Racial Diversity on the Bench: Beyond Role Models and Public Confidence

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Racial Diversity on the Bench:
Beyond Role Models and Public Confidence

Sherrilyn A. Ifill*

The lack of racial diversity on our nation's courts threatens both the quality and legitimacy of judicial decision-making. Traditional arguments emphasizing the "role model" value of black judges and the need for black judges to help promote "public confidence" in the justice system have turned our attention away from the most important justification for judicial diversity: Diversity on the bench can enrich judicial decision-making by including a variety of voices and perspectives in the deliberative process. In this Article, the Author advocates racial diversity among judges as a critical means of achieving cultural pluralism in judicial decision-making.

Judicial diversity advocates have failed specifically and precisely to connect the demand for cultural pluralism in judicial decision-making to racial diversity efforts. Fear of tackling the myth of judicial impartiality and the failure to recognize the representative function of judges has resulted in an over-emphasis on the symbolic rather than the substantive value of judicial diversity. The Author ultimately concludes that our diversity efforts should focus on ensuring that judges who can and are willing to represent the values and perspectives of minority communities are represented on the bench, rather than focusing exclusively on the race of a judicial aspirant.

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Introduction

Despite the robust and often nuanced public debates that focus on the need for racial diversity in the legislative and executive branches of government, 1

1. See, e.g., Kenneth J. Cooper, GOP Moves to Restrict Caucus Funds, Some Women, Blacks, Hispanics Cry Foul, WASH. POST, Dec. 7, 1994, at A1 (discussing congressional move to cut caucus funding); Rick Delvecchio, Voter Apathy Did in Carson’s Senate Bid, SAN FRANCISCO
calls for diversity on the bench rarely move beyond identifying the need for minority role models and for increased public confidence in the judicial system. But the need for diversity on the bench has become as compelling as the need for diversity in the other two branches of government. The judiciary remains "a powerful tenured institution that is overwhelmingly white, male, and upper-middle class." Judges have a more direct and irrevocable impact in the lives of many Americans than local or even national legislators. This is particularly true for


3. Maryka Omatsu, The Fiction of Judicial Impartiality, 9 CAN. J. WOMEN & L. 1, 3-4 (1997) (discussing Canadian judiciary and calling for greater diversity). Omatsu's observation about the Canadian judiciary is equally applicable to the U.S. judiciary. African Americans comprise only 3.3% of the judges on our nation's federal, state, and local courts. Over 90% of all federal appellate judges are white. Only one judge among all of the federal circuit courts is Asian American. See MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 9 (ABA Comm. on Opportunities for Minorities in the Profession ed., 1998) (reporting statistical information regarding minorities in legal profession). On the federal Fourth Circuit Court of Appeals, which covers the states of Maryland, Virginia, West Virginia, South Carolina, and North Carolina, all the judges are white, yet the states that comprise the Fourth Circuit together contain the largest black population -- 22% -- of any federal circuit. See Debra Baker, Waiting and Wondering, A.B.A. J., Feb. 1999, at 52, 53 (discussing sloth of political process in confirming judicial appointees). At the state level, the figures are disturbingly similar. African Americans comprise only 8% of the judges in our nation's state courts. See Barbara Luck Graham, Judicial Recruitment and Racial Diversity on State Courts: An Overview, 74 JUDICATURE 28, 32 (1990) (offering statistics about judicial diversity on state benches). The majority of these African American judges sit on courts of limited rather than general jurisdiction. Id. at 30-31.

African Americans,\(^5\) who are disproportionately involved with the judicial system.\(^6\) Given this reality and given the increasingly widespread belief that

problems with prejudicial United States judiciary as they relate to South Africa). Judge Higginbotham observed:

In a democratic society, the judiciary occupies a unique position of extraordinary power. Judges are involved in the affairs of all the people. By their decrees they determine who will live and who will die in capital punishment cases, dictate how vast amounts of resources will be allocated through civil verdicts and corporate reorganizations, and define the duties and obligations individuals will have with regard to one another in day-to-day life.

Id. at 1058. Judge Higginbotham is among the few commentators in this area who have explicitly recognized the connection between cultural pluralism in judicial decision-making and diversity on the bench. Id. at 1029-30.

5. Throughout this paper I use the term "African American" interchangeably with "black." See CHICAGO MANUAL OF STYLE (1993), at 7.35. I use the term "white" to refer to Caucasian or predominantly European-descended peoples. I do not view these terms as having biological significance. Instead, I use these terms in reference to the culturally, economically, and socially constructed racial communities in the United States. Although in this paper I refer almost exclusively to African Americans, I believe that my arguments regarding the need for racial diversity on the bench are similarly applicable to other "marginally ascriptive groups." I borrow this term from Professor Melissa Wilson, who describes marginally ascriptive groups as those for whom

(1) patterns of social and political inequality are structured along the lines of group membership; (2) membership in these groups is not usually experienced as voluntary; (3) membership in these groups is not usually experienced as mutable; and (4) generally, negative meanings are assigned to group identity by the broader society or the dominant culture.


6. For example, African Americans are disproportionately subject to searches by law enforcement personnel. See John Lambeth, Driving While Black, WASH. POST, Aug. 16, 1998, at C1 (stating results of surveys performed in Baltimore, Maryland and on New Jersey Turnpike). In a suit that African American motorists filed in the state of Maryland, records revealed that although African Americans constitute only 17% of the motorists along Interstate 95, 70% of the motorists stopped and searched along that highway were African American. These searches have resulted in arrest in only 20% of the time. Id. In April, 1999, the governor of the state of New Jersey publicly acknowledged that New Jersey State Troopers systematically engaged in racial profiling, which disproportionately targets minority motorists for stops and searches. See David Kocieniewski, Whitman Fails to Appease Critics of Troopers' Action, N.Y. TIMES, Apr. 22, 1999, at B5 (discussing Governor Whitman's plan to stop officers' racial profiling); Owen Moritz, Whitman to Put End to Racial Profiling, N.Y. DAILY NEWS, Apr. 21, 1999, at 8; Paul Butler, Walking While Black, LEGAL TIMES, Nov. 10, 1997, at 23 (describing experience of being stopped and questioned by white police officers while walking in middle class neighborhood where he lives in Washington, D.C.). If convicted of criminal offenses, African Americans are disproportionately imprisoned, and receive harsher sentences than
our judicial system denies equal treatment to racial minorities, any calls for racial diversity on the bench should find support in arguments that describe how diversity will benefit judicial decision-making and promote fairness in the justice system.

Ironically, reliance on the role model and public confidence rationale to support diversity on the bench has seriously undermined the strength of judicial diversity efforts. Both rationales fail to explain why racial diversity on the bench is not just important symbolically but also important for improving the legitimacy and quality of judging. In fact, the most important benefit


Judicial control in the lives of African Americans extends beyond the criminal context. See, e.g., Barbara Vobjda, Revamping of Foster Care Brings Surge in Adoptions, WASH. POST, Apr. 13, 1999, at A3 (reporting that in furtherance of policies promoting adoptions to move children out of foster care in District of Columbia, judges are waiving rights of biological parents when they determine "that it [is] the best option for the child"). For a disturbing description of the historical role of judges in controlling black families, see PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 147 (1997) (describing, for example, power of local judges in Maryland during Reconstruction to place "black children in the care and service of white people if placement was deemed "better for the habits and comfort of the child").


