



JUDICIAL DIVERSITY

Sherrilyn A. Ifill

LET ME BEGIN WITH TWO QUOTES.

The first: “I am . . . a Brooklynite, born and bred – a first-generation American on my father’s side, barely second-generation on my mother’s.”¹

The second: “I am who I am in the first place because of my parents My father was brought to this country as an infant. . . . He grew up in poverty. Although he graduated at the top of his high school class, he had no money for college [I]n the midst of the Depression, he found that teaching jobs for Italian Americans were not easy to come by, and had to find other work”²

The first quote is from Justice Ruth Bader Ginsburg’s opening statement at her Supreme Court confirmation hearing in 1993. The second quote was part of the opening statement of Justice Samuel Alito at his confirmation hearing in 2006.

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¹ Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. On the Judiciary, S. Hrg. No. 103-482, at 49 (1993).

² Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. On the Judiciary, S. Hrg. No. 109-277, at 54 (2006).

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This has become an almost standard opening for modern Supreme Court nominees. Why is this? And why are these statements about family and upbringing always focused on the hard-scrabble, working class, or ethnic experience? We're unlikely to hear a nominee say, "I am an Upper East-sider, born and bred. I attended the finest prep schools in New England, as my father did before me, and his father did before him. Although my father didn't need to work due to our family's investments in shipping and United Steel, my father nevertheless took up the law."

The effort by the nominee is always to communicate something very specific to the American public at the outset of the hearing. *Even though I'm a highly educated judge, I'm like you at my core. I understand your experience and the experience of average people.* In fact, nominees are telling the public to believe that, in addition to what the nominees learned in law school, in the practice of law, or as judges on the bench, they will take something more into the conference room. They will take with them an understanding of how life is lived for average people.

I begin with this because I do think that at some fundamental level we all understand the importance of judicial diversity. Promoting the inclusion of racial and ethnic minorities, women, and judges from a variety of backgrounds on our courts is a positive and important value. This seems fairly non-controversial. So why aren't we more successful at diversifying our courts?

The most recent figures for the federal bench shows that of the active federal judges on the courts (including bankruptcy and magistrate judges), 6.8% are African American, 5.3% are Hispanic, and 1.1% are Asian American. Only 26% of the active appellate judges are women; and only 25% of district court judges are women.³

When we begin to look more closely at individual circuits the figures get downright alarming. For example there *is* only one, and *has* only ever been one, woman on the Eighth Circuit, Judge Diana Murphy. The First Circuit also has only one woman – the Chief

³ Demographic data on the federal judiciary provided by the Fair Employment Practices office of the Administrative Office of the Courts.

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Judge, Sandra Lynch. The Second Circuit has enjoyed respectable gender diversity, and has four active women judges.⁴ But only one active Judge on the Second Circuit – based in New York – is African American. The Fifth Circuit has six active women judges (out of 17), but despite encompassing Texas, Louisiana and Mississippi, it has only *one* active African American judge. You get the idea. It's rare to find a federal appellate court that has managed to achieve both race and gender diversity.

Why is this? Are we less comfortable with the idea of promoting racial and gender diversity than we like to think? And if so, why? I think that the truth is that we prefer to treat judicial diversity as a kind of noblesse oblige exercise. We don't really want to talk very much – at least not openly – about *why* judicial diversity matters, except perhaps to mention the importance of having role models of different backgrounds.

But we are not uncomfortable with judicial diversity across the board. In fact, we're quite comfortable with, and willing to embrace, some kinds of judicial diversity. Indeed some forms of judicial diversity have been fully internalized in our judicial selection process.

I'll give an example. In selecting judges to serve on the federal courts of appeals there is an unwritten, but in almost all instances strictly adhered to, tradition of appointing judges that more or less reflect the geographic make-up of the circuit. The Eighth Circuit encompasses seven states, so, it would be shocking for all of the 11 active judges on it to be from North Dakota. Geographic diversity in the circuits is respected. Among the many contentious battles we've had in trying to diversify the Fourth Circuit, where I live and work, none was more rough and tumble than when then-President George W. Bush sought to nominate a Virginian to fill the seat held by the late, great and much-revered Marylander Frank Murnaghan. Geographic diversity is understood as important for the circuit court that covers multiple states.

⁴ See National Association of Women Judges, 2009 State Court Statistics, available at www.nawj.org/us_state_court_statistics_2009.asp.

