When Judging Is Power

A GENDER PERSPECTIVE ON THE FRENCH AND AMERICAN JUDICIARIES

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ABSTRACT

This article examines the feminization of the judiciary in France and in the United States through the prism of the "imagined judge," that is, the judge as he or she is represented in a specific legal culture. The French imagined judge is a knowledgeable automaton mechanically applying the law entirely created by the parliament, while his or her American counterpart is a decision maker well equipped to solve social problems. Interpreting the gender composition of the judiciary through the intellectual device of the imagined judge leads to a crucial observation: there is a correlation between the conceptualization of the imagined judge as a being exercising power, as in the United States, and the continued underrepresentation of women on the bench. From this observation comes an important hypothesis: the conceptualization of judging as an act of power works to keep women off the bench.prism

I. INTRODUCTION

Almost 80 years separate the appointment of the first female judge in the United States (1870) and in France (1946).[1] Yet France now has proportionally twice as many women acting as judges as the United States has. This article takes this curious observation as its starting point. Its aim is to make sense of it. Traditionally, this proportion has been explained by differences in judicial appointment procedures. If this explanation appears to

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1. In the United States, Esther Morris was the first female appointed as a judge (justice of the peace in the Wyoming Territory in 1870). Florence E. Allen was the first woman appointed to the federal bench, in 1934. Women in France were allowed access to judicial office in 1946 (Loi no. 46-643 du 11 avril 1946 ayant pour objet de permettre aux femmes d'accéder à la magistrature, *Journal Officiel* [April 12, 1946, 3062]).

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be convincing, it is, this article argues, a step too short. Judicial selection methods are not an independent variable; the choice of a given procedure is dictated by the cultural values attached to the judiciary in a legal system, by the way judges are represented in it, and by the foundation of their legitimacy within it.

This article proposes therefore to examine the feminization of the judiciary through the prism of what I call the "imagined judge." This conceptual tool refers to representations of the judge that are shaped by the institutional apparatus prevailing in a given legal system. It is, in other words, the judge as he or she is represented in a specific legal culture. The French and American imagined judges differ fundamentally, almost as Weberian ideal types. They are therefore particularly interesting to compare. The French imagined judge is, in broad terms, a knowledgeable automaton mechanically applying the law entirely created by the Parliament, while his or her American counterpart is a decision maker well equipped to solve social problems. Interpreting the gender composition of the judiciary through the intellectual device of the imagined judge reveals that there is a correlation between the acknowledgment of the power held by the imagined judge and the underrepresentation of women on the bench. This observation leads to an important hypothesis: the conceptualization of judging as an act of power works to keep women off the bench.

II. THE TRADITIONAL INTERPRETATION OF WOMEN'S PRESENCE ON THE BENCH

In a nutshell, France counts (proportionally) twice as many women on the bench as the American federal judicial system;[2] women account for about 60% of the French *magistrats judicaires* (ordinary judges), while they account for about 30% of the judges sitting on the American federal bench.

In the United States at this time, 261 of 806 active federal judges are women (about 32%): three out of nine US Supreme Court justices, 60 out of 172 courts of appeals judges, and 198 out of 625 district court judges (Federal Judicial Center 2014a). It is interesting to note that the percentage of women in the American federal judiciary is constant across the judicial hierarchy; women account for about a third of active judges, from the US Supreme Court to the district courts.

In France, 60.5% of judges in the ordinary court system are women.[3] This proportion should not obscure the fact that a "glass ceiling" or "sticky floor" persists in the French judiciary: women in France continue to be confined to lower judicial positions. While women account for 72.8% of the judges on *Tribunaux d'Instance* 56.9% of the judges on *Tribunaux de Grande Instance*, and 76.7% of juvenile judges (Boigeol 2013,

2. This article focuses on the federal judiciary, leaving aside state courts.

3. In France, 5,015 out of the 8,442 ordinary judges are women (*Conseil Supérieur de la Magistrature* 2012, 28). It is interesting to note that when the French judiciary is described, feminization is often insisted upon as one of its prominent characteristics. (See, e.g., J. Bell 2008, 38.)

129), they make up only about 35% of the *Cour de Cassation*, 25.7% of the *Conseil d'Etat* (Bui-Xuan 2007, 90) and a third of the *Conseil Constitutionnel*.[4] The French *Conseil Supérieur de la Magistrature* highlights in its 2012 report the imbalance in the representation of women in top hierarchical positions; only 34.1% of the *hors hiérarchie*—the highest judicial grade—are women, whereas they account for 75.4% of the lowest grade (*Conseil Supérieur de la Magistrature* 2012, 29*)*.[5]

Traditionally, judicial selection methods have been mobilized to explain this state of affairs (Schultz 2013, 6–7): the entrance examination method would favor the appointment of women, while a political appointment process would not necessarily give rise to a greater diversity on the bench.

