

# Presence or Persuasion?

## The Intersection of Persuasion and Gender in the Judiciary

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### Abstract

The growing consensus in the judicial literature is that women judges pull men's votes in their direction in certain areas of law, namely sex discrimination cases. Many scholars have conjectured as to why this pulling phenomenon exists, however, no scholars have been able to empirically or emphatically pin down their suspect. I attempt to overcome these limitations by creating a new measure of judicial performance—persuasion. With this new measure, I show that it is not merely a woman's presence, but the persuasiveness of the woman that actually drives the observed panel effects. After controlling for persuasion, the mere presence of a woman has little to no statistical effect on a man's vote. In this paper I explain how this new measure is created, why it matters, and how it can be implemented to potentially uncloud a phenomena otherwise shrouded in mystery—judicial panel effects on gendered panels.

### What We Know and Where We're Going

- Women judges vote differently than men in certain areas of law, namely sex discrimination case types (Boyd, Epstein and Martin, 2010; Peresie, 2005; Davis, Haire and Songer, 1993).
- Furthermore, at the intersection of sex discrimination cases and gendered panels, women judges pull case outcomes in their direction: "panel effects" (Boyd, Epstein and Martin, 2010; Peresie, 2005).
- What is missing from the judicial literature, however, is a causal mechanism for why this "pulling" phenomenon exists—that is, what is causing men to be more likely to vote pro-plaintiff when a woman is present on the panel?
- I theorize that the causal mechanism is persuasion. That is, the causal mechanism isn't the mere presence of a woman on an otherwise panel of all men, but the persuasiveness of the woman on the panel.

### Testable Hypotheses

- H<sub>1</sub>:** Women judges should outperform men. That is, on average, they should have higher scores on the persuasiveness index (PI), and lower scores on the persuadability index (pdi) in the aggregate.
- H<sub>2</sub>:** Women judges with higher persuasiveness (PI) scores should reveal stronger panel effects than women judges with lower persuasiveness (PI) scores on sex discrimination cases.
- H<sub>3</sub>:** Men with higher persuadability index (pdi) scores should be more susceptible to persuasive women judges than are men with lower persuadability index (pdi) scores on sex discrimination cases.
- H<sub>4</sub>:** The persuasion model will be a better predictor of men's votes on sex discrimination cases than the presence-only model.