Why? Surely no one thinks that the judges on the Tenth Circuit who are originally from Kansas will be biased in favor of Kansas plaintiffs or defendants? No one seriously believes that an Iowa judge will seek to advance the interests of Iowa in deciding cases that come to the Eighth Circuit. So why bother with geographic diversity? Because geographic diversity among judges on the Circuit bench has value for the same reason that judicial diversity of any kind has value.



There are two principal rationales that support the importance of judicial diversity. The first is one about which I believe there is largely a consensus. The other is perhaps a bit more controversial (and goes to the heart of the some of the discussions had this summer during the Supreme Court confirmation process). I will address each of them briefly.

The first, and I think widely accepted, view is that diversity on the bench promotes public confidence in the legitimacy of the courts. It's not that a judge from Iowa is biased in favor of Iowa litigants. It's that if all the judges on the Circuit are from Iowa, then Minnesota litigants or Arkansas litigants might lose confidence in the fairness of the court.

The importance of public confidence to the legitimacy of our courts cannot be overstated. Judges possess neither armies nor battalions. What courts rely on is the public's acquiescence, the public's sense that when a court issues a decision that decision is to be obeyed. It is a key feature of a country in which the rule of law is paramount. Decisions of our courts are to be complied with, even when we disagree with them. The thankfully few occasions when the public, and even elected officials, have departed from this — such as in Little Rock, Arkansas over 50 years ago — have been among the most shameful episodes in our country's history.

But the public's confidence in the judiciary must be earned. The public wants to know ultimately not that its views will always win the day, but that the deck is not stacked. That the judicial decisions that govern our conduct, the reach of governmental power, our constitutional rights and our statutory entitlements and prohibitions

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have been examined and subjected to the most fully informed and vigorous scrutiny by our courts. Knowing this enables members of the public to accept even those decisions with which they fundamentally disagree.

The second reason that judicial diversity is important is a bit more controversial but I think it is important to discuss it openly. That is the view that diversity on the courts enriches judicial decisionmaking, that the interplay of perspectives of judges from diverse backgrounds and experiences makes for *better* judicial decisionmaking, especially on our appellate courts. This view invites some controversy; it inevitably leads to concerns about impartiality, and whether judges are obeying their duty to decide cases based on the facts and law of the case before them, not on their own predilections or views.

Again, let's focus first on the non-controversial example of how diversity can enrich judicial decisionmaking. One of the issues that I wrote about in the midst of this past summer's Supreme Court nomination and confirmation process is the importance of professional-background diversity on the Supreme Court. The same can be said for appellate courts. I've noted that the current track to the Supreme Court has become pretty well set over the past 20 years. *One hundred percent* of our current Supreme Court justices have come from the federal courts of appeals. With the departure of Justice Souter, and before him Justice O'Connor, there are now no justices on the Court who have state court judicial experience (or even substantial state court litigation experience). And yet many of the cases (criminal and civil) that wind their way up to the Supreme Court emanate originally from state courts.

Likewise the law-practice experience of our current Supreme Court justices has virtually excluded certain areas of practice, including criminal defense. This seems shocking to me, as our very system of criminal justice could not exist without those who defend the accused. I'm reminded of the observations of one former law clerk to Justice Thurgood Marshall. While many people who wrote tributes to Justice Marshall after his retirement focused on his former career as a civil rights lawyer, she wrote:

[Justice Marshall] knew how to read a record (and did so). He knew how trials work, the importance of fact-finding, how lawyers and judges can influence a jury without leaving tracks in the record, the importance of procedural rules in preserving justice. He knew about police procedures, the interactions between law enforcement and criminal defendants, how government agencies work. [His] practical trial experience generated a sophisticated understanding of issues and records, the kind of understanding that is essential for effective appellate judging. Such expertise is sadly lacking on the current Court.⁵

Although there's been very little interest in exploring the importance of professional-background diversity, the value of bringing this kind of experience to the bench is fairly non-controversial.

But when we begin discussing other forms of diversity – gender and race in particular – we start to get nervous about the idea that the inclusion of women and/or judges of color might lead to *different* or even *better* judicial decisionmaking. I want to take a stab at addressing this subject.

Let's start with gender. It has been over two decades since the first woman was nominated for a seat on the Supreme Court. But there were discussions even 10 years before the appointment of Justice Sandra Day O'Connor about appointing the first female Supreme Court justice.

