Critical Junctures in Women’s Economic Lives

A Collection of Symposium Papers

By researchers, policymakers, educators, and activists exploring the causes and consequences of women’s economic decisions nationwide.

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Counting Women Judges: The Intersection of Law and Politics

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I am pleased that the Institute for Women’s Policy Research (IWPR) has undertaken its study, *The Status of Women in the States*, and was delighted to be part of the advisory committee for the state of Minnesota. Unfortunately, by the time IWPR submitted the protocol for our comments, it had largely been set. Clearly, in order for comparative measures to be of use, they have to be consistent across states. Each state cannot propose its own indicators. Whether the instrument is the U.S. Census or the National Election Study, researchers change questions and measures (however poorly constructed) reluctantly because comparison is possible only with measures that are consistent over time. As I said to the study’s designers when consulted, however, the IWPR report leaves out an important dimension of comparison that is relevant to the status of women and girls and feminism more generally—the integration of women in the judiciary. Before I discuss this measure, I would like to make a few general comments about the significance of this report.

We should all applaud IWPR for systematically gathering high quality data that is well analyzed and well presented for researchers and policy makers alike. Despite the first-rate efforts of our own Legislative Commission on the Economic Status of Women, the Minnesota Women’s Foundation and others have echoed women’s groups in other states in lamenting the paucity of useful comparative data on the status of women and girls. Documenting disparities is the first step to eliminating discrimination. Numbers matter and, especially in Minnesota, comparisons matter. We pride ourselves on being leaders on social welfare measures and the provision of public amenities. I am particularly pleased to see the IWPR joining efforts with the World Bank, the United Nations Development Project, and the European Union who recognize that they cannot evaluate their efforts at gender mainstreaming if they do not have good data. The IWPR has taken a leadership role in assembling researchers to collect better data on women and girls.

I must admit to a certain skepticism about ratings in general. First, my own research utilizes little quantitative analysis. Second, and more important, interdisciplinary entities like the Humphrey Institute of Public Affairs are acutely aware of the limitations of ratings such as those *US News and World Report* produces. Schools of public affairs are very different from each other (some contain planning programs, others are part of schools of social sciences, some have undergraduate degrees and Ph.D.s, others only master’s degrees, some are schools of international affairs, others focus on domestic social policy). In short, despite our pleasure in occasionally ranking highly (and our willingness to exploit its propaganda value when we do), we think the rankings obscure more than they illuminate and are weighed too highly by administrators who use them as substitutes for more rigorous evaluations.

Even within the discipline of political science, alternative ranking schemes have a somewhat dubious reputation. Our discipline’s magazine, *P/S: Political Science and Politics*, regularly publishes new systems for ranking Ph.D.-granting faculties. Oftentimes we will see a new candidate for measuring excellence (publications in the flagship journal, for example, rather than reputations among department chairs), followed by an anomalous ordering—the
University of Iowa or the University of Rochester or the University of Arizona is suddenly ranked first, while Harvard, Princeton, and Stanford have plummeted to 15th or 20th. A quick scan of the institutional affiliation of the authors reveals them to be from the University of Iowa or the University of Rochester or the University of Arizona. In short, attempts to dislodge reputational rankings to something "objective" often seem self-serving. We see the same thing with livable communities ranking. We greet the finding that Omaha, Nebraska is more desirable than San Francisco with skepticism while we may recognize that it may have some laudable quality-of-life indicators.

What, then, should we make of the indicators of the status of women? The IWPR study avoids the shortcoming of many comparisons of the status of women—too few points of comparison. The quality of life for women depends on many complex factors, and varies enormously for different groups of women. Single mothers who are marginal earners may be better off in Sweden or Germany than in the United States, while women lawyers may face fewer barriers to promotion in the U.S. One state, such as Minnesota, may be a leader internationally in reforming domestic violence laws but have very limited reproductive choice for women. Women in Scandinavia may have wonderful state services for child care but little provision for victims of sexual or domestic violence (Elman 1996). Other measures may also be contradictory. Women in Minnesota, for example, have one of the highest levels of voter participation but only elected our first woman to Congress since 1958 last year. The virtue of the IWPR's study is that it has tried to go across a number of issues rather than focusing on only one or a few. This comprehensiveness is essential to make genuine comparisons.

But despite its many virtues, the IWPR’s study leaves out a critical measure: women’s integration of the legal system. Why? I would argue this occurs because of two general reasons. First, even in the United States, we tend to bifurcate law and politics conceptually. Second, there are significant measurement obstacles. In political science, as in our everyday discourse about politics, we see law as a separate domain from politics. Lawyers carefully guard the image of legal reasoning as a monopoly, accessible only to those with specialized technical education. Political science, too, has been too ready to push this body of knowledge off, if not into law schools, into specialized law courses rather than integrating it into international relations, comparative politics, political theory, and American politics. In our Political Action Committees, support for women judicial candidates is often an afterthought. The recruitment of women judges is left to specialized groups of women lawyers, not Emily’s List. In short, we tend to bracket women lawyers and judges (if we consider them politicians at all) as a separate breed of politician.

Second, it is difficult to get good data on women in state courts. The biggest problem is one familiar to the comparativist—what counts as a judge varies from jurisdiction to jurisdiction. Once we get outside the realm of the appellate courts, state variation makes comparisons more difficult. In one state, worker's compensation adjudicators are considered members of the judiciary, in another state, they are considered civil servant administrators. There is no doubt about it, it is harder to count women in the state courts than women in the state legislature—but it is not that hard, and I think we should do it. Even if we only count women at the highest state appellate court, it is worth comparing those numbers.