In France, judges are selected through the *concours*, a competitive entrance examination, taken by law graduates, usually immediately after university.[6] The entrance examination consists of written and oral components. Theoretically, "personality plays no part in the selection process for the training," at least for the written examination testing knowledge of the law, which is anonymous (Boigeol 2013, 128). Those who succeed are enrolled as *auditeurs de justice* (judicial trainees) in the *Ecole Nationale de la Magistrature* (a judicial college). Judicial trainees receive 31 months of professional training,[7] after which they are appointed as judges. This judicial selection method has proven to be a "chance for women" (Boigeol 2013, 128); from the mid-eighties, the percentage of women entering the *Ecole Nationale de la Magistrature* has continuously increased to

4. The *Tribunaux d'Instance* are courts dealing with small civil cases. The *Tribunaux de Grande Instance* are courts of first instance. The *Cour de Cassation* is the highest court for civil and criminal matters. Data collected from the French *Cour de Cassation*'s website. This data is also available here: http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/judiciary/supreme-courts/index_en.htm (last accessed August 12, 2014). The *Conseil d'Etat* is the highest court for administrative jurisdiction. The *Conseil Constitutionnel* is the highest constitutional authority. Its main duty is to review whether proposed statutes (after they have been adopted by the parliament but before they are signed by the president) are in accordance with the constitution, and now also to review statutes when they have been promulgated following the *Question Prioritaire de Constitutionalité*. Data collected from the website of the *Conseil Constitutionnel*: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/les-membres-du-conseil/liste-des-membres/liste-des-membres-du-conseil-constitutionnel.319.html http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/les-membres-du-conseil/liste-des-membres/liste-des-membres-du-conseil-constitutionnel.319.html (last accessed August 12, 2014).

5. It should be noted that nowadays there is a correlation between the gender disparity (with a prevalence of men) and the age disparity (with a prevalence of older people) among those occupying top hierarchical positions (*Conseil Supérieur de la Magistrature* 2012, 27–28).

6. There are three *concours*. The first one is open to young law graduates, and "is by far the most important recruitment channel for the *ENM*" (Guarnieri and Pederzoli 2002, 36). The second *concours* is open to civil servants with at least 4 years professional experience, while the third *concours* is for those of at least 8 years' standing in a private sector profession (see, e.g., Bell 2008, 38).

7. There is one exception to the 31-month-long training: the training for those who have been recruited through the *concours complémentaire*, which is open to people at least 35 years old with a university degree and at least 10 years of professional experience. The training at the ENM in this case lasts 9 months.

between 70% and 80% in the last few years (*Ecole Nationale* 2010, 4; 2011, 7; 2012, 7; 2013, 7; 2014, 7).[8]

In the United States, federal judges are appointed, according to Article II of the US Constitution, by the president "by and with the advice and consent of the Senate." The judicial recruitment procedure is composed of three main steps: nomination by the president, screening of candidates (i.e., judicial nominees) by the Senate Judiciary Committee, and final consent by the Senate. Although there is no formal requirement to be appointed to the federal bench, candidates' professional competence as well as their political beliefs and affiliations play a relevant part in the selection process (Guarnieri and Pederzoli 2002, 31). Appointments to district courts and courts of appeals are "basically patronage appointments" (Tushnet 2009, 128–29). Appointments to the Supreme Court are also the result of a political process in which "merit has only rarely played the dominant role" (130). The identity as well as the judicial ideology or philosophy of candidates, on the other hand, have played an increasing role (132). Candidates are also increasingly scrutinized by the Senate Judiciary Committee (Ringhand and Collins 2011). Since the appointment procedure is overtly political, it is not surprising that the appointment of women on the federal bench has depended on who is in office (Kenney 2012, 65). Barack Obama, for instance, has appointed 111 women and 156 men to the federal bench—the largest percentage of woman appointees (42%) of any president so far. In contrast, only 22% of George W. Bush's appointments were women (Federal Judicial Center 2014a).[9]

Methods of judicial recruitment should certainly be part of an explanation of why women are better represented on the bench in France than in the United States. When the judicial selection procedure is a political one, the appointment of women on the bench (or of minority judges) depends directly on the existence of a strong political will in favor of diversity (Kenney 2012, 65). If this will does not exist, the bench tends to remain uniformly composed. In this regard, it is interesting to note that even though gender diversity on the bench has been on the political agenda since Jimmy Carter's administration (Kenney 2012, 66), the proportion of women appointed to the federal bench since then has remained low (about 22%), revealing that a political discourse in support of diversity is not sufficient to lead to an actual transformation of the bench. On the other hand, when appointment to the judiciary relies essentially on passing an (anonymous) competitive exam—which tests primarily the legal knowledge of the candidates with no attention paid, at least in principle, to their identity—those who pass

8. It should however be noted that women do not perform better than men on the entrance examination, since between 70% and 80% of the candidates are women (*Ecole Nationale de la Magistrature* 2010, 3).

