

# Chivalry, Masculinity, and the Importance of Maleness to Judicial Decision Making\*

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## Abstract

Social science research on gender in the legal system has largely focused on the woman as the “other.” This research has looked for ways in which women judge or are judged differently from the norm. The results of this line of research have been mixed. Male-centered theories of masculinity and chivalry provide promising tools help researchers understand the contribution that maleness has on outcomes in the legal system. Immigration appeals provide an ideal test of these theories, which predict that male judges will be harder on male immigrants and easier on female litigants than will female judges. In this paper, we implement a research design that takes seriously both female-centric and male-centric explanations of decision outcomes. Using an original database of immigration appeals in the U.S. Courts of Appeal, we find evidence to support the research of maleness on its own terms. We find that elements of chivalry and masculinity theory both operate to frame the decisions made by male judges. The introduction of women on the panel of judges is associated with significant changes in the relative success of male and female petitioners, but not in a way that is consistent with theories of women judges as representatives.

## 1 Introduction

In the judicial decision making literature, theories abound about how women judges are (or are not) different from men. Our theories tend to normalize male behavior, using them as a baseline against which to compare the “other.” In this paper, we argue for a reconsideration of this habit. If we as a discipline believe that it is a judge’s gender that mitigates his or her behavior in gender-based situations, it is critical to consider masculinity as an alternative or supplement to femininity as the intervening variable.

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We begin by reviewing the literature on gender-based differences in judicial decision making. In the section that follows, we present a series of theories that are male-centered. These theories present substantive hypotheses about how being *male* can influence decision making. To do this, we draw heavily on an interdisciplinary literature about maleness and masculinity.

As a concrete example of the importance of addressing maleness directly, we provide a case study of immigration appeals in the U.S. Courts of Appeals. Here, we show how masculinity and chivalry theories each contribute to our understanding of how gender matters in framing the choices judges make.

## 2 The Female-Centered Literature

Social scientists have long studied the effect of gender in the courts. Research abounds on the role of female judges in the courtroom. A substantial amount of research has also investigated the fate of female litigants, although most of these studies have focused solely on women as criminal defendants. However, our collective approach to the topic has been notably one-sided. As a discipline, we have largely accepted the idea of female judge and female litigant as the “other”, or the category to be contrasted with the “normal,” male judge or litigant.

### 2.1 Women as Judges

The main accounts of the effects of sex on judging are all female-centered, in that they compare the behavior female judges to the “normal” judge. They try to identify what qualities or characteristics of female judges make them decide cases differently from male judges (individual effects) or influence their male colleagues to behave differently than they otherwise would (panel effects). There are a number of different female-centric theories about sex differences in judging behavior, but they have largely yielded mixed results (Boyd, Epstein, and Martin 2010).

The “different voice” account posits that female judges bring a feminine perspective to the bench based on a distinct worldview and a different relationship to society, often framed as a communitarian versus individualistic perspective (Gilligan 1982; Sherry 1986; Davis 1992; Steffensmeier and Herbert 1999). This theory predicts that individual female judges will decide cases differently from male judges across a range of legal questions, be they obviously gendered or not.

The representational theory provides that female judges serve as representatives of their class and will work towards its protection (Pitkin 1967; Allen and Wall 1993; Martin and Pyle 2004; Tobias 1990). This theory predicts individual effects in cases involving legal issues that have policy

consequences of special relevance to women, such as abortion, affirmative action, sex discrimination, and sexual harassment. Allen and Wall (1993) found evidence of the representational role in their observation of pro-woman decisional behavior by female judges in cases involving sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and family law cases involving parent-child relationships. This theory would predict that women judges, in these gendered courtroom situations, would be disproportionately inclined to find in favor of women litigants.

The informational account maintains that female judges possess unique and valuable information based on their own professional experiences (Cameron and Cummings 2003; Gryski, Main, and Dixon 1986; Peresie 2005). Under this theory, we would expect individual and panel effects in areas where female judges are likely to have experience, such as employment discrimination based on sex. Their votes on the bench would be informed by their experience in these areas, and their presence in collegial deliberations would provide their male colleagues with insights they would otherwise lack. A study of thirteen areas of law by Boyd, Epstein, and Martin (2010) found evidence of sex effects only in sex discrimination cases, providing support for the informational account. These results are consistent with the findings of several other studies (e.g. Crowe 1999; Davis, Haire, and Songer 1993; Peresie 2005).

Boyd, Epstein, and Martin (2010) find that only about a third of their sample of thirty systematic, multivariate analyses claim to find clear sex differences in judicial behavior. To explain this difference, many researchers offer the organizational or minimalist account, which argues that similar socialization and the decision making constraints that judges face should mitigate any measurable sex-based differences in judicial behavior (e.g. Kritzer and Uhlman 1977; Sisk, Heise, and Morriss 1998; Steffensmeier and Herbert 1999). The organizational frame may explain why women judges do not seem to be speaking in a different voice; perhaps this voice has been diluted through the process of ascending to the bench (Davis 1993).

## 2.2 Women as Litigants

Judges, of course, must arrive at decisions using imperfect information. Although attorneys strive to highlight the relevant evidence and judges strive to make sense of it, this information is necessarily an abstraction from the full factual and contextual landscape of any given case. As such, judges probably rely on stereotypes—usually implicit ones—about defendant characteristics to help fill in the blanks. This is a merger of “the structural perspective of rational decisionmaking... with the social-psychological perspective of causal attribution” (Albonetti 1997: 797).

The mechanism by which litigant gender affects court outcomes is a complicated one. We do see some evidence of gender-of-litigant effects in the judicial decision making literature. Most of the evidence comes from criminal trial courts. Some shows that women defendants are convicted less frequently (Spohn, Gruhl, and Welch 1987) and sentenced more leniently (Albonetti 1997; Mustard 2001; Spohn, Gruhl, and Welch 1987) than men. They may get preferential treatment from prosecutors, too; charges against them may be dropped more frequently, keeping them out of the trial court process in the first place (Spohn, Gruhl, and Welch 1987).

Other research has called these findings into question. The gender variable in the models may be acting as a proxy measure for other relevant covariates of conviction and sentencing, such that including more direct measures of the omitted variables may cause the gender disparities to drop out (Kruttschnitt and Green 1984; Steffensmeier, Kramer, and Streifel 1993). Because women tend to have stronger and more demonstrable community ties, heavier family responsibilities, and less serious criminal records, they also tend to reap the benefits of these facially gender neutral mitigating factors. But other research shows that men may be more likely to be sent to prison than women defendants “even when accounting for offender characteristics such as the presence of dependents or college attendance” (Etienne 2010: 75).

It is difficult, of course, to parse the sources of the gender-based discrepancies in criminal procedure outcomes. Aside from the average gender-based differences in aggravating and mitigating factors, lenient sentencing of women litigants may result from a collective sense on the part of the prosecutor or judge that women are naturally less culpable (Gertner 2002). Mothers and pregnant women seem to get even more lenient treatment, even after controlling for the facially neutral mitigating factors applied as part of the sentencing process (Berberian 1999).