### Establishing Persuasion as a Measure of Judicial Influence

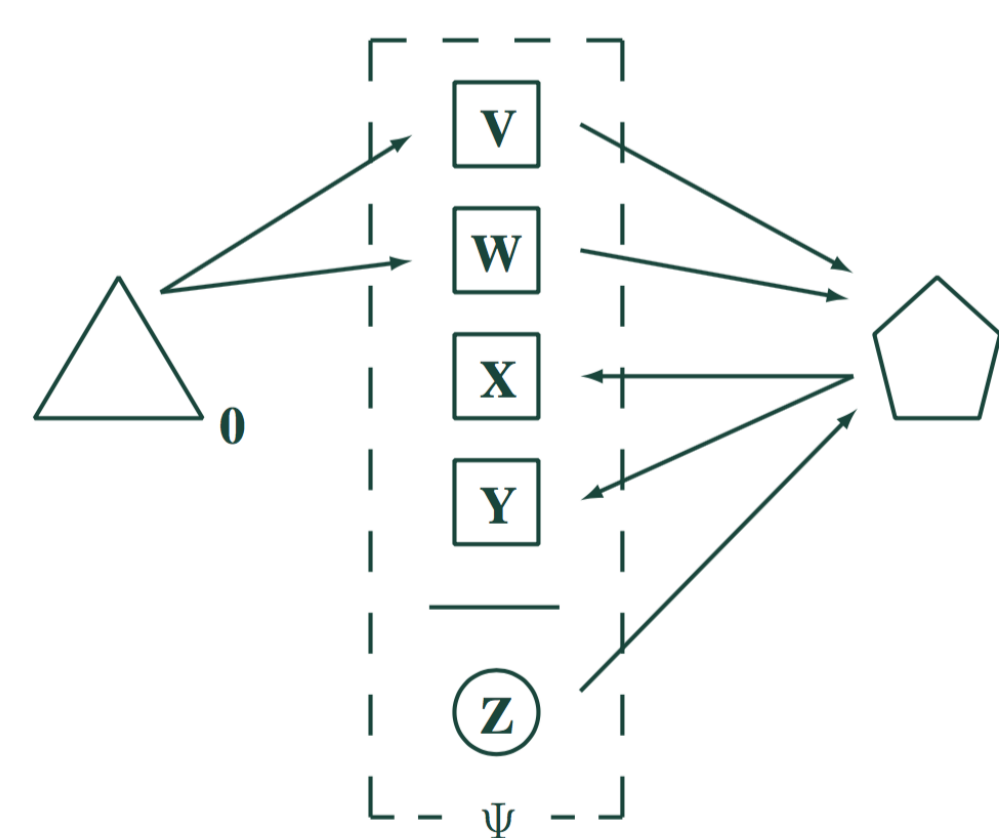


Figure 1: Presence Model

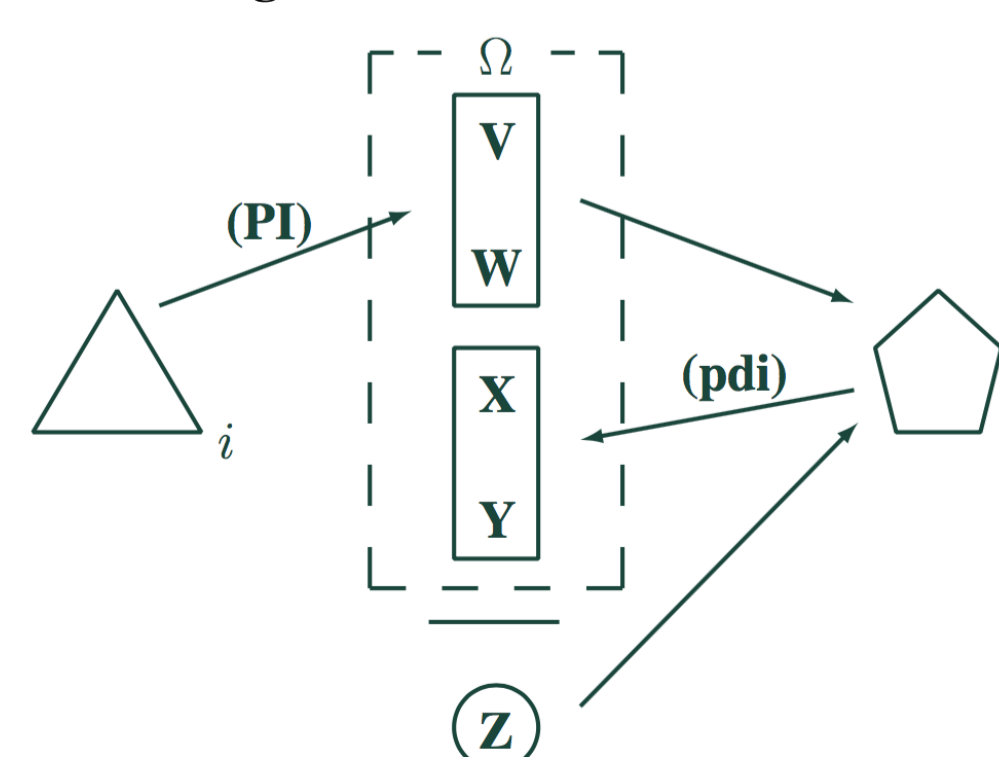


Figure 2: Persuasion Model

- The common approach to panel effects, is the question: is a panel of all men different from a panel with a woman?
- While they find there is, and can conjecture as to why, without a measure for our causal stories, we cannot determine whether the effect is Z or any (or all) of V-Y. All we know is that some effect  $\Psi$  is causing panel effects.
- But if we conceive of V & W as skills judge's use to get their way, X & Y as choices judge's use to achieve some goal, and Z as the mere presence of a woman on a panel, we can ask a new question: Is persuasion, or presence the causal story at play?
- We can differentiate between the effects of Z and V-Y by giving judges a score on each of (PI) and (pdi), which, taken together, constitute  $\Omega$ .
- We now have another question we can explore: Do some women judges affect men differently? That is, does  $\Omega$  produce different effects from what we observe when looking only at  $\Psi$ ?

### Theory

- Previous literature has established a generally accepted set of potential causal stories for the existence of gendered panel effects, namely: deliberation, votes, deference, logrolling, and mere presence).
