with a mean difference of nearly half a point (0.514,  $p = 0.091$ ). Third, even when subset by issue, female respondents consistently respond with higher levels of agreement when asked whether the female appellate judge was influenced by gender than when asked about the male judge. Yet, the magnitude of this difference strongly varies based on the issue treatment, with the difference being much larger for the abortion treatment (0.012,  $p = 0.407$ ) than the boyfriend treatment (0.305,  $p = 0.066$ ).

The most notable differences in perceptions of extralegal influences on judicial decisionmaking between male and female respondents relates to the influence of personal ideology on the trial judge's decisionmaking. In the full sample, we observed a slight difference in mean perceptions of the influence of ideology. When looking separately at male and female respondents, we see that this

small effect was driven almost entirely by the views of male respondents. While there are no differences in female respondents between the male and female trial judges with respect to their reliance on ideology (0.023,  $p = 0.000$ ), for male respondents the difference in mean responses is nearly half a point greater (i.e., more reliant on personal ideology than legal factors) for the female trial judge (0.489,  $p = 0.009$ ). When broken down by issue treatment, the mean difference in female respondents' perceptions of the use of ideological influences by the male and female trial judges remains statistically indistinguishable from zero (0.009,  $p = 0.524$  abortion and 0.056,  $p = 0.340$  boyfriend). Large differences, however, remain across both treatments for males (0.433,  $p = 0.093$  abortion and 0.528,  $p = 0.026$  boyfriend). As with the full sample, when broken down by respondent gender, there remains no significant difference in perceptions of ideological influences for the appellate judge.

### CONCLUSION

The results of our survey experiment provide us with some cautious optimism regarding gender stereotypes and their influence (or lack thereof) on public assessment of judicial decisionmaking. Our first set of hypotheses (H1–H3) predicted that respondents would express greater levels of overall agreement with the decisions of a male judge, and that they would be more likely to attribute extralegal influences to the decision of a female judge. The data provided minimal support for this, as respondent agreement with the decisions was no different when a male judge decided the case versus a female one. Moreover, while respondents were more likely to agree that a female judge's decision was influenced by extralegal factors in some situations, in others they were more likely to agree that a male judge's decision was similarly influenced. This offers some evidence that the assignment of traditional gender stereotypes to the role of judge may be decaying over time, as respondents appeared to care less about the gender of the judge and more about the outcome of the case. This is exemplified by the results shown in Figure 2 where the male trial judge was viewed as being more influenced by his gender, while the female appellate judge was viewed as being more influenced by her gender. This likely reflects a perception by respondents that gender was influencing judicial decisionmaking in this case when the judge's gender corresponded with the gender of the winning litigant, rather than a broad perception that female judges are more influenced by extralegal factors overall.

So, what was driving respondent perceptions if not the gender of the judge? Our results show that on nearly every dimension we asked

about, responses tended to reflect a correspondence between respondents' own gender and the gender of the *litigant* in the case, buttressing our conclusion that agreement with the case outcome rather than gender stereotypes provides the strongest influence on respondents' views. Regardless of whether the particular survey item was asking solely about agreement with the case outcome or about perceptions of extralegal influences on the judge's decision, responses were almost uniformly more positive (or anti-extralegal influence) when the gender of the litigant who benefited from the decision matched the respondent's own gender. For example, in the treatments where a male judge granted custody to the mother, male respondents were *less* likely than female respondents to agree with the outcome of the case and *more* likely to attribute the decision to gender and ideological influences. In other words, gender matters, but it mattered in ways that were heavily context dependent and less based on assigning traditional gender stereotypes to judges.