9. To give more examples: Bill Clinton appointed 266 men and 106 women (28.5% women); George H. W. Bush 152 men and 36 women (around 20%); Ronald Reagan 334 men and 30 women (8% women); Jimmy Carter 220 men and 41 women (16% women); Gerald Ford one woman and 61 men (1.6% women) and Richard Nixon 226 men and one woman (0.4% women).

the test are appointed. Hence, if women pass the exam, they are appointed. To sum up, the French and the American case studies confirm that selection procedures are a useful lens through which to understand the presence of women on the bench.

However, I argue that it is illuminating to go beyond this dominant account and to question the feminization of the judiciary from a legal-cultural perspective. Two reasons lead me to advocate this new path. First, the arguments based on selection methods do not explain why, from the mid-1980s, the percentage of women taking the entrance examination has steadily risen to over 70% in 2014 (*Ecole Nationale de la Magistrature* 2014, 7). In other words, they do not explain why French men have shown a growing disinterest in the judicial function. Second, they seem to overshadow that culture is ubiquitous and that the choice made in favor of one selection procedure over the others is influenced by the shared beliefs about judges and their role within the legal system. This is why I choose to look at the gender composition of courts from a legal-cultural perspective and, more particularly, to analyze the feminization of the judiciary through the prism of a new conceptual tool: the imagined judge.

The interpretative stance adopted in this article leads to a crucial observation that will enable me to formulate an important hypothesis. First, the observation: there is a link between the conceptualization of the imagined judge as a being exercising power, as in the United States, and the continued underrepresentation of women on the bench. This observation allows me to forge the following hypothesis: the conceptualization of judging as an exercise of power acts as an obstacle to the entry of a critical mass of women in the judiciary. The next two sections develop these points.

III. THE IMAGINED JUDGE

The comparison between the French and the American situations reveals a connection between the acknowledgment of the power held by judges and the underrepresentation of women on the bench. To establish this link, this article mobilizes a new theoretical concept: "the imagined judge." The phrase aspires to embody the *imaginary representation**s*** a legal culture conveys about its judges. It does not intend to provide an accurate description of what judges actually do when they adjudicate, but refers to the image a society forges of its judges, their role, and their power within the system. It should also be clarified that the imagined judge mobilized in this article is the institutional imagined judge, i.e., the judge as an institution of the State.

A. The Imagined Judge: Knowledgeable Automaton or Powerful Actor?

As will be developed further below, the French and American imagined judges are clearly distinct judicial figures: the former is a "knowledgeable automaton" and the latter a "powerful actor." These portraits have been drawn, first, from an analysis of the French and American constitutions, and in particular the allocation of powers they organize. Since constitutions are based on, as well as engender, imaginary representations, analysis of constitutions can reveal the place and role recognized for judges in both

systems. The conceptualization of the imagined judge is further drawn from the judge's cultural representation and his or her role within the legal system.

B. The Judiciary in the Constitutional Allocation of Powers

The separation of powers has been conceived differently on either side of the Atlantic, even though both constitutions have their roots in the same theoretical background (Cappelletti 1970, 1020–31). In brief, the United States displays a tripartite division of powers, with the judiciary being on an equal footing with the two other branches of government, while the French conception is bipartite, with the judiciary accorded a subservient status (Favoreau et al. 2013, 389).

The American constitution clearly establishes three distinct powers—the legislative, the executive, and the judicial—and explicitly recognizes in Article III the existence of genuine power held by the courts.[10] Since *Marbury v. Madison*, the judiciary can in the course of litigation exercise judicial review of the legislation. The courts assume, therefore, "an extremely important role of review of both administrative and legislative action" (Cappelletti 1985, 14). The judiciary plays "a robust role . . . in the legal and political life of the nation" and this characteristic is probably the "most provocative aspect of the separation of powers among the branches of government in the United States" (Sager 1996, 52).

In post-revolutionary France, the principle of the separation of powers, established by article 16 of the Declaration of the Rights of Man and of the Citizen, is linked to the notion of sovereignty, which lies, according to Article 3, with the Nation (Favoreau et al. 2013, 388). Hence, the separation of powers plays for the most part in favor of the power representing the Nation, namely the legislative power. The judiciary is absent from the equation; the principle is understood as an encounter between the legislative and the executive powers (Hourquebie 2010, 9). In this regard, the name given to Title VIII of the French constitution is an interesting sign of the status granted to courts within the French system (Favoreau et al. 2013, 625): the judiciary is, according to the lexicon of the constitution, an authority (*l'autorité judiciaire*) and not a power, whereas the French constitution recognizes the existence of a *power* held by both the executive and the legislative branches. In the French imagination, there is a dominance of politics over law; the separation of powers works to insulate the administrative and legislative domains against the judiciary (Allard 2009, 363). This is why the French judiciary is not vested with the power of judicial review,[11] nor is it empowered to control the

10. Note that according to the Lockean conception of the principle, the judiciary is encompassed in the executive power, and in Montesquieu's writings the judicial power remains in embryo.

