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Diversifying the Judiciary: The Influence of Gender and Race of Judging

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COMMENT

DIVERSIFYING THE JUDICIARY: THE INFLUENCE OF GENDER AND RACE ON JUDGING

I. INTRODUCTION

In 1978, political scientist Beverly Blair Cook wrote *Women Judges: The End of Tokenism* for a publication of the National Center for State Courts. She observed that the "national proportion of women judges has matched the national proportion of women lawyers on a time lag basis."[1] She compared the number of women law graduates with the number of women judges, finding that in the 1960s, women composed 1-2% of the legal profession and accounted for 1-2% of judges. With women representing 4% of all law graduates in the 1960s, the number of women judges increased to 4% in the 1970s.[2] Cook predicted that with 15% of law classes in the 1970s estimated to be women, 15% of judges would be women in the 1980s, and that states with a large number of women lawyers employed in the 1970s would almost achieve full sex integration by the year 2000.[3]

Time has proven Cook's predictions overly optimistic. According to comprehensive state court statistics, by 1985 well below 10% of judges were women.[4] By 1988, only 81 out of 833 state

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1. Beverly B. Cook, *Women Judges: The End of Tokenism*, *in* WOMEN IN THE COURTS 84, 84 (Winifred L. Hepperle & Laura Crites eds., 1978).

2. *Id.*

3. *Id.* at 84-85.

4. Letter from Larry L. Sipes, President, National Center for State Courts, to Sue Smith, University of Richmond Law Review 1 (Oct. 29, 1992) (on file with author) (citing FUND FOR MODERN COURTS, INC., THE SUCCESS FOR WOMEN AND MINORI-

intermediate appellate judges were women, slightly less than 10%.[5] In 1991, 36 out of 356 judges in state courts of last resort were women, only slightly more than 10%.[6] The distribution in the federal judiciary is equally bleak. By 1989, of 2618 authorized federal judicial positions, women held only 216, or 8%.[7] As the chart in Appendix I illustrates,[8] in 1993, out of the 837 Article III active, lifetime positions in the federal judiciary, only 93, or 11.1%, are women.

These numbers are disturbingly low when considering that 13% of lawyers in 1984 were women,[9] and that women have been graduating from law school in steadily increasing numbers. In 1982, 35% of law graduates were women.[10] If Cook's correlation between law school graduates and women judges had held true, during the 1990s, over one-third of all judges would be women. In 1990, 43% of law classes were women.[11] It is likely that there will be an ever increasing pool of women lawyers qualified to sit on the bench. Cook was assuming that this would be the case, and she was right, yet women judges still provide only token representation.[12]

As the national judiciary has remained predominantly male, it has also remained predominantly white. In 1991, the total number of black judges was 895.[13] Of these, 822 serve on state courts, representing an increase of 14% from 1986.[14] At the federal level there has actually been a significant decrease in

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TIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS (1985)).

5. *Id.* (citing BUREAU OF NATIONAL AFFAIRS, DIRECTORY OF STATE COURTS, JUDGES, & CLERKS (2d ed. 1988).

6. *Id.*

7. *Id.* at 2.

8. Alliance for Justice, 1993 (please see Appendix I).

9. SUSAN G. MEZEY, IN PURSUIT OF EQUALITY, WOMEN, PUBLIC POLICY, AND THE FEDERAL COURTS 194 (1992).

10. *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138, 140 (1990) [hereinafter *Different Voices*].

11. *Id.* at 138.

12. Rosalie E. Wahl, *Some Reflections on Women and the Judiciary*, 4 LAW & INEQ. J. 153, 154 (1986).

13. JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES & THE JUDICIAL COUNCIL OF THE NAT'L BAR ASS'N, ELECTED AND APPOINTED BLACK JUDGES IN THE UNITED STATES 1991, 5 (2d ed. 1991) [hereinafter BLACK JUDGES].

14. *Id.* However, a fewer number of states have black judges than in 1986. *Id.*

the number of black judges, from 99 in 1986 to 73 in 1991.[15] The chart reflects that blacks hold 42 of the 837 Article III active, lifetime positions in the federal judiciary, of which 7 are women. Nationally, the total number of black women judges has increased from 140 in 1986 to 204 in 1991, an increase of 46%.[16]

Obviously, there is a long way to go to achieve meaningful, not merely token, diversification. The lack of progress can be partially explained by the political climate of the past decade, especially when looking at statistics at the federal level. The process by which federal judges are chosen[17] has become highly politicalized.[18] The Executive Branch has great power to influence the composition of the judiciary.[19]

When comparing the number of women law school graduates and women judges in 1978, Cook was not counting on the Reagan-Bush era. At the time of her writing, President Jimmy Carter was calling for greater diversification of the federal bench.[20] Of his 258 nominations, Carter nominated 40 (15.5%) women and 55 (21.3%) minorities.[21] During his term, 38 (14.7%) black judges were appointed.[22]

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15. *Id.* at 6. Supreme Court Justice Clarence Thomas had not yet been confirmed.

16. *Id.* at 5. This is one of the few statistics offered that distinguishes black women. Unfortunately, most statistics do not, so we do not know if double counting or single counting is occurring. Apparently, those compiling the statistics do not think a separate category is warranted, which probably exemplifies what Angela Harris calls "gender essentialism" and "racial essentialism." *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

17. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . . ." U.S. CONST. art. II § 2.

18. Some view this as a major problem with the process. *See, e.g.*, Orrin G. Hatch, *The Politics of Picking Judges,* 6 J.L. & POL. 35 (1989); Patricia M. Wald, *Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J.L. & POL. 15, 22 (1989) (discussing how politicalization may be unavoidable). Certainly the "Thomas-Hill" hearings have intensified attention on the process.

