

# The Judiciary, Diversity, and Justice For All Revisited

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## INTRODUCTION BY THE ASIAN AMERICAN LAW JOURNAL

It is with great honor and pleasure that the *Asian American Law Journal* presents the following Article, *The Judiciary, Diversity, and Justice for All Revisited*, by Judge Chen. Almost thirty years ago, Judge Chen was one of the four writers whose work was published in the inaugural issue of the *Asian American Law Journal*, then called the *Asian Law Journal*. His Article, *Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism*, critiqued a Ninth Circuit ruling that held an English-only rule in the workplace did not qualify as discrimination. The Article initiated a sequence of immensely crucial and legally pertinent dialogue surrounding the Asian American community.

There is also great value in revisiting his speech, *The Judiciary, Diversity, and Justice for All*, published jointly in the *California Law Review* and the *Asian American Law Journal* in 2003. At the time, Judge Chen noted that 12 percent of Article III judges and less than 9 percent of federal magistrate judges were persons of color. Recent numbers lie at only 24

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percent and 14 percent respectively, while people of color compose 40 percent of the US population. As law students, we find it necessary to examine the implications surrounding these numbers and emphasize the role that law students of color can play in advancing the legal system in a fairer direction.

Though the lack of diversity in the judiciary generally and the noticeably minimal representation of Asian Americans are enduring problems in the American legal system, we hope our work as one of the two law journals in the United States focusing on Asian American jurisprudence can facilitate the scholarly discourse that many legal scholars and practitioners such as Judge Chen have helped establish. This is precisely a central purpose of the *Asian American Law Journal* to this day—to continue an iterative dialogue which reflects upon and discusses both the lack of diversity in the legal field as well as the disproportionate impact of the law to various racial and cultural minorities living in the United States.

A. *Korematsu v. United States*: What If There Had Been a Japanese American Justice on the Court?

In 1943 and 1944, the Supreme Court upheld the imposition of race-based curfews and the internment of 120,000 Americans of Japanese descent in *United States v. Hirabayashi* and *United States v. Korematsu*.<sup>1</sup> In justifying the singling out for mass treatment of Japanese Americans, despite the lack of such treatment of Americans of German and Italian descent, the Court opined that Japanese Americans were more prone to be disloyal and presented a military risk.<sup>2</sup> The Court based its assumption on its observation that the Japanese Americans “have intensified their solidarity with Japan and have in large measure prevented their assimilation as an integral part of the White population.”<sup>3</sup> Noting that large numbers of Japanese American children are sent to Japanese language schools, the Court observed that “there has been relatively little social intercourse between them and the White population.”<sup>4</sup> However, these assumptions about Japanese Americans—pivotal to the Court’s ultimate conclusion—had no basis in the record or in the life experiences of the justices.

*Korematsu* begs the question: What if there had been a Japanese American Justice on the Court? That Justice could have challenged, in a way no other justice could, the false assumption that Japanese Americans were inherently unassimilable. That justice could have reminded them that two-thirds of those interned were U.S. citizens, most by birthright, and that before they were ripped from their homes by the internment order, Japanese

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1. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

2. *Hirabayashi*, 320 U.S. 81; *Korematsu*, 323 U.S. 214.

3. *Hirabayashi*, 320 U.S. at 96.

4. *Id.* at 98.

Americans were inextricably integrated into the economy and local communities. That Justice might have related how they had a relative who had just been elected class president of an integrated high school, described how Japanese American children were active in the YMCA and Boy Scouts, excelled in All-American sports like basketball, tennis, bowling, and golf, and followed baseball as close as any other American, worked alongside White Americans, and that among their friends and families were not only Buddhists, but Baptists, Methodists, Catholics, and Quakers.<sup>5</sup> And that Justice could have told their colleagues about their son, nephew, or brother who enlisted in the army, along with thousands of other Japanese Americans, and joined the famed 442 Regimental Combat Team, the most decorated unit for its size in U.S. military history and a regiment that ironically was among the first to liberate the concentration camp at Dachau.<sup>6</sup> Perhaps that Justice—armed with lived experiences—could have persuaded their colleagues that Japanese Americans were just that: Americans. But in the Court’s conference room, that voice was missing.

#### B. Revisiting Diversity and the Bench

Eighteen years ago, Berkeley’s *Asian American Law Journal* and *California Law Review* published a speech I had given on the importance of diversity in the judiciary. At the time, I noted that persons of color comprised only 12 percent of Article III judges and less than 9 percent of federal magistrate judges. Since 2003, the number of Article III judges who identify as persons of color has increased, but still not by much. In 2021, of those Article III judges who reported their race, about 24 percent identified as persons of color.<sup>7</sup> In 2019, of those magistrate judges who reported their race, nearly 14 percent identified as persons of color.<sup>8</sup> Thus, while the federal judiciary is more diverse today than it was 20 years ago, it is still far less diverse than the general population it serves; people of color make up 40

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5. Interview with Dale Minami, lead counsel for the *Korematsu* coram nobis legal team circa March, 2021.

