

# Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court

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## Abstract

Women are less successful than their male counterparts at Supreme Court oral arguments under certain circumstances. However, existing work relies on mere presence rather than on any action female attorneys take in their argument. Drawing on recent work that stresses gender is performative, I argue success for women at oral arguments is tied to conformance with gender norms, subtle and unconscious expectations of how men and women should communicate. Via a quantitative textual analysis of the 2004–2016 terms, I find attorneys are more successful when their oral arguments are more consistent with gender norms. Specifically, male attorneys are rewarded for using less emotional language whereas female attorneys are successful when using more emotional language. This study represents a more nuanced and performative understanding of gender at oral arguments. These results raise normative concerns about how effective women are at the Supreme Court.

## Keywords

gender norms, oral arguments, U.S. Supreme Court, attorneys

When Sarah Weddington argued *Roe v. Wade*<sup>1</sup> on behalf of Jane Roe, her physical appearance became a central feature of the case for Court observers. Initially, Weddington wore her hair down. When the Court ordered reargument, she wore her hair in a bun. Since gender norms hold hair worn down is feminine, speculation swirled she wore her hair up in an effort to appear more persuasive to the Court; in reality, her hair was wet and she did not have a hair dryer (Weddington 1993). Weddington's experiences underscore how gender norms, subconscious ingrained expectations about how men and women should act (Jones 2016; Rudman and Glick 1999, 2001), shape outcomes across a host of contexts (e.g., Karpowitz and Mendelberg 2014). While gender norms can involve practically any aspect of interaction, including mannerisms and appearance, scholars frequently focus on the use of language (e.g., Gleason, Jones, and McBean 2019; Jones 2016; Pennebaker 2011; Yu 2014). Importantly, language lies at the heart of an attorney's job.

The Supreme Court extols attorneys to emphasize “legal theory” over “facts and emotion” in their arguments (O'Connor 2013, 91). This seems intuitive: an impassioned jury argument has little place before an appellate court focused on the nuance of the law. The Court sets the professional norm that attorneys avoid emotion. This is not an issue for male attorneys since the markers of a good man and a good attorney are synonymous; arguments (and

men) should be forceful and persuasive. By contrast, this professional norm is problematic for female attorneys because gender norms hold women should use more emotional communication (Chaplin 2015; Fischer and LaFrance 2015). This places female attorneys in a difficult balancing act where they must navigate competing professional and gendered expectations (Rhode 1994). Violating expectations, either professional or gendered, can negatively shape decision-makers' calculus even if only at the subconscious level (Gleason, Jones, and McBean 2019; Kathlene 2001). Faced with such a balancing act, women tend to downplay their gender by adopting masculine communication styles in professional contexts (Gleason, Jones, and McBean 2017; Kanter 1977). However, by eschewing gender norms, women often face sanction (e.g., Biernat, Tocci, and Williams 2012).

While scholars have traditionally dismissed oral arguments as a formality (e.g., Rohde and Spaeth 1976), recent work notes they can shape outcomes both in terms of the justice vote and the content of the resulting opinion (T. R.

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Johnson 2001; Ringsmuth, Bryan, and Johnson 2013). Importantly, previous scholars note gender impacts success at oral arguments in terms of outcomes (see, for instance, Szmer, Sarver, and Kaheny 2010) and interactions between justices and attorneys (e.g., Patton and Smith 2017). While these studies provide valuable insight into how attorney gender manifests at oral arguments, they operationalize gender as mere presence. That is to say, was the argument made by a male or female attorney (e.g., Szmer, Sarver, and Kaheny 2010)? This approach, while intuitive, fails to account for the myriad of ways in which attorneys perform gender and are subsequently evaluated for conformance with gender norms. Thus, it is not just important that an attorney is a woman, but it is also important whether she argues consistent with gendered expectations (e.g., Rudman and Glick 2001). A host of scholarship, both on the Court (e.g., Gleason, Jones, and McBean 2019) and in other political contexts (e.g., Jones 2016; Karpowitz and Mendelberg 2014; Shaw 2000; Yu 2014), stresses compliance or violation of gender norms sways decision-makers and, thus, alter the shape of case law binding on all lower courts. While previous work notes this effect exists in party briefs (Gleason, Jones, and McBean 2019), I argue it is also present in oral arguments. Importantly, oral arguments are the only public stage of the judicial decision-making process and the sole instance where attorneys directly interact with justices. Thus, the performance of gender and its evaluation can have wide-ranging consequences for how effectively women participate at the apex of the American legal profession. Given this, it is imperative scholars understand the way in which the performance of gender at oral arguments affects judicial decision-making.

I examine the extent to which attorneys' compliance with gender norms at oral arguments shapes the justice vote at the merits. In doing so, I build on recent work, which stresses attorney gender shapes judicial behavior at oral arguments (Jacobi and Schweers 2017), and the way in which attorneys perform gender in party briefs predicts success when male justices write the majority opinion (Gleason, Jones, and McBean 2019). This approach provides a more nuanced account of how gender at the Supreme Court shapes outcomes than current studies on the mere presence of women (e.g., Szmer, Sarver, and Kaheny 2010). Briefly, I find female attorneys are more successful at oral arguments when their arguments are in line with female gender norms. The reverse is true for male attorneys.

While this study could be conducted at virtually any stage or level of the judicial process, examining oral arguments at the Supreme Court is particularly beneficial for a number of reasons. Since oral arguments represent the only public stage of the judicial decision-making process, the role of gender norms likely has consequences

for public evaluation of the Court and, thus, considerations of judicial legitimacy (e.g., Nelson 2015). If the public does not believe women are capable of effective advocacy at the Court, they may lose faith in the institution. In addition, while briefs are relatively formal documents in which a plethora of law clerks and attorneys can shape content and language (Peppers and Zorn 2008; Rosenthal and Yoon 2011), oral arguments place attorneys in direct interaction with the justices without any benefit of revision or ghostwriting (e.g., T. R. Johnson 2004; Wrightsman 2008). Accordingly, oral arguments represent a relatively straight-forward test of how conformance with gender norms in language manifest at the Court. Finally, while scholars stress the importance of oral arguments (e.g., T. R. Johnson 2001), they are quick to note while oral arguments can shape the topics discussed at conference and opinion content, "flipping" a vote is rare (Ringsmuth, Bryan, and Johnson 2013). Thus, oral arguments represent a relatively high bar by which to test how attorney conformance with gender norms impact outcomes.