19. Former President Reagan and President Bush appointed 60% of the sitting federal judiciary. *See* Michael P. Williams, *Clinton's Win Won't End Fight for Civil Rights*, RICH. TIMES DISPATCH, Nov. 16, 1992, at B1.

20. *See generally* Charles Halpern & Ann Macrory, *Choosing Judges*, N.Y. TIMES, July 1, 1979, at E21 (editorial discussing Carter's appointments).

21. Patrick Leahy, *Reflections on Federal Judicial Selection*, 6 J.L. & POL. 25, 28 (1989).

22. BLACK JUDGES, *supra* note 13, at 7.

In contrast, out of President Reagan's 379 appointments, 31 (8.2%) were women and 7 (1.8%) were black.[23] President Bush appointed more than 200 judges, and only 13 were black.[24] These track records underscore the impact of political realities on the judiciary, regardless of what other factors may influence the question of diversity. Regarding the decline in the number of black federal judges, it has been recognized that three successive Republican presidential victories and consistent black support for the Democratic ticket may explain why few black candidates were appointed.[25] While the debate over increased politicization of the judiciary is relevant, further elaboration is beyond the scope of this inquiry. This inquiry begins, after a sobering introduction, by asking what is wrong with a judiciary dominated by white males? Statistics are just numbers, and after all, judges are impartial, bound by the law, rules of procedure, and by precedent—right? Why would a judge's gender and race make a difference? This article attempts to answer these questions.

Part II posits that a judge's perspective, influenced by factors such as gender and race, is a critical factor in his or her role as an adjudicator. The judge is an individual, with notions of fairness and justice, who stands in relation to those being judged. Part III discusses the intersection of gender and race with impartiality and morality in judging, examining whether, and how, they might intersect. Part IV addresses the representational and substantive importance of diversification of the judiciary, finally tackling the question of whether any measurable differences may be manifested. Part V concludes that the increased presence of different perspectives on the bench will positively impact decisionmaking, but only if true, rather than token, diversity is achieved.

II. A JUDGE'S PERSPECTIVE AND THE ROLE OF ADJUDICATOR

Judges are required to be impartial, independent, and disengaged by the American Bar Association Model Code of Judicial

23. Leahy, *supra* note 21, at 28.
24. *See* Williams, *supra* note 19, at B1-B2.
25. BLACK JUDGES, *supra* note 13, at 7.

Conduct[26] and the United States Code.[27] These uniform attributes are designed to ensure that the judge will not prejudge parties in disputes and will apply the law neutrally. Though existing perhaps as ideals to which judges must continually strive, these uniform attributes do not define a "judge."

A. *Who Is a Judge*

A judge is an individual. "Who" that judge is depends on where he or she is from, how he or she was raised, instilled values, life experiences, gender, race, ethnicity and a host of other factors. These factors will define an individual's culture and shape an individual's perspective.

When an individual ascends the bench, his or her perspective, shaped since childhood, is not left behind. As Kenneth Karst has noted, it is unrealistic to ask a judge to leave acculturation at home: "We might as well ask that the judge leave his or her own self at home."[28] Gender and race are important aspects of acculturation, and they continue to influence people throughout their lives. All women[29] and men of color, the disempowered groups in society, continue throughout their lives to be affected by their often unequal treatment in that society.

For example, when Sandra Day O'Connor became the first woman Supreme Court Justice, she probably did not forget that when she graduated at the top of her Stanford Law School class in 1952, she was offered a job as a legal secretary.[30] The fact that she had a law degree did not make a difference to the employer. As a law school graduate, she did not fit patriarchal society's definition of "woman."[31] The employers operated within a paradigm which did not recognize female attorneys.

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26. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

27. 28 U.S.C.A. § 455 (West 1992).

28. Kenneth B. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957 (1988).

29. Throughout this article the term "women" is inclusive of women of all races.

30. *Different Voices*, *supra* note 10, at 138.

31. *See* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 808 (1990) (arguing that "woman" is a socially constructed category defined by men).

When Paulette Brown, the only black woman graduate from Seton Hall Law School in 1976, became a municipal judge in New Jersey, she probably did not forget she was harassed so much about her race that she quit her second corporate law job.[32] Probably no white male attorney has ever been mistaken for a court reporter at a deposition, yet Muzette Hill, a black woman attorney, has been so mistaken at every deposition she ever attended.[33] These black women not only contradicted society's definition of "woman," but society's definition of people of color as well.[34]

These are but a few examples of the various experiences of individuals where one's gender, or race, or both, functioned as determinant factors.[35] Critical to these examples is the perception of the people meeting these women. More than exercising individual judgment, these people were reacting to intrusions into their paradigm. They were content with the set of rules that defined their view of the world, and in their view neither white women nor women of color were supposed to be attorneys. Their reactions were a manifestation of the tension created when the paradigm encountered these women.

While focusing primarily on gender and race, these examples are only of educated professionals, whose experiences are still quite different than those of different socioeconomic status. Although various factors may compel different reactions from people, these factors represent multiple layers of an individual. These various factors, then, combine to determine a person's vantage point in society, and it is this combination of factors which will then wear a robe.

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32. Nina Burleigh, *Black Women Lawyers: Coping with Dual Discrimination*, A.B.A. J., June 1988, at 64.

33. *Id.*

34. Racial categories may also be viewed as social constructs. Cain, *supra* note 31, at 808 n.20.

35. For black women, neither gender nor race alone can be a determining factor. *See* Harris, *supra* note 16 at 604 (explaining that the black woman's experience is defined differently than the white woman's because she is simultaneously black and female).