### **2.3 The Limits of the Female-Centric Approach**

All of this assumes, of course, that it is some set of characteristics of the female judges or litigants that must be driving whatever systematic differences we do see. What is missing from these accounts should be obvious by now. None of these describes characteristics or qualities of *male* judges that might affect their judgments. None of these take seriously that the maleness of a litigant may interact with the characteristics of male judges to determine his fate in court.

This omission makes it appear that we assume male judges’ decisions are completely unaffected by sex—their own or that of the litigants and colleagues in their courtroom. Using all-male judge panels as the control group in studies of sex effects on collegial courts simply reinforces this notion.

Masculinity often remains invisible and “unmarked” in the same way that whiteness and heterosexuality tend to go unnoticed (Reeser 2009). Perhaps it is masculinity, not femininity, that influences the way that judges respond to particular gendered situations in the courtroom.

### 3 Bringing Masculinity to the Table

In this article, we consider the possibility characteristics of male judges may influence the way they approach their decision making tasks. Over the course of the last decade, researchers across a number of disciplines have begun to engage the idea that masculinity is an important way of understanding social behavior. Mirroring the helpful table presented by Boyd, Epstein, and Martin (2010), we present a summary table of the major male-centered theories as they might apply to judicial decision making (see Table 1).

[Table 1 about here.]

#### 3.1 Chivalry

The first of these theoretical frames is *chivalry*. This perspective begins with the idea that men see women as being in need of protection. Because of this, men ought to protect and defend women, minimizing their pain and suffering. This concept has been evoked to explain why women tend to receive more lenient sentences in criminal cases (Nagel and Weitzman 1971; Pope 1975; Kruttschnitt and Green 1984; Daly and Bordt 1995; Steffensmeier, Kramer, and Streifel 1993). However, the chivalry thesis specifically predicts that male judges will be more lenient with female defendants than they will with male defendants, while female judges will treat male and female defendants the same (Kritzer and Uhlman 1977). Kritzer and Uhlman (1977) found no support for this chivalry thesis because they found that female judges were also more lenient with female defendants. The research showing that female defendants are convicted less frequently (Spohn, Gruhl, and Welch 1987) and are sentenced more leniently (Albonetti 1997) have been called into question by others, who have argued that the binary sex variable in these studies might be acting as a proxy measure for other relevant covariates of conviction and sentencing; including more direct measures of these omitted variables may cause sex effects to fall away (Kruttschnitt and Green 1984; Steffensmeier, Kramer, and Streifel 1993).

A modified version of the chivalry thesis is called *selective chivalry*. This frame argues that chivalry is conditioned upon adherence to traditional gender roles. Under this theory, men protect women who conform to traditional gender stereotypes, but not women who violate their assigned

gender roles. For example, the theory of selective chivalry predicts that male judges will treat female defendants more leniently than male defendants when the offense is consistent with stereotypical female gender roles, like shoplifting, check forgery, or drugs; male judges will not show such leniency when female defendants commit “masculine” offenses, like violent offenses (Crew 1991; Farnworth and Teske 1995; Spohn 1999; Rodriguez, Curry, and Lee 2006). Some scholars argue that male judges will be harsher on stereotype violating women offenders than they would be if the offender had been male (Boritch 1992; Chesney-Lind 1978).

There are relatively few empirical studies of the selective chivalry theory, and these studies have mixed results. Few address the relationship between judge gender and litigant gender, so the relevant studies test only part of the story. One study has found evidence that women are three times more likely than men to be arrested when accused of perpetrating domestic violence (Hester 2013). Women who perpetrate domestic violence, of course, are violating societal expectations about typical or appropriate female behavior. A finding that such women are more harshly punished would suggest that selective chivalry *might* underlie this, assuming that female judges buck this trend.

Several studies, however, fail to find support for the idea that female perpetrators are treated more leniently than men when they commit male-stereotyped crimes. One such study finds that, while women are no less likely than men to be incarcerated for property and drug crimes, they actually receive relatively lenient sentences for violent crimes (Rodriguez, Curry, and Lee 2006). Another finds that women receive shorter sentences than men for stereotypically masculine crimes like bank robbery and drug trafficking, while their sentences were only slightly shorter for larceny, fraud, and immigration violations (Mustard 2001). Similarly, Steffensmeier, Kramer, and Streifel (1993) found slightly larger gender differences in sentencing for violent crimes than for forgery, theft, and drug offenses. Two additional studies have found no relationship between sentencing and the interaction of gender and offense type (Farnworth and Teske 1995; Koons-Witt 2002). As such, evidence for the selective chivalry thesis is currently weak at best.

## 3.2 Masculinity

The second main theory to describe male-centered sex effects on judging is *masculinity* theory. This theory, like feminist theory, is based upon the premise that gender is socially constructed. Gender is learned through social pressures and expectations (Connell 2005). The study of masculinity explores how the meaning of manhood influences society, institutions, and individual behavior (McGinley and Cooper 2012). This theory has only recently begun to make its way into political science literature (Connell, Hearn, and Kimmell 2004).

Normative or hegemonic masculinity describes the most stereotypically desirable way to be a man; it is the image of the white, heterosexual, middle-class, American male most widely portrayed in popular culture (Harris 2013). This form of masculinity, sometimes called the “John Wayne syndrome,” values strength, fearlessness, stoicism, and independence while devaluing vulnerability, emotionality, and dependence (Miedzian 2002; McGinley 2010*b*). “Real” men are expected to command respect and authority, be successful and upwardly mobile, and provide financial support and stability for their families (Dowd 2000; Dyke and Murphy 2006). Expressions such as “boys don’t cry,” “man up,” and “be a man” reflect this normative masculinity. The pressure men feel to conform to the often unattainable ideals of normative masculinity can lead to extreme expressions of masculinity, known as hyper-masculinity, which includes certain acts of violence (Pleck 1981; Kimmel 2004; Dowd 2008).

In recent years, masculinity scholars have used the term Multidimensional Masculinity Theory (MMT) to describe the idea that masculinity cannot be understood in isolation from other aspects of identity, such as race, national origin, class, gender, and sexual orientation (Cooper 2012; McGinley and Cooper 2012; Rich 2014). Depending on the context, certain aspects of identity will move to the foreground while others remain subordinate. The multiple dimensions of identity affect how masculinity is performed, as well as how others perceive this performance. For example, MMT examines how African-American boys are perceived as dangerous and frightening when they display masculine behaviors that are dismissed lightly under the “boys will be boys” mentality when performed by white boys (Dowd 2010; McGinley 2013*a*). The theory asserts that white, heterosexual men have defined hegemonic masculinity, and therefore most “naturally” fit those norms (Carbado 2012).