I explore this question by drawing on all orally argued cases at the U.S. Supreme Court from the 2004 to 2016 terms. Using quantitative textual analysis, I extract the amount of emotional language used in each attorney's argument (Gleason, Jones, and McBean 2017, 2019; Jones 2016; Pennebaker and King 1999). In tandem with attorney gender, this represents my primary predictor of the attorney success. This allows me to move beyond the mere presence of women at oral arguments and toward a more nuanced measure of how attorneys perform gender. In line with expectations, I find female attorneys are more successful in securing justice votes when they conform with gender norms.

## Oral Arguments and Attorney Gender

The Supreme Court's work is shrouded in secrecy. Indeed, oral arguments are the only public stage of the entire judicial decision-making process. Ironically, for many years, scholars contended oral arguments have no impact on outcomes (e.g., Rohde and Spaeth 1976; Segal and Spaeth 2002). However, recent scholarship demonstrates oral arguments impact judicial decision-making by shaping opinion content and offering a means for justices to signal their thoughts on the case to their colleagues (e.g., Black, Johnson, and Wedeking 2012; T. R. Johnson 2004). These studies cast oral arguments as an information gathering exercise by the justices (T. R. Johnson 2004). This occurs in what Wrightsman (2008) calls an "atypical conversation" where the justices can interrupt attorneys at will with questions, jokes, or wistful stories (Black et al. 2011; Black, Johnson, and

Wedeking 2012; T. R. Johnson 2004; T. R. Johnson, Black, and Wedeking 2009). These conversations and the questions the justices pose to attorneys therein provide information, both directly and through inter-justice signaling, which permeate throughout the entire opinion-writing process, ranging from the discussions at conference to the final content of the opinion itself (T. R. Johnson 2004).

Throughout this literature, there is an underlying theme of justices evaluating attorneys and their arguments. A skilled attorney, or one from a prestigious firm, is better able to make a persuasive argument, which can have consequences on the subsequent shape of the discussion at conference and in resulting case law (Black et al. 2012; T. R. Johnson 2004). While this work often notably uses Justice Blackmun's "grades" (T. R. Johnson, Wahlbeck, and Spriggs 2006; Ringsmuth, Bryan, and Johnson 2013), it also identifies a number of predictors of oral argument success. While legal factors play a role (see, for instance, Black, Johnson, and Wedeking 2012), scholars are increasingly cognizant individual attorney characteristics shape outcomes.

All attorneys arguing before the Court are members of the Supreme Court Bar, the apex of the American legal profession, but not all of its members are equally skilled. Many attorneys argue before the Court just once in their career; understandably then, there is remarkable variation in the quality of oral arguments (Ringsmuth, Bryan, and Johnson 2013). Unsurprisingly, the markers of an effective oral argument track well with traditional indicators of attorney quality such as previous experience before the Court, affiliation with the Office of the Solicitor General, and serving as a law clerk, to name just a few (Curry 2015; Feldman 2017; T. R. Johnson, Wahlbeck, and Spriggs 2006; Ringsmuth, Bryan, and Johnson 2013). These are, at first blush, nongendered markers of quality; however, female attorneys are underrepresented at the Supreme Court Bar (Sarver, Kaheny, and Szmer 2008) and in the law clerk corps (Kromphardt 2017). Thus, it is tempting to say that greater representation of women at the Court will lead to more success as they will accrue greater experience and presumably be hired by better firms (e.g., Kaheny, Szmer, and Sarver 2011; Kenney 2002). However, there is little to assess this expectation with since, save for a few studies, gender is conspicuously absent from the predictors of oral argument attorney success.

The small literature on gender and attorney success indicates female attorney success depends in large part on the institutional context of the court in question. Context manifests as the number of women on the bench (Collins, Manning, and Carp 2010; Scheurer 2014; Szmer, Christensen, and Kaheny 2015), at the bar (Kaheny, Szmer, and Sarver 2011), and in the law clerk corps

(Kaheny et al. 2015). In a highly gendered environment, such as the Supreme Court Bar, gender is a salient feature that shapes outcomes and evaluations (e.g., Eagly and Carli 2007; Shih et al. 1999). Simply put, because women are rare at oral arguments, their presence is readily noted, and the justices implicitly enforce gendered expectations (Kanter 1977). As the gendered context of a given institution becomes more equitable, gender becomes less salient and women are more successful. For instance, female attorneys fare better than their male counterparts at the Supreme Court of Canada where approximately 50 percent of all attorneys and law clerks are women (Kaheny, Szmer, and Sarver 2011; Kaheny et al. 2015). Shifting to the American context, Szmer, Sarver, and Kaheny (2010) note female attorneys at the Supreme Court are evaluated more harshly by conservative justices in some issue areas. In addition, women are more successful in cases involving women's issues where they are perceived as experts because of their gender (Szmer et al. 2013; Szmer, Sarver, and Kaheny 2010).