B. *Perspective as Affecting Notions of Fairness and Justice*

Important in this article's analysis is that one's perspective influences perceptions of what is fair and just. Fern Smith, District Court Judge for the Northern District of California, commented on the concepts of fairness and justice.[36] She discounted gender as a factor, saying that women do not look at fairness and justice any differently than men.[37] Yet, at the same time, she does "think that ethnicity and race and socioeconomic status change people's perception of fairness and justice."[38]

Judge Smith also noted that the presence of women in the legal profession expands the application of justice and fairness, observing that there are now causes of action such as date rape and sexual harassment that were unheard of ten years ago.[39] This observation is certainly valid, not only regarding causes of action but emerging legal standards as well. For example, the relatively new "reasonable woman" test is changing how some courts view sex discrimination claims.[40] It has been observed that women judges generally view sex discrimination cases differently than men, and this may significantly impact decisional output.[41] With more women judges using this standard, its application may be expanded, resulting in more verdicts for female plaintiffs in sex discrimination cases.[42]

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36. *Different Voices*, *supra* note 10, at 144-46. Judge Smith's comments were made during a panel discussion at the American Judicature Society's annual meeting on August 3, 1990. *Id.*

37. *Id.* at 145.

38. *Id.*

39. *Id.*

40. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (Keith, J. concurring in part, dissenting in part); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). For a discussion of these cases and the impact of the "reasonable woman" standard, see Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?* 26 IND. L. REV. 227 (1993).

41. *See* Elaine Martin, *Men and Women on the Bench: Vive la Difference*, 73 JUDICATURE 204 (1990).

42. Toni Lester analyzed five sex discrimination cases using the reasonable person test in which the female plaintiff lost. Lester applied the "reasonable woman" test to these cases, and concluded that four out of the five plaintiffs may have won their cases if this standard had been used. Lester, *supra* note 40, at 229-30, 247-57.

While the increased presence of women in the judiciary will affect gender-specific issues, it will also affect issues not related to women. Gender cannot be discarded as a factor which does not influence one's perception of fairness and justice. Fern Smith's analysis discussed above underestimates the importance of gender in our patriarchal society, and how a feminine perspective might influence many neutral, or traditionally male-oriented issues.[43] Her analysis also requires that women of color peel away their gender in order for their race to exert its influence on perception. Similarly, women of differing ethnicities and socioeconomic status would have to shed their gender when developing perceptions of fairness and justice. Perception is influenced by all factors which constitute an individual's reality; omitting gender from the analysis is impossible,[44] because justice is not a concrete, static concept. Rather, "justice is created by, and defeated by, people who have genders, races, ethnicities, [and] religions."[45]

In addition, there are different pathways to the bench which may influence the perspective of a judge. Most white male judges are prosperous, having risen through the ranks in a traditional fashion, while many women and men of color have taken non-traditional routes. For example, during President Carter's administration, the white male candidates were more likely to have private law firm careers, ties to the local community and the appropriate political contributions. They were also more likely to receive higher preconfirmation ratings from the American Bar Association (ABA).[46] The non-traditional candidates were younger, less affluent, and came from the types of careers historically open to them, such as public interest practice.[47] It was observed that these types of career paths are "deemed less

43. *See* Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. J. 159, 165 (1986).

44. Multiple consciousness theorists developed this idea. *See generally* Harris, *supra* note 16; Marie J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

45. Martha Minow, *The Supreme Court 1986 Term: Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987).

46. Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 598-99 (1985).

47. *Id.*

worthy" by the ABA Committee on the Federal Judiciary which rates nominees.[48]

Although Carter did nominate some non-traditional candidates, he was criticized for allowing lawyers with political connections to be chosen frequently over outstanding public interest lawyers.[49] Public interest lawyers are more likely to recognize the experience of the disadvantaged groups in our society, and they may have a different notion of fairness, and perhaps justice. Their perspective, at any rate, would be very different. They would have been close to many outsiders in our society, who themselves would have a particular idea of what justice is.[50]

C. *The Relationship of Different Vantage Points*

1. A Starting Point

Our legal system is founded on liberal ideas of neutrality, objectivity, and universal truth. Objective rules are constructed, which can then be applied neutrally to subsequent cases. In order to do this, similarities and differences of groups must be discerned, and relevant differences identified, which requires abstracting the similarities.[51] According to Ann Scales, the basis of the approach to rulemaking in our system is "abstract

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48. *See* Carl Tobias, Comment, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 175 (1990) (analyzing President Bush's appointments at midterm).

49. *See* Halpern & Macrory, *supra* note 20, at E21. Ruth Bader Ginsberg, "a leading women's rights advocate," was among those candidates the editorial cited as being overlooked by President Carter. Now, fourteen years later, she is the second woman named to the United States Supreme Court. *Id.*

50. *See* Matsuda, *supra* note 44, at 8. Matsuda discusses the concept of justice in communities of color, observing that

> [n]ot much time is wasted in those communities arguing over definitions of justice. Justice means children will[sic] full bellies sleeping in warm beds under clean sheets. Justice means no lynchings, no rapes. Justice means access to a livelihood. It means control over one's own body. These kinds of concrete and substantive visions of justice flow naturally from the experience of oppression.

Id.