11. A weak form of constitutional review was nevertheless established by the 1958 constitution, but it was granted to a nonjudicial organ: the *Conseil Constitutionnel*. Note that instituting constitutional review is a general trend throughout Europe after World War II.

legality of administrative action or the conduct of government officials (Merryman and Pérez-Perdomo 2007, 16, 19).[12]

This short overview shows that the judiciary has been conceptualized in the United States as a power that intervenes in the political realm. The political component inherent in the act of judging has not been concealed in the American legal culture; judging has not been reduced to an act of knowledge. The same cannot be said for France where the constitutional system reveals, by contrast, the will to establish a clear distinction and hierarchy between the legal and the political territories. In the French legal culture, judging is thus perceived as a purely cognitive exercise whose legitimacy is based on knowledge and not on power (Allard 2013, 187). The power of the judiciary is, as Montesquieu put it, "invisible and null" (Montesquieu 1989, 158). Judicial interpretation is therefore not easily acknowledged, and if it is, its creative component is hardly recognized, if not considered as lacking legitimacy.

C. The Judge's Cultural Representations

The fundamental difference between the conceptualization of judging as an act combining power and knowledge and as an act of knowledge alone is not confined to the constitutional place and role of the judiciary but is also reflected in the cultural representations of judges prevailing in France and in the United States.[13]

The American imagined judges are genuine and crucial actors in the legal system.[14] They, not the court to which they belong, are the institution (Vogel 1984, 749). In the United States' legal culture, justice is rendered by men and women made of flesh and blood, not a disembodied institution. The imagined judge is a decision maker who bears the direct responsibility of his or her judgment and whose power is not hidden. In other words, he or she is a powerful actor.

The contrast with the French imagined judge is striking. The French imagined judge not only disappears as a person behind the institution, but his or her power is denied. The French imagined judges are "the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigor" (Montesquieu

12. Such control is exercised by the administrative courts, with the *Conseil d'Etat* as their supreme court. The creation of such a system of specialized courts is another consequence of the sharp conception of separation of powers and the corresponding minimization of judicial power.

13. In this respect, it should be noted that while there are types of judges within the French legal system, i.e., the *magistrat judiciaire*, the administrative judge, and the constitutional judge, it is the former who is its emblematic figure (Merryman and Pérez-Perdomo 2007, 86–87). The imagination surrounding the *magistrat judiciaire* has indeed deeply infused the thoughts and reflections developed in France about the judicial function. In the remainder of this article, I shall therefore focus on the *magistrat judiciaire*.

14. It should be noted that, in the United States, in addition to the judge there is the jury. In this article, the focus is on the judge and not the jury.

1989, 163).[15] They are anonymous machines who identify the relevant facts and legal provisions, and then apply the law—all contained in the written provisions—to the facts. In a nutshell, they are knowledgeable automatons mechanically applying the law.

As one tries to apprehend how judges are represented in the French and American cultures, one is struck by the fact that each stratum of society participates in the elaboration and the spread of these representations. Methods of legal education, scholarship on (gender and) judging, the place judges hold in the public sphere, and the style of judgments all reflect and contribute to the portrait of French and American imagined judges.

1. Legal Education

In the United States, law is mainly taught through the case method, which includes a Socratic dialogue between professors and students.[16] The case method "was designed to produce independent and creative thinking" (Patterson 1951, 6) and to teach students about the judicial process (7). It reveals, as well as maintains, the representation of the judge as "the protagonist, the hero of [the American] legal tradition" (Merryman 1974, 873). It also leads students to realize that judicial decisions are influenced by other factors "than traditional doctrine . . . such as the economic or political beliefs of judges" (Patterson 1951, 21) and that judges do play an active role in the construction of the law. Clinical education, which is also prominent in the United States law schools, pursues similar objectives. It makes students realize some of the potential of the lawyer as a socio-legal engineer (Wizner and Curtis 1980, 675). These methods of legal education represent lawyers, and judges in particular, as problem solvers and decision makers.