6. *442nd Regimental Combat Team*, GO FOR BROKE NAT’L EDUC. CTR., [https://www.goforbroke.org/learn/history/combat\\_history/world\\_war2/european\\_theater/central\\_europe\\_campaign.php](https://www.goforbroke.org/learn/history/combat_history/world_war2/european_theater/central_europe_campaign.php) [https://perma.cc/D8HF-JFZ6] (last visited March 6, 2022).

7. Roslynn R. Mauskopf, *The Judiciary Fair Employment Practices Annual Report: Fiscal Year 2021*, ADMIN. OFF. U.S. CTS. (2021) (on file with author). In Fiscal Year 2018, of those Article III Judges reporting, 13.7% were African American, 10.7% were Hispanic/Latinx, and 3.5% were Asian Pacific American.

8. James C. Duff, *The Judiciary Fair Employment Practices Annual Report: Fiscal Year 2019*, ADMIN. OFF. U.S. CTS. (2019), [http://www.mab.uscourts.gov/pdffdocuments/FY\\_2019\\_Judiciary\\_Fair\\_Employment\\_Practices\\_Annual\\_Report\\_FINAL.pdf](http://www.mab.uscourts.gov/pdffdocuments/FY_2019_Judiciary_Fair_Employment_Practices_Annual_Report_FINAL.pdf) [https://perma.cc/367R-ZPSX]. 7% of those reporting were African Americans, 3.6% Hispanic/Latinx, 2.9% Asian Pacific American. *Id.* The recently released “Judiciary Fair Employment Practices Annual Report” for Fiscal Year 2020 which employed a new survey methodology making comparisons with prior years difficult, showed a slight increase of African Americans (0.4%) and Asian Pacific Americans (0.4%) as a percentage of those reporting in 2020 over that in 2018. Roslynn R. Mauskopf, *The Judiciary Fair Employment Practices Annual Report: Fiscal Year 2020*, ADMIN. OFF. U.S. CTS. (2020) (on file with author).

percent of the U.S. population.<sup>9</sup> Women comprise 35.7 percent of active federal judges in 2018.<sup>10</sup> While this is a substantial increase from 20.6 percent in 1999, there remains a substantial gender parity gap.<sup>11</sup>

The disparity of diversity in the judiciary is particularly salient in the criminal justice system. While people of color constitute nearly 80 percent of federal criminal defendants,<sup>12</sup> they constitute just around 24 percent of Article III judges.<sup>13</sup> An appearance before magistrate judges is a criminal defendant's initial point of contact with the federal courts: magistrate judges make crucial decisions on pretrial release and detention. Yet, the magistrate judge bench is even less diverse than the Article III bench. In fiscal year 2018, just 72 persons of color comprised less than 14 percent of that bench.<sup>14</sup>

Despite the relative rise in diversity in the federal judiciary since 2004, the observations I made eighteen years ago remain relevant. Indeed, the Black Lives Matter movement and cases arising out of the killings of persons of color at the hands of law enforcement and private citizens have only heightened the urgency of remedying the issues of diversity, equity, and inclusion within the judiciary. And *Korematsu* reminds us of the price we pay when the bench is unreflective of the underrepresented voices and the society it serves generally.<sup>15</sup>

9. *QuickFacts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/AZ89-CKQZ] (last updated July 1, 2021).

10. James C. Duff, *The Judiciary Fair Employment Practices Annual Report: Fiscal Year 2019*, ADMIN. OFF. U.S. CTS. (2019) 1, 6, available at [http://www.mab.uscourts.gov/pdfdocuments/FY\\_2019\\_Judiciary\\_Fair\\_Employment\\_Practices\\_Annual\\_Report\\_FINAL.pdf](http://www.mab.uscourts.gov/pdfdocuments/FY_2019_Judiciary_Fair_Employment_Practices_Annual_Report_FINAL.pdf) [https://perma.cc/263U-4WA5].

11. *Fair Employment Practices: 1999 Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (1999) (on file with author).

12. *United States Sentencing Commission Quarterly Data Report*, U.S. SENT'G COMM'N 1, 6 (2021), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC\\_Quarter\\_Report\\_2nd\\_FY21.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_2nd_FY21.pdf) [https://perma.cc/NF56-LENH].

13. *Biographical Directory of Article III Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> [https://perma.cc/745F-AU72], last visited March 2021.

14. Duff, *supra* note 10.

15. Although the focus of my speech in 2003 and herein is on racial, ethnic, and gender diversity, the value of diversity applies equally to other measures of diversity such as sexual orientation and identity, geographic, socio-economic background, and career experiences. See Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CTR. FOR AM. PROGRESS (June 17, 2020), <https://www.americanprogress.org/article/startling-lack-professional-diversity-among-federal-judges/> [https://perma.cc/GBR9-DFB5]. As Professor Joanna Shepherd noted with respect to diversity in the professional background of judges:

It isn't surprising that judges' perspectives would be significantly shaped by their professional experiences. Over the course of their careers, lawyers can learn the laws, regulations, precedents, and legal philosophy relevant to their area of practice. They also come to understand more intangible lessons about litigants, legal arguments, and the perspectives of the clients for which they advocate. Thus, lawyers from different areas of practice will inevitably have different perspectives that represent their experience and expertise. If selected for the bench, the different perspectives and expertise gained in their legal work up to that point will inevitably exert some influence on a judge's determination of which legal claims are plausible, which legal arguments are convincing, which witnesses are credible, and which behavior is

### C. Judicial Diversity Promotes Public Trust and Confidence in the Judiciary

The disparity between the composition of the federal bench and the public it serves creates a gap in trust and credibility between the courts and historically underserved and underrepresented communities.<sup>16</sup> This gap is magnified by historically rooted feelings of alienation and isolation from the legal system. According to the American Bar Association (ABA) Task Force, “Minorities do not trust the court system. They don’t trust it to resolve their disputes or administer justice fairly.” Black Americans are far more likely than White Americans to say the nation’s criminal justice system is racially biased and that its treatment of minorities is a serious national problem. Close to nine-in-ten Black adults – 87 percent – say Black people are generally treated less fairly by the criminal justice system than White people, a view shared by a much smaller majority of White adults at 61 percent.<sup>17</sup> In a 2018 survey, 79 percent of Black Americans in contrast to 32 percent of White Americans, stated, “the way racial and ethnic minorities are treated by the criminal justice system is a very big problem in the United States today.”<sup>18</sup> A study on California courts found that the lack of trust in the court system correlates with the lack of racial diversity on the bench.<sup>19</sup>

A bench that is reflective of the diversity of the community it serves can be instrumental in securing the trust and confidence of the public. A diverse judiciary validates multicultural perspectives and voices on the bench, provides role models for minority youth, and promotes public perceptions of the court as fair and objective.<sup>20</sup> Researchers have found that a judiciary that

unreasonable. As Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit explained, it is “inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”

Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, DEMAND JUST. 2, 11 (2021), <https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> [https://perma.cc/B62H-AXEH]. In support of her thesis, Professor Shepherd performed a statistical analysis of district court decisions between 2015 and 2019 and found that judges who worked as a prosecutor or with a corporate background tended to rule against claimants in employment cases more often than judges without such backgrounds. *Id.* at 12-17.

16. See Mary D. Guerra, *Latina and Latino Judges: Changing the Complexion of the Bench*, 9 FLA. A&M U.L. REV. 145 (2013) (“The New York State Judicial Commission on Minorities stated, ‘There are two justice systems at work in the courts of New York, one for whites, and a very different one for minorities and the poor.’”).

17. John Gramlich, *From police to parole, black and white Americans differ widely in their views of criminal justice system*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [https://perma.cc/933N-58FM].

18. *Id.*

19. Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation* (Gov. Code, § 12011.5(n)) (2020), <https://www.courts.ca.gov/documents/2021-JO-Demographic-Data.pdf> [https://perma.cc/6KWF-Q7RS].

20. See, e.g., *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity*, LAW’S COMM. FOR CIV. RTS. UNDER L. 2, 29 (2005), [https://www.opensocietyfoundations.org/sites/default/files/answering\\_20050923.pdf](https://www.opensocietyfoundations.org/sites/default/files/answering_20050923.pdf) [https://perma.cc/Y4WG-8PKE].

reflects the communities the courts serve increases the public's trust and confidence in the judicial branch of government and in the overall justice system.<sup>21</sup>

A simple vignette from my Court tells the story in human terms. My colleague, Judge Edward Davila, sits in San Jose and presides over a diverse docket. He is the first Latino judge to sit in our court in twenty years.<sup>22</sup> In a case involving a limited-English speaking Latino litigant, Judge Davila discussed some procedural matters and then asked the litigant if he had any questions. Appearing nervous, he looked at Judge Davila and asked, "Will you be my judge?" Those simple words fraught with anxiety bespoke the sense of intimidation and alienation too often felt by members of underserved communities.<sup>23</sup> In Judge Davila, the litigant found an island of hope in a sea of isolation—hope that he would at least be heard and understood by a judge who might appreciate in a personal way that litigant's life experiences in a personal way. This vignette demonstrates a point made by Justice Elena Kagan: "People look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that's a sort of natural thing and they feel more comfortable if that occurs."<sup>24</sup>

#### D. Judicial Diversity Improves the Quality of Decision-Making

The public will only trust the judiciary as much as they trust in its decision-making.<sup>25</sup> Diversity on the bench enhances the quality of decision-

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21. Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance — and Inhibit — Judicial Diversity?*, AM. JUDICATURE SOC'Y 1 (2009), ("[A] judiciary that is representative of the population's diversity increases public confidence in the courts.") (citing Gary S. Brown, *Characteristics of Elected Versus Merit-Selected New York City Judges 1992-1997*, THE FUND FOR MOD. CTS. (1998); Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. (2010) (finding that greater representation of Black judges led to increased perception of court legitimacy among Black Americans); Maya Sen, *Diversity, Qualifications, And Ideology: How Female and Minority Judges Have Changed, Or Not Changed, Over Time*, 2 WIS. L. R. 367, 373 (2017); Shepherd, *supra* note 15, at 10 ("A judiciary that looks like the broader populace is assumed to possess the diversity of experiences, values, and viewpoints necessary to ensure that judicial decisions reflect a broad range of perspectives.") (citation omitted).