- While these causal stories are informative, they are unseen.
- Because we cannot know for certain which causal story is causing our observed panel effects, we can categorize all of them into a single category called **presence**—because in order for any of these causal stories to be active, a woman judge must first be present on the panel.
- But what if we could measure these causal stories? Imagine a theoretically conceived variable that measured a judge's effectiveness at obtaining one's goals through the use of any (or all) of the aforementioned causal stories. This is **persuasion**.

### How the Persuasion Indexes Are Obtained

#### The persuasiveness index (PI)

- Persuasiveness is the ability of a judge to influence other judge's votes through the deliberative process based on the mean number of situations a judge was in the ideological minority and was successfully able to create a situation where the majority judges voted to overturn a lower-court's decision in favor of the minority judge's ideology as measured by the judge's JCS (Epstein et al., 2007) score:

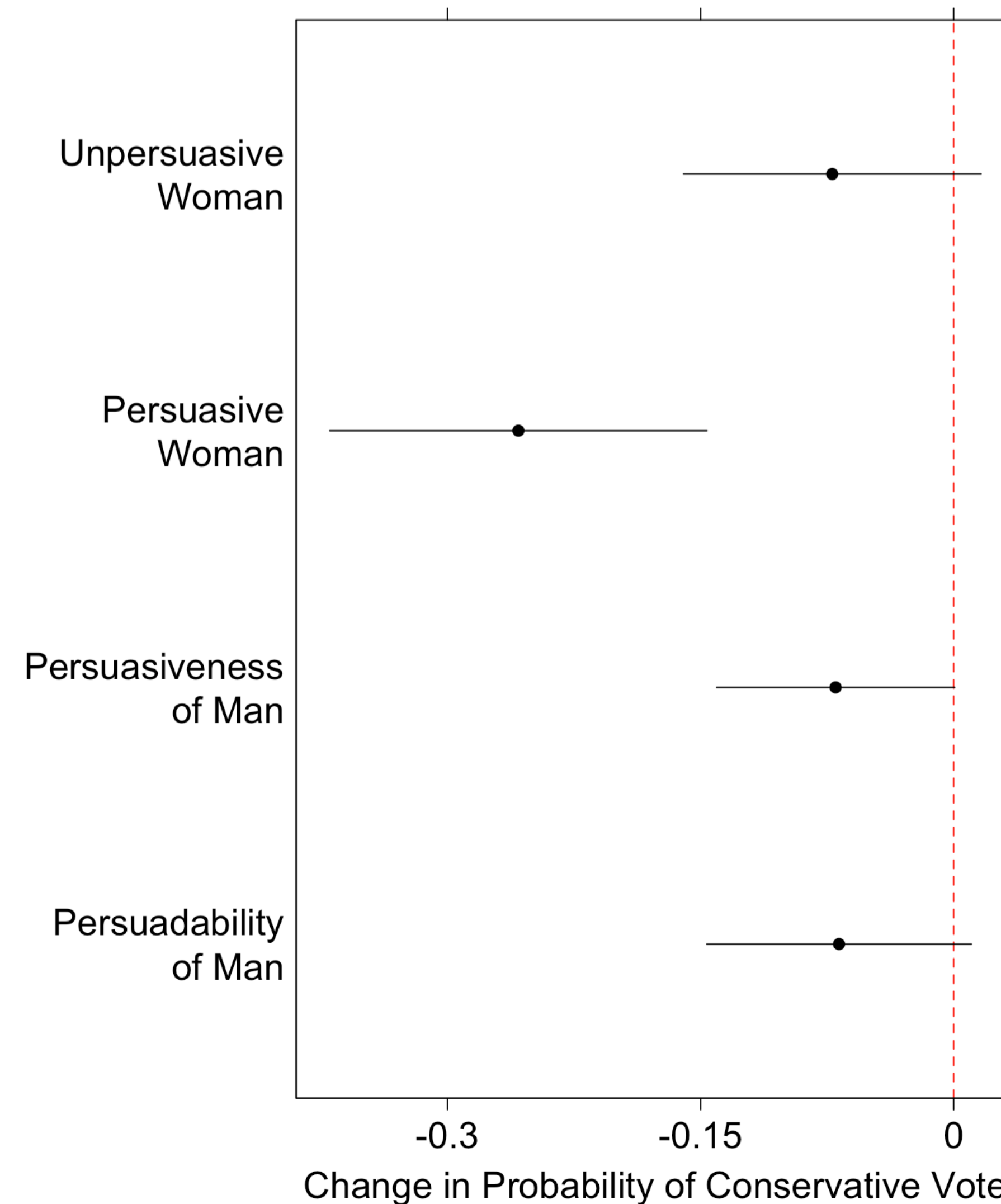
$$\frac{\sum \text{of successful persuasive situations}}{\sum \text{of persuasive opportunities}}$$