While the focus of this study is on perceptions of bias based on gender stereotypes, this last finding offers broader implications about public perceptions of judicial decisionmaking more generally. In our study, respondents overwhelmingly attributed extralegal influences to the judge's decision when the outcome favored the litigant of the opposite gender. We conjecture that this is likely generalizable to public perceptions of judicial decisionmaking more broadly with individuals showing a higher level of support for the premise that a judge decided a case based on legal factors when that individual agreed with the outcome.<sup>100</sup>

Broadly, our findings reflect previous research that illustrates the influence of judge gender on public assessment of court outcomes is conditional on a myriad of case specific and environmental factors. While differences in overall levels of public support for court decisions based on judge gender do not always emerge, scholars find that factors such as regional differences among the public,<sup>101</sup> and whether the

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100. See, e.g., Badas, *supra* note 91, at 325 (supporting the notion that the outcome of a judicial decision affects an individual's perception of how the judge decided the case).

101. See Boddery et al., *supra* note 57, at 22–24 (discussing the effect regional differences have on responses to female- and male-authored court decisions). Professors Scott Boddery, Laura Moyer, and Jeffrey Yates examine the way in which attribution of majority opinion authorship affects how the public responds to a U.S. Supreme Court decision in a Fourth Amendment search and seizure case. Initially, they find no statistically significant difference in levels of support for majority opinions attributed to a male author (Justice Anthony Kennedy) versus a female author (Justice Sandra Day O'Connor). *Id.* at 23. However, Boddery et al. find lower levels of support when the opinion is attributed to a female author (when compared to an opinion attributed to the Court) among Southern survey respondents. *Id.* at 24. Support for the female-authored majority opinion was actually higher (when compared to a male-authored majority opinion) among non-

female judge rules in a “substantively representative manner”<sup>102</sup> (i.e., pro-woman position) can produce divergent agreement and responses to court decisions. Our results also mirror existing research that finds clear differences in the ways in which men and women respond to political officials and gender differences in public opinion more broadly.<sup>103</sup>

A few caveats must be taken into account. First, our survey sample was limited to undergraduate college students. While some scholars have provided evidence that the widespread criticism of the “college sophomore problem” is exaggerated,<sup>104</sup> it is possible that changes in the use of gender stereotypes may reflect a change in values in younger cohorts rather than a society-wide shift in such views. Yet, even if we assume a lack of generalizability to a population of a broader age range, this still provides evidence that traditional views on gender roles are evolving. Second, it is unclear if these results would hold in a case that did not have a clear female and male litigant role. While we speculate that these results would be generalizable to cases involving issues such as gender discrimination, sexual harassment, and abortion rights, we are unsure how they would translate to cases where the gender(s) of the litigant(s) was not apropos to the outcome. This is a question that will hopefully be addressed by future research.

Although women are still underrepresented across nearly all levels of government in the United States, and although gender gaps in public opinion are still present, over time both men and women have exhibited an increased willingness to support female candidates for various political offices.<sup>105</sup> While an abundance of studies have examined how the public responds to female candidates and officials in

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Southern survey respondents. *Id.* Boddery et al. attribute this result to the South’s “traditionalistic political culture,” which is less favorable for female electoral candidates. *Id.* at 22.

102. See Nelson, *supra* note 9, at 258 (finding that female judges authoring pro-woman decisions are viewed as more empathetic and less knowledgeable than their male counterparts).

103. See, e.g., PAGE & SHAPIRO, *supra* note 85; Dolan, *Gender Differences*, *supra* note 89; Dolan, *supra* note 65; Herek, *supra* note 88; Lawless, *supra* note 64; Jennifer Wolak, *Candidate Gender and the Political Engagement of Women and Men*, 43 AM. POL. RES. 872 (2015).

104. The “college sophomore problem” refers to a view that surveys of college students are not generalizable to the broader population. Recent research has provided evidence that this criticism may be vastly overstated. See, e.g., James N. Druckman & Cindy D. Kam, *Students as Experimental Participants: A Defense of the “Narrow Data Base,”* in CAMBRIDGE HANDBOOK OF EXPERIMENTAL POLITICAL SCIENCE 65 (James N. Druckman et al. eds., 2011).