I rarely hear commentators talk about the very sincere efforts of President Nixon to appoint the first woman to the U.S. Supreme Court. In 1971, Nixon was presented with the presidential windfall of having two simultaneous nominations to the Court, when Justices Hugo Black and John Marshall Harlan II announced their resignations within weeks of one another. Along with his confidantes and advisors, H.R. Haldeman and Attorney General John Mitchell, Nixon determined that one of those seats should go to a woman. His search focused principally on Judge Mildred Lillie, a state appellate court judge from California, Nixon's home state. Nixon believed that if he appointed a woman to the seat it would be historic,

⁵ Janet Cooper Alexander, *TM*, 44 STAN. L. REV. 1231, 1233 (1992).

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and that “it’ll always be a woman’s seat from then on.”⁶

I wish I could tell you that President Nixon sought to bring gender diversity to the Court because he believed that women justices would make an important contribution to the work of the Court. He didn’t. In fact, Nixon said “I don’t think a woman should be in any government job whatever. I mean, I really don’t. The reason why I do is mainly because they are erratic. And emotional. Men are erratic and emotional too, but the point is a woman is more likely to be.” He concluded about the Court, “there should never be a woman there.”⁷

But to his credit Nixon also believed that “the woman’s viewpoint probably ought to be on the Court.” “It isn’t a man’s world anymore,” he added, though he called this “unfortunate[.]” And then of course the politically-obsessed Nixon explained, “[s]o I lean to a woman only because, frankly, I think at this time, John [Mitchell], we got to pick up every half a percentage point we can.”⁸

In the end, President Nixon didn’t pick the first woman for the Supreme Court. It became known that the American Bar Association would not give Judge Lillie a qualified rating for a seat on the Court, and President Nixon chose instead to formally nominate Lewis Powell and William Rehnquist. But it’s fascinating to look back 38 years and see this very robust and open discussion between President Nixon and his advisors about the wisdom of appointing a woman to the Supreme Court.

Justice Ruth Bader Ginsburg was appointed to the Court by a Democratic president in 1993. At her hearings she predicted that “in [her] lifetime” she expected “to see three, four, perhaps even more women on the High Court Bench, women not shaped from the same mold, but of different complexions.”⁹ It’s sobering to note

⁶ John Dean, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 113 (2001).

⁷ *Id.*

⁸ *Id.*

⁹ *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States*, at 50.

that it took 16 years to appoint only one woman of a different complexion to the Court, and it's been a bit of a bumpy ride.

We've rarely talked openly and explicitly about the real concrete value of gender diversity on the bench – the potential that a diverse set of legal decisionmakers can result in richer judicial decisionmaking. By this I do not mean to suggest that “wise Latinas” or “wise white men” make better or worse decisions than one another. What I do mean to suggest is that the interaction of wise Latinas, white men and women, African Americans, Native American judges – just like the interaction of former prosecutors, defense counsel, corporate practitioners and in-house counsel – provides opportunities for a robust exchange that can inform appellate decisionmaking.

Let me pause here to emphasize an important point. Too often our conception of what people mean when they talk about “better” decisionmaking or the way race or gender might affect judicial decisionmaking is that we're talking about affecting case “outcomes.” The empirical data on this is sketchy and contradictory. It does appear that having even one woman on a three-judge appellate panel affects the entire panel's decisionmaking in employment discrimination cases.¹⁰ Beyond that the figures and the statistical disparities between case outcomes when women or racial minorities are on a panel are negligible, with slight bumps in discrimination cases and some criminal cases.

But judicial decisionmaking is not just about outcomes; it is also about the *process* of decisionmaking. About subjecting a given case to the most rigorous and comprehensive analysis – analysis that takes into account differing viewpoints and perspectives that may be shaped by a judge's personal or professional knowledge or experience. When this takes place in the appellate conference – when we as the public are confident that the court has considered all of the angles, applied the law to the facts and viewed the facts using the full measure of their judicial experience and knowledge – then re-

¹⁰ See Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decisionmaking*, 20 J.L. ECON. & ORG. 299-330 (2004).

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ardless of the outcome we can feel confident that the decisionmaking of that court is the best it could be. And we should want that. We should want our cases to be rigorously examined in this way – by judges from Colorado and Oklahoma and Nebraska, by male and female judges, by white and Native American judges.

