

Dis-Covering Our Cover

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Justitia—our icon of justice. She sits or stands above courthouses or in courtrooms, supposedly overseeing and inspiring choices between right and wrong. And we trust in her competence—until we are confronted with a body of law such as sex discrimination law, in which so much seems unjust. Thus, we approach her. Is she really what she seems?

At first glance, we are reassured—Justice is, after all, a woman. She must understand us. Yet why is she female, given the Supreme Court’s conclusion—and the evidence in society—that “God designed the sexes to occupy different spheres of action and that it belonged to men to make, apply, and execute the laws?”¹ If Justice is a woman, surely this fact should argue for women’s *inclusion* in the sphere of law.

But, as we again look at our icon, a troubling reality confronts us: Justice is not simply a woman, she is a *blindfolded* woman. Why this blindfold? The standard assumption among legal scholars is that Justice herself tied it. But if we accept this explanation, we must wonder why Justice chooses to separate and distance herself. Does she not consider the circumstances of a dispute important to its resolution? Is the ethos of concern for the individual, which is a crucial element in today’s feminist visions of a legal system, an approach that Justice considers inappropriate? Perhaps Justice is not a feminist.

Or perhaps Justice did not choose to be blindfolded. In such a case—where Justice was blindfolded by someone else—our suspicion that Justice has been “similarly situated” appears verified. Blindfolded, Justice cannot see that she is a woman; not realizing that she is different from men, she is deprived of all the advantages and disadvantages such recognition would bring.

It may be true, as many have observed, that the blindfold ensures Justice’s impartiality towards those with more power and influence than she. But at the same time, the blindfold ensures Justice’s impartiality towards those with *less* power, those who are, in some sense, disadvantaged. Unable to see whatever systemic disadvantages this latter group faces, unable to see her own membership in such a group and thereby possibly understand the nature of their plight, Justice can make her decisions based only

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1. *Bradwell v. Illinois*, 83 U.S. 130, 132 (1873).

on a limited set of facts before her. The blindfold guarantees not only that Justice will be similarly situated, but that she will apply the similarly situated doctrine to all she does. It is placed upon her to guarantee her adherence to a status quo predetermined by the Pygmalions who personified her.

We may hope that Justice, though blindfolded, realizes her gender through non-visual means. From a feminist standpoint, the blindfold may even have served some positive purpose, in heightening Justice's other senses, allowing her to "see" what may not always be visible. But the time has come fully to restore Justice to *all* her senses. It is time Justice employed *all* of her powers in overseeing the law. It is time she cast off her blindfold.