In France, most of the law curriculum is devoted to the teaching of the "grammar of the law" as well as to the study of a panoramic view of the main fields of the law (Damaska 1967, 1364). Legal knowledge is conveyed through lectures whose main purpose is to instruct the students. Careful analysis of cases does not form a large part of the program of study; case law is, for the most part, seen as peripheral.[17] It is often studied merely to illustrate how "law on the books" is applied in practice. Moreover, when cases are examined, focus is put on their outcome, with little attention paid to the facts or the reasoning employed by the judge (Merryman 1974, 874). Furthermore, legal clinics (as

15. This is certainly true for the ordinary judges, but it also holds to a lesser extent for the *Conseil Constitutionnel*. There is, in Alec Stone Sweet's words, "a fierce resistance to the notion that the Council is a political actor at all; a radical dissociation between legal and policy-making process is propagated and actively defended; the impact of constitutional review on macropolitics is obscured or altogether ignored" (Stone Sweet 1992, 116).

16. Students are expected to actively engage with the material they have been asked to read—largely cases—before attending the class, as they are expected to participate actively in the class discussion.

17. Note that the status of case law as a formal source of law has been debated for a long time (Capitant 1898, 50–54; Malinvaud 2008, 156–71).

well as clinical education) are almost nonexistent in France. This demonstrates as well as preserves the image of the judge as "a faithful and passive executor of the legislative will" (Guarnieri and Pederzoli 2002, 69) and of the judicial process as an abstract and technical process submissive to an anterior political will.

2. *Scholarship on Gender and Judging*

The kinds of questions addressed by French and American scholarship on gender and judging further show the differences between the representations of the French and American imagined judges.[18]

American scholars recognized early on that judges exercise power and that their judgments are not a mere automatic application of pre-established legal rules.[19] Particularly enlightening in this regard is the emergence, in the United States in the beginning of the 20th century, of the legal realist movement whose leading figures comes from the legal world, be it legal scholars or even judges, such as Karl Llewellyn or Oliver Wendell Holmes.[20] Legal realists emphasize "the indeterminacy of law and legal reasoning, and the importance of non-legal considerations in judicial decisions" (Leiter 2005, 59). It has brought scholars to center their inquiry on what courts actually do instead of what they claim to do. This, in turn, has "cleared the way for judges and lawyers to talk openly about the political and economic considerations that in fact affect many decisions" (59). It has also cleared the way for American scholars to investigate the factors that influence judicial reasoning and decisions. It is in this cultural context that the gender and judging scholarship has surfaced since the late 1960s. A great deal of this scholarship has been dedicated to the potential impact gender may have on judging[21] as well as to the desirability of a gender-diverse judiciary.[22] Besides gender, other judges' characteristics, such as their race, have also been the focus of scholarly debate (Graham 1990; Smith 1994; Ifill 1997, 2000). More generally, the American literature has widely investigated judicial behavior.[23]

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18. Due to the format of this article, I touch on only some of the questions dealt with by the literature on judging.

19. In this regard, it is also interesting to highlight the impressive amount of research dedicated to discussing the legitimacy of judicial review along with the conditions under which the courts should exercise this power.

20. Legal realism places "emphasis on what courts may do, rather than on abstract logical deduction from general rules, and on the inarticulate premises which may underlie the decisions of courts" (Freeman 2008, 988).

21. See, e.g., Kritzer and Uhlman (1977); Gruhl, Spohn, and Welch (1981); Walker and Barrow (1985); Gryski, Main, and Dixon (1986); Sherry (1986a); Allan and Wall (1987); Davis (1993); Martin (1993); Aliotta (1994); Songer, Davis, and Haire (1994); Beiner (1999); Martin and Pyle (1999); Coontz (2000); Elliott (2001); Kay and Sparrow (2001); Massie, Johnson, and Gubala (2002); Palmer (2002); Westergren (2003); Peresie (2005); Boyd, Epstein, and Martin (2010); Dixon (2010); Menkel-Meadow (2011); Songer and Crews-Meye (2013).

22. See, e.g., Sherry (1986b); Minow (1987); Cooney (1993); Werdegar (2001); Kenney (2012).

23. For an overview of the study of judicial behavior in the United States, see Maveety (2002).

Strikingly, while legal realism has been a prominent movement in the United States since the start of the 20th century, it has no equivalent in France (Jamin 2011). French scholars have not consistently considered the courts and their work as a major subject of research. Legal scholars and political scientists, sticking to the official portrait of judges as invisible wheels of their system, have disregarded, at least until recently, the judges' contributions to the elaboration of the political order (Commaille 2000, 10). Judges' contributions remaining mainly unquestioned, French scholars have not conducted a great amount of research investigating the various factors potentially influencing judicial behavior. Judges' identities, in particular, have not been scrutinized in depth. This trend is illustrated—in the domain of gender and judging scholarship—by the fact that the merit and impact of gender diversity on the bench have barely been addressed in French academic circles.[24] These matters appear to be, scientifically speaking, a "non-issue" (Boigeol 2010). Instead, French scholars have focused their explorations on a sociological analysis of the feminization of the judiciary (see, e.g., Boigeol 1993, 1996, 1999, 2003a, 2003b, 2003c, 2004; Cacouault-Bitaud 2001; Mekki 2011).