8. The concept of the "racial role model" has been the subject of some criticism by critical race scholars. See Regina Austin, Sapphire Bound!, 1989 WIS. L. REV. 539, 574-75 (critiquing minority "role model" as one who by "project[ing] an assimilated persona that is . . . unthreatening to white people . . . help[s] to contain demands from below for further structural changes"); see also Anita L. Allen, On Being a Role Model, 6 BERKELEY WOMEN'S L.J. 22, 41
of judicial diversity is its potential to improve judicial decision-making. First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making. Because they can bring important and traditionally excluded perspectives to the bench, minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities.

(1991) (cautioning against reliance on role model argument for hiring black female law professors). Professor Allen's article identifies the weaknesses of the role model argument and focuses on the substantive contribution black female professor can make to legal academia. For a critique of the "role model" theory applied to African American elected officials, see Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1104-09 (1991). Nevertheless, the minority "role model judge" is an image that continues to have some currency as a rhetorical tool.

9. Justice Thurgood Marshall made this kind of contribution to Supreme Court deliberations. See Sandra Day O'Connor, Thurgood Marshall: The Influence of a Raconteur, 44 Stan. L. Rev. 1217, 1217 (1992) ("Justice Marshall brought a special perspective."); Byron R. White, A Tribute to Justice Thurgood Marshall, 44 Stan. L. Rev. 1215, 1215-16 (1992) (discussing how Justice Marshall's experiences altered Supreme Court conferences). According to his colleagues on the Court, Marshall used "stories" from his life experiences to inform the Court's deliberations on matters relating to racial discrimination, the application of the death penalty, and the lives of poor people. Justice White wrote that Marshall's life as a black man and his experience as a civil rights lawyer enabled him to bring to the work of the Court "experience that none of us could claim to match." Id. at 1215. In a personal interview, Justice Powell referring to the contribution of Justice Marshall to the work of the Court stated "that a member of a previously excluded group can bring insights to the Court that the rest of its members lack." BARBARA PERRY, A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 137 (1991). As Justice Ruth Bader Ginsburg has observed, "A system of justice will be the richer for diversity of background and experience. It will be the poorer in terms of appreciating what is at stake and the impact of its judgments if all of its members are cast from the same mold." Justice Ruth Bader Ginsburg, Remarks by President Clinton and Justice Ruth Bader Ginsburg at Swearing-In Ceremony (Aug. 10, 1993), in U.S. NEWSWIRE, Aug. 10, 1993.

10. Here I do not assume that there is a monolithic "black perspective" that all black judges can represent. Instead, I endorse the Supreme Court's sense, expressed in the jury impartiality cases, that the exclusion of blacks, women, or any other discrete group from participating in juries will necessarily exclude the perspectives and experiences that these individuals might bring into jury deliberations. See Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (holding that systematic exclusion of women from jury panels violates Sixth Amendment); Peters v. Kiff, 407 U.S. 493, 504 (1972) (holding that state cannot, as matter of due process, subject defendant to indictment by grand jury or trial by petit jury that has been selected in arbitrary and discriminatory manner). Diverse viewpoints enrich deliberations by ensuring that the administration of justice includes an array of viewpoints. Justice O'Connor has suggested that "the distorting influence of race is minimized on a racially mixed jury." Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting). Several excellent articles have explored the danger of essentializing the views of marginalized groups. See, e.g., Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics, 1989 U. Chi. Legal F. 139, 166 (1989) (analyzing
Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making. I advanced the argument that judicial diversity promotes impartiality in an earlier article. There I argued that the impartial judge mandate of the Fourteenth Amendment requires both the impartiality of individual judges and structural impartiality on the bench. Courts achieve structural impartiality when judicial decision-making includes a cross-section of perspectives and values from the community. The balance of these diverse perspectives ensures that no one perspective dominates legal decision-making and lessens the opportunity for bias to taint judicial decision-making.

antidiscrimination from combined feminist and black perspectives); Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 588-89 (1990) (arguing that gender essentialism is dangerous to feminist legal theory and often ignores experiences of black women).

11. Efforts to promote racial diversity on the bench also offer opportunities to re-examine flawed judicial selection systems that have resulted in nearly all-white benches in many states. Since the early 1980s, judicial selection systems that deny minority voters an equal opportunity to elect judicial candidates of their choice have been the subject of litigation in numerous states. In this sense, increasing racial diversity is essential to promoting the legitimacy of the bench. The justice system derives its legitimacy from the public’s participation in the making, enforcement, and interpretation of the laws that govern the society. See Note, The Case for Black Juries, 79 YALE L.J. 531, 531 (1970) (discussing interrelation of legitimacy of judicial process and integrated juries). By contrast, the appeal to symbolism of both the role model and public confidence rationale for promoting racial diversity on our courts may negatively affect judicial selection reform efforts aimed at achieving diversity by casting racial diversity as a "feel-good" noble exercise, rather than as an imperative that basic democratic principles compel.


13. Id. at 98-99 (concluding that persistent presence of all-white bench violates Fourteenth Amendment). In advancing this argument, I borrowed from the Supreme Court’s reasoning in cases requiring racial diversity in jury venires, see generally Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972). I argued that the impartial judge mandate of the Fourteenth Amendment requires racial diversity on the bench. See Ifill, supra note 12, at 119-28. I borrowed the term "group impartiality" from Scott Howe, who used the term to describe the requirement of diversity on jury venires in his article, Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate, 70 NOTRE DAME L. REV. 1173 (1995).

14. The Due Process Clause entitles litigants to appear before an impartial tribunal. See Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("It certainly violates the Fourteenth Amendment, and deprives a defendant . . . of due process of law to subject his liability . . . to the judgment of a court . . . which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."). Due process also prevents judges from hearing cases in which there is an appearance of impartiality. See Offutt v. United States, 348 U.S. 11, 14 (1954) (stating that "justice must satisfy the appearance of justice").

15. See Omatsu, supra note 3, at 5-9 (asserting that judicial bench on which nearly all judges are of same race, class and gender may result in "systemic blindspot" that excludes alternative perspectives and values from judicial decision-making). Decision-making in which
Because the Fourteenth Amendment compels structural as well as individual impartiality, I argued that a racially diverse state trial bench is an essential component of a fair and democratic justice system. In this sense, diversity promises real and concrete returns for both African American and white communities and also for the bench.

Yet all of these justifications for promoting diversity on the bench flow from the assumption that minority judges can include racial perspectives in their judicial decision-making. Although the premise that African American participants in traditionally all-white environments will bring different perspectives and views to the table is fairly standard in diversity discourse, this assumption raises particularly difficult questions when applied to judges. First, due process and indeed our entire system of justice requires impartial judges must explicitly consider alternative or opposing perspectives is more corrective of bias than are "demand-laden exhortations to be fair . . . and unbiased." Charles G. Lord et al., Considering the Opposite: A Corrective Strategy for Social Judgement, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984). Justice Cardozo believed that "[t]he eccentricities of judges balance one another." BENJAMIN CARDozo, THE NATURE OF THE JUDICIAL PROCESS 177 (1921). Although Justice Cardozo may have had in mind appellate court deliberations when he envisioned this balancing of views, see Jerome Frank, Cardozo and the Upper-Court Myth, 13 L. & CONTEMP. PROBS. 369, 372-73 (1948) (reviewing Cardozo's extra-judicial writings and analyzing his philosophies), trial court judging also provides opportunities for interaction within the culture of the courthouse. Ifill, supra note 12, at 138-40.