51. *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986).

universality,"[52] which "made maleness the norm . . . all in the name of neutrality."[53] White males have constructed these "objective" rules. The legal system, and the law itself, has been shaped by white males.[54] One particular perspective has been represented, calling into question whether neutral standards could be achieved,[55] even as they may claim to be neutral.[56]

When studying the effect women and men of color might have upon entering the judiciary, the threshold question is one of timing. It is easy to focus on those who are only recently entering an established structure, shaking the status quo, versus those who entered in the formative stages of the system shaping its growth. Even though white males have been and remain the majority on the bench, "[t]he comfort of finding one's perspective widely shared does not make it any less a perspective."[57] Any changes made by more women and men of color serving as judges can only be understood within the framework of the existing structure. As judges, they are only different because they are compared to the predominantly white male institution.[58] From this departure point, we can then look at the interplay of multiple perspectives in a courtroom.

2. Relationship to the Judged

Providing every party who comes before the court with a fair hearing and ensuring that justice is served are the laudable

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52. *Id.*

53. *Id.*

54. *See* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning* 64 NOTRE DAME L. REV. 886, 892-93 (1989).

55. *See* Iris M. Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535, 538 (1987) (arguing that while standards may claim to be neutral, they actually tend to be biased toward privileged groups).

56. *See generally* Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L. J. 64 (1985). According to Wishik, law is not ungendered and legitimates patriarchy by "masking and by giving an appearance of neutrality to, the maleness of the institution it serves." *Id.* at 66.

57. MARTHA MINOW, MAKING ALL THE DIFFERENCE 63 (1990).

58. Minow, *supra* note 45, at 13. Minow explains that "[w]omen are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities.'" *Id. See also* Cain, *supra* note 31, at 809-10 (observing that maleness goes unstated when men describe themselves, yet women often list gender).

goals our judicial system tries to achieve. Judges play a critical role adjudicating disputes. The people entering the courts are from various backgrounds with differing life experiences. They too have perspectives. For example, in a landlord-tenant dispute, the landlord will usually have a significantly different background from the tenant; they will have different life stories.

Not only will adversarial parties often have different life experiences from each other, but so too in relation to the judge. Considering the large majority of federal judges appointed are prosperous, white, Anglo males, Karst has concluded that they "will have a picture of reality that differs markedly from the pictures carried around by a large proportion of the people being judged: women, poor people, or people of another race, ethnicity, or religion."[59]

Of course the judge will not always have a different background than the litigants. The relationship of a judge's background to that of defendants in a criminal context provides an interesting illustration of the influence of perspective. Criminal defense lawyer, John B. Mitchell, discussing the frequent coercion of guilty pleas from defendants, observed that our criminal justice system functions differently depending on the class of the defendant.[60] Mitchell first observed that the system primarily functions administratively, with 90% of cases decided through plea bargaining. Thus most defendants are not afforded the protections of the "full screening system" against abuses and inaccuracies.[61] Many of these defendants must settle for plea bargaining because a disproportionate number of defendants are poor members of the black community who lack the political strength to challenge the coercion of pleas.[62]

He then contrasts this treatment of defendants with the treatment that middle class white defendants received when they invaded the system in the 1960's as a result of crackdowns

59. Karst, *supra* note 28, at 1958.

60. *See* John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 317-18 (1980).

61. *Id.* at 313-14.

62. *Id.* at 318-19.

on illegal demonstrators and marijuana users.[63] Mitchell observed that "[t]he power of the middle class protected its sons and daughters," because when these defendants entered the process, even very minor violations resulted in jury trials, and in many instances, prosecutors dismissed cases at trial doubting the defendant's guilt.[64] Mitchell identified two sources of this power: (1) "the personal identification which the judges and prosecutors felt with these middle class defendants and their families;" and (2) the middle class expectations of the operation of the criminal justice system.[65] This example illustrates that judges' perspectives can result in differing treatment of defendants, those with whom the judges readily identify and those with whom they do not identify.

It is important for a judge to be aware of his or her own point of view, since recognizing one's own point of view is the first step towards recognizing the points of view of others. It has been observed that "[o]nce we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point."[66] Judges must then identify the vantage points of others as well as their own.[67] It will be difficult for a judge to identify a voice with which he or she is completely unfamiliar. Thus, as Karst notes, it may be too much to ask for a judge to go as far as empathizing with the parties, considering that a judge will encounter people "that his culture has trained him to see as outsiders."[68]

It is important, however, for those in the dominant group to recognize that they have a particular point of view and learn to identify other points of view. If dominant groups become aware that their "experiences and ways of understanding social relations are particular, they can perhaps become more aware of how their standards of authority, intelligence, reasonableness,

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63. *Id.* at 318.
64. *Id.*
65. *Id.* Mitchell added that "no one involved" in the system "was prepared to disappoint" those expectations. *Id.*
66. Minow, *supra* note 45, at 15.
67. *Id.*
68. Karst, *supra* note 28, at 1965.

creativity, and the like are colored by that experience."[69] This awareness may lead to the realization that there is no universal truth because it might become "increasingly difficult for dominant groups to maintain their norms as neutral and universal, and to construct the values and behavior of the oppressed as deviant, perverted, or inferior."[70]

If we can ask a judge to identify different points of view, it is not too much to ask that a judge see the parties as more than mere abstractions. Detaching oneself from one's own perspective in order to hear the other voices does not mean one must be totally detached from the others.[71] Independent judgment is not sacrificed. In fact, one can only be independent if one is willing to listen to a previously silenced voice. A judge must stand back, yes, but only in order to listen to the stories of all who come before him or her.

Empathic understanding is desirable, and achievable, from this posture. First, however, a judge must break free from the rigid explanations the traditional perceptions of the law impose. The law has authoritatively shaped the understanding of events, because it has a limited "concern over a narrow set of explanations."[72] Furthermore, the law also makes assumptions concerning women which do not match the reality of women's life situations.[73] A judge should strive for a complete understanding of the stories of both parties, free from pre-determined explanations or assumptions. Only then will he or she be able to make an independent, informed decision, and only then will all people entering a courtroom get the fair hearing we so loftily espouse, but do not always achieve.