While these studies collectively indicate female attorneys are less successful than men at American federal appellate courts under certain circumstances in part because of their gender, they rely on the mere presence of women at oral arguments. That is to say, the primary predictor of success for female attorneys is their presence in the court room. While intuitive as the gender of attorneys is surely readily noted by the justices (e.g., Kanter 1977; Shih, Pittinsky, and Ambady 1999), this approach ignores gender can be conceptualized as a performance in which people are evaluated for how well they conform with expectations of behavior via gender norms (Butler 1999; Mulac et al. 2013). Gender norms are subtle expectations about how men and women should act, appear, and communicate. Gender norms typically hold women should use more emotional language than men (Eagly and Carli 2007). For their part, men are expected to use less emotional language (Biernat, Tocci, and Williams 2012; Rudman and Glick 1999, 2001). Violating these norms often results in sanctions from decision-makers in a number of contexts in often subtle and subconscious ways. Often, gender norms manifest through language.

Gender permeates through language (Butler 1999; Jones 2016), and scholars note a number of measurable differences in how men and women communicate, including function words (Pennebaker 2011) and emotional language (Newman et al. 2008; Schwartz et al. 2013). Indeed, there is empirical evidence that women employ emotional language more than men (Chaplin 2015), and people subconsciously hold both men and women to these standards of communication (Mulac et al. 2013). Should a woman communicate with less emotional language, she will likely face sanctions such as criticism and lower success rates (Gleason, Jones, and McBean 2019;

Heilman et al. 2004; Jones 2016).<sup>2</sup> Extended to the legal profession, this implies in order for women to succeed they should conform with female gender norms and use more emotional language in oral arguments. However, the American legal system is premised on adversarial conflict, and the Court explicitly instructs attorneys to avoid emotional language (O'Connor 2013). Perhaps taking this to heart, women often adopt more masculine styles of language and behavior to downplay the salience of their gender (Gleason, Jones, and McBean 2017; Kanter 1977), particularly when they occupy a token number of positions in a given institution (e.g., Collins, Manning, and Carp 2010; Scheurer 2014; Szmer, Christensen, and Kaheny 2015). Thus, the fewer women present in a given context the more likely women are to argue "like men" by employing low levels of emotional language. But, by doing so, they violate gender norms, which can have negative consequences.

Work on gender norms and attorneys is largely relegated to the trial court literature. These studies indicate female attorneys conform more to the adversarial professional (masculine) norms rather than female gender norms in the courtroom. Female trial court attorneys then face sanction and are evaluated more harshly by their male peers (Blodgett 1986; Kearney and Sellers 1996; Seidenberg 1985), perhaps in part because of their transgression of gender norms. Despite the trial court literature's focus on the performance of gender, work on appellate courts is typically limited to mere presence. This is problematic as the structure of arguments can impact success (Wedeking 2010). Recent work moves beyond mere presence at appellate courts to performance and notes the way in which attorneys perform gender in party briefs shapes success at the Supreme Court. While the Court writ large enforces a norm that attorneys avoid emotion in their briefs (Black et al. 2016), Gleason, Jones, and McBean (2017) note that female attorneys' party briefs are more successful when they employ more emotional language. Gleason, Jones, and McBean (2019), expand on this work and find only male opinion authors enforce gender norms. Given the Court's institutional culture (Sarver, Kaheny, and Szmer 2008) and previous work, the role of gender norms in shaping attorney success likely extends to oral arguments as well.

While *Bradwell v. Illinois*,<sup>3</sup> a case in which the Court upheld a state ban on women practicing law, has long since been discredited, the Court remains an overwhelmingly male institution. Female attorneys were only permitted to argue before the Court after an Act of Congress in 1879. Even then, opposition to women entering the legal profession remained well into the twentieth century. As a recent law school graduate in the 1950s, Justice Ginsburg was denied a clerkship largely because of her gender. The most prominent office arguing before the

Court, the Office of the Solicitor General, did not hire female attorneys until 1972 (Wrightsmen 2008).<sup>4</sup> While women now hold three of the nine seats on the Court, they remain a distinct minority at the Supreme Court Bar (Sarver, Kaheny, and Szmer 2008), and the number of female attorneys has remained steady from the 1990s through the 2010s. Sarver, Kaheny, and Szmer (2008) note that women argue approximately 14 percent of all cases from 1993 to 2001; more contemporary times are relatively unchanged: from 2004 to 2016, 15.5 percent of oral arguments were presented by women.<sup>5</sup> Women are a distinct minority at the Court and that minority status makes gender salient. Under these circumstances, the culture will be overwhelmingly male, and an argument presented by a female attorney is a rare and notable event, which heightens the salience of gender and the enforcement of gender norms (e.g., Shih, Pittinsky, and Ambady 1999). This is evident in justice interactions with female attorneys at oral arguments.

When gender is a salient aspect of the environment, the justices will be cognizant of the gendered dynamics of attorneys' argument (e.g., Kanter 1977; Shih, Pittinsky, and Ambady 1999). Under such circumstances, women are likely to adopt the communication style of the majority, which is to say male attorneys. This means gender norms are violated as women downplay the salience of their gender (Kanter 1977; Scheurer 2014). In such a context, gender norms are likely to be enforced by the justices even if subconsciously (Gleason, Jones, and McBean 2019; Jones 2016; Kathlene 2001). While previous studies contend female attorneys are less successful based on their presence in the court room (e.g., Szmer, Sarver, and Kaheny 2010), I argue that the success of female attorneys is best determined by conformance with gender norms. Drawing on work on briefs filed at the Supreme Court (Black et al. 2016; Gleason, Jones, and McBean 2017, 2019), I argue female attorneys are more successful at oral arguments when their communicative style aligns with feminine gender norms, which the justices subconsciously enforce (e.g., Rudman and Glick 1999; Heilman et al. 2004). Likewise, male attorneys should be less successful when their arguments break with male gender norms.

## Data and Method

I collect transcripts of orally argued cases on the discretionary docket from 2004 to 2016 with a signed opinion and where one attorney argues for each the petitioner and respondent (e.g., Szmer, Sarver, and Kaheny 2010).<sup>6</sup> This results in 429 unique cases. I follow the lead of previous studies on attorney success at oral argument and use the justice vote as my unit of analysis (e.g., T. R. Johnson, Wahlbeck, and Spriggs 2006). Since I am interested in the

success of each attorney's argument, I generate one observation per attorney for each justice that heard the case. This results in a total of 6,664 observations.