16. Id. at 101-04. In that article I intentionally focused on the need for racial diversity on state trial courts. I continue to believe that the need for racial diversity is crucial on state trial courts. Nevertheless, I now urge that our discourse about the need for racial diversity on the courts must include state appellate and federal courts as well. The debate about judicial diversity is often publicly played out in the nominations of federal circuit court judges and Supreme Court Justices. The nomination and confirmation process for judges on these courts would benefit from a more coherent understanding of the need for diversity as it relates to judicial officers.

17. The Supreme Court endorsed this assumption in some of its diversity jurisprudence. See, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547, 552 (1990) (upholding FCC policy awarding radio and television contract to minority controlled firms to promote diversity in broadcasting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (identifying state interest in ameliorating or eliminating "disabling effects of identified discrimination"). The Court has moved away from this reasoning in subsequent cases. See Shaw v. Reno, 509 U.S. 630, 647 (1993) (denouncing creation of majority-minority congressional districts). Diversity as a means of enriching substantive discourse has been used as a rationale for supporting diversity on law faculties. See Kimberle Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 NAT'L BLACK L.J. 1, 2 (1989) (describing efforts of minority law students to press for hiring of minority law professors in order to change "substantive dynamic" of law school classroom); see also Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 705, 730 (supporting hiring of law professors of color in part because "scholars with ties to subordinated communities are uniquely situated in respect to these ideological resources, and more likely than white scholars to mobilize them to contribute to our understanding of law-in-society"). But see Daniel Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 846 (1993) (disputing that women and minorities are in unique position to transform legal scholarship).
judges. Does the constitutional judicial impartiality requirement preclude African American judges from consciously engaging minority community perspectives and values in their decision-making? Second, judges—including black judges—are subject to significant professional influences, which shape their approach to legal problem-solving. Are such legal decision-makers capable of authentically representing diverse community values? This Article attempts to answer these questions.

We must confront these issues if we are to realize the full power of diversity to transform judicial decision-making. Symbolic forms of racial diversity may result in the appointment or election of some minority judges, but without a diversity discourse that both confronts restrictive conceptions of representation and challenges existing definitions of judicial impartiality, minority judges may feel constrained from articulating viewpoints and values that reflect those of minority communities. In order to realize the potential of diversity to transform and improve the bench, advocates of increased judicial diversity must be prepared to explore more carefully and to promote more openly the potential of racial diversity to affect actual decision-making, rather than just the appearance of the bench.

18. See supra note 14 (discussing due process requirements).
19. Justice Cardozo identified the "restrictions" that "hedge and circumscribe [a judge’s actions]" as including "the tradition of the centuries... the example of other judges, his predecessors and his colleagues... the collective judgment of the profession and... the duty of adherence to the pervading spirit of the law." CARDOZO, supra note 15, at 114; see J. Woodford Howard, Jr., Role Perceptions and Behavior in Three U.S. Courts of Appeals, 39 J. POl. 916, 917 (1977) (describing "professional values... as essential controls" on federal courts).
20. Minority judges also may feel isolated and exposed when only a small number serve in their jurisdiction. Studies of jurors have shown that a jury needs at least three minority jurors to overcome the group pressure of the majority. See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1698 (1985) (discussing racial bias in criminal jury trials). Similar research involving female law students has shown that "the larger the numbers, the greater the likelihood that previously excluded groups will perform well, both in terms of traditional achievement and in their ability to innovate." Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 MAMl L. REV. 29, 44 (1987).

Obtaining the full benefits of a diverse bench in which black judges feel themselves legitimately able to represent black communities will require a richer form of diversity beyond mere tokenism. Future empirical studies on race and judicial decision-making will tell us if black judges on integrated benches are more likely to explicitly represent minority community perspectives and values. In several jurisdictions where minority voters have successfully challenged discriminatory voting practices, voters proceeded for the first time to elect significant numbers of black judges. See, e.g., Clark v. Edwards, 725 F. Supp. 285, 302 (M.D. La. 1988) (concluding that "use of multimember election districts and circuit wide election districts... affords black citizens 'less opportunity... to elect representatives of their choice'"), Hunt v. Arkansas, No. PB-C-89-406 (E.D. Ark. Nov. 7, 1991) (consent decree) (reporting election of nine African American trial judges after change in election system). These jurisdictions may provide appropriate venues for empirical study in the future.
In so doing, diversity advocates need not, and indeed should not, argue that the African American community is monolithic in its configuration, views, or values, or that only one "black perspective" exists. Essentializing African American communities or judges denies the richness and complexity of African American political thought. Nevertheless, critics of "color blindness" remind us that ignoring the potential relevance of race carries dangers for subordinated groups. In a society still deeply fractured along racial lines, "color blindness" can merely entrench existing racial inequity.

Moreover, denying the significance of race denies that the perspectives and values of African Americans can contribute to our understanding and analysis of law. Including the distinct and often unique perspective and values of African Americans in legal decision-making brings additional and important analytical resources to the judiciary. The exclusion of African Americans from judicial decision-making, like the wholesale exclusion of men or women from judging, removes critical analytical resources from judicial decision-making. Seeking diversity on the bench acknowledges the ways in which the different experiences of many blacks and whites can contribute to our interpretation and understanding of legal doctrine.

Pursuing judicial diversity need not rest on the belief that all African American judges are either obligated or always suited to represent the values of African American communities. I do not seek to trade in one kind of

21. Black political thought has always been diverse and multilayered. Anna Julia Cooper, W.E.B. DuBois, Booker T. Washington, Marcus Garvey, and Ida B. Wells Barnett are among the many black leaders who differed vehemently, and often publicly, in their conceptions of the best route to black advancement. For a critical analysis of the different and often conflicting strains of black political thought, see generally Joy James, Transcending the Tented Tent: Black Leaders and American Intellectuals (1997). For a critique of the "black perspective" theory as resulting in an excessive focus on race to explain the plight of blacks, see William Julius Wilson, The Urban Underclass in Advanced Industrial Society, in The New Urban Reality 129, 131-33 (Paul E. Peterson ed., 1985).


24. Nor do I suggest that black judges have no obligation to represent the values of the black community. That discussion is simply beyond the scope of this paper. My discussion focuses instead on supporting the ability of those black judges who wish to serve such a representative function, to do so free from charges of bias or partiality. More importantly, I continue to press the view that the representation of diverse community perspectives in judicial decision-making will strengthen judicial decision-making on the whole, not just for traditionally excluded
tyranny for another, creating a "tyranny of expectations" for black judges in exchange for freedom from the tyranny of racial majoritarianism on the bench. Some African American judges will be unfamiliar with or unwilling to engage the values and perspectives of African Americans in their judicial decision-making. While these judicial aspirants may make excellent judges and receive support if they are qualified to serve, they cannot satisfy the goals of diversity. Minority judicial candidates who are explicitly promoted to fulfill diversity objectives, however, must offer more than their racial "face" to demonstrate that they can bring diversity to the bench.