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69. *See* Young, *supra* note 55, at 541-42.

70. *Id.* at 542.

71. Scales has criticized the fact that the legal system clings to a lack of subjectivity and impersonality. *See* Scales, *supra* note 51, at 1389. She maintains that "objective reality is a myth." *Id.* at 1378.

72. *See* Finley, *supra* note 54, at 889.

73. Wishik, *supra* note 56, at 73-74. Her concept can be applied to people of color, about whom the law also makes assumptions.

III. THE INTERSECTION OF GENDER AND RACE AND IMPARTIALITY AND MORALITY IN JUDGING

In attempting to maintain independence, a judge is charged with remaining impartial throughout court proceedings. Adversarial parties to a dispute, and parties seeking either an equitable or a legal result, have a right to expect a fair hearing by an impartial decisionmaker. They have a right to be heard.[74] The judge must identify with the litigants[75] equally, that is, impartially. And although a judge must be impartial he or she is nevertheless a participant, for at some stage the judge will prefer one side over another. Judges, as adjudicators, must make choices, and occasionally moral judgments. The judge will then have to struggle with his or her own morality, legislated or majority morality, and whether an unpopular decision is nonetheless morally correct.

A. *Judicial Impartiality and Decisionmaking*

It is nearly impossible to discuss impartiality without first considering the role of attitude, or perspective of the judge. Recognizing that a judge has a particular perspective does not negate the element of impartiality in judicial proceedings. Far from being mutually exclusive concepts, acknowledging one's own perspective actually enhances the possibility of an impartial hearing. If that critical step of acknowledgement does not occur, the perspective can influence the behavior of the judge without any conscious recognition.[76] Furthermore, while a judge may believe he or she is being objective, the stance taken may actually seem partial from another's point of view.[77]

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74. *See, e.g.*, Judith Resnick, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: Hearing Women*, 65 S. CAL. L. REV. 1333, 1334-35 (1992) (comparing what she terms the inability of some members of the Senate to hear Anita Hill with what she maintains routinely occurs in courts—judges failing to listen to or hear women).

75. Identification is preferable to abstraction because Scales believes abstraction insulates the status quo when institutionalized. Scales, *supra* note 51, at 1385.

76. Minow uses cases of racial and religious discrimination to show what she believes to be the "oppressive" impact of the observer's unacknowledged perspective. Minow, *supra* note 45, at 62-63.

77. *Id.*

There will usually be several different vantage points represented in the courtroom, and to be impartial, a judge must realize this. Moreover, there will, in most cases, come a time when a choice must be made favoring one side or the other.[78] It is the judge's job as adjudicator to decide which of the represented vantage points to adopt.[79] This is the nature of the process. Judges are asked to make judgments.

Impartiality is intertwined with the process of decisionmaking. How a judge arrives at a particular decision is vital to understanding his or her role in relation to those being judged. Decisions are made on a case-by-case basis, each with a specific set of facts to which the law is applied in order to reach an outcome. During this process the judge will, in many instances, have the opportunity to exercise discretion; there will either be no set rule or the rule will specifically authorize discretion. When a judge is called upon to fashion an equitable remedy or decide a novel case, here too, he or she will exercise discretion.

In discussing the common law and impartiality, it was observed that in cases with no clearly applicable precedent, "personality-based, attitudinal and other subtler forms of prejudice are not so easily shrugged off."[80] If, then, impartiality is called into question, so too is the effect of factors such as gender, race, and the overall attitude of the judge. In novel cases, "the court will ask simply: what does justice require in a case such as this?"[81] As previously discussed, notions of justice may vary between individuals. Gender and race are factors which may impact how one defines justice, and, therefore, the result in a given case may be influenced by them.

Frequently, the judge is not permitted to exercise discretion and must apply a rule or law as the legislature has mandated. The substantive outcome of the case is determined by the law, and a judge may apply uniform reasoning to reach the decision. Judges will also sometimes feel bound by precedent. However,

78. H. K. Lucke, *The Common Law: Judicial Impartiality and Judge-Made Law*, 98 LAW Q. REV. 29, 48 (1982).
79. Minow, *supra* note 45, at 15.
80. Lucke, *supra* note 78, at 49.
81. *Id.* at 52.

in the process of evaluating the facts, a judge may distinguish certain facts from those in previous cases, and reach a different result.[82]

A significant example of when a previous rule of law may be distinguished occurs when the judge determines that "the relevant social and legal environment prevailing at the time of the first dispute . . . has changed."[83] This determination might be made because the judge recognizes society has changed and sets a standard to comport with evolving society. Today, many problems recognized as legitimate causes of action are related to gender or race. Perhaps the relatively new members of the judiciary, women and men of color, are more familiar with many of the problems and issues being presented and litigated in our courtrooms, and perhaps they would be more likely to distinguish existing law. A member of the establishment, on the other hand, may be resistant to change. Connection with the judged, or the lack thereof, will affect the evaluation of the facts.[84]

Clearly, impartiality is not an abstract principle rigidly determining behavior. As Karst has commented:

> The impartiality we can fairly demand is not devotion to some self-applying principle that eliminates judgment from judging. Rather it is an effort to decide the case from an independent standpoint, as opposed to the point of view of one of the parties, and to approach all parties' contending positions with sympathetic regard.[85]

Thus, openness to the views of outsiders and a willingness to listen to everyone's stories actually fosters impartiality in decisionmaking.