22. Howard Mintz, *Edward Davila wins key senate endorsement for federal judge*, EAST BAY TIMES (Dec. 1, 2020), <https://www.eastbaytimes.com/2010/12/01/edward-davila-wins-key-senate-endorsement-for-federal-judge/> [<https://perma.cc/7WRB-PFYB>].

23. Interview with Judge Edward J. Davila, United States District Judge, United States District Court for the Northern District of California, circa March 2021.

24. Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court*, N.Y. TIMES (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html> [<https://perma.cc/6GCL-SE8E>].

25. See, e.g., *Improving Diversity on the State Courts: A Report from the Bench*, CTR. FOR JUST., L. & SOC'Y GEORGE MASON UNIV. 6 (2009). ("Perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision-making. Judges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions. Judges can debate with one another, offering divergent perspectives and educating their colleagues about how their decisions will

making because diverse judges are able to evaluate cases and witnesses with a broader lens. For instance, Judge Consuelo María Callahan of the U.S. Court of Appeals for the Ninth Circuit highlighted the benefit of having diverse judges when analyzing whether a comment may be offensive to a particular group.<sup>26</sup> Judges from diverse backgrounds can provide different perspectives to the situation based on their personal experiences with discrimination.<sup>27</sup> Judge Jacqueline Nguyen of the U.S. Court of Appeals for the Ninth Circuit has explained that as a refugee from the Vietnam War, “her life experience . . . gives [her] an appropriate sense of humility when [she] review[s] the facts of each case and that [she] ha[s] an understanding and appreciation of how intimidating the court system can be.”<sup>28</sup>

Similarly, Justice Alito, the son of an Italian immigrant, observed at his confirmation hearing:<sup>29</sup>

When a case comes before me involving, let’s say, someone who is an immigrant – and we get an awful lot of immigration cases and naturalization cases – I can’t help but think of my own ancestors, because it wasn’t that long ago when they were in that position . . .

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.

The nature and breadth of a judge’s life experiences can inform and affect their roles both as fact finders and as expositors of law.

### 1. *Factual Determinations*

The value of diversity in fact finding for judicial decision-making is specifically evident in the judge’s crucial role of credibility determinations. Credibility determinations sometimes turn on subtleties such as non-verbal body language.<sup>30</sup> The standard wisdom of judging the veracity of a witness is by seeing whether the witness looks the questioner in the eye.<sup>31</sup> But in some cultures, avoiding eye contact is a sign of respect, not a sign of

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affect various populations.”) (citing Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 409-10 (2000)).

26. Kristine L. Avena, *Judges of Color: Examining the Impact of Judicial Diversity in the Equal Protection Jurisprudence of the United State Court of Appeals for the Ninth Circuit*, 46 HASTINGS CON. L. Q. 221, 239 (2018).

27. *Id.* at 239.

28. *Id.* at 240.

29. *Confirmation Hearing of the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States, Before the Sen. Comm. on the Judiciary*, 109th Cong. (2006), <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ALITO.pdf> [<https://perma.cc/5KPY-N2C3>].

30. Vincent Denault, *Furtive looks, nervousness, hesitation: How nonverbal communication influences the justice system*, THE CONVERSATION (May 1, 2019), <https://theconversation.com/furtive-looks-nervousness-hesitation-how-nonverbal-communication-influences-the-justice-system-114145> [<https://perma.cc/D7SG-HSA8>].

31. *Id.*

dishonesty.<sup>32</sup> A diverse bench can sensitize its members to the risk of cross-cultural misunderstandings.

A witness's testimony may seem more credible if it is consistent with the judge's knowledge or experience, and, conversely, less credible if it is outside the judge's experience.<sup>33</sup> For example, judges of different racial groups who can draw upon similar life experiences of racial prejudice as witnesses in court can better understand the implications of coded words that express racial prejudice.<sup>34</sup> Some studies suggest Black judges tend, as a group, to be more sensitive to issues relating to racial discrimination because of their firsthand experiences with racial discrimination.<sup>35</sup> Minority judges appear to be more sympathetic to civil rights issues such as gender and racial discrimination.<sup>36</sup> Studies show that female judges are more likely to find for plaintiffs in sex discrimination and sexual harassment cases.<sup>37</sup>

Thelton Henderson, the first Black chief judge of my Court,<sup>38</sup> recalled an instance early in his judicial career in which a White colleague of his presided over a racial harassment trial. The White judge noted that the Black plaintiff was generally credible; however, the judge found it inherently hard

32. Sophie Thompson, *Cultural Differences in Body Language to be Aware of*, VIRTUAL SPEECH (Aug. 25, 2017), <https://virtuallanguage.com/blog/cultural-differences-in-body-language#:~:text=In%20many%20Asian%2C%20African%2C%20and,respect%20for%20bosses%20and%20elders> [https://perma.cc/5L99-ZXS2]. (In many Asian, African, and Latin American countries, unbroken eye contact would be considered aggressive and confrontational. These cultures tend to be quite conscious of hierarchy and avoiding eye contact is a sign of respect for bosses and elders.)

33. Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUD. 187, 190 (2015).

34. Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS 18 (2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [https://perma.cc/V47E-T72N].

35. See Susan B. Haire & Laura P. Moyer, *Diversity Matters*, 18–22 (2015).

36. E.g. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L. ECON. & ORG. 303 (2004); Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 91 (2012).

African American judges are more likely to believe that employees have credible grievances of racial harassment. At the same time, it appears that both African American and White judges recognize relevant factual features of the case, such as whether the harassment included racial slurs or harassment by both coworkers and supervisors. Thus, neither group is inattentive to the legal principles; rather they differ in their interpretation and understanding of the dispute.

Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161 (2009); see Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, S. CAL. L. REV. 313, 343 (2012) (“Minority judges are more likely to allow employment civil rights cases to continue past motions for summary judgment regardless of the race of the plaintiff.”).

37. E.g. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 395 (2010); Sean Farhang & Gregory Wawro, *Indirect Influences of Gender on the U.S. Courts of Appeals: Evidence from Sexual Harassment Law* 9 (Univ. of Cal., Berkeley, 2010), <http://www.columbia.edu/~gfw10/FarhangWawroIndirectEffectsMay2010.pdf> [https://perma.cc/V2EC-E7FB].

38. *The Honorable Thelton E. Henderson Biography*, The History Makers, <https://www.thehistorymakers.org/biography/honorable-thelton-e-henderson> [https://perma.cc/BF8R-7P9M].



to believe the plaintiff's testimony about racist graffiti found on a locker—a drawing of a hangman's noose around a baboon. Although his colleague thought the plaintiff otherwise had a strong case, he found that testimony unbelievable. Judge Henderson recounted to that judge how members of his own family had experienced the very same kind of harassment. Unlike his colleague, Judge Henderson thought the harassment testimony was not inherently implausible.<sup>39</sup>

The vignette is more than anecdotal. For instance, Latinx judges are reportedly more sympathetic in immigration cases, not due to racial discrimination, but rather, due to “the shared view of opportunities that life in the United States presented to their immigrant families.”<sup>40</sup> Asian judges are also shown to be more sympathetic to immigrants because of their firsthand experiences with racism and xenophobia.<sup>41</sup>

The impact of life experiences upon a factfinder's determinations is hardly a novel proposition. Indeed, the Constitution implicitly recognizes the value of diversity among jurors in ensuring that the deliberative process is informed by these varying experiences and perspectives<sup>42</sup> by requiring that juries represent a fair cross-section of the community and prohibiting the exclusion of identifiable groups.<sup>43</sup>

Without diversity among jury members, the deliberative process can lead to unfair and dangerous outcomes; jury diversity and the deliberation process enhance the quality of deliberations and can serve as a check on biases, including implicit biases. In almost 200 actual juries in felony cases with Black defendants, the greater the percentage of White people on a jury, the greater the likelihood the jury was to convict a Black defendant.<sup>44</sup> Likewise, the greater the proportion of White men on a capital jury, the greater the likelihood that a Black defendant is sentenced to death.<sup>45</sup> Similarly, in more than 300 non-felony juries in Texas, majority-White juries were harsher toward Latinx defendants than were majority-Latinx juries.<sup>46</sup> Some studies show that Whites who are on a racially heterogeneous jury are more skeptical of a Black defendant's guilt and less likely to make factually inaccurate statements than those on an all-White jury.<sup>47</sup> Representative juries engage in a fuller deliberation process for many reasons. They spend more

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39. Interview with Judge Thelton E. Henderson, Former Senior United States District Judge, United States District Court for the Northern District of California, circa March 2021.

40. Haire & Moyer, *supra* note 34, at 25.

41. Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 *ASIAN PAC. AM. L.J.* 92, 106, 112 (2006).

42. See *Right to an Impartial Jury: Current Doctrine*, LEGAL INFO. INSTITUTE, <https://www.law.cornell.edu/constitution-conan/amendment-6/right-to-an-impartial-jury-current-doctrine> [https://perma.cc/9DRN-5TPQ].

43. See *id.*

44. Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes*, 27 *THE JURY EXPERT* 16, 20 (2015).

45. *Id.*

46. *Id.*

47. *Id.*

time deliberating and “are better able to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, and avoid presuming the defendant is guilty.”<sup>48</sup>

This should not be surprising. As Justice Thurgood Marshall noted in *Peters v. Kiff*, when any large and identifiable segment of the community is excluded from jury service, the effect is the removal, from the jury room, qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.<sup>49</sup> Justice Marshall explained that the “exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”<sup>50</sup>

What is true about the value of diverse voices on juries applies with similar force to the value of diverse voices on the bench. As Boyd, Epstein, and Martin have observed, “the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process, and the higher the likelihood of altered deliberations in response.”<sup>51</sup>

## 2. Legal Analysis

Diversity not only enhances the fact-finding process, but also the formulation, understanding, and application of legal rules. It ensures a fuller and more informed legal analysis.<sup>52</sup>

Take, for instance, the case of *Safford Unified School District v. Redding*, which involved the question of whether a strip search of a middle school female student suspected of drugs violated the Fourth Amendment.<sup>53</sup> The Supreme Court had to determine whether the search was excessively

48. *Race and the Jury: Illegal Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE 58 (2021), <https://eji.org/report/race-and-the-jury/harm-caused-by-racially-biased-jury-selection/#wrongful-convictions-and-excessive-sentences> [https://perma.cc/C7XK-VARU].

49. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012).

50. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 597 (2006).

51. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406-07 (2010) (internal quotation marks omitted).

52. See Chew & Kelley, *supra* note 35. Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 171 (2013) (“[D]iversity can lead to increased information sharing and improvements in complex thinking overall (Antonio et al. 2004; Phillips and Loyd 2006), leading group members to evaluate a task differently.”); Sheryl J. Willert, *Building a Diverse Court: A Guide to Recruitment and Retention*, 2 WASH STATE MINORITY AND JUST. COMM’N (2010) (“A diverse court is a smart court — one that is more likely to be innovative, productive and efficient in meeting the challenges facing the justice system in the twenty-first century because a diverse court is rich in human resources including a broad range of experience, background and perspective.”); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 789 (2004) (“However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender. For instance, a recent study of one federal circuit reveals that female judges are more likely than male judges to observe, report, and intervene when instances of gender-related incivility are directed at women.”).

53. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).

intrusive and thus unreasonable.<sup>54</sup> During oral argument, one male justice noted, “In my experience when I was 8 or 10 or 12 years old . . . we did take off our clothes once a day, we changed for gym.”<sup>55</sup> As the only female Supreme Court Justice at the time of the case, Justice Ginsburg explained in a later interview that she needed to facilitate her fellow Justices’ understanding of what a strip-search might mean to a teenage girl.<sup>56</sup> As she put it, “They never have been a 13-year-old girl . . . It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”<sup>57</sup> The Court ultimately found the search unconstitutional.<sup>58</sup>

Another example where diversity appears to have informed the Supreme Court’s decision is the case of *Virginia v. Black*, where the Court addressed the constitutionality of a law that prohibited burning crosses.<sup>59</sup> According to press accounts, the initial questioning indicated that members of the Court seemed inclined to strike the law down as violative of the First Amendment, until Justice Clarence Thomas, the sole Black justice on the Court, spoke.<sup>60</sup> Citing the reign of terror visited upon Black communities by the Ku Klux Klan, Justice Thomas explained how a burning cross is “unlike any symbol in our society”; “There’s no other purpose to the cross, no communication, no particular message . . . It was intended to cause fear and to terrorize a population.”<sup>61</sup> According to press accounts, his fellow Justices were rapt, and the tenor of the argument turned.<sup>62</sup> The Court went on to uphold the statute making it illegal to burn a cross in public with the intent to intimidate others.<sup>63</sup>

Diversity on the bench contributes to the development of the law by bringing to bear a broader range of experiences, perceptions, and understandings critical to the establishment and application of legal principles. As *Korematsu* conversely demonstrates, the lack of experiences and perspectives on the bench limits the Court’s understanding, and can lead to dire consequences, like the persecution of racial minorities.

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54. *Id.* at 375.

55. *Safford Unified School District v. Redding*, OYEZ, <https://www.oyez.org/cases/2008/08-479> [<https://perma.cc/U9QL-L9QU>] (last visited Feb 11, 2022).

56. Valerie Strauss, *Ruth Bader Ginsburg and the Case of the 13-year-old Girl Strip-searched at School*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/education/2020/09/25/ruth-bader-ginsburg-case-13-year-old-girl-strip-searched-school/> [<https://perma.cc/F6QV-Y6WU>].

57. *Id.*

58. *Safford*, 557 U.S. at 368. See Kim M. Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1640 (2010) (examining *Safford* as an illustration of the role of empathy in judicial decision-making).

59. *Virginia v. Black*, 538 U.S. 343, 347 (2003).

60. Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES (Dec. 12, 2002), <https://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html> [<https://perma.cc/E2SQ-Q5Z8>].

61. *Id.*

62. *Id.*

63. *Black*, 538 U.S. at 366.

### E. Judicial Diversity Enhances Interrelationships within the Bench

A diverse bench affords judges a unique and personal opportunity to learn from each other, thereby enriching interpersonal relationships. By bringing their unique life experiences into the cases they hear, the judges are facilitating an exchange of perspectives and enhancing each other's understandings in a personal way. That point was eloquently made by Justice Sandra Day O'Connor in her 1992 tribute to Justice Thurgood Marshall.<sup>64</sup> She recounted Justice Marshall's fondness for sharing personal stories with the other justices in conference in order to emphasize legal points, including stories about Ku Klux Klan violence, jury bias, wrongful executions of innocent Black people falsely accused of rape, and the many indignities of racial segregation he personally had endured.<sup>65</sup> Justice O'Connor, who lived and traveled a widely different path than Justice Marshall, spoke about the impact those stories had on her own understanding of the issues confronting the Court.