This Article contains four sections, each of which engages aspects of the issues set out above. In Part I, I argue that judges, like all other social actors, are members of racial communities and are influenced by racial narratives. In Part II, I focus specifically on how racial diversity on the bench affects the way courts may decide discrimination cases.

In Part III, I examine the perceived conflict between judicial impartiality and efforts to bring diversity to the bench. For this discussion, I return to cases in which white litigants have challenged the impartiality of black judges and to cases brought by minority voters who have challenged judicial election methods that prohibit them from electing judges of their choice. In the voter communities. However, for a compelling argument that African American judges have an affirmative obligation to work towards advancing the interests of the black community, see generally A. Leon Higginbotham, Jr., An Open Letter to Clarence Thomas from a Federal Judicial Colleague, 140 U. Pa. L. Rev. 1005 (1992). For an argument describing the moral obligation of black corporate attorneys to advance the interests of the African American community, see generally David B. Wilkins, Two Paths to the Mountaintop?: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1981 (1993).

25. I borrow the term "tyranny of expectations" from Professor Anthony Appiah. See K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS 99 (1996) (regarding imposed notions of monolithic black identity as form of tyranny adopted by many blacks during the 1960s and 1970s to restore the loss of dignity engendered by tyranny of racial oppression). Other scholars have identified and analyzed the dangers of essentialism. See supra note 9.

26. See, e.g., Clark v. Roemer, 500 U.S. 646, 648-49 (1991) (discussing how Louisiana voting procedures violated Voting Rights Act); Davis v. Chiles, 139 F.3d 1414, 1426 (11th Cir. 1998) (ruling that districting plan based on race was clearly erroneous), cert. denied sub nom. Davis v. Bush, 119 S. Ct. 1139 (1999); League of United Latin Am. Citizens Council v. Clements, 999 F.2d 831, 876-77 (5th Cir. 1993) [hereinafter LULAC IV] (weighing evidence of vote dilution against Texas's interest in maintaining jurisdictional linkages); Chisom v. Edwards, 839 F.2d 1056, 1065 (5th Cir. 1988) (holding that challenge of at-large voting system stated claim of racial discrimination under Fourteenth and Fifteenth Amendments). I focus specifically on LULAC v. Clements. See infra Part III. B. In that case the Fifth Circuit found that minority voters' challenges to the at-large method of electing trial judges in 10 counties in Texas threatened the impartiality of the judiciary. In reviewing subsequent cases brought by minority voters under the Voting Rights Act challenging judicial election schemes, almost all appellate courts have adopted the LULAC decision in some form. I served as counsel to the African American voters in LULAC, as well as other Voting Rights Act challenges to judicial election practices. See, e.g., Robinson v. State, No. 91-C-468-B (N.D. Okla. June 10, 1993)
cases, although the United States Supreme Court held that elected judges are representatives subject to the Voting Rights Act of 1965,27 appellate courts have insisted that minority voters’ efforts to elect judges of their choice to the bench would threaten individual judicial impartiality. These cases have challenged diversity advocates to take on the question of whether requiring judicial diversity conflicts with judicial impartiality. Beginning to resolve the perceived tension between judicial diversity and impartiality, therefore, is a critical step in advancing efforts to bring substantive rather than cosmetic racial diversity to the bench. I contend that the role model/public confidence argument for diversity, avoids this important task.

In Part IV, I describe how judges can be impartial representatives. Unlike legislative representatives, judges cannot and need not decide cases based on constituent opinion. The representative role of judges requires only that judges give constituent communities the opportunity for the expression of their values and views in public policy. Judges as representatives, therefore, should seek to include and engage the multiple and competing perspectives of the communities they serve in the process of judicial decision-making. Thus, judges exercise their representative function in the judicial decision-making process, not merely through decisional outcomes. In order to understand the potential for judges to be both impartial and representative I contend that we must examine more closely opportunities for expression in judicial decision-making.

Finally, despite the importance of increasing the number of blacks on the bench, I conclude in Part V that diversity efforts also must be targeted more specifically at identifying judicial candidates who are capable of and willing to represent the perspectives and values of minority or other marginally ascriptive groups in their judicial decision-making. I argue that white judges who demonstrate these abilities also can serve to promote diversity on the bench. In this part, I view the nomination and confirmation of Judge Clarence Thomas to the Supreme Court as exemplary of the consequences of our failure to look beyond the “racial face” of judges to satisfy diversity. Thomas’s performance in the pre-Anita Hill phase of his confirmation hearings demonstrates how the idea of diversity can be manipulated by the promotion of black role models. I also look at the 1996 experience of a white federal district court judge, Judge Harold Baer, who faced a national firestorm when he articulated and endorsed the perspective of poor, minority men in a decision granting a motion to suppress drug evidence. Judge Baer’s initial opinion articulating and crediting


the perspective of young African American men who interact with police in one New York City neighborhood reveals that white judges as well can play a key role in bringing diversity to judicial decision-making.

I. Race and Judging: Does the Race of the Judge Matter?

A. The Enduring Power of Racial Constructs

The intuitive sense that minority judges can bring traditionally excluded perspectives to the process of legal decision-making is consistent with the prominent role race plays in shaping the perspectives and values of blacks and whites. I deliberately speak here of both perspectives and values. Perspectives might be defined as "ways of looking at the world" or the eyes through which blacks "see" and "interpret" events, symbols, or people.26 Because perception is the lens through which judges make decisions,29 the inclusion of multiple perspectives in judicial decision-making is a critical focus of diversity. Values are also critical to judicial decision-making. Values are the rules or standards by which a community, based on its perceptions, organizes and assigns worth. Values reflect "an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable."30 Values are the principles which undergird our laws and legal doctrine. Judges interpret law based on their perception of our core societal values. Both perspective and values can strongly influence legal decision-making.31

By now it is incontrovertible that race influences how Americans see the world. Although "race and racial categories are not natural [but] ... are social constructions created by culture, politics, and ideology,"32 the power of race
to influence values and perception cannot be underestimated. The catastrophic history of slavery as well as the history and current reality of racial subordination binds African Americans. In this sense, African American identity is an identity born first of racial subordination and oppression. African American identity continues to exist both in spite of and because of racial subordination and oppression. Black identity is at once cultural, political, and social. Like other ethnic groups, common cultural practices related to music, styles of communication and expression, worship, food, and family structure tie blacks together. Through these cultural practices, blacks often demonstrate an affirmative desire to maintain a "black" identity.

33. Id. at 225 (arguing that "[t]he identities of people of color are constructed by America's racism even as we embrace, or more accurately reconstruct, those identities to fight racial subordination").

34. Blacks share "distinctive styles and modes of expression, attitudes and beliefs about political and social issues, customs and practices, that are recognized and understood (if not always agreed with or followed) by a broad range of blacks across geographic and social lines." David B. Wilkins, Introduction to APPIAH & GUTMANN, supra note 25, at 3, 22-23. See generally THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT (1981) (discussing communication differences between blacks and whites and how they lead to racial tension); THE REAL EBONICS DEBATE (Lisa Delpit & Theresa Perry eds., 1998) (examining controversy sparked by Oakland's recognition of Ebonics, or "black English," as valid linguistic system).