105. See, e.g., Anna Brown, *The Data on Women Leaders*, PEW RES. CTR. (Mar. 17, 2017), <http://www.pewsocialtrends.org/2017/03/17/the-data-on-women-leaders/> [<https://perma.cc/ZK3V-H9R6>] (documenting the increased representation of women in leadership positions over time); Clare Malone, *From 1937 to Hillary Clinton, How Americans Have Felt About a Woman President*, FIVETHIRTYEIGHT (June 9, 2016, 1:23 PM), <https://fivethirtyeight.com/features/from-1937-to-hillary-clinton-how-americans-have-felt-about-a-female-president/> [<https://perma.cc/9TZQ-S4FM>].

executive and legislative positions, there is a surprising dearth of research examining public response to judge gender and decisionmaking, particularly at the state level. As more women join the state and federal judiciary, the likelihood of encountering female judges and their decisions becomes much more common. Although existing research illustrates that female judges are subject to systematic biases in terms of their professional evaluation, our analysis provides modest evidence that gender-based assessment of state judges does not necessarily dominate public support and approval of judicial decisionmaking.



## APPENDIX I: VIGNETTE AND SURVEY ITEMS

*A. Vignette*

All participants were given the following vignette. The first name of the trial court judge, the first name of the family court judge, and the issue (abortion/boyfriend) were each randomly assigned according to a 2 x 2 x 2 factorial design.

On Monday, in an opinion written by Justice (Lisa/David) Smith, the South Carolina Supreme Court reversed the decision of a family court judge, (Mary/John) Williams, granting custody to the father of an eight-year-old child. The South Carolina Supreme Court held that the family court judge had mistakenly considered the thirty-five-year-old mother's (abortion/past relationship with a nineteen-year-old boyfriend) as a sign of irresponsible decisionmaking.

In granting custody to the father, Judge (Mary/John) Williams relied on factors (she/he) considered as evidence of a lack of judgment by the mother. Most important was the judge's consideration of the mother's abortion. In Judge (Mary/John) Williams's order, (she/he) wrote "I'm concerned about the abortion. That was an irresponsible decision. I am concerned about the environment."

In reversing the decision, the South Carolina Supreme Court held this to be an inappropriate consideration. In Justice (Lisa/David) Smith's majority opinion, (she/he) held that a parent's personal behavior is only relevant when it has an effect on the child. Finding that her abortion had no direct or indirect effect on her child, (she/he) ruled that it was inappropriate for the family court to have considered it.

*B. Survey Items*

After reading the vignette, participants were given questions about their support for the decisions, their views on the role of law and ideology in the judges' decisions, their views on the role of gender as an influence on the judges' decisions, and their views on the judges' level of legal knowledge. The exact wording of the survey items is presented below. The question categories did not appear in the survey given to respondents, but are presented here for convenience.

- Support for Decision
  - Thinking about the court decisions in the news bulletin, how much would you say you agree or disagree with Judge (Mary/John) Williams' decision to award custody to the father?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree
- Thinking about the court decisions in the news bulletin, how much would you say you agree or disagree with Judge (Mary/John) Williams' decision to consider the mother's (prior abortion/past relationship with a nineteen-year-old) in her decision?
  - Strongly agree
  - Somewhat agree
  - Neither agree nor disagree
  - Somewhat disagree
  - Strongly disagree
- Thinking about the court decisions in the news bulletin, how much would you say you agree or disagree with Justice (Lisa/David) Smith's majority opinion overturning the custody decision of Judge (Mary/John) Williams?
  - Strongly agree
  - Somewhat agree
  - Neither agree nor disagree
  - Somewhat disagree
  - Strongly disagree
- Role of Law and Ideology
  - Some people feel that judges base their rulings primarily on their personal preference and ideology. Others argue that judges primarily rely on the law when making their court rulings. To what extent do you think Judge (Mary/John) Williams based (her/his) custody decision on (her/his) ideology and to what extent to do you think Judge Williams based (her/his) custody decision on the law?
    - Decision was only based on personal ideology
    - Decision was mostly based on personal ideology
    - Decision was based equally on personal ideology and the law
    - Decision was mostly based on the law
    - Decision was only based on the law
  - Some people feel that judges base their rulings primarily on their personal preference and ideology. Others argue

that judges primarily rely on the law when making their court rulings. To what extent do you think Justice (Lisa/David) Smith, who authored the majority opinion overturning Judge (Mary/John) Williams' custody decision, based (her/his) decision on (her/his) ideology and to what extent do you think Justice Smith based (her/his) decision on the law?