The resulting literature is primarily a descriptive analysis of where women are, how their presence can be explained, and what, if anything, their presence has changed in the working life within the judiciary. The questions dealt with in the French literature are thus in accordance with the dominant legal culture in which judges are not represented as situated persons who exercise an active role within the adjudicative process.

3. *Perception in the Public Sphere*

In the United States, judges "are cultural heroes, even parental figures" (Merryman and Pérez-Perdomo 2007, 34). Many of the great names of the American legal culture were and are judges (Farnsworth and Sheppard 1996, 30), for example, Marshall, Story, Holmes, Brandeis, and Cardozo. Judges are the representative type of lawyers. They are also public figures, particularly US Supreme Court justices, who are known not only by lawyers but also by (a portion of) the public at large. Their opinions are discussed in newspapers;[25] their appointments make front-page news. Judicial biographies are popular and can be best sellers.[26] Besides, judges are well paid, although less than a successful private practitioner. For instance, a US Supreme Court associate justice makes $244,400 a year and the chief justice $255,500, while the salary of a district judge is $199,100 (Federal Judicial Center 2014b). If this high level of income can be explained, at least partially, by the fact that American judges tend to be appointed after a successful career in

24. However, this may be changing, since some French scholars have started to engage with these questions. See, e.g., Bessière and Mille (2013).

25. For example, as of August 12, 2014, the *New York Times* website listed more than 157,000 articles matching the key words "US Supreme Court."

26. There are more than 100 books listed as "Best Sellers in Lawyer and Judge Biographies" on Amazon. See, e.g., Kaufman (2000); Toobin (2008); Wermiel and Wermiel (2010); Felix (2011); Stevens (2011); Murphy (2014); Sotomayor (2014).

private practice, government, or academia, it is also a sign of the judges' status in the United States.

Judges do not enjoy the same status in France. First, the great names of the French legal culture are those of legislators, such as Justinian or Napoleon, or of scholars, such as Grotius, Domat or Savigny, not of judges.[27] In this regard, it is interesting to note that Benjamin Cardozo, who sat on the New York court of appeals and later on the US Supreme Court, chose François Geny, a French law professor, as one of his virtual interlocutors in his famous essay, *The Nature of the Judicial Process* (Cardozzo 1921). In the French legal culture, the representative type of lawyer is either the law professor[28] or the attorney, not the judge (J. Bell 2008). Judges are, in general, not public figures; they are not known by the public at large, with the exception of some criminal law judges whose names appear regularly in newspapers. Their appointment is not covered by the press. Their salaries are significantly lower than in the United States. In France, a Supreme Court judge (at the end of his or her career) earns $145,647, while a trial judge makes $52,192 a year. Although this level of income is not particularly low when compared to average professional salaries, it is between 40% and 70% lower than the salary of an American judge.[29] All these elements confirm that French judges are not accorded the same status as American judges.

4. The Style of Judicial Decisions

Judgments handed down by American courts are long; they discuss the facts at length. They refer extensively to previous case law which often, in the absence of clear legislative guidance, constitutes the starting point of the judicial reasoning (Cataldo et al. 1965, 22). They are written and signed by individual judges, sometimes in a deeply personal tone (Lasser 2004, 64). And they often adopt a policy-driven approach (Lasser 2004, 64). Concurring and dissenting opinions are permitted and common. All of this expresses a certain conception of the role of the judge in the legal process: the American imagined judge is a 'narrator of the law' (Garapon and Papadopoulos 2003, 201) who contributes to the elaboration of the legal system.[30]

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27. It should nonetheless be emphasized that Montesquieu and Kelsen—two great names belonging to the civil law culture—were judges (though not necessarily for a long time). They have, however, not been remembered for their judgeships—many do not even know that they were judges—but for their scholarly work.

28. Law professors in particular have a privileged position in the French legal field because they were, and continue to be, crucial actors for the consolidation of legal doctrine (García-Villegas 2006, 356).

29. Note that, according to the OCED, the average annual salary is $55,048 in the United States and $45,568 in France. Hence, the average annual pay in France is about 18% lower than in the United States.

30. In the United States, judges even create the law, since the common law was and is judge-made. There has been debate within the common law world as to whether the judge created the common law or merely discovered—and declared—it. (See the debate between Blackstone and Bentham

The decisions handed down by French courts differ in important respects from their American equivalents: they are very short (often no longer than a single page); they are written impersonally; they start with an outline of the applicable legislative provisions; they do not contain extensive discussions of the facts; they do not, in general, refer to past judicial decisions; they do not, in general, incorporate serious interpretative or policy analysis; and they are rendered by the court *per curiam*, without any dissent or concurrence (Lasser 2004, 30–31). This style of judgment illustrates that the French imagined judge is not an actor participating in the development of the legal system, but is rather like an automaton, finding within statutory law the unique and indubitable judicial solution.