For the most part, the impact of masculinity on the legal system has been explored theoretically by examining cases and legislation. For example, McGinley has discussed how masculinity influences employment discrimination cases brought by gender non-conforming men, as well as the treatment of fathers in family law cases (McGinley 2010*a*, 2013*b*). However, there are few empirical studies examining quantitatively whether masculinity theory affects the legal system. At the crime-reporting and law enforcement stages, masculinity theory may help explain findings that men often fail to report sexual abuse and rape (Andersen 2013) and domestic violence (Smith et al. 2011). It also helps us understand why law enforcement officers frequently refuse to recognize men as victims when they do report such crimes (Brown 2004).

In terms of judicial decision making, an empirical study of the Court of Appeals of Ontario found possible “male-on-male gender bias” in family law cases where males appealed an adverse

ruling (Stribopoulos and Yahya 2007). Another Canadian study found bias against men as both victims and perpetrators in involuntary vehicular homicide cases (Glaeser and Sacerdote 2000). However, neither of these studies explicitly engages masculinity theory in their interpretation of the results.

But masculinity theory has the potential to help us to understand the phenomenon in which men treat other men particularly harshly. We use the term “collective masculinity” to describe the concept that men primarily express their masculinity in front of other men. In other words, the performance of masculinity is “homosocial”; men engage in certain behaviors “to prove to other men that they are masculine” (McGinley 2010*c*: 708) and to solidify their group identity (McGinley 2013*a*; Kimmel 2004). In this way, men in all-male groups may act differently, exacerbating the behaviors that would be predicted by masculinity theory. For example, men in some all-male workplaces may try to prove their masculinity to each other by “engag[ing] in competitive ritual behaviors” (McGinley 2010*a*: 722). Just as like minded people who deliberate together typically end up with a more extreme point of view than any would have reached independently (Brown 1985; Sunstein 2008), masculinity effects may be heightened in all-male group settings.

## 4 Immigration Appeals: A Test

In order to understand how masculinity theory relates to the job of judging, we need to accommodate for the effect of the gender of the judge as it relates to the gender of the litigant. Immigration appeals are a good place to look if we want to see the interplay of gender-of-judge and gender-of-litigant effects. These cases have particularly high stakes for the litigants involved, who are all facing the real possibility of deportation, separation from friends and family, and all of the other associated consequences. Additionally, those pursuing asylum claims may face real physical danger upon deportation.

Potential deportees are generally served with a notice to appear before an immigration judge in Immigration Court, which is a part of the Executive Office of Immigration Review in the Department of Justice. At this stage, the immigration judge can either issue an order of removal or decline to order removal. After this, the noncitizen or government may appeal the decision to the Board of Immigration Appeals, which is another division of the Executive Office of Immigration Review. From this final order, noncitizens may appeal to the U.S. Court of Appeals in the relevant circuit. Typically, this appeal is the first time that the deportation case makes its way into the judicial branch. Only a small fraction of noncitizens appeal to the Board of Immigration Appeals, much less to the Court of Appeals (Kagan, Marouf, and Gill 2014).



Historically, researchers have not identified a pattern of distinctly female judicial decision making behavior in immigration appeals. Research has found, however, that female judges are more likely to support female immigrant appellees, even though female judges are not more pro-alien in general (and female appellees are not more successful in general, either) (Williams and Law 2012). We build upon this work by investigating the relationship between gender-of-judge and gender-of-litigant in immigration appeals. Our interest is in taking seriously both female-centric and male-centric explanations of decision outcomes. This is important in terms of general gender differences in decision making patterns or litigant outcomes; it is also critical to understanding whether the gender-of-judge effect is mitigated by the gender of the litigant.

## 4.1 Data and Design

Much of the empirical literature on appellate court decision making, including in the area of immigration appeals (Ramji-Nogales, Schoenholtz, and Schrag 2011), relies upon data gleaned from the final dispositions of published cases. We stray from this path, using instead information from the dockets of both reported and unreported immigration appeals from 2009-2012. We began with a stratified random sample of approximately 100 cases per circuit, yielding 1098 immigration cases spread across the eleven U.S. Courts of Appeal that handle immigration appeals. We found these cases through the Public Access to Court Electronic Records (PACER) service, which provides online access to federal court records for a small fee. This gives us a wider range of cases than would other sources; the selection of unpublished cases in Westlaw or Lexis is a non-random sample of the unpublished cases in PACER. About 17.5% of these cases did not allow us access to the case files. Because we were unable to evaluate these cases closely enough to code our key variables, we have excluded these cases from consideration, yielding a total sample of 906.<sup>1</sup>

[Table 2 about here.]

Summary statistics of the data are presented in Table 2. The differences in the number of cases represents the fact that only 860 of these cases were decided by a panel of judges; the rest were

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<sup>1</sup>The omitted cases have docket reports, but the relevant case materials are locked in PACER. In other words, there are documents there, but we cannot see them. There is some evidence to suggest that these data are not missing completely at random. The bulk of the cases with locked records are from the Second Circuit. As a percent of the random sample of cases, the cases with no access to the record make up the following percentage of cases from each circuit: 1st: 2%; 2nd: 73%; 3rd: 0%; 4th: 0%; 5th: 2%; 6th: 1%; 7th: 25%; 8th: 23%; 9th: 33%; 10th: 28%; 11th: 5%. We are working with our contacts in the various circuits to get an explanation for why some of these cases are locked from view.

disposed of by the clerk. Successes on the merits of these appeals are exceedingly rare (Kagan, Marouf, and Gill 2014; Marouf, Kagan, and Gill 2013). There are a few different ways to define success including situations in which the litigant petition was granted (89 cases), cases where the government motioned to remand the case (56 cases), or cases in which the litigant voluntarily agreed to withdraw the petition (110 cases). Only petition grants are directly attributable to the behavior of the judges. Because we are interested in judicial decision making only those petition grants are included in our definition of success.

For simplicity and clarity, the empirical expectations presented in Table 1 are stated in terms of individual judicial behavior. In order to glean individual-level behavior insights from our analysis of these collegial decisions, we might have reorganized the data to focus on the judge level. This might make sense in many circumstances, especially in situations in which there are a good number of nonunanimous decisions. Indeed, a number of previous studies have attempted to make inferences about individual decision making from votes in a panel setting (Davis, Haire, and Songer 1993).

We decline to do this for a couple of different reasons. The first is a practical limitation in our data. In our sample there are only seven dissents (about 1% of the sample) and twelve concurrences (about 2% of the sample). This level of unanimity is higher than the already high levels cited in previous research because we are not limiting our sample to published cases. As such, we gain very little from organizing our data in this way.

Our second reason for declining to pursue this path is related to the first. In part because of the incredibly low rate of dissent in our sample, we include unanimous decisions in our sample. This high level of unanimity likely conceals a good deal of disagreement among the judges on the circuit courts (Atkins and Green 1976). A particularly strong norm of consensus exists on the Courts of Appeals (Goldman 1968; Songer 1982). Recent research argues convincingly that the “panel effects” change the voting propensities of the individual justices, such that the collegial decision is not a simple aggregation of the individual judge preferences (Fischman 2013).

