Basu: Courts need female justices' perspectives

Written by Rekha Basu
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When an all-male majority on the U.S. Supreme Court this week narrowed the definition of workplace harassment — making it harder to win a case against an employer — all three female justices dissented.

Four days earlier in West Des Moines, a panel organized by the Infinity Project, which aims to increase gender diversity on federal courts, decried the scarcity of Iowa women in the judiciary. There are no female justices on Iowa’s top court, and the 8th U.S. Circuit Court of Appeals, of which Iowa is part, has had only two women out of 62 in 122 years.

Though panelists didn’t all agree that gender makes a difference to rulings, the Vance v. Ball State University case that was decided this week was a great example of how it can. Authored by Justice Samuel Alito, the majority’s ruling went against an African-American woman’s claim of harassment by a co-worker. The court decided that her employer couldn’t be “vicariously liable” under Title VII of the Civil Rights Act because the person harassing her didn’t have the power to hire, fire or reassign her.

Justice Ruth Bader Ginsburg’s dissenting opinion (with the other two female justices and Stephen Breyer concurring) faulted the court for not recognizing as supervisors employees who “control the day-to-day schedules and assignments of others,” as the U.S. Equal Employment Opportunity Commission’s guidelines do. The dissenters said the ruling “disserves the objective of Title VII to prevent discrimination from infecting the nation’s workplaces.”

The justices warned that employers will now have less incentive to train people “who control their subordinates’ work activities and schedules.” Victims of workplace harassment will also be more fearful of resisting it or suing, the dissent says.

I wish the ruling had come out a week earlier and dispelled the notion that gender doesn’t affect rulings. That was the view of speaker Sally Kenney, author of “Gender and Justice: Why Women in the Judiciary Really Matter,” who teaches at Tulane University and formerly at the University of Iowa. Though she staunchly advocates for having more women on the bench and criticizes the institutional obstacles women face, Kenney believes that gender parity is mostly symbolically important, just like geographic representation. A court is seen as less legitimate if it only represents some of the population, she said.

It’s a similar argument made by the organization 50-50 in 2020, which aims to increase the number of women in elected office, regardless of their political perspectives.

But even some men on Iowa’s all-male Supreme Court acknowledge that an absence of one sex can affect its thought processes. As it happened, last week a network TV crew from a prime-time show was in Iowa to do a piece about Melissa Nelson, the Fort Dodge woman who was fired from her job for being too irresistible to her male boss. The Supreme Court ruled that her firing wasn’t sex discrimination. The decision was authored by Justice Edward Mansfield, who was in the audience for last week’s panel.

During a break, I asked him if he thought gender makes a difference to perspectives. “Yes, absolutely,” he
acknowledged. "On an appellate court, you want to avoid group think. You want someone to get up and say, 'Stop! You don't understand this point.'"

I appreciated his honesty.

Iowa’s Supreme Court is one of only three in the country that is all male. Speaking on the panel, Justice Thomas Waterman, who replaced Marsha Ternus, the only woman on the Supreme Court, called it unfortunate that “the public is seeing a court of seven white men.” But he added, “We don’t pick ourselves. It’s part of the process.”

“We are all shaped by our childhood, upbringing and education,” said panelist Romonda Belcher, Iowa’s first African-American female judge, who serves on a district court. “We all have some inherent biases. It (race or gender) shapes who we are. We add something that’s different to the table.”

Both she and former Iowa Attorney General Bonnie Campbell stressed the need for people who appear before the court to feel some of those on it reflect them. Noting that issues like domestic violence, sexual assault and sex trafficking, to which women are especially vulnerable, all “have to do with power,” Campbell said women’s life experiences help them understand those situations.

The issue, in my view, is not that women are more moral, compassionate, fair or any of those stereotypes that Kenney aims to discredit. It’s not that women speak with one voice on policy issues or agree on what is best for women. Larger political agendas and ideologies can interfere with that.

It’s that women uniquely have the experience of inhabiting women’s skins, just as people of color do theirs, and sometimes that brings a deeper level of understanding of an issue, as it did in Vance v. Ball State University.

It’s just too bad that women — or those willing to listen when they say, “Stop! You don’t understand” — are still in such a minority.