The dependent variable is a dichotomous measure of whether the justice votes for the attorney's party at the merits. I use the Supreme Court Database (Spaeth et al. 2018) to note whether the justice votes for the petitioner or the respondent. Using the official oral argument transcripts on the Supreme Court's website, I link attorney names to the petitioner (respondent) in each case.<sup>7</sup> This is set to "1" if the justice votes in favor of the attorney's party and "0" otherwise.

I have three primary independent variables. First, I measure attorney gender by examining how the transcript notes each attorney's speaking roles. In almost all instances, attorneys are referred to as "Mr." or "Ms." Using these markers, I am able to determine attorney gender.<sup>8</sup> My second primary independent variable measures the level of emotional language in each attorney's oral argument. Emotional language is frequently used to measure compliance with gender norms (see, for instance, Jones 2016; Mulac et al. 2013; Rhode 1994), and a number of scholars in political and legal contexts (Black et al. 2016; Bryan and Ringsmuth 2016; Shaw 2000; Yu 2014), including attorney arguments in briefs at the Supreme Court (Gleason, Jones, and McBean 2017, 2019), use affect to measure emotional language. Affect measures the amount of emotion in a body of text. To create this measure, I use text scraping software (Wickham 2016) to produce an individual attorney transcript containing just her utterances. I next analyze each attorney's transcript with Linguistic Inquiry Word Count (hereafter LIWC) (Pennebaker and King 1999).<sup>9</sup> LIWC generates scores for a number of aspects of language, including affect. Lower values of affect are more masculine, whereas higher values are more in line with female gender norms. In keeping with standard practice, I standardize the resulting measure (e.g., Wedeking 2010). Since I posit attorneys are rewarded for conforming with gender norms and those norms manifest differently for male and female attorneys, I interact the gender and affect measures.

Recent scholarship provides a number of control variables. More experienced attorneys fare better (e.g., Curry 2014; McGuire 1995) and approach oral arguments differently. *T*-tests indicate the most experienced attorneys are less affective than attorneys writ large; this is also true when comparing the ten most frequent male (female) attorneys to attorneys of the same gender.<sup>10</sup> This suggests experience leads attorneys, regardless of gender, to argue differently. To this end, I include the experience advantage for each attorney. I construct this measure by first noting the total number of appearances at oral arguments each attorney made prior to 2004 via the total number of entries for each attorney in Oyez.org's oral argument

records prior to 2004. I increment this value by one for each subsequent appearance by that attorney. I next subtract the opponent's score from the attorney in question to create an experience advantage. Since attorneys affiliated with the Office of the Solicitor General are more successful (see, for instance, Black, Johnson, and Wedeking 2012; Black and Owens 2012; McGuire 1998), I include a dichotomous measure of whether the attorney is affiliated with the solicitor general. Since attorneys who have previously served as law clerks win more frequently, I include a dichotomous measure of whether the attorney previously clerked at the Court (Peppers 2006). Parties with more resources tend to win more frequently (Galanter 1974; Wheeler et al. 1987). Accordingly, I include the difference in party capability as defined by Szmer, Sarver, and Kaheny (2010).

The Court often accepts cases to reverse the lower court. Accordingly, I include a dichotomous variable noting whether the attorney represents the petitioner (Spaeth et al. 2018). Because an increased number of questions from the Bench leads to lower overall success rates (T. R. Johnson, Black, and Wedeking 2009), I include a count of the total number of judicial statements during the oral argument for each attorney relative to her opponent. I construct this measure by text scraping the transcript (Wickham 2016) to count the total number of times the transcript notes the justices speaking. I then subtract that attorney's opponent's question total from hers to note the relative number of questions each attorney receives following the same procedure used for the experience and resource measures.

A greater number of amicus briefs filed in support of a party also increases that party's success (Collins 2008); I note the relative level of amicus brief support each attorney enjoys by subtracting the number of briefs filed in support of the attorney's opponent from the number of briefs filed in support of the attorney in question (Box-Steffensmeier, Christenson, and Hitt 2013). Of course, not all amici are created equal, and an amicus brief from the solicitor general boosts success (Collins 2008; McGuire 1998). Accordingly, I include a dichotomous marker noting whether the attorney is supported by an amicus brief from the solicitor general.<sup>11</sup>

Given ideology is a powerful predictor of judicial behavior, I create a measure of ideological congruence between each attorney and justice. This measure accounts for the possibility that an attorney is successful not because of gender performance but because the attorney advocates an ideological position congruent with the justice's preferences. To create this measure, I multiply each justice's Judicial Common Space score (Epstein et al. 2007) with the ideological position for which each attorney advocates (Spaeth et al. 2018). More specifically, I multiply the justice's ideology score by  $-1$  if the

attorney represents the liberal position and by 1 if the attorney represents the conservative position. This results in a positive score if the attorney argues in line with the justice's preferences, negative otherwise. Female justices likely share many of the same experiences as female attorneys and may, therefore, be more sympathetic to their arguments (e.g., Gleason, Jones, and McBean 2019; Haire and Moyer 2015). Because of this, I include a dichotomous measure noting whether a justice is female. I interact it with the female attorney variable. Because an increased number of women on a given bench leads to jurists seeing cases from a different lens, at least in some issue areas (Boyd, Epstein, and Martin 2010; Collins, Manning, and Carp 2010; Scheurer 2014), I include a count of the number of female justices on the Court at the time of argument. I interact this with the female attorney variable. Kromphardt (2017) notes justices with more female law clerks are more receptive to sex discrimination and abortion claims, conditional on ideology. Accordingly, I include the percentage of female law clerks each justice has in the term that the case is decided and multiply it by the female attorney variable. The justices often decide cases differently in politically salient cases (Epstein and Segal 2000). As such, I include a dichotomous marker of whether the decision appeared on the front page of the *New York Times* the day after it is decided. This measure is interacted with the female attorney measure.