No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul . . . . Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.<sup>66</sup>

On a local level, we have seen the same impactful effect that diversity has on interpersonal relationships within the bench. Former chief judge of the U.S. District Court for the Northern District, Judge Marilyn Hall Patel, spoke of her experience as the first, and for a number of years the only, woman on our bench.<sup>67</sup> She described how she would hear laughter and loud chatting in the judges' lunchroom which would come to a sudden halt when the sounds of her approaching heels reached her male colleagues.<sup>68</sup> One day, a raucous rally was heard outside the courthouse.<sup>69</sup> One of her colleagues asked what was going on. Judge Patel explained it was a rally for International Women's Day.<sup>70</sup> Her colleague then jabbed, "Maybe they should have an International Men's Day," to which she replied, "That's the

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

65. *Id.*

66. *Id.* at 1220.

67. See Alan Abrahamson, *Judge Who Granted Stay Described as 'Savvy' Jurist: Courts: Marilyn Hall Patel has long been a champion of liberal causes. But lawyers say she is fair and not motivated by politics surrounding Harris controversy.*, L.A. TIMES (Apr. 20, 1992), <https://www.latimes.com/archives/la-xpm-1992-04-20-mn-452-story.html> [<https://perma.cc/5Y2D-Q6DW>].

68. Interview with Judge Marilyn Hall Patel, Former United States District Judge, United States District Court for the Northern District of California, circa 2003.

69. *Id.*

70. *Id.*

other 364 days of the year.”<sup>71</sup> Judge Patel, on many other occasions, stood her ground, and brought a woman’s voice to the Court that had not previously been heard.<sup>72</sup>

As Professor Edwards aptly explained, “in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles.”<sup>73</sup>

In my own experience, I have found invaluable exchanges with other judges who come from backgrounds, life experiences, and careers different from mine. Discussions have taken place in structured meetings and more informal settings. Our diverse experiences have led us to conversations on a wide-ranging number of topics, covering legal theories, policy, courtroom practices, and court governance. We draw upon not only our practical experiences, but also our understandings of history, perceptions of and reactions to current events, and our details of our personal lives. On some things we agree. On others we disagree. But from each exchange, I learn something beyond my own lived experience, and that in turn broadens my perspective as a judge and as a person.

#### F. Judicial Diversity Enhances Court Governance

Diversity on the bench enhances the quality not only of decision-making in cases, but also of court governance. In addition to deciding cases, judges are responsible for selecting personnel for key positions such as clerk of court, chief probation officer, chief of pretrial services, magistrate judges, law clerks, and attorney representatives to bench and bar committees.<sup>74</sup> Courts establish programs such as pretrial diversion, reentry programs, assistance for pro se litigants, and educational programs.<sup>75</sup> Courts also promulgate local rules, general orders, and operating policies that affect access to the courts.<sup>76</sup> As with any governing institution, diversity of experiences and voices among personnel broadens perspectives and deepens discussion about priorities and values. Judicial diversity further cultivates

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71. *Id.*

72. *Id.*

73. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002).

74. See *About Federal Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/about-federal-judges>; *Judicial Administration*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [<https://perma.cc/M79X-9NUA>]; *Probation and Pretrial Officers and Officer Assistants*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> [<https://perma.cc/VF8R-GFWZ>].

75. Stephen E. Vance et al., *Federal Reentry Court Programs: A Summary of Recent Evaluations*, U.S. CTS., [https://www.uscourts.gov/sites/default/files/75\\_2\\_11\\_0.pdf](https://www.uscourts.gov/sites/default/files/75_2_11_0.pdf) [<https://perma.cc/3AG3-WT23>]; *Filing Without An Attorney*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/filing-without-attorney> [<https://perma.cc/E4A3-VFKW>].

76. *Current Rules of Practice & Procedure*, U.S. CTS., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure> [<https://perma.cc/K93Z-RWKZ>].

considerations of equity and inclusion, enhances collective creativity, and sensitizes decisionmakers to the risk of unintended consequences.

My Court has long enjoyed a diverse bench over the past thirty years. Three of the chief judges have been women, three have been Black, and one has been gay. Currently, a majority of active district judges are persons of color.<sup>77</sup> A majority of senior district judges are women.<sup>78</sup> District and magistrate judges (who are full partners in court governance) of our Court come from diverse practices, including prosecutors, criminal defense lawyers, attorneys from large and small firms representing civil plaintiff and defendants, clinical law professors, and staff attorneys for public agencies and non-profit organizations.

