Denver Law Review

Volume 91
Issue 4 *Symposium - Revisiting Sex: Gender and Sex Discrimination Fifty Years after the Civil Rights Act Part I*

Article 3

January 2014

Bias in Litigation and among the Jury

Diane S. King

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CHAPTER INTRODUCTION: BIAS IN LITIGATION AND AMONG THE JUDICIARY

DIANE S. KING†

Whereas our justice system has long acknowledged our faith in juries as a bedrock of our judicial system, due to the value of the combined wisdom of people with different backgrounds and beliefs, this concept is not applied when it comes to judges. Why not? Why do we assume that judges do not, or should not, bring their experiences to bear on their interpretation of a set of circumstances?

The "Bias in Litigation and Among the Judiciary" panel was composed of Judge Christine Arguello of the United States District Court for the District of Colorado, Pat Chew, Salmon Chaired Professor and Distinguished Faculty Scholar, University of Pittsburgh School of Law, and Jason Bent, Assistant Professor of Law, Stetson University College of Law.

When then-nominee for the United States Supreme Court Judge Sonia Sotomayor remarked about the "wise Latina judge," this remark ignited considerable controversy. Some claimed that the nominee could not possibly be objective or fair, while others claimed that she was just stating the obvious. Though coming at the issue from very different directions, the articles by Professors Chew and Bent examine the underlying assumptions our system of justice makes as to the role played by the backgrounds of judges.

Professor Chew's essay, entitled *Anticipating the Wise Latina Judge*,[1] explores how alternative race and gender perspectives bring insight into cases where those perspectives are relevant. By its very title, Professor Chew captures the nub of the problem. There are those who argue that any sort of diversity, be it sex, race, or otherwise, predisposes a judge towards inappropriate bias. Professor Chew explores whether fears of bias are justified.

Professor Chew compares and contrasts the application of both the formalist model of decision making and the realist model of decision making. Under the formalist model, the judicial analytical process is supposed to be systematic and uniformly executed. Under the realist model, there is an acknowledgement that judges cannot help but bring their backgrounds and experiences to the bench.

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† Partner, King & Greisen, LLP; B.S., Colorado State University; J.D., University of California at Berkeley.

1. 91 DENV. U. L. REV. 853 (2014).

As a practical matter, there are differences based upon gender and race. Professor Chew cites to empirical research exploring how the race and gender of judges impacts their judicial decision making when race and gender are salient parts of the case. For example, the likelihood of a plaintiff's success in a sex discrimination case increases by 10% when the judge is a woman.

Professor Chew explores whether the fears regarding a "wise Latina" make sense. Her point is that there is irony in the fear of the Latina judge—why fear the Latina judge and not any other judge? Why not fear the white male judge who is far less likely to have actually experienced illegal discrimination? There is no empirical evidence that judges of a particular gender or race are more likely than any other gender or race to ignore legal principles and instead substitute their own political or personal preferences.

Professor Chew applies salience theory to explain differences in perception. Salience theory is the explanation for why, when individuals are bombarded with information, certain bits of that information stand out more than other bits of the information. This theory offers explanations as to why judges may have different perspectives when faced with the same information. Professor Chew concludes that since "individuals can be trained to find salient stimuli that would otherwise not be noticed," judges should use a "deep" analysis of the factual circumstances and the applicable legal principles in order to gain awareness of their potential bias. This "deep" analysis involves a collaborative and introspective process where the decision maker examines the perspective of, for example, a minority judge's world view in order to understand the judge's alternative assumptions and saliencies.

Judge Christine Arguello, who spoke on the panel, is herself a wise Latina, having had a hardscrabble childhood and having been a partner in several major law firms, a law professor, Managing Senior Associate University Counsel, and Colorado's Deputy Attorney General prior to joining the bench. Her talk reinforced the points that Professor Chew makes. Judge Arguello emphasized that no judge is a blank slate. She questioned why, given that fact, being a woman and Hispanic would be perceived as a "problem" instead of an asset. Judge Arguello gave examples where her background influenced her decision making, but for the better. Those examples emphasized that in certain circumstances, she had an enhanced understanding and increased sensitivity that lead her to make more informed decisions. In addition, her background and sensitivity influences her vocabulary; whereas Justice Alito uses the label "illegal alien," to refer to individuals in the country illegally, Judge Arguello prefers the label "non-citizen." Last, her background has led her to treat pro se litigants with patience and respect. Judge Arguello's overarching theme was that bringing a diverse perspective to the bench is an asset, not a detriment.

Professor Bent, in his paper *Hidden Priors: Toward a Unifying Theory of Systemic Disparate Treatment Law*,[2] makes the point that judges make fundamental assumptions based upon their backgrounds and beliefs. These fundamental assumptions, or "hidden priors," lie buried and often hidden beneath layers of legal doctrine and analysis. By way of example, Professor Bent looks at the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[3] and examines the hidden priors in the decision. He uses the decision to both analyze the impact of the case on disparate-treatment law and to argue that despite the fact that there are shortcomings in the use of statistical evidence which were exposed by the Court, that statistical evidence is still important and should be examined in conjunction with the underlying assumptions.

In the *Wal-Mart* decision, Professor Bent exposes the hidden priors in *Wal-Mart*, which are the Court's preconceptions about the background rates of discrimination. Quoting the Court,

> [L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.[4]

It is telling that Justice Scalia cites to no authority for the above statement. Based upon this hidden prior, articulated by Justice Scalia, the majority went on to articulate an entirely new, and more rigorous, standard to be applied in a systemic disparate treatment case—to establish a prima facie case, the plaintiff must establish both a gross statistical disparity and the identification of a particular policy or mechanism responsible for generating the observed disparity. This new second element can be satisfied through evidence of a policy of discrimination, a common discriminating decision maker or anecdotal evidence on a larger scale than what was produced by the plaintiffs in *Wal-Mart*.

Professor Bent attributes the Court's doctrinal shift to the fact that the Court's underlying assumption about the prevalence of discrimination in society has changed from the 1970s, when discrimination was very prevalent, to now, when at least the Court assumes that discrimination is relatively rare (this point is obviously open to debate). He goes on to argue that the scholarship on systemic disparate treatment has, thus far, not articulated the proper role and importance of statistical evidence; thus, there has been no coherent theory that both advances the goals of the doctrine, on the one hand, without overstating the reach of statistical evidence, on the other hand. In his article, Professor Bent proposes a

2. 91 DENV. U. L. REV. 807 (2014).
3. 131 S. Ct. 2541 (2011).
4. *Id.* at 2554.

theory of systemic disparate treatment that embraces hidden or Bayesian priors and takes them into account in evaluating claims.