35. For a study of the role of the church in maintaining common cultural bonds among blacks, see generally C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990), and Michelle M. Simms Parris, Comment, What Does It Mean to See a Black Church Burning?: Understanding the Constitutional Significance of Hate Speech, 1 U. PA. J. CONST. L. 127 (1998).

African Americans and whites often have distinct values, which shape approaches to family structure. The deliberate disruption of the African American family during slavery, when slave holders could separate children from parents by death, work, sale, or "hiring out" contributed to a tradition of family in the African American community that values and recognizes single mothers, grandmothers, aunts, cousins, and even non-blood-related "family" as primary care givers. See Twila L. Perry, Family Values, Race, Feminism & Public Policy, 36 SANTA CLARA L. REV. 345 (1996) (describing effects of slavery on structure of black families). The need for relatives and friends to step in for murdered, sold, or working parents, created a definition of "family" that defies the nuclear family that middle-class white norms value. See generally REMEMBERING SLAVERY (Ira Berlin et al. eds., 1998) (collecting testimonials of "ex-slaves"). See DAVIS, supra note 6, at 92 (describing "network of surrogate care givers" who filled parental role during slavery). Professor Peggy Davis's excellent work further documents the unique and overwhelming pressures slavery imposed on the family life of blacks. Her study ultimately reveals how the stories of black slave families can "enrich our interpretations, in constitutional theory and in public debate, of the value and place of family." DAVIS, supra note 6, at 251. Retained African traditions also reflect a more communal approach to child-rearing within African American families than the standard nuclear family model. African Americans families continue to reflect this tradition.

36. See Alex Johnson, Bid Whist, Tonk & United States v. Fordice: Why Integrationism Fails African-Americans Again, 81 CAL. L. REV. 1401, 1403 (1993) (arguing that integration can be achieved only through acknowledgment and accommodation of unique African American culture); Isabel Wilkerson, Middle Class But Not Feeling Equal: Blacks Reflect on Los Angeles
Nevertheless, as Charles Lawrence and Mari Matsuda correctly point out, although "[o]ur culture, our identity, is not entirely of our own making," black self-identification also can reflect a highly conscious choice. For example, while historically the "one drop rule" (which declared that anyone having "an appreciable" amount of "black blood" was black) purported to set the boundaries for black identity, blacks have always found ways of exercising power over the terms and limits of community membership. The decision of some blacks who were sufficiently light-skinned to "pass out" of the black community in order to better their economic and social life chances in the white world demonstrates how some blacks subverted imposed racial identity. Others who could have passed as white affirmatively chose to remain within the black community—some using their white appearance to infiltrate white communities and expose racist practices. Black identity also can be a political choice. Contemporary battles over the creation of "multiracial" categories

Strife, N.Y. Times, May 4, 1993, at A20 (explaining that many in black middle class have "turned inward" in effort to maintain sense of identity); see also Holding on to a Language of Our Own: An Interview with Linguist John Rickford, in THE REAL EBOONICS DEBATE, supra note 34, at 59 (discussing relationship of Ebonics and socio-economic status of blacks in America).

37. Lawrence & Matsuda, supra note 32, at 225.


39. Walter White, executive director of the NAACP, was so fair-skinned that he was able to infiltrate southern white communities to report on lynchings. See WALTER WHITE, ROPE AND FAGGOT (photo. reprint 1969) (1929) (providing detailed account of lynchings in 1930s and 1940s).

40. The political dimension of black identity was an important part of national and international liberation struggles during the 1960s and 1970s. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER 44-45 (1967) (calling for black unity as means of improving black life). In Britain during this period, immigrants from former British colonies in the Caribbean as well as India and Pakistan politically identified themselves as black. See DAVID R. RODEiger, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 4 (1994) (discussing ways social construction of race enters politics); A. SIVANANDAN, A DIFFERENT HUNGER: WRITINGS ON BLACK RESISTANCE (1982) (discussing Black Power and international struggle against racism). For members of the Black Consciousness Movement in South Africa in the 1970s, to be black was to be among "those who are politically, socially and economically discriminated against, and identified as such." MAMHELA RAMPHELE, ACROSS BOUNDARIES 59 (1997). Steve Biko, the murdered leader of the Black Consciousness Movement, argued that "[b]eing black is not a matter of pigmentation—being black is a reflection of mental attitude." STEVE BIKO, I WRITE WHAT I LIKE 48 (1978). Political consciousness has influenced the ethnic identity of other communities as well. Gloria Anzaldua has said that Chicanos became "a people" after Cesar Chavez led the farm workers' movement. BORDERLANDS/LA FRONTERA: THE NEW MESTIZO 63 (1982) (stating that "something momentous happened to the Chicano soul—we became aware of our reality and acquired a name and a language [Chicano Spanish] that reflected that reality").
reflect the continuing role of choice in shaping black identity.41

It must also be recognized that despite common cultural connections, great diversity exists within the African American community as well.42 Blacks often split over the best means of addressing issues of common interest.43 Although conflicts within the black community are frequently portrayed as indica-


42. A significant percentage of the black population, particularly in large urban areas, are immigrants from the Caribbean and Africa. Because Caribbean and African immigrant groups face discrimination as blacks, these communities are connected by their resistance to racial discrimination. Two recent police brutality cases in New York demonstrate this phenomenon. Following the brutal police attack of a Haitian immigrant in 1997, the Caribbean American community in New York mobilized with the African American community to protest police abuse and violence. See Merle English, For Cops, It Was Tough Duty, N.Y. Newsday, Aug. 30, 1997, at A05 (describing multi-ethnic demonstration against police brutality). In 1998, the West African community in New York responded similarly to the killing of an innocent unarmed West African immigrant, who was shot at 41 times by New York City police. Robert D. McFadden with Kit R. Roane, U.S. Examining Killing of Man in Police Volley, N.Y. Times, Feb. 6, 1999, at A1. The assault and killing of a Caribbean American man, whom a mob of white youths chased into highway traffic, ignited the 1986 Howard Beach, Queens case that mobilized the largest civil rights protests of the 1980s in New York. Robert D. McFadden, 3 Youths Are Held on Murder Counts in Queens Attack, N.Y. Times, Dec. 23, 1986, at A1. Caribbean and African immigrant communities also suffer from unique forms of discrimination such as anti-immigrant bias, and the wave of anti-Haitian bias that occurred in the early 1980s when the Center for Disease Control incorrectly listed Haitian immigrants as a target population for the AIDS virus. See Christine Russell, Haitians No Longer Listed as Known AIDS Risks; Action by Disease Control Centers Unexplained, Wash. Post, Apr. 9, 1985, at A3 (reporting that Centers for Disease Control eliminated Haitians from its weekly report of patient groups with known risk for AIDS).