We do not view this as a limitation of our research design. In fact, it is critically important to include unanimous cases if we are to identify the subtle, indirect ways in which the gender balance on appellate panels influences outcomes on the court (Farhang and Wawro 2004). Peresie (2005) finds that male judges were more likely to vote like women if there was even a single woman on the panel; this influence effect was stronger than the judge’s own ideology. We follow this lead.

One of the difficulties in determining the causal mechanism driving this influence is the continued underrepresentation of female judges on the U.S. Courts of Appeals. As of early 2015, women

make up less than 35% of the seats on the circuit court benches (NWLC and the Courts 2015). This means that there are precious few cases with all-female panels. The distribution of women across the panels in our sample are shown in Figure 1. The uneven distribution of women across these panels makes it difficult to isolate conclusively the nature of the women judge’s indirect influence on the panel’s collective decision. The deliberation theory suggests that women’s influence on male judges accrues as the proportion of women on the panel is increased (Fischman 2013). If an additional woman added to the panel increases the influence effect, such evidence would tend to support deliberative theory over other theories that conceptualize influence as coming from the mere presence of one or more women (Peresie 2005).

[Figure 1 about here.]

Our research design, then, allows for a test of a number of female-centered and male-centered theories of gendered decision making. We present these recast empirical expectations in Table 3.

[Table 3 about here.]

We operationalize success as a petition grant on the merits. The explanatory variables of interest are coded in a relatively straightforward manner. We have coded the gender of the judges using the official judge biographies from the various circuit websites. The gender of the litigant was determined using an online gender checker for given names.<sup>2</sup> In the analyses reported here, we counted all cases with male litigants as “male.” Given the focus of masculinity theory on the need to men to provide for their families, men who appeared as named litigants alongside women or children are likely to engender the same judicial treatment as men who appear alone or only with other males as named litigants.<sup>3</sup>

We include a number of control variables to capture other factors relevant to the decision on the merits of the petitions. Following previous research, we include a measure of the number of Democratic appointees on the panel. To accommodate party capability concerns (Galanter 1974), we include a measure of the number of attorneys listed in PACER for the petitioner. Previous research (Marouf, Kagan, and Gill 2013) shows that cases raising asylum issues fare worse in these

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<sup>2</sup>The method we used was the Gender Checker at [www.genderchecker.com](http://www.genderchecker.com). There were few ambiguous names, which were sorted by the authors. In future research, we plan to implement Stephen Holiday’s `genderPredictor` module in R to fine tune these ambiguous names. Of the 1,187 named litigants in this sample, only about 6% had ambiguous names.

<sup>3</sup>We also tested alternate specifications of this variable, including counting as a male litigant only those men who appeared as the first named litigant, only those men who appeared as named litigants with other men, and only those men who appeared alone as named litigants. Our findings were robust to these alternate specifications.

appeals, so we have included a control for this. We control for importance of the case to the judges using a dummy variable for whether the decision in the case is published. Finally, we include a proxy measure for minority race/ethnicity of the litigant.

[Table 4 about here.]

A series of bivariate analyses shows the various panel/litigant gender configurations. The first column in each section of Table 4 shows the percentage of cases decided on the merits. The second column shows the percentage of merits cases that result in success for the petitioner. Table 4 shows that there are no significant differences at the 95% confidence level between male and female litigants in front of mixed-gender or all-male panels when it comes to rates of merits consideration and ultimate success.<sup>4</sup>

## 4.2 Results

The first multivariate analysis is a logistic regression. We have clustered the standard errors by circuit to accommodate the effects of any unobserved non-independence of observations attributable to circuit practices or context.<sup>5</sup> The results of the analysis are presented in Table 5.

[Table 5 about here.]

The results show that the interaction of panel gender and litigant gender is important. To make the interpretation of this relationship more straightforward, a plot of the marginal predicted probabilities is presented in Figure 2. This plot shows that female litigants fare significantly better in front of all-male panels than they do in front of mixed-gender panels. It also shows that men fare far worse in front of all-male panels than they do in front of mixed-gender panels. Contrary to our expectations, the difference between success rates for male and female litigants is significant in mixed-gender panels, but with male litigants doing significantly *better* than female litigants.

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<sup>4</sup>Although there are no significant bivariate differences between male and female litigants in terms of getting cases heard on the merits, the test statistics in Table 4 approach significance. Therefore, it is important to consider the possibility that some selection bias is evident at the merits stage. For this reason, we estimated a probit model of merits success with sample selection correction (Heckman 1979; Van de Ven and Van Praag 1981). In this model, the estimate of rho was not significantly different from 1. This evidence suggests that conducting a logistic regression on the merits cases will not introduce selection bias into the model. Results of the selection model are available upon request from the author.

<sup>5</sup>In a separate analysis, we modeled the circuits as fixed effects. The results were robust to this alternative specification.

[Figure 2 about here.]

Figure 1 shows that the number of cases with more than one woman on the panel is relatively small (79, or 13% of cases). Even still, we attempt to parse the various explanations of gender effects by entering panel gender as a count variable. The results of this analysis are found in Table 6. In many ways, these results are very similar to those reported in Table 5. The control variables have similar effects. The explanatory variables maintain much the same configuration, as well.

[Table 6 about here.]

Again, we present the marginal predicted probabilities in Figure 3. As we interpret this figure, it is important to remember that there are very few cases populating the rightmost tail (see Figure 1. However, it seems fairly clear that the effect of adding an additional woman to the panel does increase the effect of the mixed-gender panel.

[Figure 3 about here.]

## 5 Discussion

Masculinity theory predicts that men will be disadvantaged when appearing in front of an all-male panel, while chivalry theory predicts that women will benefit from an all-male panel. Our results provide support for both of these theories. The right side of Figure 2 shows this difference in stark relief. However, we hypothesized that the effect of the all-male panel would be relative either to the even odds of both groups in front of mixed panels, or at least the relative advantage of women in front of mixed panels (as per the representational hypothesis).

Instead, our results show a statistically significant gender difference between grant rates for mixed-gender panels, with *men* the comparatively advantaged party. If presence of women judges on the panel is to mitigate the implicit biases of their male colleagues, then the results should show no difference between the grant rates in mixed-gender panels. If this were the case, we could conceptualize the grant rates in mixed-gender panels as a baseline against which to compare the decisions of all-male (or, where available, all-female) panels.

That there is a significant difference between the grant rates presents a new problem, which is anchoring the relative advantages and disadvantages of litigants to a single measure of what those rates ought to be. Are all-male panels too lenient on women and too hard on men? Are mixed panels too lenient on men and too hard on women? Our results provide no clear answer to these questions.