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82. "It is an open secret that judges have a good deal of choice in the way in which they apply the case law, that they are prone to 'distinguish' even the most closely similar precedent if they feel strongly that it tends toward a undesirable result." *Id.* at 38.

83. *Id.* at 44.

84. Karst, *supra* note 28, at 1962.

85. *Id.* at 1966.

B. *Morality in Judging*

The judge, from an independent standpoint, will listen to the stories presented to him or her, balance the interests, and eventually favor one side or the other. The next question is how did that judge arrive at that particular conclusion? When discussing cases in law school, the reasoning of the judge is usually analyzed. The process of evaluating the facts and applying the law to the facts is studied. Rarely, if ever, is the role of morality in decisionmaking discussed.

The simplest form of legal reasoning used in common law cases is an "analogous application of a precedent or of a precedential rule."[86] The application of the precedent to the facts yields a particular result. In some cases, however, moral intuition is relied upon to reach a conclusion.[87] It is legitimate for judges to rely on their own moral values, because if they do not, the ethical quality of the law "could not have changed and/or improved in the course of time."[88] It is important, then, to study moral reasoning as applied to factual situations.

The role of morality in judging is a highly philosophical inquiry, but it is important to note that gender and race are aspects of that inquiry. They are factors which may influence one's own sense of morality. They are also significant factors in determining a community's morality and they may affect how one chooses between conflicting moralities. According to Patricia Wald, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, many of the issues judges are now deciding are highly visible moral issues—abortion, homosexuality, the homeless, and remedies for racial inequality.[89] Most of these issues are related to gender or race, or both, which may pose moral dilemmas for judges of different backgrounds.[90]

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86. Lucke, *supra* note 78, at 65.

87. *Id.*

88. *Id.* at 67.

89. Patricia M. Wald, *The Role of Morality in Judging: A Woman Judges' Perspective*, 4 LAW & INEQ. J. 3, 4 (1986).

90. *See, e.g.*, Charles Malarkey, *Judicial Disqualification: Is Sexual Orientation Cause in California?* 41 HASTINGS L.J. 695, 696 (1990) (discussing the opportunity for a judge to decide the rights of a group to which the judge belongs).

Gender and race may influence how individuals identify and solve moral dilemmas. For instance, Carol Gilligan has provided strong evidence that women deal with moral conflicts differently than men.[91] She found that males use images of hierarchy in structuring relationships, while females use a web of interconnected relationships, leading to different views of morality.[92] She illuminated the possibility that men and women see moral dilemmas differently, without labeling one method "better" than the other. Thus, individuals may develop differing moral values.[93]

The concept of a majority or conventional morality may also be affected by gender and race. Conventional morality is defined by the popularly elected legislative and executive branches.[94] Judge Wald describes how morality influences constitutional issues and notes the danger in being tied to the moral values of the Framers or the majority when judges must enforce individual rights.[95] Certainly, the Framers did not write the Constitution with women and men of color in mind, and popularly elected legislatures are dominated by privileged white males.[96] She concludes that there are times when judges must transcend conventional morality and call upon their own personal morality, as well as the underlying aspirations and ideals of our national history.[97] Judge Wald speaks from experience, and her analysis can be expanded beyond constitutional issues to all areas of the law.

IV. THE RAMIFICATION OF DIVERSITY

This article has discussed gender and race and how they might impact perspective, impartiality and morality in judging. The extent of the role of these elusive concepts in judging itself is difficult to measure, let alone the extent to which gender and

91. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMAN'S DEVELOPMENT *33* (1982).
92. *Id.* at 62.
93. *Id.* at 62-63.
94. Wald, *supra* note 89, at 9.
95. *Id.* at 9-11.
96. *See id.*
97. *Id.* at 15.

race may influence these concepts. Certainly, there are experiential differences between white males, women and minorities. This last part addresses whether including more women in the judiciary would have concrete effects on judicial decisionmaking and policy. First, it will account for the most obvious symbolic effects based on the increased representation of groups other than white males. Then, it will discuss whether there may be any substantive ramifications.

A. *Representation of Women and Men of Color*

The judiciary is an important institution which remains dominated by white males of similar backgrounds. As a social institution, the judiciary perpetuates gender and race-based stereotypes, myths and biases. It is important for women, and men of color, to gain representation in this powerful institution. It is a question of power and status, of empowering segments of society and permanently eliminating those stereotypes, myths and biases. Rosalie Wahl, Associate Justice of the Minnesota Supreme Court, believes that "[a]ny lasting change in the position of women in our society will be reflected in greater numbers of women beyond the level of tokenism in the judiciary and in the legal profession."[98] The same holds for the increased representation of minorities.

The importance of increasing the number of women in the judiciary should not be underestimated. The increase in symbolic representation will substantially eliminate stereotypes, myths and biases. Some black women lawyers support the "critical mass" theory which alleviates problems by numbers alone: as more black women enter the profession, they become less of a phenomenon.[99] Associate Justice Wahl believes that enough women are now in the legal profession and on the bench to form a critical mass which can act as a catalyst.[100] She asserts that women who have achieved status and power have a duty to support other women.[101] Thus, numbers alone can be

98. Wahl, *supra* note 12, at 154-55.
99. *See, e.g.*, Burleigh, *supra* note 31, at 68.
100. Wahl, *supra* note 12, at 156.
101. *Id.*

a catalyst for change by further increasing the representation of women, and men of color.

Diversifying the judiciary will reflect the diversity in the population and those affected by judicial decisions. The judiciary is a highly visible institution, and the racial and gender composition of the bench affect perceptions of that institution.[102] Some, such as Governor Weld of Massachusetts, support diversification, recognizing it is important to the quality of justice that the judiciary be perceived as a more impartial institution.[103] In the wake of the Rodney King verdicts and the outcry of many who believe that a fair trial is unobtainable, it is easy to see that perceptions of our judicial system are strongly held. Diversification may help change these perceptions.