The Court has established innovative programs such as the Alternatives to Incarceration Program, in which select high-risk criminal defendants are afforded intense supervision and service to help them learn from their mistakes, make better choices, engage in productive behavior, and reduce the risk of recidivism.<sup>79</sup> The Court also established a reentry court program which focuses on individuals on federal post-conviction supervision at high risk of violating the conditions of their supervision and provides them an opportunity to earn early termination of supervision.<sup>80</sup> The Court has established the Federal Pro Bono Project, positioning attorneys provided by non-profit organizations in three courthouses to afford advice and assistance to self-represented litigants and place appropriate cases with pro bono counsel. The Court has taken steps to help ensure jury pools reflect a fair cross-section of the community; it draws from both the Department of Motor Vehicles as well as voter registration records and continues to explore ways to expand access to other databases. On a pilot basis, the Court implemented a zip code replacement program to address lower response rates from underrepresented neighborhoods and conduct community outreach in an attempt to enhance proportionate representation in jury pools.<sup>81</sup> The Court has engaged researchers to conduct a sophisticated analysis to determine whether there are race or gender disparities in bail decisions. As part of the orientation process for prospective jurors, the Court includes a video on

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77. See *Article III Judges of the Northern District*, N.D. CA., <https://www.cand.uscourts.gov/about/northern-district-history/article-iii-judges-of-the-northern-district/> [<https://perma.cc/QNR2-VJH5>].

78. See *id.*

79. *Diversion Program, Conviction Alternatives Program (CAP), and Leading Emerging Adults to Develop Success (LEADS) Pilot Program*, N.D. CA., <https://www.cand.uscourts.gov/about/court-programs/diversion-cap-leads/> [<https://perma.cc/FG6S-HY9H>].

80. *Reentry Court*, N.D. CA., <https://cand.uscourts.gov/about/court-programs/reentry-court/> [<https://perma.cc/M9ND-6DDY>].

81. *Plan for the Random Selection of Grand and Petit Jurors*, N.D. CA (2017), [https://www.cand.uscourts.gov/wp-content/uploads/general-orders/abrogated-general-orders/GO\\_06\\_8-7-2017.pdf](https://www.cand.uscourts.gov/wp-content/uploads/general-orders/abrogated-general-orders/GO_06_8-7-2017.pdf) [<https://perma.cc/2PX7-83T4>] (note: the program has been temporarily suspended pending further study and is no longer available on the court website).

implicit bias,<sup>82</sup> and judges routinely give jury instructions which address implicit bias.<sup>83</sup> The Court has had success in recruiting diverse candidates for magistrate judges and for key positions in the Probation Office, Pretrial Services, and Clerk's Office. Members of the Court have been involved in innovative efforts to increase law clerk diversity.<sup>84</sup> At bench-bar conferences, planned by lawyer delegates selected by the Court (who have historically been reflective of the breadth of demographic and practice groups comprising the local bar), educational panels invariably include issues of implicit bias, civil rights, anti-discrimination practices, and equity in the administration of justice. Law clerks have organized regular internal court community meetings to address a wide range of diversity, equity, and inclusion issues.

These programs, policies, and practices were the product of the vigorous input of and robust discussions among judges who have come from a wide range of backgrounds and who bring a variety of perspectives. Our efforts represent the collaborative, collective product of many voices.

#### CONCLUSION

There is a cost when voices are missing from the room. That cost is not theoretical. It is real. Diversity makes for a better judiciary, by promoting public confidence in the courts, improving the quality of factual and legal decision-making, enhancing relationships within the bench, and bettering court governance. That in turn helps fulfill our promise of justice for all.

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82. See *Welcome to Jury Service*, N.D. CA, <https://www.cand.uscourts.gov/jury/> [<https://perma.cc/757U-WHBL>]; *Northern District of California: Video for Potential Jurors*, YouTube (March 18, 2021), [https://www.youtube.com/watch?v=uL8Ilg\\_okrU](https://www.youtube.com/watch?v=uL8Ilg_okrU) [<https://perma.cc/5G5R-6SXX>].

83. See jury instructions given in *Martin v. San Jose*, C-19-1227 EMC (N.D. Ca.), Docket No. 143: "We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of, and others we might not be fully aware of, which is why they are called implicit or unconscious biases. No matter how unbiased we think we are, our brains are hard-wired to make unconscious decisions. We look at others and filter what they say through our own personal experience and background. Because we all do this, we often see life and evaluate evidence in a way that tends to favor people who are like ourselves, or who have had life experiences like our own ... Bias can affect our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors, you are being asked to make an important decision in the case. ... You must carefully evaluate the evidence and resist, and help each other resist, any urge to reach a verdict influenced by bias for or against any party or witness. Each of you have different backgrounds and will be viewing this case in light of your own insights, assumptions and biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision making." This instruction was used in *State v. Chauvin*.

84. Bob Egelko, *Federal judge in SF wants his court to take a page from the NFL playbook*, S.F. CHRONICLE (Jan. 9, 2019), <https://www.sfchronicle.com/news/article/Federal-judge-in-SF-wants-his-court-to-take-a-13521729.php> [<https://perma.cc/EZ8K-5S3S>]: "The Rooney Rule was adopted from the National Football League to require teams to interview at least one minority candidate to fill a vacancy for head coach or general manager. United States District Judge Vince Chhabria uses a version of the Rooney Rule in hiring law clerks, who assist him in court cases and legal research. Before hiring a clerk, he will interview at least one minority candidate and one candidate from a law school outside the elite "Top 14" in the annual U.S. News & World Report rankings."