Our results do, however, raise important questions about how we approach the task of interpreting the interactive effects of judge gender and litigant gender. While the presence of women on the panel does seem to mitigate the all-male panel's leniency on women, it introduces a symmetrical leniency on men. This could be a result of female judges bringing their own implicit biases to the table. It is possible that women judges judge female litigants especially harshly, perhaps because they understand that women are not the damsels in distress that male judges may implicitly assume them to be. Giving male litigants more leniency might be the flip side of this, as women may refrain from judging men on the basis of masculinity-related characteristics.

We can also derive some insights about how the mechanism through which the presence of women judges shifts the behavior of a panel of judges. The results we find seem to support the deliberative hypothesis. The mere presence of a woman on the panel is associated with a change in panel behavior, all else equal. When the panel has a majority of women, these effects increase. This suggests that female judges are inclined to view these cases differently from their male counterparts, and can exert more power over the panel when they form a majority.

Generally, research on gender and decision making has a tendency to consider male behavior only as the baseline against which to compare female behavior. Our findings suggest that it is important to consider maleness on its own terms. Normalizing male behavior hides important information about how gender influences decision making. We hope that our findings contribute to a new conversation about how empirical research conceptualizes the complicated ways in which gender frames legal outcomes.

## References

- Albonetti, Celesta A. 1997. "Sentencing under the federal sentencing guidelines: Effects of defendant characteristics, guilty pleas, and departures on sentence outcomes for drug offenses, 1991-1992." *Law and Society Review* 1997: 789–822.
- Allen, David W., and Diane E. Wall. 1993. "Role Orientations and Women State Supreme Court Justices." *Judicature* 77: 156–165.
- Andersen, Torbjørn Herlof. 2013. "Against the wind: Male victimization and the ideal of manliness." *Journal of Social Work* 13(3): 231–247.
- Atkins, Burton, and Justin J. Green. 1976. "Consensus on the United States Courts of Appeals: Illusion or Reality?" *American Journal of Political Science* 20(4): 735–748.
- Berberian, Sean B. 1999. "Protecting Children: Explaining Disparities in the Female Offender's Pre-trial Process, and Policy Issues Surrounding Lenient Treatment of Mothers." *Hastings Women's Law Journal* 10: 369.
- Boritch, Helen. 1992. "Gender and Criminal Court Outcomes: An Historical Analysis." *Criminology* 30(3): 293–326.
- Boyd, Christina L, Lee Epstein, and Andrew D Martin. 2010. "Untangling the causal effects of sex on judging." *American Journal of Political Science* 54(2): 389–411.
- Brown, Grant A. 2004. "Gender as a factor in the response of the law-enforcement system to violence against partners." *Sexuality and Culture* 8(3-4): 3–139.
- Brown, Roger. 1985. *Social Psychology*. 2nd ed. Free Press.
- Cameron, Charles M., and Craig P. Cummings. 2003. Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971-1999. In *American Political Science Association Annual Meeting*.
- Carbado, Devon M. 2012. "Masculinity by Law." In *Masculinities and the Law: A Multidimensional Approach*, ed. Frank Rudy Cooper, and Ann C. McGinley. New York University Press p. 51.
- Chesney-Lind, Meda. 1978. "Chivalry reexamined: Women and the criminal justice system." *Women and the criminal justice system* 1978: 197–223.
- Connell, R. W. 2005. *Masculinities*. 2 ed. Oakland, CA: University of California Press.
- Connell, R. W., Jeff Hearn, and Michael S. Kimmell. 2004. "Introduction." In *Handbook of Studies on Men and Masculinities*. Thousand Oaks, CA: SAGE Publications.

- Cooper, Frank Rudy. 2012. "The King Stay the King: Multidimensional Masculinities and Capitalism in The Wire." In *Masculinities and the Law: A Multidimensional Approach*, ed. Frank Rudy Cooper, and Ann C. McGinley. New York University Press p. 96.
- Crew, B Keith. 1991. "Sex differences in criminal sentencing: Chivalry or patriarchy?\*" *Justice Quarterly* 8(1): 59–83.
- Crowe, Nancy E. 1999. The Effects of Judges' Sex and Race on Judicial Decision Making on the US Courts of Appeals, 1981-1996 PhD thesis University of Chicago, 1999. Department of Political Science.
- Daly, Kathleen, and Rebecca L Bordt. 1995. "Sex effects and sentencing: An analysis of the statistical literature." *Justice Quarterly* 12(1): 141–175.
- Davis, Sue. 1992. "Do Women Judges Speak in a Different Voice—Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit." *Wis. Women's Law Journal* 8: 143.
- Davis, Sue. 1993. "The Voice of Sandra Day O'Connor." *Judicature* 77: 134–139.
- Davis, Sue, Susan Haire, and Donald R. Songer. 1993. "Voting Behavior and Gender on the U.S. Courts of Appeals." *Judicature* 77: 129.
- Dowd, Nancy E. 2000. *Redefining fatherhood*. NYU Press.
- Dowd, Nancy E. 2008. "Boys, masculinities and juvenile justice." *J. Korean L.* 8: 115.
- Dowd, Nancy E. 2010. *The man question: Male subordination and privilege*. New York University Press.
- Dyke, Lorraine S, and Steven A Murphy. 2006. "How we define success: A qualitative study of what matters most to women and men." *Sex Roles* 55(5-6): 357–371.
- Etienne, Margareth. 2010. "Sentencing Women: Reassessing the Claims of Disparity." *J. Gender Race & Just.* 14: 73.
- Farhang, Sean, and Gregory Wawro. 2004. "Institutional dynamics on the US court of appeals: Minority representation under panel decision making." *Journal of Law, Economics, and Organization* 20(2): 299–330.
- Farnworth, Margaret, and Raymond HC Teske, Jr. 1995. "Gender differences in felony court processing: Three hypotheses of disparity." *Women & Criminal Justice* 6(2): 23–44.
- Fischman, Joshua B. 2013. "Interpreting circuit court voting patterns: A social interactions framework." *Journal of Law, Economics, and Organization* p. forthcoming.



- Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9: 95–160.
- Gertner, Nancy. 2002. "Women, Justice, and Authority: How Justice Affects Women." *Yale Journal of Law and Feminism* 14: 291.
- Gilligan, Carol. 1982. *In a different voice*. Harvard University Press.
- Glaeser, Edward L, and Bruce Sacerdote. 2000. The determinants of punishment: Deterrence, incapacitation and vengeance. Technical report National bureau of economic research.
- Goldman, Sheldon. 1968. "Conflict and Consensus in the United States Courts of Appeals." *Wisconsin Law Review* 1968: 461–82.
- Gryski, Gerard S., Eleanor C. Main, and William J. Dixon. 1986. "Models of State High Court decision Making in Sex Discreimination Cases." *Journal of Politics* 48: 143–155.
- Harris, Christine R. 2013. "Shifts in masculinity preferences across the menstrual cycle: Still not there." *Sex roles* 69(9-10): 507–515.
- Heckman, James J. 1979. "Sample selection bias as a specification error." *Econometrica: Journal of the econometric society* 41(1): 153–161.
- Hester, Marianne. 2013. "Who does what to whom? Gender and domestic violence perpetrators in English police records." *European Journal of Criminology* 10(5): 623–637.
- Kagan, Michael, Fatma Marouf, and Rebecca D. Gill. 2014. "Buying Time? False Assumptions About Abusive Appeals." *Catholic University Law Review* 63: 679–728.
- Kimmel, Michael S. 2004. "Masculinity as homophobia: Fear, shame, and silence in the construction of gender identity." *Race, Class, and Gender in the United States: An Integrated Study*. Ed. Paula S. Rothenberg. New York: Worth pp. 81–93.
- Koons-Witt, Barbara A. 2002. "The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines." *Criminology* 40(2): 297–328.
- Kritzer, Herbert M, and Thomas M Uhlman. 1977. "Sisterhood in the courtroom: Sex of judge and defendant in criminal case disposition." *Social Science Journal* 14(2): 77–78.
- Kruttschnitt, Candance, and Donald E. Green. 1984. "The sex-sanctioning issue: is it history?" *American Sociological Review* 1984: 541–551.
- Marouf, Fatma, Michael Kagan, and Rebecca D. Gill. 2013. "Justice on the Fly: The Danger of Errant Deportations." *Ohio State Law Journal* 75: 337–404.

- Martin, Elaine, and Barry Pyle. 2004. "State high courts and divorce: The impact of judicial gender." *U. Tol. L. Rev.* 36: 923.
- McGinley, Ann. 2013a. "Masculinity, Labor and Sexual Power." *Boston University Law Review* 93: 795.
- McGinley, Ann C. 2010a. "Erasing Boundaries: MAsculinities, Sexual Minoirities, and Employment Discrimination." *University of Michigan Journal of Law Reform* 413: 713.
- McGinley, Ann C. 2010b. "Theory. Destefano: A Masculinities Theory Analysis." *Harvard Journal of Law and Gender* 33: 581.
- McGinley, Ann C. 2010c. "Work, Caregiving, and Masculinities." *Seattle UL Rev.* 34: 703.
- McGinley, Ann C. 2013b. "Masculine Law Firms." *Florida International University Law Review* 8: 423–591.
- McGinley, Ann C., and Frank Rudy Cooper. 2012. "Masculinities, MulMultidimensional, and Law: Why They Need One Another." In *Masculinities and the Law*. New York: New York University Press chapter Introduction, pp. 1–24.
- Miedzian, Myriam. 2002. *Boys will be boys: Breaking the link between masculinity and violence*. Lantern Books.
- Mustard, David B. 2001. "Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the US Federal Courts\*." *Journal of Law and Economics* 44(1): 285–314.
- Nagel, Stuart S, and Lenore J Weitzman. 1971. "Women as litigants." *Hastings LJ* 23: 171.
- NWLC, Judges, and the Courts. 2015. *Women in the Federal Judiciary: Still a Long Way to Go*. Technical report National Women's Law Center Washington, D.C.: .
- Peresie, Jennifer L. 2005. "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts." *Yale Law Journal* 114(7): 1759–91.
- Pitkin, Hanna Fenichel. 1967. *The concept of representation*. Univ of California Press.
- Pleck, Joseph H. 1981. *The myth of masculinity*. Mit Press Cambridge, MA.
- Pope, Carl E. 1975. *Sentencing of California Felony Offenders*. Technical report United States Department of Justice, Law Enforcement Assistance Administration, Criminal Justice Research Center.

- Ramji-Nogales, Jaya, Andrew Ian Schoenholtz, and Philip G. Schrag. 2011. *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*. New York, NY: New York University Press.
- Reeser, Todd W. 2009. *Masculinities in theory: An introduction*. John Wiley & Sons.
- Rich, Camille Gear. 2014. "Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness." *Calif. L. Rev.* 102: 1027–1053.
- Rodriguez, Fernando S, Theodore R Curry, and Gang Lee. 2006. "Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?\*" *Social Science Quarterly* 87(2): 318–339.
- Sherry, Suzanna. 1986. "Civic Virtue and the Feminine Voice in Constitutional Adjudication." *Virginia Law Review* 72: 543–615.
- Sisk, Gregory C, Michael Heise, and Andrew P Morriss. 1998. "Charting the influences on the judicial mind: An empirical study of judicial reasoning." *New York University Law Review* 73: 1377.
- Smith, K, K Coleman, S Eder, and P Hall. 2011. "Homicides, firearms offences and intimate violence."
- Songer, Donald R. 1982. "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals." *American Journal of Political Science* 26: 225–39.
- Spohn, Cassia. 1999. "Gender and sentencing of drug offenders: Is chivalry dead?" *Criminal Justice Policy Review* 9(3-4): 365–399.
- Spohn, Cassia, John Gruhl, and Susan Welch. 1987. "The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges." *Criminology* 25(1): 175–192.
- Steffensmeier, Darrell, and Chris Herbert. 1999. "Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?" *Social Forces* 77(Mar.): 1163–1196.
- Steffensmeier, Darrell, John Kramer, and Cathy Streifel. 1993. "Gender and imprisonment decisions." *Criminology* 31(3): 411–446.
- Stribopoulos, James, and Moin A Yahya. 2007. "Does a Judge's Party of Appointment or Gender Matter to Case outcomes: An Empirical Study of the Court of Appeal for Ontario." *Osgoode Hall LJ* 45: 315.
- Sunstein, Cass R. 2008. "Neither hayek nor habermas." *Public Choice* 134(1-2): 87–95.

Tobias, Carl. 1990. "Gender Gap on the Federal Bench, The." *Hofstra L. Rev.* 19: 171.

Van de Ven, Wynand P.M.M., and Bernard Van Praag. 1981. "The Demand for Deductibles in Private Health Insurance: A Probit Model with Sample Selection." *Journal of Econometrics* 17(2): 229–252.

Williams, Margaret S, and Anna O Law. 2012. "Understanding Judicial Decision Making in Immigration Cases at the US Courts of Appeals." *Justice System Journal* 33: 97.