While some might believe that numbers should be increased as a matter of "fair play" and proportional representation,[104] some use the proportional representation argument to criticize affirmative action programs.[105] Judge Wald maintains that diversifying the judiciary is not about any group having a right to proportional representation.[106] She asserts "it is a matter of injecting into the appointment process, consistent with the highest standards of individual capabilities, a reasonable mix of the racial, gender, and ethnic backgrounds of the citizens who will be affected by the rulings of the courts."[107]

Opponents of affirmative action have argued that selecting judges based on gender and racial characteristics would dimin-

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102. Senator Leahy cites as a disturbing issue nominees who belong or have belonged to discriminatory clubs. He uses as an example Shannon T. Mason, Jr., whose nomination was considered by the Judiciary Committee in 1988. Mason had been a member of the James River Country Club in Newport News, Virginia for sixteen years. In its fifty-six-year history, the club had never admitted a black member. Mason admitted he knew of its discriminatory policies but did nothing about it. Mason resigned from the club two weeks before the hearings, but his nomination was blocked when local black lawyers opposed it. Leahy, *supra* note 21, at 28-29.

103. Renee Loth, *Weld's Hunt for Judges*, BOSTON GLOBE, July 7, 1991, at A19. *See also* Tobias, *supra* note 47 at 177 (listing citizens' perceptions of the neutrality of the judicial system as one benefit to increasing the number of female federal judges).

104. John Gruhl et al., *Women as Policy-Makers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 309 (1981).

105. Wald, *supra* note 18, at 19.

106. *Id.*

107. *Id.*

ish the quality of the judiciary.[108] Judge Wald does not believe the quality of candidates need be sacrificed in order to bring to the judiciary those with "unique experiences and sensitivities of different sectors of our nation . . . ."[109] In fact, many believe there is a highly-qualified pool of women and men of color who would make positive contributions as judges.[110] We just may have to look beyond the large law firms to other areas such as public interest and academia to find excellent lawyers who have been previously overlooked.[111]

B. *Substantive Effects*

The final issue is whether any substantive policy changes are effectuated by including women, and men of color on the bench. Certainly, many people perceive that women, and men of color are more connected to the people who are being judged.[112] Some also believe that policies will change only if white male dominance is eroded. Barbara Arnwine, executive director of the National Lawyers' Committee for Civil Rights Under the Law, is calling for more black appointments, observing that as the Reagan-Bush era closes, we are left with a federal bench that is "hostile to civil rights."[113] Others feel that women are needed on the bench to eliminate gender bias from court outcomes.[114]

Regardless of what people might perceive the influence of gender or race to be, is there any measurable difference in the decisions made? Political scientists have conducted studies with less than dramatic results. One study of trial judges predicted that women would be more lenient than men; however, no support was found for this hypothesis.[115] Interestingly, the on-

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108. *See, e.g.*, Walker & Barrow, *supra* note 45, at 598.

109. Wald, *supra* note 18, at 19.

110. *See* Loth, *supra* note 103 at A19; *see also* Wahl, *supra* note 12 at 156.

111. *See, e.g.*, Halpern & Macrory, *supra* note 20, at E21 (noting that President Carter's nominations included only token numbers of lawyers with careers dedicated to representing the indigent, minorities and others).

112. Karst, *supra* note 28, at 1958; *see also* Loth, *supra* note 102, at A19.

113. Williams, *supra* note 19, at B2.

114. *See, e.g.*, Sherry, *supra* note 43, at 160 (citing a study by the New Jersey Supreme Court Task Force on Women in the Courts).

115. Gruhl, *supra* note 104, at 319.

ly significant difference found was that women were more strict in sentencing female defendants.[116]

Another study by Walker and Barrow considered both gender and racial differences, using matched pairs of male/female and black/white judges after President Carter's appointments.[117] They similarly failed to find statistically significant differences in decisionmaking.[118] However, the authors of this study admitted that the number of cases analyzed was limited, constricting the potential for behavioral analyses.[119]

It is significant that the samples in each study were small. Obviously, until more women and men of color are represented, it will be difficult to collect data on decisionmaking. It is also significant that we do not know what one judge would do compared to another had each heard the same cases. In addition, we do not know if the judges differed in how they arrived at their decisions.

The political process of selecting judges is also usually overlooked as a variable. Interestingly, Walker and Barrow did mention the possible influence of the selection process, stating that it might screen out candidates with other than conventional viewpoints.[120] They accurately noted that "the judges studied . . ., be they traditional or non-traditional, were generally suggested by white, male legislators and [state] party officials . . . , nominated by a white, male president, and confirmed by a white, male Senate."[121] This leads to the conclusion that increased gender and racial diversification beyond tokenism may indeed have substantive policy ramifications.

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116. *Id.* at 320. It is important to note that because men far outnumbered women in the sample used for this study (as is the case in most jurisdictions), men decided over 82% of the more than 30,000 felony cases studied. *Id.* at 313 n.11.

117. Walker & Barrow, *supra* note 46, at 599.

118. *Id.*

119. *Id.* at 615.

120. *Id.* Walker and Barrow further recognized that "[m]inority persons selected for judgeships may well tend to be 'safe' candidates who are generally supportive of the system." *Id.* See also BRUCE WRIGHT, BLACK ROBES, WHITE JUSTICE 65-87 (1987). Wright argues that the few token black judges "are the arbitrary and capricious product of white politics," who distance themselves from other blacks. *Id.* at 64, 85.