In line with other research exploring the language employed in briefs, I include a measure of the lexical complexity of the oral argument with the standardized version of LIWC's measure of words greater than six letters long (see, for instance, Black et al. 2016; Gleason, Jones, and McBean 2017, 2019; Wedeking 2010).<sup>12</sup> Recent work notes the extent to which party briefs comply with gender norms shapes attorney success (Gleason, Jones, and McBean 2019). Thus, I collect the full text of all party briefs filed for the petitioner and respondent and note the counsel of record and their gender. Using LIWC, I measure the level of affect in each brief. I multiply this score by -1 for male authors and 1 for female authors to generate the extent to which the brief complies with gender norms.<sup>13</sup>

Since my dependent variable is dichotomous, I employ a logit model with the justice vote as the unit of analysis and robust standard errors. Since many of my control variables are highly correlated with each other, I run three separate models with alternate specifications for the control variables; my results are robust across all specifications.<sup>14</sup>

## Results

The results of my models provide support for my contention that female attorneys are more successful at oral

arguments when they conform with gender norms. My models, displayed in Table 1, are robust across all three specifications. This provides support to my hypothesis. Models 4 to 6 are the same as models 1 to 3, but they exclude the interaction terms. When considered in tandem with the fact an evaluation of justice votes is a high bar (T. R. Johnson 2004; Ringsmuth, Bryan, and Johnson 2013), my results demonstrate gender norms at oral arguments have a powerful influence on judicial decision-making. To facilitate ease of interpretation, I use model 1 when discussing the size of effects and rendering figures unless otherwise noted. Since logit coefficients are unintuitive, I discuss the results in terms of predicted probabilities.

The Court instructs attorneys to avoid emotion and instead focus on arguing the law (O'Connor 2013). Importantly, the Court enforces this expectation in party briefs as those briefs with the most affect are the least successful (e.g., Black et al. 2016). Here, I find much the same to be the case when looking at the affect term without reference to attorney gender. As an oral argument becomes more affective, its success decreases. Moving from the mean level of affect to one standard deviation above the mean decreases the success of an oral argument from 0.50 to 0.49. Examined at the most extreme, the predicted probability of securing a justice vote with the least affective argument in my dataset is 0.55. Conversely, the predicted probability of a justice voting in favor of an attorney using the most affective argument is 0.44. Importantly however, the affect measure considers the impact of affect without respect to attorney gender.

While gender is not on its own significant in models 1 to 3, it is significant and positively signed in models 4 to 6. While this would suggest female attorneys are more effective at oral arguments than their male counterparts, the interaction between gender and affect in models 1 to 3 demonstrates the presence of female attorneys does not in itself predict success; rather, the role of attorney gender in predicting success is contingent on compliance with gender norms. By not including the interaction terms, models 4 to 6 are misspecified and erroneously suggest the mere presence of a woman make them more successful than men at oral arguments. To determine the impact of gender on justice votes, I turn to my interaction term.

Interaction terms cannot be evaluated in the same manner as typical additive model terms where the coefficient is interpreted while holding all other values at their means; rather both attorney gender and affect must vary while every other model term is held constant (Brambor, Clark, and Golder 2006). This is displayed graphically in Figure 1 where the *x*-axis denotes the affective content of the female attorney's oral argument while the *y*-axis notes the marginal effect of affect on brief success. The solid sloped line represents the point estimate for the marginal