- Decision was only based on personal ideology
- Decision was mostly based on personal ideology
- Decision was based equally on personal ideology and the law
- Decision was mostly based on the law
- Decision was only based on the law

➤ Role of Gender

- Thinking about the court decisions in the news bulletin, how much would you say you agree or disagree that the gender of Judge (Mary/John) Williams influenced (her/his) custody decision?
  - Strongly agree
  - Somewhat agree
  - Neither agree nor disagree
  - Somewhat disagree
  - Strongly disagree
- Thinking about the court decisions in the news bulletin, how much would you say you agree or disagree that the gender of Justice (Lisa/David) Smith influenced (her/his) majority opinion overturning Judge (Mary/John) Williams' decision?
  - Strongly agree
  - Somewhat agree
  - Neither agree nor disagree
  - Somewhat disagree
  - Strongly disagree

➤ Legal Knowledge

- Thinking about the court decisions in the news bulletin, how knowledgeable do you think Judge (Mary/John) Williams is about the law in general?
  - Extremely knowledgeable
  - Very knowledgeable
  - Moderately knowledgeable
  - Slightly knowledgeable

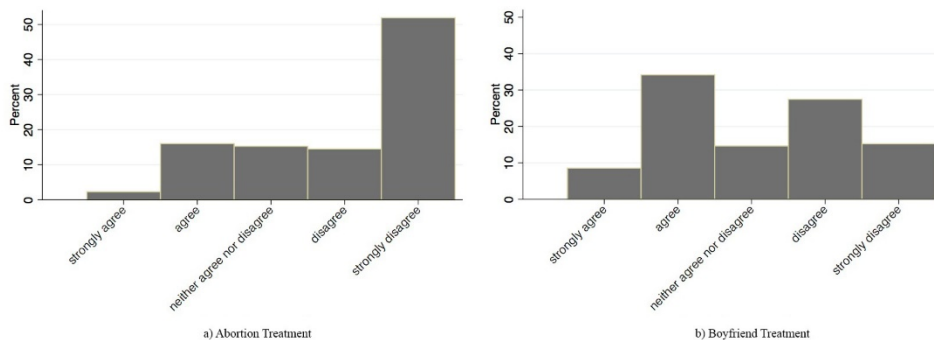
- Not knowledgeable at all
- Thinking about the court decisions in the news bulletin, how knowledgeable do you think Justice (Lisa/David) Smith, who wrote the majority opinion overturning Judge (Mary/John) Williams, is about the law in general?
  - Extremely knowledgeable
  - Very knowledgeable
  - Moderately knowledgeable
  - Slightly knowledgeable
  - Not knowledgeable at all

## APPENDIX II: ADDITIONAL ANALYSES

*A. Agreement with Consideration of Abortion/Boyfriend*

Overall, respondents were much less likely to agree with the trial judge's decision to consider the prior abortion than the prior relationship with the nineteen-year-old boyfriend. As Figure 1A shows, over 50% of respondents strongly disagreed with the trial judge's consideration of the mother's prior abortion, and over 65% either disagreed or strongly disagreed. Conversely, respondents' agreement with the trial judge's consideration of the boyfriend was more heterogeneous, as approximately 42% of respondents selected one of the two disagree categories while another 42% either answered with agree or strongly agree.