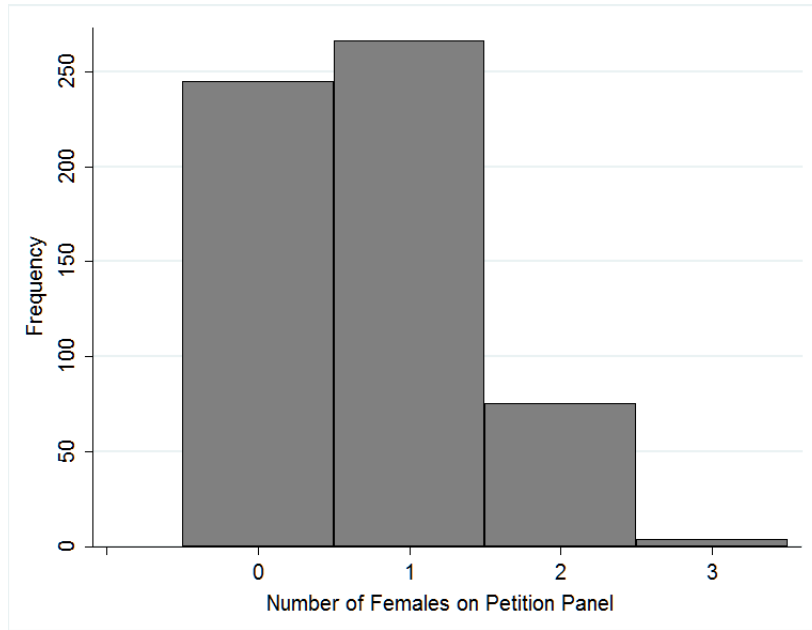


Figure 1: Gender Composition on Panels

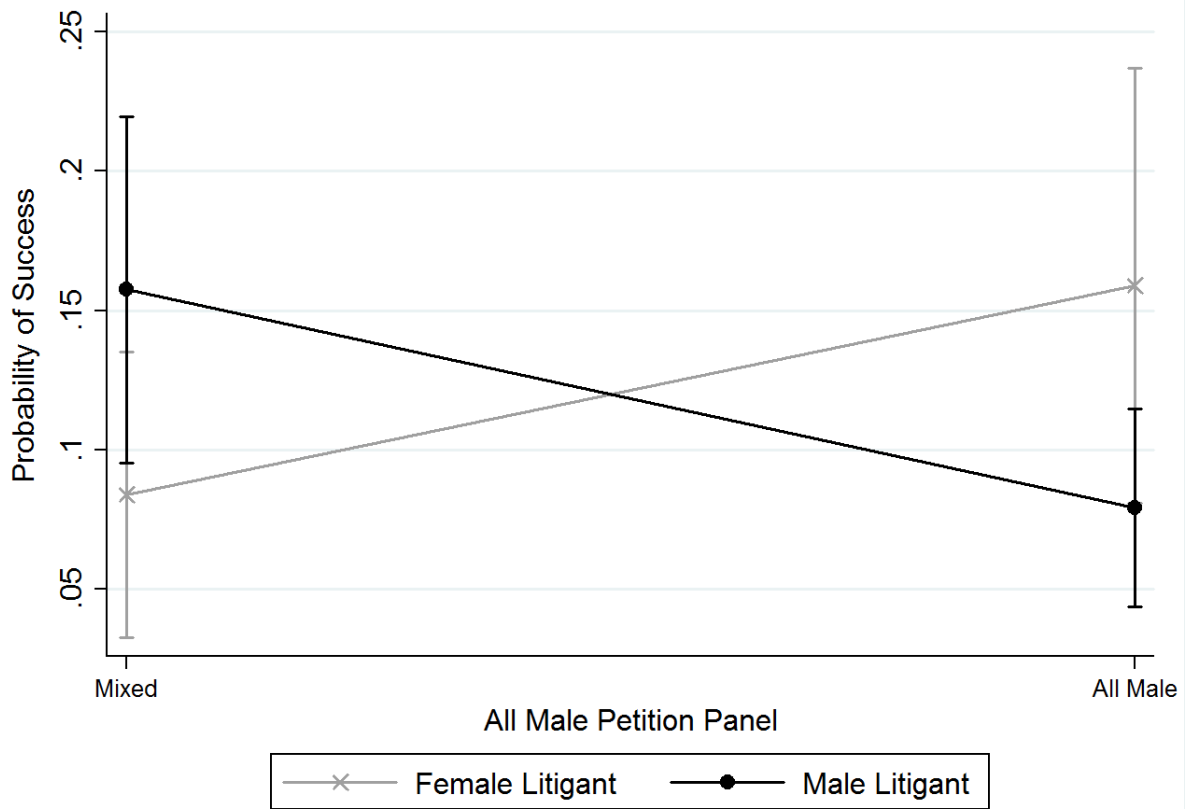


Figure 2: Marginal Predicted Probabilities by Gender Configuration

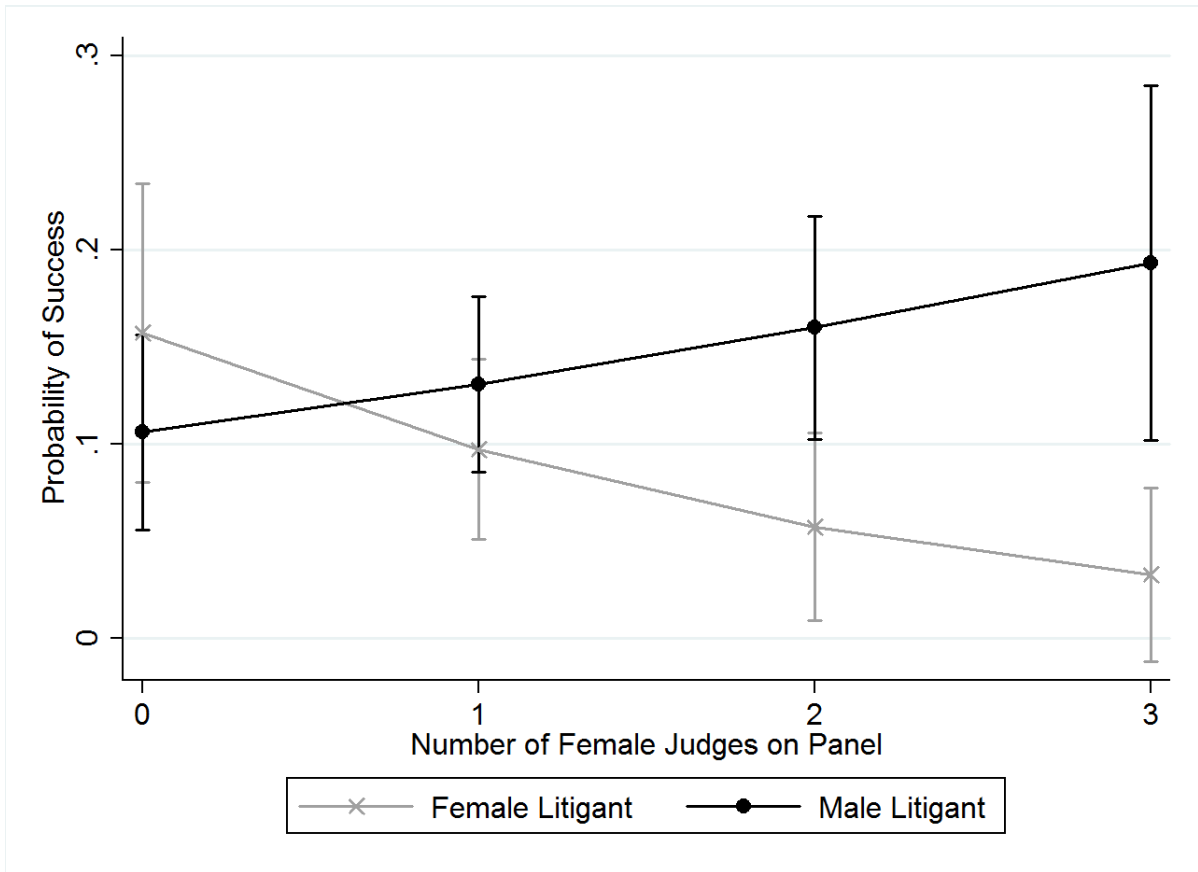


Figure 3: Marginal Predicted Probabilities by With Number of Women

Table 1: Male-Centered Accounts of Sex Effects on Judging

Theory	Premise	Empirical Expectations
Chivalry	“Damsels in Distress.” Women need the protection of men; men should minimize the pain and suffering of women by protecting and defending them.	Male judges will be more lenient or generous with female litigants in cases where deciding against them may cause them harm.
Selective Chivalry	Chivalry is conditioned on adherence to gender roles: women who abide by gender roles are “good” and deserve protection; women who flout gender roles are “bad” and deserve punishment.	Male judges will be more lenient and generous with women who exemplify stereotypical female roles and harsher with women who do not. For example, male judges will sentence women defendants either more leniently or more harshly than me, depending on the nature of the crime; male judge’s decisions in employment discrimination cases will be influenced by whether the female plaintiff adhered to gender roles.
Masculinity	“Boys Don’t Cry.” Men should be strong and independent; men should not be vulnerable or emotional.	Male judges will be harsher on male litigants who show vulnerability, as in child custody cases, immigration cases, and sex discrimination cases brought by male plaintiffs.
Collective Masculinity	Men express masculinity primarily in the company of other men; all-male spaces foster masculinity, whereas masculinity tends to be hidden in mixed-gender spaces. Masculinity is performed in front of other men.	In collegial courts, harshness against non-masculine males will be mitigated in the presence of female colleagues.



Table 2: Descriptive Statistics

<b>Variable</b>	<b>N</b>	<b>mean</b>	<b>sd</b>	<b>min</b>	<b>max</b>
Petition Granted	906	.085	.336	0	1
Male Litigant	906	.744	.437	0	1
All Male Panel	590	.415	.493	0	1
Dems on Panel	590	1.149	.796	0	3
Asylum Issue	906	.422	.494	0	1
No. of Attorneys	906	.881	.619	0	5
Published Opinion	906	.108	.311	0	1
IFP Filed	906	.191	.393	0	1
Heard on Merits	906	.657	.475	0	1
Circuit	906	- -	- -	1	11

*Source:* Stratified random sample (by circuit) of immigration cases in PACER, 2009-2012.

Table 3: Gendered Decision Making Hypotheses

Theory	Empirical Expectations
Chivalry or Selective Chivalry	All-male panels will grant female litigants' petitions at higher rates than will mixed panels. Their grant rates for male litigants will be indistinguishable from mixed panels.
Masculinity	All-male panels will grant male litigants' petitions at lower rates than will mixed panels. Their grant rates for female litigants will be indistinguishable from mixed panels.
Representational	Mixed-gender panels will grant female litigants' petitions at higher rates as compared to all-male panels. Their grant rates for male litigants will be indistinguishable from all-male panels.