IV. UNDERSTANDING THE PRESENCE OF WOMEN ON THE BENCH THROUGH THE PRISM OF THE IMAGINED JUDGE

Now that we have outlined, in a comparative perspective between France and the United States, the different methods of legal education; the varying approaches taken by the literature on gender and judging; the divergent perceptions of judges in the public sphere; and, finally, the contrasting style of judicial decisions, the portraits of the French and American imagined judge can be drawn. On the one hand, an anonymous civil servant faithfully and mechanically applying the law, and on the other, a genuine actor contributing to the elaboration and development of his or her legal and political system.

As one observes the state of affairs concerning the presence of women on the bench through the prism of these imagined judges, the correlation between the acknowledgement of power exercised by judges and the under-feminization of the judiciary becomes remarkable. In the United States, where the imagined judge is conceived as a powerful actor, there are half as many women acting as judges as in France, where the power of the imagined judge is concealed. How should we interpret this relationship? I submit that conceptualizing judging as an exercise of power acts as an impediment to the appointment of a critical mass of women.

I have argued that the concept of power may be put to use to characterize and distinguish the American and the French imagined judges. Power is not gender neutral. The "dominant collective knowledge or set of accepted myths," Hilary M. Lips shows, "portrays femininity and power as falling on opposite sides of a duality" (Lips 1991, 16). Commentators on power have "frequently remarked on its connection with virility and masculinity" (Hartsock 1990, 157). David Bell, for instance, writes that "through its links with notions of potency, virility and masculinity, [power] appears much sexier" than the two other concepts he studied in his book *Power, Influence and Authority* (1975, 8). Nancy Hartsock lists other examples from the literature where authors have linked the

outlined in Bong Yu [1999, 38].) Today, there is a growing consensus that judges actually do make the law, either while developing the common law as a source of law or while interpreting constitutions and .statutes. However, they do not enjoy unlimited discretion: safeguards restrain their creativity (Bong Yu 1999, 38–39).

idea of power with virility: "Bertrand de Jouvenal's note that a 'man feels himself more of a man when imposing himself and making others the instruments of his will' . . . Robert Penn Warren's statement that 'masculinity is closely tied to every form of power in our society' [and] Henry Kissinger's telling but perhaps apocryphal remark, 'Power is the ultimate aphrodisiac'" (Hartsock 1983, 6).

My hypothesis is that the double association between, on the one hand, power and judging and, on the other, power and manliness works to hinder women's entry into the judiciary. In other words, I argue that the masculine gender of power, combined with the conceptualization of judging as an act of power in the American legal culture, works to keep women off the bench. In contrast, the efforts deployed by the French legal system to suppress the power component in the representation of the judicial process and to consequently frame it as a knowledge issue have kept men out of the judiciary and have made it easier for women, once they have been granted the right to act as judges, to get into the judiciary.

In support of this hypothesis, it is illuminating to look at the representation of women in the two other branches of government. Interestingly, but perhaps not so surprisingly, women in both countries remain largely underrepresented both in parliaments and within institutions exercising executive power. They account for merely 19% and 25.7%,[31] respectively, of the US Congress and the French Parliament. Furthermore, all these assemblies remain chaired by men. Executive power also continues to be exercised mainly by men. The president of the United States currently in office is a male as well as his 43 predecessors and 80% of his cabinet.[32] Not only is the current president of France a man, but a woman has never occupied the presidency of the Republic. Moreover, the prime minister in power is a man, there is only one woman who has ever led the French government, and this was for less than a year in the beginning of the 1990s. It should, however, be noted that François Hollande, who was elected to the presidency in 2012, has kept the promise he made as a candidate to appoint a government made up of as many women as men. Since May 2012, the French government has been composed of about 50% women for the first time in history.

These statistics reveal not only that the exercise of power—be it in the courts (for the United States) or in parliament (both for France and the United States)—remains in the hands of men, but also that where the distinction between law and politics—between

31. For an overview of the representation of women in the US Congress, see Manning and Brudnick (2014). For an explanation of the underrepresentation of women in the US Congress from a feminist perspective, see McDonagh and Monopoli (2012). The French Parliament is composed of the National Assembly, which counts 151 women among its 577 members, and the Senate, which counts 87 women among its 348 members. These data have been collected from the websites of the National Assembly (http://www.assemblee-nationale.fr/elections/femmes-deputees.asp) and the Senate (http://www.senat.fr/senateurs/femsen.html).