**Table 1.** Attorney Success at Oral Arguments.

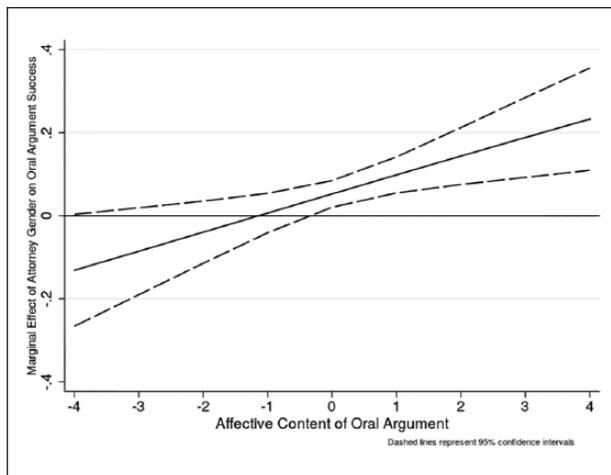
	1	2	3	4	5	6
Female Attorney	0.219 (0.181)	0.247 (0.179)	0.322 (0.181)	0.245** (0.075)	0.263*** (0.075)	0.381*** (0.075)
Affective Content of Argument	-0.090* (0.036)	-0.080* (0.036)	-0.041 (0.036)	-0.044 (0.032)	-0.039 (0.032)	-0.011 (0.032)
Female × Affective Content	0.215** (0.078)	0.195* (0.077)	0.143 (0.077)	—	—	—
Experience Advantage	—	—	0.001* (0.001)	—	—	0.001* (0.001)
Solicitor General Party	—	0.330*** (0.068)	—	—	0.325*** (0.068)	—
Former Clerk	0.183** (0.056)	0.217*** (0.056)	0.245*** (0.056)	0.181** (0.056)	0.214*** (0.056)	0.240*** (0.055)
Capability Advantage	0.075*** (0.008)	—	—	0.074*** (0.008)	—	—
Petitioner	1.178*** (0.057)	1.102*** (0.056)	1.213*** (0.057)	1.177*** (0.056)	1.101*** (0.055)	1.216*** (0.057)
Question Advantage	—	—	-0.014*** (0.001)	—	—	-0.015*** (0.001)
Amicus Brief Advantage	0.069*** (0.008)	0.054*** (0.007)	0.045*** (0.008)	0.070*** (0.008)	0.054*** (0.007)	0.045*** (0.008)
Solicitor General Amicus Brief Support	-0.146 (0.247)	—	—	-0.181 (0.248)	—	—
Ideological Congruence	0.947*** (0.053)	0.961*** (0.052)	0.988*** (0.053)	0.941*** (0.052)	0.954*** (0.052)	0.981*** (0.053)
Female Justice	-0.045 (0.071)	-0.046 (0.071)	-0.049 (0.072)	-0.002 (0.065)	-0.001 (0.065)	-0.003 (0.066)
Female Attorney × Female Justice	0.272 (0.184)	0.289 (0.186)	0.29 (0.186)	—	—	—
Female Justice Count	0.004 (0.087)	0.026 (0.086)	-0.003 (0.088)	-0.004 (0.032)	-0.012 (0.032)	-0.004 (0.032)
Female Attorney × Female Justice Count	-0.009 (0.210)	-0.067 (0.208)	0.006 (0.210)	—	—	—
% Female Clerks	0.043 (0.153)	0.04 (0.152)	0.041 (0.154)	-0.005 (0.140)	-0.006 (0.139)	-0.006 (0.140)
Female Attorney × % Female Clerks	-0.279 (0.383)	-0.271 (0.380)	-0.261 (0.378)	—	—	—
Political Salience	-0.067 (0.111)	-0.089 (0.110)	-0.039 (0.117)	0.002 (0.106)	-0.013 (0.105)	0.018 (0.109)
Female Attorney × Political Salience	0.66 (0.374)	0.699 (0.385)	0.52 (0.357)	—	—	—
Lexical Complexity	0.055* (0.027)	0.061* (0.027)	0.044 (0.028)	0.056* (0.027)	0.060* (0.027)	0.043 (0.027)
Brief Gender Norm Compliance	-0.049 (0.031)	-0.042 (0.031)	-0.015 (0.032)	-0.03 (0.030)	-0.024 (0.030)	-0.002 (0.031)
Constant	-0.692*** (0.081)	-0.763*** (0.082)	-0.752*** (0.082)	-0.688*** (0.093)	-0.744*** (0.093)	-0.756*** (0.095)
$\chi^2$	801.17	765.85	835.22	792.72	758.75	827.49
Observations	6,664	6,664	6,664	6,664	6,664	6,664

Standard errors in parentheses.

\* $p < .05$ . \*\* $p < .01$ . \*\*\* $p < .001$ .

effect of gender at that particular level of affect. The dashed lines represent the 95 percent confidence intervals. Should the reference line at  $y = 0$  fall within the 95 percent confidence intervals, then the marginal effect of

gender on oral argument success is insignificant at that particular level of affect. The positive slope in Figure 1 indicates female attorneys have a higher probability of securing justice votes when they use higher levels of

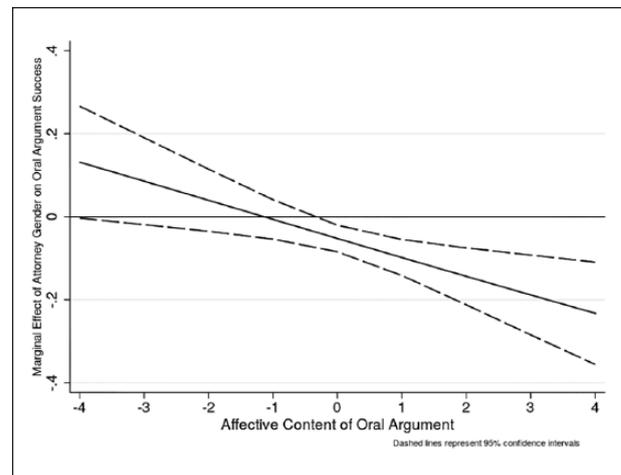


**Figure 1.** Impact of interaction of attorney gender and affective content of oral argument on securing justice vote at oral arguments (female attorneys).

affect, which are more in line with female gender norms. However, when female attorneys use low levels of affective language, it does not factor into their success in securing the justice vote. This demonstrates increased compliance with gender norms increases female attorney success at oral arguments.

Figure 1 displays the interaction between attorney gender and affective content of the argument. Because of the way the gender variable is coded, the sloped line displays the impact of affect on argument success for female attorneys. The effect for male attorneys is the opposite of Figure 1. To provide a graphical representation, I rerun model 1 with the gender variable recoded to one if the attorney is male and zero if the attorney is female. While this does not alter the results beyond flipping the sign on the gender variable, it allows me to produce Figure 2, which follows the same conventions as Figure 1. The important distinction for Figure 2 is that it plots the marginal effect of affective language on male attorney success. The negatively sloped line indicates male attorneys are less successful when they use higher levels of affective language, which breaks with male gender norms. Should male attorneys use low levels of affective language, which is consistent with male gender norms, it does not alter their ability to secure the justice vote. Thus, as long as male attorneys do not break with gender norms, their success is not impacted. This lends further support to my expectations that attorney success is tied to compliance with gender norms.

Several control variables reach significance. Attorneys are more successful when they are affiliated with the Office of the Solicitor General. On average, affiliation with the Solicitor General increases the predicted probability of oral argument success from 0.48 to 0.56.<sup>15</sup>



**Figure 2.** Impact of interaction of attorney gender and affective content of oral argument on securing justice vote at oral arguments (male attorneys).

Previously serving as a law clerk increases the predicted probability of oral argument success from 0.48 to 0.53. Attorneys are also more successful when the gap between party resources increases. For parties with equal resources, the predicted probability of success is 0.50. At the greatest gap, such as an inmate suing the federal government, the predicted probability of success falls to 0.44 for the inmate and increases to 0.56 for the federal government. Should an attorney represent the petitioner, her predicted probability increases from 0.38 to 0.63 relative to if she were representing the respondent.