43. For example, blacks vary in their views of how best to address the problem of crime in inner-city black communities. In a recent case, blacks filed amicus briefs on both sides of a pending Supreme Court case that challenged Chicago's anti-gang loitering law. Compare Amicus Brief of Chicago Neighborhood Organizations In Support of Petitioner, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121) (urging Supreme Court to uphold Chicago's anti-loitering law) with Amicus Brief of Chicago Alliance For Neighborhood Safety et al. In Support of Respondents, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121) (urging Supreme Court to strike down Chicago's anti-loitering law). Chicago's ordinance prohibited residents from loitering "for no apparent reason" and required citizens to "disperse and remove themselves from the area" upon police order. Black communities on both sides of the issue had unique perspectives which reflected the challenges facing their communities. The Supreme Court later held the ordinance unconstitutional. See Chicago v. Morales, 527 U.S. 41, 55 (1999) (holding that law was impermissibly vague, in violation of Fourteenth Amendment's Due Process Clause). For an excellent analysis of the disparate opinions in the black community on questions of crime and punishment, see generally Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769 (1992) (analyzing discord created in black community by black lawlessness).
tive of the black community’s increasing fragmentation, they reflect longstanding diversity in black political thought. The black community has never been monolithic in its view of how best to advance its collective economic, political, and social interests. In the 1920s, followers of Booker T. Washington differed from Garveyites, who in turn saw themselves in conflict with allies of W.E.B. DuBois. Yet all remained committed to the idea of black advancement, and all perceived the urgent need to overcome racism in America’s white political, economic, and educational institutions. In the late 1960s and early 1970s, the black community divided between those who adhered to traditional Civil Rights movement methods of fighting racial oppression, and those who adopted the more confrontational, aggressive stance of the Black Panthers and other black nationalist groups. Similarly, while African Americans today may endorse different approaches to resolving the scourge of crime, joblessness, educational deprivation, and incarceration that continues to plague the lives of African Americans in many communities, African Americans believe virtually unanimously that racism – either overt or institutional – remains a significant barrier to overcoming these problems. Furthermore, most African Americans share a sense of urgency about the resolution of these problems.

As David Wilkins has argued, what ultimately connects blacks is a sense of shared destiny. According to Wilkins, “[B]lacks are inextricably linked to each other in a manner that makes it predictable that the actions of individual Blacks will affect the fate of the black community as a whole, and that ties the opportunities available to any individual black, to the progress of the group.”

44. See James supra note 21, at 4 (discussing historic lack of cohesion among groups within black community). See also Derrick A. Bell Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 482, 485 (1976) (describing conflicts between NAACP Legal Defense Fund and some black parents in school desegregation cases in Atlanta and Boston).

45. See James, supra note 21, at 21 n.16 (explaining how DuBois differentiated himself from Washington). For a synopsis of the differing views of Washington, Garvey, and DuBois, see Floyd B. McKissick, Sr., Black Leadership in America: The Legacy and the Current Crisis, 30 How. L.J. 1083, 1088-92 (1987), and see also Voices of a Nation: Political Journalism in the Harlem Renaissance (Theodore G. Vincent ed., 1973).


Individual African Americans cannot help but be aware of the history that links all African Americans to one another. Nor can African Americans deny the reality that present day racism continues to connect the collective future of all African Americans. To identify the strong ties that bind African Americans to one another does not deny the fundamental "Americanness" of blacks. In describing the double identity of blacks, W.E.B DuBois has said that an African American "ever feels his dual identity - an American, a Negro." While existing in a separate subculture, African Americans at the same time are an essential component of the larger American culture. Indeed, there is no "American" identity or culture without African Americans. Whatever "American culture" is, its very existence has been shaped by its nearly four-hundred year relationship with its African-descended population. In this sense, "American culture is anything but white."

49. See generally Austin, supra note 43. For these reasons, most remain convinced that "[t]here exists out there, somewhere, "the black community."" Id. at 1769.


51. For a searing historical examination of the relationship between the culture of white violence in back country South Carolina in the eighteenth and nineteenth century and generations of violence within one modern-day African American family, see generally FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSSET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE (1995). African American culture is both fully American and an amalgam of African influences, survival strategies formed in a racially oppressive slave society, religious, geographical, and countless other influences. See KOCHMAN, supra note 34, at 7-15 (exploring influence of cultural factors on communication between blacks and whites).

52. See generally TONI MORRISON, PLAYING IN THE DARK (1992) (discussing role of race in American literature). Nobel Prize winning novelist Toni Morrison compellingly makes this argument in the context of African American influence on white literary tradition. In her excellent analysis of the "Africanist" influence on seminal white literature, Morrison refutes the "more or less tacit agreement among literary scholars, that, because American literature has been clearly the preserve of white male views, genius, and power, those views, genius, and power are without relationship to and removed from the overwhelming presence of black people in the United States." Id. at 5. Instead, Morrison finds that "a real or fabricated Africanist presence was crucial to [the] . . . sense of Americanness" of the great American writers. Id. at 6.

53. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (postulating that differences between black and white wealth explain racial inequality in America). The very best that American culture has to offer inevitably is tied to the worst of America's historical interaction with its African American population. America's economic traditions are one example of this connection. In Black Wealth White Wealth, Oliver and Shapiro provide an excellent empirical study of the "intimate connection between white wealth accumulation and black poverty." Id. at 5. Historian Robin Kelley has described slavery as "one of the essential legs upon which modern capitalism was built." Robin O. Kelley, Foreword to REMEMBERING SLAVERY, supra note 35, at vii.

Yet "whiteness" is a constructed group identity as well, although as one prominent historian has observed "why people think they are white and whether they might quit thinking so [is] the most neglected aspect of race in America." Historian David Roediger has described the creation of whiteness as "a dramatic and an American choice." This country almost from its inception has constructed, maintained and insisted on "whiteness" as an identity, a cultural marker, a form of currency, and a badge of citizenship. As an identity, "whiteness" served as a unifying feature for a nation comprised of immigrants, transcending even traditional ethnic divisions among white groups. Studies demonstrate that "most White ethnic groups in America have . . . assimilated into what is considered to be mainstream American culture, and have consequently become more identified with the dominant White American middle-class culture than a particular ethnic group or culture."59

White racial identity also has carried with it economic benefits. The decision of some light-skinned blacks to "pass for white" was in many, if not most, cases motivated by the desire to obtain access to the jobs and financial stability that whiteness promised.60 Whiteness has also been described as a

55. ROEDIGER, supra note 40, at 12.
56. Id. at 21.
58. See Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (concluding that state's refusal to enroll Chinese Americans at white-only public school did not violate Fourteenth Amendment); In re Thind, 268 F. 683, 684-85 (D. Or. 1920) (discussing immigration law that authorized naturalization of "free white" aliens). Attaining whiteness may also be tied to "becoming American" in less formal ways. Writer Toni Morrison contended that "[i]f there were no black people here in this country, it would have been Balkanized. The immigrants would have torn each other's throats out, as they have done everywhere else. But in becoming an American from Europe, what one has in common with that other immigrant is contempt for me." Bonnie Angelo, The Pain of Being Black, TIME, May 22, 1989, at 120, 120 (recalling interview with Toni Morrison following publication of her Pulitzer Prize-winning novel Beloved, see also Camille O. Cosby, America Taught My Son's Killer to Hate Blacks, USA TODAY July 8, 1998, at 15A, claiming that "racism and prejudice are omnipresent and eternalized in America's institutions, media and myriad entities").
59. BLACK AND WHITE RACIAL IDENTITY 106 (Janet Helms ed., 1990). The political behavior of white voters bears out this thesis. For example, ethnically diverse white voters will coalesce behind a white candidate when that candidate faces an African American opponent who challenges the existing white political order. See John Citrin et al., White Reactions to Black Candidates, 54 PUB. OPINION Q. 74, 94 (1990) (analyzing mayoral race of former Chicago Mayor Harold Washington). Thus, as one scholar has observed, "For all practical purposes, Whites of all classes and ethnicities now prefer to present a common front." ANDREW HACKER, TWO NATIONS 12 (1992).
60. See Cheryl Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1710-14 (1993) (describing her light-skinned grandmother's experience "passing" as white during the day while
"vested interest" in privilege. Even today, whiteness persists as a key factor in obtaining access to social and economic opportunity.