Judge C. Arlen Beam of the Eighth Circuit endorsed this kind of exchange when he said in 1991 that: “*The robust exchange of ideas at conference and later, hones and strengthens our opinions and provides an enjoyable part of our nonjudicial lives.*”¹¹

We saw this on display in the Supreme Court last Term in *Safford Independent School District*, the case about the young girl in Colorado who was strip-searched.¹² It was Justice Ginsburg who shared with her colleagues on the Court the kind of devastating humiliation that a 13-year-old girl might suffer at being strip-searched in school, a humiliation and injury that might rise to the level of a constitutional harm.¹³ Similarly, in the Lilly Ledbetter case,¹⁴ Justice Ginsburg’s dissent articulated a legitimate and important perspective that contributed to our discourse about workplace discrimination. We should remember that dissents also increase public confidence because they allow opportunities for a court to speak from multiple voices, so that even those dissatisfied with the court’s decision will know that their perspective was taken into account, even if it failed to carry the day.

¹¹ Jeffrey Morris, *ESTABLISHING JUSTICE IN MIDDLE AMERICA: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT* 248 (2007), citing C. Arlen Beam, *Foreword*, 17 WM. MITCH. L. REV. 697, 699 (1991).

¹² *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009).

¹³ In a remarkable interview following the oral argument in the case, Justice Ginsburg talked about how her male colleagues on the Court initially seemed unable to fully appreciate how a teenage girl might experience being strip-searched at school. See Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009 available at http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm. Justice Ginsburg’s concurrence in the case paid particular attention to the facts surrounding the treatment the girl was afforded by school officials.

¹⁴ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).



Let me turn to addressing racial diversity on the bench. This tends to be the form of diversity about which there is, understandably, often the most anxiety. For a variety of reasons, and given our history, race is different. We afford racial classifications the most searching scrutiny in constitutional law, and we tend to be most sensitive to efforts to imbue race with significance beyond the cosmetic.

But to recognize that differing racial or ethnic groups may have different perspectives that bear on legal decisionmaking is not to assign or essentialize the experiences of different groups. To be sure, there is no one “black perspective” or “Latino perspective.” But there are shared experiences that influence how we look at the world around us – even the law. In previous articles about this I’ve cited polls that showed that even black and white lawyers *and judges* differ in their views about aspects of the criminal justice system. For example, in one poll 83% of white judges polled, but only 18% of black judges, believed that blacks are treated fairly in the criminal justice system.¹⁵ This is a stark disparity. What is it that black judges see that white judges do not? What is it that white judges see that black judges do not? How do we reconcile these disparate views of our justice system held even by *judges*? Is one view illegitimate and the other legitimate? The truth is that neither of these perspectives should be disqualified from legal decisionmaking.

It was Justice Byron White, in his tribute to Justice Thurgood Marshall, who said about Marshall’s contribution to the conferences on the Court that Marshall “would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our experience.”¹⁶

All federal judges are lawyers – distinguished ones. But it is the ways that they differ that makes a court. Judges fill in the spaces for

¹⁵ Kevin L. Lyles, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 21, 237 (1991).

¹⁶ Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 *STAN. L. REV.* 1215, 1216 (1992).

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each other. When appellate judges sit in the conference each brings to bear the full weight of his or her knowledge and experience to the record the panel must review. And each brings a different set of experiences that influences how he or she reads the record, hears the arguments presented, and responds to the claims made by the parties. As Justice Cardozo once put it, “the eccentricities of judges balance one another.”¹⁷

A judge brings to the table accumulated knowledge which he or she applies to the record. That knowledge comes sometimes from other cases the judge has read with similar records, or cases the judge prosecuted that seem to bear on the case before the court, or the judge’s remembrance of how water issues are managed in that part of the country, his or her own experience as a legislator, or experience litigating antitrust cases or giving instructions to a jury as a trial judge. Judges cannot erase this knowledge from themselves. They can only acknowledge it and expose it to their colleagues so that it can be tested and examined openly – rejected if it should not bear on the deliberations of the case before the panel, utilized if it should.

This is what I’d hoped we were poised on the precipice of discussing this summer with the nomination of Justice Sonia Sotomayor, and with the scrutiny afforded to her now famous “wise Latina” comment – which certainly warranted explanation. I hoped we would explore what Justice Alito meant when he said at his confirmation hearings, “When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account.”¹⁸ No one on that Judiciary Committee three years ago thought that Judge Alito meant that he feels more inclined to rule in favor of a plaintiff in a discrimination case because of what his forebears suffered as Italian-American immigrants. Judge Alito instead suggested that he has a heightened

¹⁷ Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921)

¹⁸ *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States*, at 475.

awareness of the possibilities of, and harms of, discrimination. That he may even have a sense of how discrimination can manifest itself in the lives of average, hard-working people from disfavored racial or ethnic groups. By contrast, although she experienced gender discrimination as a young law graduate, Justice Sandra Day O'Connor confessed that growing up on a ranch in Arizona she "had not been personally exposed to racial tensions [She had] no personal sense, [growing up] of being a minority in a society that cared primarily for the majority."¹⁹

I firmly believe that we will not make significant strides in promoting diversity on the bench until we confront openly the potential of diversity to enrich judicial decisionmaking. It is in the interest of all of us, white, black, Latino, Asian American, Native American, to have the best, most deeply informed judicial decisionmaking.

