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SCOM 542: Seminar in Critical Theory and Communication

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The innate power differential between men and women has seen vast improvement over the centuries – in a legal sense. However, there continues to be less obvious forms of discrimination against women in the form of communication. Studies have shown that, while men and women interrupt one another equally, (James & Clarke, 1993) men do so more to female speakers than their male counterparts, and men are much less likely to yield to a woman's interruption than a man's. (Smith-Lovin & Brody, 1989)

Jacobi and Schweers (2017) apply this theory to the Supreme Court of the U.S. Why? Because oral arguments within the Supreme Court “affect case outcomes and constitute the only opportunity for outsiders to directly witness the behavior of the Justices of the highest court.” (p. 1379) Decisions made on the bench of the Supreme Court can impact millions of people and can have ripple effects that last for generations. It wasn't until very recently, in 1981, that a seat on the bench was held by a woman – Sandra Day O'Connor; over two centuries after the founding of our country. Since then, the Court has had a total of four female justices, three of whom are currently serving. Consequently, the question of gendered communication on the Supreme Court did not come into play until very recently.

In their comprehensive study about communication within the Supreme Court justices as well as between justices and advocates arguing their cases, Jacobi and Schweers (2017) offer a deep look into how justices on the bench communicate with – or rather interrupt – one another.

They ultimately find that gender, ideology, and seniority are the primary reasons behind why one justice might interrupt another. The authors utilize two separate databases to base their findings on: a public database of oral arguments from the Roberts Court, and a database created by the authors that consists of analyses from the 1990, 2002, and 2015 Terms of the Court. The purpose for this latter database is to compare patterns from when there was one, two, and three female justices on the court, respectively.

In the case of gender, the authors found that, “even though female Justices speak less often and use fewer words than male Justices, they are nonetheless interrupted during oral arguments at a significantly higher rate.” (p. 1384) This can be clearly seen in an oral argument from *Connecticut v Doehr* in 1991:

**Henry S. Cohn (advocate):** . . . Your Honors, this is a facial challenge to the statute, and I say this because it was noted in the opening paragraph of Judge Pratt’s opinion for the Second Circuit and was so noted in all the papers and opinions below. It arose on summary judgment –

**Justice Sandra Day O’Connor:** I’m not sure I –

**Justice William H. Rehnquist:** Mr. Cohn, what does that mean in the context of a case like this to say that it’s a facial challenge? I mean, we’re not dealing with a First Amendment situation here.

**Henry S. Cohn:** Yes, Your Honor, the evidence . . . (p. 1409)

While this is simply one example of a male justice (Rehnquist) interrupting a female justice (O’Connor), there are various other examples within the paper that give similar examples of such exchanges between male and female justices. What is more interesting, however, are the exchanges between male advocates arguing their case and female justices questioning them. Court guidelines specify that advocates are barred from interrupting a justice. The following is an example of this guideline being enforced after Justice Scalia was interrupted by an advocate during oral arguments in *Wiggings v. Smith* in 2003:

**Justice Antonin Scalia:** No. He reached the conclusion because –

**Donald B. Verrilli, Jr.:** And that's completely supported by the proffer.

**Justice Antonin Scalia:** He reached the conclusion because he –

**Justice William H. Rehnquist:** No two voices at the same time. Justice Scalia is asking you a question.

**Donald B. Verrilli, Jr.:** Excuse me. (p. 1384)

However, in an oral argument in *American Insurance Association v. Garamendi* in 2003, Chief Justice Rehnquist allowed the following to occur:

**Justice Ruth Bader Ginsburg:** But when you take what the President undertook, which was just to use best efforts, that doesn't sound like –

**Kenneth Steven Geller:** Under the Supremacy –

**Justice Ginsburg:** -- this Court would have much to –

**Kenneth Steven Geller:** --Justice Ginsburg, I think it's the operation of the Supremacy Clause.

(p. 1385)

Given numerous examples such as these, this begs the question: are female justices afforded equal opportunity to question during oral arguments?

The authors compiled information into a table in which they documented the number of interruptions in oral arguments between 2004 – 2015. During this period, on average, about one quarter of the justices serving on the bench were women, and female justices accounted for roughly 25% of speech episodes. This means that the proportion of female speech to the number of females on the bench is rather proportional. However, of the 7,239 recorded interruptions during this time frame, the women on the bench were interrupted about 32% of the time, and women did the interrupting about 4% of the time. This suggests that female justices are being interrupted at disproportionate rates.

In the case of seniority, the authors found that the longer a justice has served, the more they feel emboldened to interrupt their less senior colleague. Although this relationship is less significant in the reasons behind interruption, it is important to note nonetheless. As women gain more years on the bench, they become less likely to frame questions with “may I ask,” or other lead-ins like this that give other justices – primary male justices – the opportunity to interrupt. Essentially, women learn to communicate more aggressively like their male counterparts. Ideology, on the other hand, is much more indicative of justice interruption. In general, conservative justices interrupt liberal justices at a higher rate, and the most common form of interruption on the lines of ideology is that of a male conservative justice against a female liberal justice.

Obviously, the three variables mentioned – gender, ideology, and seniority – should not be looked at in isolation; rather, each variable operates in conjunction with the other two variables such that a senior male conservative justice is much more likely to interrupt a junior female liberal justice than vice versa. These kinds of interruptions on the basis of gender, ideology, and seniority are significant because they breach norms of equality (gender), neutrality (ideology), and power dynamics (seniority). While this article does not explicitly examine the impacts of excluding junior female liberal justices from speaking and questioning during oral arguments, it is obvious that there is a stark difference in power and influence between male and female justices. When a female justice – or any justice, for that matter – is interrupted and their point goes unaddressed, they are prevented from using that unaddressed point to persuade their colleagues, and their voice is prevented from being heard in potentially monumental court cases. While this article does not examine the implications these patterns may have on the general public, it is important to not overlook the reflections.

## **Citations**

Jacobi, T., & Schweers, D. (2017). Justice, Interrupted. *Virginia Law Review*, 103, 1379–1496.

James, D., & Clarke, S. (1993). Women, Men, and Interruptions: A Critical Review.

In *Gender and conversational interaction*. New York, NY: Oxford University Press.

Smith-Lovin, L., & Brody, C. (1989). Interruptions in Group Discussions: The Effects of Gender and Group Composition. *American Sociological Review*, 54(3), 424–435.