32. There are currently three women among the 15 members of the American cabinet (in October 2014). They are the secretary of the interior, the secretary of commerce, and the secretary of health and human services.

applying legal rules and creating them—is clearer, as in France, the division of labor is also clearly sexual: creating and ordering the law remain fundamentally dominated by men while applying it has largely become a feminized activity.[33]

V. CONCLUSION

This article proposed to interpret the feminization of the American and French judiciaries through the prism of the imagined judge, that is, judges' imaginary representations and their role within the legal system. As discussed, acknowledgement of power is a key criterion to distinguish between the French and American imagined judge. The former does not exercise any power; he or she merely applies pre-established rules. In contrast, the American imagined judge is vested with the power to decide cases, even if he or she does it along the lines of applicable law. This article observed the statistics about women's presence on the bench in France and in the United States through the lens of these imagined judges. Hence, it unveiled the existence of a link between the recognition of power held by judges and the representation of women on the bench: in the United States, where the judge is an influential player, women are underrepresented in the judiciary, while in France, where the imagined judge is an erudite technician, the bench is rather feminized. Having established this correlation between the recognition of power held by judges and the underrepresentation of women on the bench, the article argued that the masculine gender carried by power is an explanatory factor of the low feminization of the American federal judiciary.

While this article focused on France and the United States, its core hypothesis, that the representation of judging as an exercise of power works to exclude women from the bench, is probably extendable elsewhere, in particular along the lines of the civil law/common law divide. First, the difference in representation of women on the bench between France and the United States is found in roughly similar proportion across the common law/civil law split.[34] In most countries sharing a common law heritage, the proportion of women sitting on the bench remains low: 28.9% in Australia; 26% in New Zealand; 26% in India; 33% in Canada; 22% in England and Wales; 18% in South Africa. In civil law countries, on the other hand, women often account for more than half

33. It is interesting to note that while a demand for parity has emerged with regard to parliament and was transformed into a bill in June 2000 (Loi no. 2000–493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives), such a demand has not been formulated with regard to the judiciary. I think that two elements may explain this. A first and obvious one: women have been well represented in the judiciary since the mid-1980s, at least at the lower level. A second and maybe more fundamental reason: the judiciary, which has not been conceptualized as a place where power is exercised, has not attracted attention much in the public debate. For a very interesting review of the process leading to the adoption of the bill, see Scott (2007).

34. There are, of course, exceptions. In some civil law countries, the proportion of women judges is closer to the one observed in common law countries. See, for instance, Switzerland with 31% of women judges, Norway with 36%, and Germany with 38%.

of the judges: 47% in Belgium; 48% in Italy; 55% in Portugal; 61% in Czech Republic; 44% in Sweden; 63% in Poland; 52% in the Netherlands; 51% in Austria; 78% in Slovenia.[35] Second, the representation of the judge as a powerful actor is diffused across the common law tradition since "the common law was and is judge-made" (Aldisert 1980, 15). In this regard, the contrast with the civil law legal culture is striking: civil law judges are "according to the folklore . . . merely the operators of a machine . . . built by legislators" (Merryman and Pérez-Perdomo 2007, 81). It is therefore submitted that the correlation brought to light in this article with regard to France and the United States, that is, a correlation between the underrepresentation of women on the bench and the prevalence of power within the judge's imaginary representations, should also be noticeable with regard to other jurisdictions. However, additional research might refine the argument.

To conclude, this article should be taken as an invitation to think further about gender diversity on the bench from a legal-cultural perspective. This article underlined how the judges' imaginary representations influence the gender composition of the judiciary. In other words, it showed how understanding the presence of women on the bench requires studying women's access to power. It follows that any conscientious reflection on strategies to increase gender diversity in the judiciary, be it in France, the United States, or elsewhere, should go beyond cogitations about methods of judicial recruitment and address directly the gendered character of power. In particular, it requires deconstructing the strong association that prevails between power and manliness. In this regard, I submit that a policy in the United States leading to the appointment of a critical number of women to the bench, including at the highest rungs of the ladder, would contribute to the elaboration of a world where both men and women are perceived as fit to exercise power. However, since the French imagined judge is a powerless but knowledgeable automaton, appointing more women to judicial posts in France cannot challenge the masculine gender of power. However, another path may be taken. It demands an acknowledgment that, counter to their official portrait, French judges do actually hold power (Garapon and Papadopoulos 2003, 166), maybe even more than their American counterparts since they do not share it with a jury (Allard 2009, 364–65). Such an acknowledgment of the power held by French judges may lead to a reassertion of the value of the judicial function and of those men and women who exercise it. Moreover, given the high proportion of women holding judicial posts, this may in turn contribute to challenging the long-standing association between virility and power.

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35. All of these numbers are borrowed from Schultz (2013, 10–14).

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