121. *Id.*

Increased diversity will lead to more creative solutions to problems. The "newcomers" to the system have less stake in the status quo and will therefore be willing to reach beyond the confines of the present system to resolve civil disputes or levy criminal punishments. A case in point is New York State Judge Helen Freedman who recently sentenced New York City officials to spend a night at the office for the homeless with reportedly deplorable conditions.[122]

IV. CONCLUSION

This article has attempted to analyze the role of a judge and the influence of gender and race in terms of perspective, impartiality and morality. It is concluded that, generally, a judge's perspective does matter and bears a crucial relationship to those being judged. Recognizing perspective is essential to both independent judgment and a fair hearing for all sides.

Apart from this general observation, it is submitted that gender and race are two factors which affect one's own view of the world. Some experiences are such that their outcomes depend on gender and race. The fact a judge brings these experiences to the bench does not compromise impartiality. It is the realization of one's vantage point which makes independent judgment possible.

This holds even when considering the broad range of discretion afforded judges in many situations. We employ judges to evaluate facts and to reach conclusions in a wide range of disputes. Judges also conduct statutory and constitutional interpretation. In some situations judges may evaluate the facts in a certain way in order to choose a particular rule of law to apply. A judge's notions of fairness and justice may play a role in decisionmaking, particularly when equity concerns are presented. The moral resources of a judge also will affect decisionmaking, as well as the interpretation of laws and the Constitution.[123]

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122. Derrick Z. Jackson, *See How the Rich Like Poverty*, RICH. TIMES DISPATCH, Nov. 28, 1992, at A11.

123. For a discussion of the influence of gender on views of conventional morality and constitutional interpretation, see Wald, *supra* note 89, at 10-18.

Certainly, diversifying the judiciary may lead to ideological diversity, and we may see this manifested in decisionmaking. However, impartiality is not compromised if we maintain realistic expectations of our judges, and dispel the notion that there is one universal truth. To do this we must always keep in mind the fact that everyone has a perspective, and particularly that the dominant group has a perspective which pervades present judicial decisionmaking. From this posture, ideological diversity is a positive step, not a threatening one. It is merely the result of expanding the type of qualifications deemed meritorious and selecting judges from a deeper pool. It is this approach to the process which is important. "Ideological correctness . . . should not function as the dispositive, or even principal, qualification for nomination."[124]

At the heart of law is morality, and diversity will be a positive influence on the moral decisions judges are increasingly being asked to make. While certainly not advocating that judges set their own moral agendas, the injection of personal morality into the process is inevitable, especially in light of an evolving community morality. Our society is nothing if not ever-changing, and with it morality changes as well.

Finally, diversity may lead to creative problem-solving. Despite the far-reaching nature of this conclusion, diversity will touch people's lives in a human way. Judicial decisions affect human beings, and some members of our society need to be affected in a positive way before they drop out all together. Previously silenced groups deserve a chance to be heard. Increased diversity in our courtrooms will also go a long way toward eliminating institutional bias,[125] a prerequisite to ensuring all voices are heard and providing for solutions to problems. However, token diversity will not achieve these goals. Identifying self-confidence as a factor in one's willingness to be innovative, Martin has commented that women may be influenced by their token status and hesitate to take nonconforming actions.[126]

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124. Tobias, *supra* note 48, at 182.

125. *See* Sherry, *supra* note 43, at 160-62 (arguing that the mere fact that women are participating in the adjudicative process may help alleviate problems of discrimination).

126. Martin, *supra* note 41, at 207.

Those in positions of power are increasingly recognizing the benefits of diversity. Some progress is being made, as evidenced by the confirmation of the second woman to the United States Supreme Court, Ruth Bader Ginsberg. With heightened political pressure, the goal of diversity may become a reality. However, as there are critics of the increasing calls for diversity, the purpose of this inquiry is to address why diversifying the judiciary is important. We must now insure that when judges are chosen, the net cast to trawl for talent is wide enough to include women, and men of color. Only then will we achieve true, rather than token, diversity.

Susan Moloney Smith

APPENDIX I

Women and Minorities in the Federal Judiciary

October 1, 1993

	Women		African-Americans		Hispanic-Americans		Asian-Americans		Disabled Americans	
Circuits	Circuit	District	Circuit	District	Circuit	District	Circuit	District	Circuit	District
DC	2	2	1	2	0	0	0	0	0	0
1st	0	2	0	0	1	8	0	0	0	0
2nd	1	6	1	1	0	2	0	0	0	0
3rd	3	7	1	4	0	2	0	0	0	0
4th	1	3	0	3	0	0	0	0	0	0
5th	2	6	0	2	1	5	0	0	0	0
6th	2	7	2	5	0	1	0	0	0	0
7th	1	4	0	2	0	1	0	0	0	0
8th	0	4	1	3	0	0	0	0	0	1
9th	5	15	2	6=	1	5=	1	5	0	0
10th	2	4	0	0	0	2	0	0	0	1
11th	2	8	1	4	0	3	0	0	0	0
Federal†	2		0		0		0		0	
Total	23	68	9	32	3	29	1	5	0	2
Supreme Court	2		1		0		0		0	
Grand Total (%)†	93 (11.1%)		42 (5.0%)		32 (3.8%)		6 (.7%)		2 (.2%)	

Source: Alliance for Justice

= Includes two women.

† Federal Circuit does not have a district court.

Percentage of the identified group in the federal judiciary.

There are 837 Article III active, lifetime positions in the federal judiciary: 9 seats on the Supreme Court, 179 positions among the circuit courts of appeals and 649 district court positions.