As the number of questions an attorney receives at oral arguments relative to her opponent increases, her success decreases. Moving from the mean where there is no question advantage to one standard deviation above the mean where a given attorney receives twenty-six more questions than her opponent decreases the predicted probability of oral argument success from 0.50 to 0.41.<sup>16</sup> Likewise, an increased number of amicus briefs filed in support of an attorney's party increases the predicted probability of her success. Moving from the mean to one standard deviation above the mean increases the predicted probability of success from 0.50 to 0.56.

Likewise, attorneys are more successful in securing the justice vote when making ideologically congruent arguments. Moving from the mean (a perfect moderate) to one standard deviation above the mean increases the predicted probability of securing the justice vote from 0.50 to 0.52. While this effect is small, it is worthwhile to examine it in the most extreme cases. The predicted probability of securing the justice vote at the furthest possible distance in the data is 0.32 while the predicted probability rises to 0.68 before the most congruent justice. While a number of studies note party briefs are more successful

when they are less complex, I find increased lexical complexity increases the predicted probability of oral argument success. Moving from the mean value of lexical complexity to one standard deviation above the mean modestly increases the predicted probability of success from 0.50 to 0.51.

## Discussion

While women occupy an increasing number of seats on the federal bench (Slotnick et al. 2017) and constitute roughly 50 percent of recent law school graduates (American Bar Association 2016), relatively few women argue at the Supreme Court (Sarver, Kaheny, and Szmer 2008). Because of the low numbers of women at the Court, gender remains salient during oral arguments (e.g., Kaheny, Szmer, and Sarver 2011; Shih et al. 1999). Under these conditions, it is likely gender norms will be enforced. Specifically, with respect to language, this suggests female attorneys should be successful if they use more emotional language. This is at odds with professional norms. However, existing work on gender at oral arguments focuses on the mere presence of female attorneys rather than how female attorneys perform gender. This is problematic because studies from a number of fields stress gender is a performative act in which women are evaluated for their compliance with gender norms and sanctioned for violation (Jones 2016; Karpowitz and Mendelberg 2014; Mulac et al. 2013; Yu 2014). In this study, I bring a performance-based measure of gender to judicial decision-making at oral arguments. I find female attorneys are more successful when employing more emotional language in their arguments. Male attorneys are less successful when using more emotional language.<sup>17</sup> This adds a new wrinkle to the literatures on both oral arguments and female attorneys and raises a number of new questions for future scholars about how identity shapes outcomes in the judicial context and beyond.

The key contribution of this study is to move gender at oral arguments from mere presence to a performative measure. That is to say, it is not just relevant that a female attorney is arguing the case, but rather it is important to account for how she argues the case. Despite the Court's directive to avoid emotion (Black et al. 2016; O'Connor 2013), the findings here indicate those rules are only enforced on male attorneys at oral arguments. This places women in a double bind where they must choose between professional and gender norms. To satisfy one, the other must be violated (Rhode 1994). Female attorneys, consistent with gender norms, are rewarded not for complying with the traditional model of an attorney but rather for complying with the emotional stereotype of women. This aligns with recent work on party briefs,

which finds female attorneys are more successful when their party briefs conform with gender norms (Gleason, Jones, and McBean 2019). The results here prompt a number of directions for future research. Broadly, these directions can be grouped as context, the dialogue between the justices and the attorney, and the nature of success. I explore each in turn.

A recurring theme in existing work on gender and judicial decision-making is the importance of context (see, for instance, Collins, Manning, and Carp 2010; Scheurer 2014). If the number of women at oral arguments or on the Bench at the Supreme Court were to increase, then the manner in which gender norms shape outcomes at oral arguments might also change or even cease to matter (e.g., Kaheny, Szmer, and Sarver 2011). This can be explored more fully by looking to other courts in the state, federal, and global contexts. While examining this question at the federal appellate courts and state supreme courts could render insight into how institutional design shapes the role of gender, perhaps one of the best places to explore this proposition is the Supreme Court of Canada. At the Canadian Court, women are more successful than their male counterparts (Kaheny, Szmer, and Sarver 2011), perhaps because of their greater presence, which allows them to move beyond token status and to take on a distinct voice. It is possible by replicating this study at the Supreme Court of Canada, the impact of gender norms at oral arguments on justice votes may be reversed or even disappear.

In line with previous work, I find that attorneys who are asked more questions are less likely to secure the justice vote (T. R. Johnson, Black, and Wedeking 2009). In addition, recent work notes women are more likely to be interrupted and questioned by the justices (Patton and Smith 2017). While I note the total number of questions the justices ask attorneys, I do not explore the overall tone of those questions or the frequency of interruption for female attorneys relative to their male counterparts. Recent work suggests the nature of interruptions may be gendered; more emotional interruptions from the justices, noted by the tone of voice, leads to less success (Dietrich, Enos, and Sen 2019). There may be a gendered element to the justices' emotional response. For instance, it may be possible attorneys who break with gender norms in their arguments are more likely to be interrupted by justices who become more emotional or angry in their responses to transgressions of gender norms. Conversely, a female attorney who presents her argument consistent with gender norms may be interrupted less, or be interrupted by more vocally level justices. Of course, justice reactions may also be explained by nonverbal markers such as appearance (e.g., Weddington 1993). While the absence of courtroom sketches for all cases makes it difficult to assess how appearance factors into how gender

norms shape judicial decision-making at the Court, it may be possible at those state supreme courts that video record oral arguments.