Why should we count women on the bench? I believe there are at least five good reasons. First, the judicial interpretation of law (administrative, statutory, constitutional) shapes all of the areas of public policy most important to feminists: abortion, employment discrimination, sexual assault, domestic violence, inheritance, divorce and custody, and so on. Simply put, we cannot understand what the policy is if we exclude legal decision
making from view. Second, feminist legislative successes have little positive effect if the
judiciary does not implement them. And, in my opinion, feminist policy makers pay far too
little attention to this aspect of public policy, leaving the terrain to public interest law firms
and legal academics. For example, Title VII of the Civil Rights Act of 1964 which prohibits
sex discrimination in employment has been systematically eviscerated by a judiciary packed
with appointments by Presidents Reagan and Bush.⁶ We are all aware of the threat of
Supreme Court appointments to Roe v. Wade, but similar effects can be seen across all
areas of legislation from the Violence Against Women Act to Title IX. Third, the judiciary is
one of the most powerful institutions in American society and the inclusion of women in it is
an important symbolic as well as practical victory. We would like to think that the U.S.
Supreme Court and Minnesota Supreme Court could never again be composed of only men.
Fourth, not only is it important to have all institutions open and inclusive of women, but the
power of women judging is important in its own right. When batterers and rapists come
before a woman in a black robe, something in their sense of natural entitlement shifts. It is
no accident that the exclusion of women from juries was one of the last citizenship
exclusions to be struck down, and not until 1975 (Kerber 1998). Women sitting in
judgment of men is a powerful transformation of power wrought by the women’s
movement. Lastly, we should tally and compare representation of women on the bench
because it was and is a demand of the feminist movement. The National Women’s Political
Caucus, the National Association of Women Judges, the National Organization for Women,
and other feminist groups all made the appointment of women to the bench a high priority
in the 1970s (Resnick 1996).

I have listed below the measure that I propose IWPR utilize in future state reports and
analyzed the data for Minnesota. Unfortunately, I have not compiled the data for all 50
states, but what I have assembled is instructive. My future work will examine the complex
issue of the timing of the appointment to the state benches.
**Measuring Legal Integration**

1. Date of first woman appointed or elected to the state supreme court
   - A: Before 1970 (5)
   - B: 1971-1980 (12)
   - C: 1981-1990 (19)
   - F: Never (1)

2. Percentage of women currently on state supreme court
   - A: 50% or higher (0)
   - B: 35-50% (16)
   - C: 26-34% (9)
   - D: 11-25% (24)
   - F: 0-10% (1)

3. Percentage of women supreme court justices 1994-96 (imperfect data, Bonneau forthcoming 2001)
   - A: 50% or higher (1)
   - B: 33.3-49% (9)
   - C: 20-33.2% (14)
   - D: 11-19% (16)
   - E: 0-10% (10) with nonreporting states as 0

4. Has the state had a gender bias taskforce?
   - A: yes (45)
   - F: no (5)

5. Does the state have an independent association of women lawyers separate from the state bar association? [I only know the results from the state of Minnesota.]
   - A: yes
   - F: no
6. Has the state ever had a woman chief justice of its supreme court?
   
   10 yes
   
   44 no

7. Does the state (or any locality) have a feminist-oriented court monitoring organization?

8. Does the state (or any subdivision) have a domestic violence court?

9. What percentage of the state bar are women lawyers?

**Minnesota’s Report Card**

1. Date of first woman appointed or elected to the state supreme court

   Rosalie Wahl, 1977
   
   Rank: Three-way tie for 10th
   
   B

2. Percentage of women currently on state supreme court

   2/7 29%
   
   Rank: 18th
   
   C

   [Note: but Minnesota is only state to have had a majority of women on the state supreme court from 1991-1994, although Texas briefly had a three-woman judge supreme court to hear one case in 1925 (Carbon et al. 1982, 292).]

3. Percentage of women state supreme court judges (1994-96)

   50%
   
   Rank: 1st
   
   A

4. Has the state had a gender bias taskforce?

   Yes, 1989, as well as one on race bias, 1993

5. Does the state have an independent association of women lawyers separate from the state bar association?

   Yes, Minnesota Women Lawyers
6. Has the state ever had a woman chief justice of its supreme court?
   Yes, Kathleen Blatz

7. Does the state (or any locality) have a feminist-oriented court monitoring organization?
   Hennepin County (WATCH)

8. Does the state (or any subdivision) have a domestic violence court?
   Hennepin County

9. What percentage of the state bar are women lawyers?
   Don’t know.
Number of states who have appointed a woman to their Supreme Court
Number of states who have appointed a woman to their Supreme Courts, 1960-2000
Status of Women in Minnesota

Number of states who appointed first woman to their Supreme Courts, 1976-2000

References


Endnotes

1 I would like to thank Rachel Estroff for her research on this project.
3 The European Commission defines gender mainstreaming as: 'the systematic integration of the respective situations, priorities and needs of women in all policies and with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring, and evaluation.' Commission Communication, Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities, COM(96) 67. See also Progress Report from the Commission on the follow-up of the Communication, 'Incorporating Equal Opportunities for women and men into all Community policies and activities,' COM (1998) 122; A Guide to Gender Impact Assessment, DG Employment and Social Affairs Website, 1998.
5 Beverly Blair Cook was the pioneer in counting women on state courts and theorizing their exclusion. See her data and analyses. More recently, other groups are collecting this data, from researchers at the American Judicature Society who seek to understand the effects of judicial selection systems to the National Council for State Courts.