FIGURE 1A: DIFFERENCES IN AGREEMENT IN SUPPORT FOR CONSIDERING ABORTION/BOYFRIEND



Interestingly, when these responses are broken down, we see that neither judge gender nor respondent gender significantly impacts respondent agreement with the trial judge's decision to consider the mother's prior abortion or prior relationship with the nineteen-year-old boyfriend. Mean responses for the level of agreement with the decision to consider the abortion are almost the same when comparing groups that received the male versus the female trial judge treatment (0.139,  $p = 0.551$ ). Similarly, agreement with the decision to consider the boyfriend elicited similar mean responses regardless of whether the respondents were in the male or female trial judge treatment group (0.053,  $p = 0.788$ ). Male respondents are slightly more likely to agree with the judge's consideration of both the abortion and boyfriend, but the differences are small and not statistically significant (0.300,  $p =$

0.301 for abortion treatment and 0.218,  $p = 0.332$  for boyfriend treatment).

While gender does not appear to impact agreement with the trial judge's consideration of the mother's prior abortion or boyfriend, both respondent party identification and self-identification as an evangelical or "born-again" Christian do. Republican respondents' mean agreement was nearly a full point lower (more to the agree side of the scale) than Democrats with respect to the consideration of the prior abortion (0.847,  $p = 0.003$ ), and well over half a point lower with respect to consideration of the boyfriend (0.635,  $p = 0.029$ ). Likewise, evangelicals were much more supporting of the decision to consider the abortion (0.709,  $p = 0.001$ ). However, there was no discernable difference between evangelicals and non-evangelicals with respect to consideration of the boyfriend (0.049,  $p = 0.592$ ).

### *B. Perceptions of Judge Knowledge*

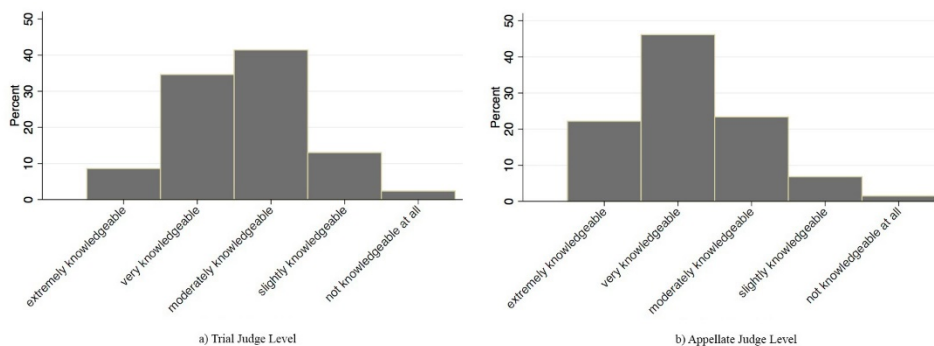
While not directly related to our primary hypotheses, we also included questions about perceptions of judge knowledge in our survey experiment to see if respondents found female judges to be less knowledgeable than their male counterparts. Consistent with other research,<sup>106</sup> we find little overall difference in respondent perceptions of judge knowledge based solely on the judge's gender. Not only do we not see respondents perceiving female judges as less knowledgeable, but the mean assessment of judge knowledge is actually slightly higher for the female judge than the male judge at both the trial (0.077,  $p = 0.427$ ) and appellate court levels (0.150,  $p = 0.130$ ), although neither is statistically significant. Moreover, differences in perceptions of knowledge based on judge gender remain statistically indistinguishable from zero when looking only at male or female respondents. Moreover, for the most part, there were no significant differences in perceptions of knowledge when examining those respondents receiving the abortion treatment only or the boyfriend treatment only. The single exception to this observation was that respondents receiving the abortion treatment perceive the female appellate judge to be nearly a quarter of a point more knowledgeable on our five-point scale of judge knowledge, a difference that is statistically significant at marginal levels (0.227,  $p = 0.089$ ).

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106. See Nelson, *supra* note 9, at 258, 259 (finding that "the data does not suggest a direct connection between the gender of the authoring judge and measures of legitimacy," while noting that female judges are perceived as less knowledgeable than their male counterparts in certain circumstances).