#### The persuadability index (pdi)

- Persuadability is measured by the mean number of abnormal votes judge's cast, given the number of opportunities a judge had to uphold a lower-court decision that was favorably in the direction of the judge's ideology.
- Abnormal votes are defined as votes cast to overturn a lower-court's decision that was in-line with the judge's ideology and in the majority position:

$$\frac{\sum \text{of situations persuaded}}{\sum \text{opportunities to be persuaded}}$$

### Persuasion: First Differences



### General Results

- There is no statistical difference when we move from a panel with no woman to a panel with an unpersuasive woman.
- There is a large substantive effect when we move from a panel of all men to panel to a panel with a persuasive woman. The change in predicted probability that the man will vote pro-plaintiff is an increase of over 25.8 percentage points.
- I reject the null hypothesis that there is no statistical difference between a panel with an unpersuasive or persuasive woman.

### Conclusions

- Women judges are, on average, more persuasive than are men. That is, women judges get their way more frequently in the aggregate.
- While the existence of gendered panel effects on sex discrimination cases are assumed, not all women judges influence men on a given panel equally.
- Strikingly, not only does the persuasiveness of a woman judge greatly increase the likelihood of observing a panel effect, it strongly mitigates the effects of merely having a woman present on the panel.
- Persuasion should be considered an important variable when analyzing judicial influence in the literature going forward.
- One potential limitation to this study is that I did not pre-treat the data using any matching technique.
- Future research includes testing the interaction of race and persuasion, specifically testing to see if these same findings hold on affirmative action cases on racialized panels.

### Data

I utilize the Sunstein, Schkade and Ellman (2004) data which has 13,928 observations, which each represent a single judge-vote. 12,477 of the observation are judge-votes on three-judge panels. There are 4,430 three-judge panels, and 317 individual judges. The observations span the course of fourteen years (1995-2008). The primary dependent variable is the conservative vote. Of the 317 judges, 54 are women, and cast 2,196 of the 12,477 votes cast. Breaking up panels by gender, of the 4,430 three-judge panels, 1,894 had a woman on the panel, consisting of 5,411 total votes on panels with a woman present.

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