Perhaps the most important and elusive benefit of white racial identity is the ability of whites to deny the existence of whiteness at all. Thus, an important privilege of whiteness may be the ability to think of oneself without regard to race – to see oneself instead as neutral, unbiased, or impartial. To the extent that whiteness is synonymous with majoritarian values, perspectives, and ideals, our culture masks it as the norm. In this sense, color-blindness, neutrality, and indeed impartiality may be terms steeped in "whiteness" – the whiteness that is unseen because of its deeply imbedded place in our nation's normative values.

B. Differing Perspectives Among Blacks and Whites

The existence of a persistent racial divide between the response of African Americans and whites to important social, economic, political, and cultural issues evidences the enduring power of racial constructs. In countless surveys, African Americans and whites reveal sharply different perspectives, particularly in response to issues that explicitly refer to race. For example, blacks and whites disagree about the meaning and power of discrimination.

Whiteness also may offer benefits that are less concrete, yet perhaps more important. For example, W.E.B. DuBois has described the "psychological wage" paid to white laborers during the post-Reconstruction period. The acceptance of this benefit by economically disadvantaged whites during that period and in many instances thereafter often helped to undermine the possibility of strong worker coalitions between whites and blacks.

Because many issues not explicitly racial in nature carry a racial

she worked at major Chicago department store to earn money for her family). Whiteness also may offer benefits that are less concrete, yet perhaps more important. For example, W.E.B. DuBois has described the "psychological wage" paid to white laborers during the post-Reconstruction period. The acceptance of this benefit by economically disadvantaged whites during that period and in many instances thereafter often helped to undermine the possibility of strong worker coalitions between whites and blacks.

61. Harris, supra note 60, at 1725 (asserting that giving whiteness legal status converted it from identity to property).

62. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 2-16 (1993) (describing importance of whiteness in accessing essential and nonessential social benefits). Massey and Denton demonstrated that racial segregation in housing denies to blacks of all socioeconomic conditions the full range of available societal and economic benefits. Access to good schools, municipal services, and asset accumulation through strong property values depends on housing location. Residential segregation keeps even middle-class blacks from enjoying these social and economic benefits. Middle-class whites, by contrast, experience tremendous opportunities for upward mobility as a result of residential housing advantages. Id.

63. Id. (identifying "unacknowledged whiteness of facially neutral criteria of decision").


65. See An American Dilemma, 7 PUB. PERSP. 19, 19-42 (Feb./Mar. 1996) (compiling survey answers from blacks and whites on social issues). For example, only 38% of whites compared to 68% of African Americans polled believe that racism in our society is a big problem. Id. at 20. Similarly, while 71% of African Americans associated past and present
African Americans and whites also express different views about ostensibly nonracial issues such as increasing aid for social programs, downsizing of the federal government, raising taxes, and giving control of welfare to the states.

Blacks and whites also differ in their responses to criminal justice issues. A majority of African Americans tend to believe that racial bias characterizes the justice system. Most whites do not. African Americans also sharply differ from whites in their views on how to deal with crime.

racial discrimination as the cause of many of the economic and social problems facing African Americans, only 36% of whites shared that view. See Harris v. International Paper Co., 765 F. Supp. 1509, 1515-16 (D. Me. 1991) (discussing need for reasonable black man standard when analyzing cases and allegations involving discrimination).

See Andrea Stone, Politics of Race Taking on More Subtle Shades, USA TODAY, Nov. 2, 1994, at 8A (asserting that modern debates over proper function and scope of social welfare programs have racial subtexts).

See An American Profile: Opinions and Behaviors: 1972-89 at 572, 710, 729 (Floris W. Wood ed., 1990) (showing differences in white and black responses to questions concerning government's provision of aid to the poor, welfare, and solutions to big-city problems); see also Thomas B. Edsall & Mary Edsall, The Impact of Race, Rights and Taxes on American Politics, 47-48, 59, 258 (1992) (citing data that revealed that 77% of blacks favor increased spending for public services, compared to 50% of whites).

See Stone, supra note 66 (arguing that blacks are only group in United States that likes big government).

See An American Dilemma, supra note 65, at 27 (surveying blacks' and whites' opinions on proper role of government). Although in numerous polls both African Americans and whites have expressed a desire for decreases in personal taxes, when asked whether they would pay more taxes if the federal government provided more services, 62% of African Americans replied in the affirmative, in contrast to only 35% of whites. Id. at 19.

See Richard Morin, A Distorted Image of Minorities: Poll Suggests That What Whites Think They See May Affect Beliefs, WASH. POST, Oct. 8, 1995, at A1 (discussing poll results that demonstrate that whites are misinformed about black life in America).

See Bill Boyarsky, The Spin/Bill Boyarsky: Simpson Murder Case: In "Just the Facts" Tones, Detectives Woo Tough Audience, L.A. TIMES, July 8, 1994, at A24 (stating that black Los Angeles residents are more suspicious of police testimony than white residents). Contrary to a majority of whites, most African Americans do not support efforts to permit juries to convict criminal defendants with non-unanimous verdicts. See Reynolds Holding, Unanimous Jury Rule Is Unpopular, SAN FRANCISCO CHRON., Sept. 12, 1995, at A13 (discussing poll finding that 71% of all participants favored allowing non-unanimous verdicts in non-death penalty cases but only 24% of African Americans supported concept).

See Maria Pueute, Poll: Blacks' Confidence in Police Plummet, USA TODAY, Mar. 21, 1995, at 3A (reporting nationwide poll showing that 66% of blacks think justice system is racist, while only 37% of whites perceive bias).

See id. (same).

See Barbara Linkin Menkele, Race Major Factor in Views About Crime, Survey Finds, HOUST. POST, Mar. 21, 1995, at A15 (reporting that 44% of African Americans, compared to 76% of whites, support efforts to increase classification of more crimes as capital offenses). In October 1995, Texas passed a law permitting the carrying of concealed weapons. In Texas,
This disparity persists despite the fact that African Americans disproportionately are victims of violent crime. A majority of African Americans also favor strong criminal sanctions for those guilty of criminal conduct. However, the historical reality of racist law enforcement practices in the United States, which permitted lynching to flourish virtually unchecked in the first half of the twentieth century and which today results in the disproportionate arrest and incarceration rate for African Americans, strongly influences the collective sense of skepticism among African Americans about the efficacy and fairness of the justice system in addressing crime. As a result, African Americans persistently articulate an interest in racial fairness in the justice system that is coequal with the desire to remove violent crime from their communities. The disparate response of African Americans and whites to capital punishment also reflects African Americans' heightened concern for racial fairness in the justice system. In general, African Americans do not support capital punishment, while an overwhelming number of whites do. Black

while a majority of whites support laws permitting licensed gun owners to carry concealed weapons, only 35% of African Americans support such a law. Id. African Americans are also less likely than whites to support "three-strikes you're out" or other mandatory sentencing measures. See Jesse Jackson, Crime Bill Is Discriminatory: Sentencing Falls Most on Minorities, USA TODAY, Mar. 28, 1994, at 13A (asserting that crime bill with "three strikes and you're out" mandatory minimums and new death penalties is racially discriminatory); Stephen W. Potts, The Last Bastion of Racial Preference, SAN DIEGO UNION TRIB., Feb. 11, 1999, at B (discussing racial discrimination in California's criminal justice system).