Interestingly, there also appears to be little relationship between respondents' agreement with the outcome of the case and their opinion of the judge's level of legal knowledge. The correlation between respondent agreement with the custody decision and perception of judge knowledge is surprisingly low for both the trial ( $r = 0.250$ ) and appellate levels ( $r = 0.278$ ). The correlation between agreement with the custody decision and perceived knowledge never rises above 0.4, even when looking solely at the responses of male respondents, female respondents, those getting only the male judge treatment, those getting only the female judge treatment, those getting only the abortion treatment, or those getting only the boyfriend treatment. Only once does the correlation even rise above 0.35 (appellate level, abortion treatment only,  $r = 0.395$ ).

FIGURE 2A: DIFFERENCES IN PERCEPTION OF KNOWLEDGE



It is worth noting that respondents do consistently appear to view the appellate judge as being more knowledgeable than the trial judge. As Figure 2A shows, only slightly over 40% of respondents rated the trial judge as being extremely knowledgeable or very knowledgeable about the law, while nearly 70% classified the appellate judge into one of those categories. This amounts to a nearly half a point difference in the mean knowledgeability rating ( $0.467$ ,  $p = 0.000$ ), and this difference remains relatively large and statistically significant when the data are broken down by respondent gender, judge gender, and abortion/boyfriend treatments.

### *C. Influence of Respondent Religion on Perceptions*

In addition to gender, we felt it likely that other respondent characteristics would influence agreement with case outcomes and perceptions of extralegal influences on judicial decisionmaking. Given

that abortion was a core issue in this case, respondent religion—or more specifically, self-identification as an evangelical or “born-again” Christian—was likely to have a strong conditional influence on respondent attitudes. As expected, there is a clear division between evangelicals and non-evangelicals regarding support for the custody decision at both the trial and appellate level, and these differences are highly conditional on the issue treatment. At the trial level, evangelicals are significantly more likely to agree with the trial judge’s decision to grant custody to the father when given the abortion treatment (0.411,  $p = 0.016$ ), but when given the boyfriend treatment there is essentially no difference between evangelicals and non-evangelicals (0.093,  $p = 0.298$ ). Additionally, this effect appears to be further conditioned on the gender of the judge. Looking solely at the abortion treatment, the difference in mean agreement between evangelicals and non-evangelicals disappears when isolating those receiving the male judge treatment (0.277,  $p = 0.177$ ), but appears stronger when looking only at those receiving the female judge treatment (0.511,  $p = 0.019$ ). There remains no significant difference in mean responses between evangelicals and non-evangelicals receiving the boyfriend treatment when looking separately at the male and female judge.

At the appellate level the findings are nearly identical. Evangelicals report significantly lower average agreement with the appellate judge’s custody decision than non-evangelicals when given the abortion treatment (0.494,  $p = 0.005$ ), and this effect is magnified when looking only at those receiving the female appellate judge treatment (0.687,  $p = 0.006$ ). However, differences between evangelical and non-evangelical support for the appellate judge’s custody decision are also statistically indistinguishable from zero when given the boyfriend treatment (0.001,  $p = 0.499$ ) or when looking only at those receiving the male judge treatment, even when isolating abortion cases (0.311,  $p = 0.131$ ).

Turning to examine differences between evangelicals and non-evangelicals with respect to perceptions of extralegal influences on judicial decisionmaking, a few surprising observations appear. Looking first at perceptions of gender influence on decisionmaking, there is no significant difference between evangelicals and non-evangelicals with respect to their belief as to whether gender influenced the decisionmaking of the trial judge, but there are notable differences with respect to the appellate judge. Surprisingly, evangelicals are overall slightly less likely to think that gender influenced the appellate judge’s decisionmaking across all treatments (0.219,  $p = 0.053$ ). Breaking this down further, the average difference between evangelicals and non-



evangelicals grows to nearly half a point when looking only at the male judge treatment (0.454,  $p = 0.013$ ), but disappears when looking at the female judge treatment (0.095,  $p = 0.296$ ). This difference is relatively consistent when the data are further subset by issue area, with evangelicals viewing the male judge as less likely to rely on gender in his decisionmaking than non-evangelicals for either the abortion (0.413,  $p = 0.074$ ) or the boyfriend treatment (0.504,  $p = 0.042$ ).