An important underlying concept in work on gender norms before courts is the nature of success. Recent work on party briefs operationalizes success as the extent to which text from the brief is incorporated into the Court's opinion (Black et al. 2016; Corley 2008; Gleason, Jones, and McBean 2019). This approach represents a more fine-grained measure than a dichotomous outcome because it can account for advocating policy positions or legal rules rather than zero-sum outcomes. However, oral argument studies tend to focus on a dichotomous justice-vote outcome. This is because oral arguments often focus original information not contained in the brief (T. R. Johnson 2001) and frequently shape the broad ideas discussed at conference, which are then incorporated into the final opinion (Black et al. 2012; T. R. Johnson 2004). Since oral arguments are a conversation (Wrightsmann 2008), language from oral arguments likely rarely appears verbatim in the opinion. While the dichotomous measure of success seems blunt in light of the more nuanced measure employed in the brief literature, the dichotomous measure of whether a justice votes for an attorney employed here without the benefit of scales or ranks represents a high bar for finding a role for gender norms at oral arguments. My approach creates the most difficult conditions under which to find a role for gender norms shaping outcomes at oral arguments. I encourage future scholars to take the findings here as a starting point toward a more nuanced understanding of how compliance with gender norms shapes outcomes at the Court. While there are surely a plethora of ways this can be done, one fruitful avenue may come by exploring the role of attorney compliance with gender norms across the entire judicial decision-making process inclusive of briefs, oral arguments, and the final opinion.

Interestingly, whereas work on briefs notes arguments are more successful when they are linguistically simple and comply with gender norms, I find more linguistically complex oral arguments supported by briefs that break from gender norms are more successful. These surprising results may actually point to a more complex process than the one modeled here or in previous studies of attorney success by incorporating briefs and oral arguments in tandem. Briefs often shape the content of opinions in terms of the actual language included (Corley 2008; Black et al. 2016; Gleason, Jones, and McBean 2019), whereas studies on oral arguments find they are often used to explore ideas not contained in the briefs (T. R. Johnson 2001) and then shape the ideas and topics discussed at conference and included in the opinion (Black et al. 2012; T. R. Johnson 2004). It may be the case that though briefs and oral arguments serve different functions in the broader

judicial decision-making process, they are linked in a larger narrative of gender performance. To that end, briefs could shape the range of ways in which attorneys can perform gender at oral arguments. This of course presents the justices with a range of possible responses at oral arguments. Next, this process would turn to the ideas discussed at conference. Those ideas and the text of the briefs would then shape the final opinion. Of course, the attorneys likely have agency in this by which portions of the briefs they choose to emphasize at oral arguments or whether they opt to discuss topics not contained in the briefs at all. Likewise, through their questions, the justices could redirect the entire tone of oral arguments. Needless to say, this would be an ambitious undertaking from both theoretical and methodological perspectives.

Scholars note that women are less successful than their male counterparts at oral arguments before the Court. While these studies are informative, they focus on the mere presence of women and do not account for recent work, which holds gender can be conceptualized as a performance. This creates an incomplete account of the success of female attorneys. I show, consistent with previous work on party briefs, female attorneys are more successful when they conform with traditional gender norms in their oral arguments. While this raises normative concerns, it also raises a number of questions for future scholars to explore to more fully explain the success of female counsel at the Supreme Court.

### Authors' Note

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### Notes

1. 410 U.S. 113 (1973).
2. In a host of political contexts, women face sanction for violating gender norms whereas men do not (Rudman and Glick 1999; Heilman et al. 2004). Gleason, Jones, and McBean (2019) note men likewise face sanction for violating gender norms in party briefs at the Supreme Court.
3. 83 U.S. 130, (1873).
4. Ironically, in the 1960s, many female attorneys worked for the federal government when private firms would not hire them because of deep-seated sexism (Haire and Moyer 2015).

5. This figure come from the data discussed later.
6. In some cases, multiple attorneys present arguments for the petitioner or respondent. In these instances, it is not possible to isolate the effect of a given attorney's argument. As such, I exclude cases where more than one attorney argues on behalf of the petitioner or the respondent (e.g., Black et al. 2016; Feldman 2016). In addition, attorneys are often supported by orally arguing amici. Since the extent to which amici comply with gender norms may shape supported party success, I exclude these cases. I rerun the analysis with oral amici cases included. This increases the number of observations to 12,820 but does not substantively alter the results.
7. In a small number of cases, the Supreme Court's website does not contain oral argument transcripts. In these instances, I obtain the transcript from Westlaw.
8. The federal solicitor general is referenced with the honorific "General." With the exception of Elena Kagan, every solicitor general from 2004 to 2016 argued at the Court before or after their tenure as solicitor general with a gendered honorific. Thus, I am able to determine every solicitor general's gender.
9. There are three primary LIWC dictionaries, one each from the 2001, 2007, and 2015 releases of the software. I use the 2007 dictionary.
10. This comes from the data discussed later.
11. If the solicitor general files a brief in support or neither party, I code this measure as 0.
12. An alternative specification is the cognitive complexity of the words used by the attorney. I run an alternate model where I replace lexical complexity with LIWC's measure of cognitive complexity. The results are substantively unchanged.
13. In some instances, multiple briefs are filed per party; this is often the case in consolidated cases or cases in which the federal government intervenes as a party. Here, it is not possible to isolate the effect of gender norms in briefs since briefs are written by multiple counsels of record, possibly of different genders. As such, those cases with multiple petitioner (respondent) briefs are excluded from analysis. This takes my total number of observations from 7,438 to 6,664. In an abundance of caution, I run a control model with this control variable excluded. The results are substantively similar.
14. In addition, I run models that include dichotomous issue area variables and justice variables. The results are substantively similar.
15. The calculation of predicted probabilities for this term are from model 2.
16. These predicted probabilities are calculated with model 3.
17. While the size of this effect is small, it does underscore literature finding gender is a "lens" through which jurists evaluate cases (e.g., S. W. Johnson et al. 2008).

### Supplemental Material

Replication data will be available on the author's website (<http://shangleason.com>) once the article appears in print. I thank OnTaya Acedeo, EmiLee Simons, and Alexandra Ready

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