Empirical studies that try to determine how or whether the race or gender of judges affects the outcomes of different kinds of cases are interesting of course, but it comes as no surprise that these studies are not particularly illuminating. One reason – which I suggested earlier – is that case outcomes are not, to my mind, the appropriate measure of how diversity affects judicial decisionmaking. It is the process even more than the outcome that may be most important to measure. I know of only one study that attempted to measure this, and the study authors found a rather significant difference in one set of cases.²⁰

But I also think that empirical studies will not really be useful until we've vigorously talked about this issue, so that judges white and black, male and female will become more reflective and con-

¹⁹ Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

²⁰ See George C. Sisk, et. al, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (finding that while outcomes in cases presenting challenges to sentencing guidelines were similar, black judges were significantly more likely to adopt a due process theory to support their decisions – a reasoning overwhelmingly rejected by most white judges).

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scious of, and more willing to examine and share, how their experiences, perspectives and viewpoints shape their approaches to law. So long as we continue the myth that only minority and women judges have particular perspectives that have the potential to influence how they view some legal issues, and that white, male judges are impartial umpires, we cannot really measure how diversity affects the process of decisionmaking. All judges must be willing to admit that they are the product of all of their experiences – if the judge saw combat in World War II or in Vietnam; was a solo practitioner in a rural county; was a family lawyer; or grew up on or near a reservation.

Let me share with you what the Supreme Court said in a case called *Peters v. Kiff*, when the Court struck down the conviction of a white criminal defendant because African Americans had been excluded from the jury venire. The Court said that removing any identifiable segment of the community from jury service “removes from the jury room the qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”²¹

Judges are not juries, it’s true. But judges are legal decisionmakers, and like jurors judges are also the product of a variety of human experiences which may bear on their understanding of the law’s power, reach, or restrictions.

I thought of the Supreme Court’s words in *Peters v. Kiff* when I read *THE LAZY B*, Justice Sandra Day O’Connor’s memoir about her life as a young girl growing up on her father’s ranch in Arizona in the 40s and 50s.²² It’s hard to imagine that the lessons and routine of life on the ranch – the sense of community, the hard work, the “no-excuses” approach to tasks that had to be done, and most of all the strong and enduring respect for and relationship to the environment – didn’t shape Justice O’Connor in ways that influenced her mindset as a lawyer and judge.

They also come to mind when I think about the life of the late

²¹ *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

²² See Sandra Day O’Connor and H. Alan Day, *THE LAZY B* (2002).

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Theodore McMillian, the first African American member of the Eighth Circuit. Jeffrey Morris' history of the Eighth Circuit describes McMillian's background:

[He was] the son of a factory worker and the great-grandson of slaves. The eldest of 10 children, McMillian attended a segregated St. Louis school . . . and Lincoln University, the only four-year institution of higher education in Missouri then open to African Americans. After McMillian graduated from Lincoln, Phi Beta Kappa with majors in mathematics and physics, he could find employment only as a dining-car waiter. After serving in the military during World War II, McMillian was unable to get into medical school because of his race. Instead he attended St. Louis University Law School, where he graduated at the top of his class. McMillian set up his practice, but needed to supplement his income by work as a busboy, movie projector operator, janitor, and adult-education teacher.²³

Perhaps it is “unknown and unknowable” how these experiences influenced Judge McMillian's understanding of the law's reach and application to the lives of the litigants whose cases he decided. As a judge, he enjoyed an unchallenged reputation for fairness, integrity and professionalism. But it seems to me that it would be a deep loss to deny the significance of his rich experiences in shaping his legal philosophy and thinking, just as it would be foolish to disqualify the influence of life on the Lazy B on the thinking of Justice O'Connor. I challenge judges, and even lawyers to think back on the experiences that have shaped our understanding of the law's reach and power, our sense of justice and injustice, our commitment to the rule of law. These experiences are part of us. And they are part of what we contribute to the legal system.

Thus, I continue to hope that we will have productive conversations about diversity on the bench in the future.



²³ Morris, *ESTABLISHING JUSTICE IN MIDDLE AMERICA*, at 195-96.