Looking at perceptions of ideological influences, we see some similar patterns to those of gender effects. Evangelicals and non-evangelicals again differ in their perceptions in systematic ways, but, surprisingly, here it is also judge gender rather than abortion/boyfriend treatment on which those differences are conditioned. Unlike with perceptions of gender influences, here the differences between evangelicals and non-evangelicals appear only at the trial judge level and not at the appellate judge level. While there is a small difference in mean responses across all treatments, with evangelicals more likely to view the judge as relying upon the law than ideology (0.177,  $p = 0.038$ ), when broken down by judge gender, this difference disappears for those respondents receiving the male judge treatment (0.122,  $p = 0.207$ ), but increases slightly for those receiving the female judge treatment (0.242,  $p = 0.035$ ). Interestingly, while only marginally significant, this latter difference remains surprisingly consistent looking separately at the abortion (0.212,  $p = 0.103$ ) and boyfriend treatments (0.269,  $p = 0.096$ ).

#### *D. Influence of Respondent Party Identification on Perceptions*

Much like religion and gender, clear differences emerged in respondent answers based on their party identification at the trial level.<sup>107</sup> In terms of agreement with the case outcome, Republican respondents were predictably more supportive of the grant of custody to the father (0.401,  $p = 0.017$ ). This difference remained at about the same level when looking separately at those receiving the boyfriend (0.384,  $p = 0.064$ ) and abortion treatments (0.485,  $p = 0.025$ ), although the latter difference was somewhat stronger. These differences are also consistent when looking separately at respondents receiving the male judge treatment (0.515,  $p = 0.031$ ) versus the female judge treatment (0.288,  $p = 0.134$ ); however, for the latter the difference is smaller and fails to achieve statistical significance.

In contrast, differences between Democratic and Republican respondents were somewhat less pronounced at the appellate level.

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107. Due to the small number of Republicans in our sample, we are more cautious in drawing strong inferences from these results.

Here, Democrats were unsurprisingly more supportive of the appellate court's custody decision; however, the difference in mean support was much smaller than at the trial level and not statistically significant (0.227,  $p = 0.111$ ). This lack of a significant difference in agreement held when subsetting by issue treatment as well. However, when looking only at those respondents receiving the female judge treatment, the difference became quite substantial (0.673,  $p = 0.008$ ), suggesting a conditional relationship between judge gender and party identification that we cannot fully explore due to data limitations related to the small number of Republicans in our sample.

Given this suggestion of a relationship between respondent agreement with the custody decision and judge gender, it seems plausible that Republican respondents may also think that gender was a major influence on the decisionmaking of the judges. Interestingly, the opposite appears to be true. Democratic respondents were significantly more likely to think gender influenced the trial judge's decisionmaking (0.649,  $p = 0.000$ ). Moreover, this difference was consistently strong when breaking down the data to look only at respondents receiving the male judge treatment (0.591,  $p = 0.010$ ), the female judge treatment (0.689,  $p = 0.001$ ), the abortion treatment (0.778,  $p = 0.003$ ), or the boyfriend treatment (0.556,  $p = 0.015$ ). While these findings are not completely counterintuitive, as Democrats could simply be blaming extralegal influences for an outcome they did not like, the fact that Democrats continue to see gender as an influence on decisionmaking at a higher level than Republicans when we turn to the appellate level is more difficult to explain. While only achieving statistical significance at marginal levels, a nontrivial difference can be seen between Democratic and Republican respondents' perceptions as to whether the appellate judge was influenced by his or her gender (0.284,  $p = 0.066$ ). Additionally, this difference is even larger when looking solely at those respondents receiving the male judge treatment (0.566,  $p = 0.013$ ) or the abortion treatment (0.414,  $p = 0.052$ ). However, the difference is statistically indistinguishable from zero for the female judge and boyfriend treatments.