Organizational or Legal Constraint	There will be no difference in male or female litigant grant rates between all-male or mixed panels.
Collective Masculinity or Informational	All-male panels grant male litigants' petitions at a lower rate than panels with one woman. Adding an additional woman will not increase this effect.
Deliberative	The differences between all-male and mixed panels will increase as the number of women on the panel increases.

Because we do not have access to litigant or government briefs, which are locked in the PACER dockets, we are unable to gather data about whether the litigant conforms to gender roles. Indeed, unless this information is contained in the briefs, the judges would also be unable to make this determination. As such, in this test we are unable to distinguish between chivalry and selective chivalry. Using this research design we are unable to isolate the causal mechanism driving a lack of panel effect. The absence of a panel effect might implicate the homogenizing effect of judicial professionalization. It might also mean that there is little discretion for value-driven judicial behavior. Likewise, we are unable to distinguish between collective masculinity and informational mechanisms. If the panel effect is constant no matter how many women are added to the panel, this may be women playing an informational role, or simply breaking up the all-male space.

Table 4: Means by Sex Across Mixed and All-Male Panels

(a) Mixed-Gender Panels

(b) All-Male Panels

	<b>Merits</b>	<b>Success</b>
Female Litigant	80.56%	9.26%
	(n=108)	(n=108)
Male Litigant	71.35%	10.34%
	(n=377)	(n=377)
Total	73.40%	10.10%
	(n=485)	(n=452)
Pearson $\chi^2$	3.64	0.11
	p=.056	p=.741

	<b>Merits</b>	<b>Success</b>
Female Litigant	63.55%	11.21%
	(n=107)	(n=107)
Male Litigant	72.76%	6.34%
	(n=268)	(n=268)
Total	70.13%	7.73%
	(n=375)	(n=375)
Pearson $\chi^2$	3.10	2.54
	p=.078	p=.111

Table 5: Logistic Regression of Success on the Merits

<b>Variable</b>	<b>Odds Ratio</b>	<b>(Std. Err.)</b>
Male Litigant	2.229	(0.809)
All-Male Panel	2.255*	(0.987)
Male Litigant * All-Male Panel	0.186**	(0.113)
Dems on Panel	1.040	(0.222)
Asylum Issue	0.321***	(0.099)
No. Attorneys	1.455*	(0.243)
Published Opinion	3.357***	(1.121)
Black, Hispanic, or S.Asian	0.223***	(0.043)
Intercept	0.125***	(0.063)

N=590. Standard errors adjusted for 11 Circuit clusters. Wald  $\chi^2 = 128.06$ , Prob >  $\chi^2 = .000$ ; Pseudo  $R^2 = 0.153$ ; Log pseudolikelihood = -185.355; Homer-Lemeshow  $\chi^2(158) = 223.72$ , Prob >  $\chi^2 = 0.001$ .

Table 6: Logistic Regression of Success with Judge Count

Variable	Odds Ratio	(Std. Err.)
Male Litigant	0.599	(0.245)
No. Female Judges	0.599*	(0.159)
Male Litigant * No. Female Judges	2.432**	(0.885)
Dems on Panel	1.083	(0.247)
Asylum Issue	0.320***	(0.103)
No. Attorneys	1.440*	(0.245)
Published Opinion	3.465***	(1.222)
Black, Hispanic, or S.Asian	0.220***	(0.041)
Intercept	0.267**	(0.126)

N=590. Standard errors adjusted for 11 Circuit clusters. Wald  $\chi^2 = 131.916$ , Prob >  $\chi^2 = .000$ ; Pseudo  $R^2 = 0.143$ ; Log pseudolikelihood = -187.649; Homer-Lemeshow  $\chi^2(202) = 249.79$ , Prob >  $\chi^2 = 0.004$ .