76. See generally RALPH GINZBURG, 100 YEARS OF LYNCHINGS (1962) (documenting racial atrocities in America through collection of newspaper articles reporting lynchings); White, supra note 39 (studying economic forces, racial prejudice, religion, sex, politics, journalism, and theories of racial superiority at play in lynchings).

77. See Lori Montgomery, 1 in 3 Young Black Men Jailed, Paroled or on Probation, HOUS. CHRON., Oct. 5, 1995, at 7 (examining exploding rates of black incarceration); see also supra note 6 (discussing prevalence of racial profiling as well as disparate sentences for possession of crack versus powder cocaine).

78. See Pete Donohue, No Gray Area in Death Penalty Vote, N.Y. DAILY NEWS, Mar. 12, 1995, at 6 (reporting that vote on death penalty statute in New York legislature split down racial lines); Lee Hancock, Jury with Blacks Called Unlikely in Jasper Trial, DALLAS MORNING NEWS, Feb. 5, 1999, at 37A (reporting that court excused more than half of potential black jurors in Jasper trial because they opposed death penalty); Allan Turner, Some in Jasper Urge "Eye for an Eye," HOUS. CHRON., Feb. 25, 1999, at A1 (reporting that some black Jasper, Texas, residents' expression of pro-death penalty views was atypical of most African Americans who generally oppose death penalty). The opposition of black potential jurors in East Texas reflected the position of a majority of blacks with regard to the death penalty. Latino jurors have expressed a similar unwillingness to impose the death penalty. Brian P. Hill, Judicial Response to Changing Societal Values on the Death Penalty: Must the Method Chosen Be the Most Humane?, 7 ST. THOMAS L. REV. 409, 417 n.57 (1995).
opposition to the death penalty is likely premised to some degree on the racially disparate application of the death penalty.\footnote{79}

The emergence of a broader black middle class in the past twenty-five years\footnote{80} has done little to close the racial perspective-gap between blacks and whites. Although some political observers, scholars, and cultural critics argue that as a result of class disparities among blacks there is no "black community,"\footnote{81} class differences appear only nominally to effect the perspective of most blacks, particularly with regard to racial discrimination.\footnote{82} The reasons for


\footnote{80. \textit{See} James Ragland, \textit{Climbing the Economic Ladder}, DALLAS MORNING NEWS, Apr. 26, 1998, at 13 (reporting that today one-third of black households are middle-income but only 10\% or black households qualified as middle income 30 years ago).

\footnote{81. \textit{See} Frontline: \textit{The Two Nations of Black America}, (PBS television broadcast, Feb. 10, 1998) (discussing division of blacks in America). In an autobiographical look at race and class mobility in his life, which aired on public television, Professor Henry Louis Gates dramatized his sense of class disconnection by acerbically disparaging the views of a young, poor, black man. The young man was not described or identified, but sat in a shadow during the interview. When he described his desire to "make money" and his refusal to try to make it working at Kentucky Fried Chicken, Professor Gates responded in a voice-over that the young man "seemed like a Martian to me." Professor Gates went on to describe his sense of community in class rather than racial terms, calling "Harvard Square" his "home." \textit{Id.}

This expression of racial disconnect is not limited to academics. African American comedian Chris Rock expressed a similar view on his Emmy-winning cable television special "Bring Home the Pain." \textit{Bring Home the Pain} (HBO television broadcast, June 1, 1996). In the most popular and most disturbing routine of his act, Rock distinguished between his "love [for] black people" and his hatred of "niggaz." In his ensuing description of "black people" and "niggaz," Rock made what amounted to a class distinction between those blacks with whom the comedian feels a sense of connection, and those he "hates." Critics have hailed this sequence as evidence of Rock's honesty and brilliance. \textit{See} David Kamp, \textit{The Color of Truth}, Vanity Fair, Aug. 1998, at 124, 127 (touting Rock's comedic talents). In a subsequent interview Rock indicated that he believed that blacks are unified in ways that transcend class. \textit{See} Eric Bogosian, \textit{Chris Rock Has No Time for Your Ignorance}, N.Y. TIMES MAG., Oct. 5, 1997, at 56. When asked what do "[a] welfare mother in Brownsville, a Nigerian selling watches on Fifth Avenue, an upper-middle-class Atlanta suburbanite, [and] a nanny from Jamaica . . . have in common other than skin?" Rock replied, "If it all goes wrong with each one of these people, they'd end up living in the exact same neighborhood. That's reality." \textit{Id.}

this are likely two-fold. First, middle class status, by and large, does not insulate blacks from overt or covert forms of racial discrimination. Blacks, therefore, remain connected through the common reality of racial subordination. Second, the term "middle class" may obscure the realities of life for blacks who have escaped poverty. For blacks, class lines tend to be more porous, and middle-class status is a much more precarious state than it is for whites. Most blacks who fall into the middle class by virtue of their income do not possess the other indicators of middle-class stability such as property ownership, manageable debt, and savings. Instead, "blacks’ claim to middle-class status is based on income and not assets." In addition, middle-class status does not afford blacks access to the same resources and benefits that are available to whites. Referring to middle-class status among blacks as if it

83. See John Gibeaut, Marked for Humiliation, A.B.A. J., Feb. 1999, at 46, 46 (discussing fact that black women traveling internationally are disproportionately searched for drugs at U.S. airports); Norris West, An Early Lesson About "Driving While Black," BALT. SUN, July 25, 1999, at 6B (relating author’s personal experience of police stop for "driving while black"); see also PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (relating story of black attorney who, despite efforts to portray himself as a "good black" to his white colleagues, was nevertheless denied partnership at white law firm); COSE, supra note 82 (examining cause of black, middle-class rage); JILL NELSON, VOLUNTEER SLAVERY (1993) (presenting black journalist’s firsthand encounters with racism in journalism world); WILLIAMS, supra note 22, at 38-41 (discussing racist response of mortgage lender when he discovered that law professor seeking mortgage was black).

84. OLIVER & SHAPIRO, supra note 53, at 95 (noting important role that dual wage earner couples played in helping black families attain middle-class living standards). “[Although] 65% of white middle-class households possess a large enough nest egg to maintain their present living standard for at least one month . . . only 27 percent of the black middle class has enough . . . to keep up present living standards for one month.” Id. at 97.

85. Id. at 95.

86. See MASSEY & DENTON, supra note 62, at 151-52 (arguing that blacks are less able to convert their socioeconomic gains into residential contacts with whites and thus remain cut off from benefits distributed through housing markets).
were synonymous with that term as it has been understood and applied to white families ignores the distinctive role race plays in defining economic position. 87 Moreover, given the fact that a large percentage of the black population continues to comprise the poor and working poor, it should be remembered that middle-class status – even precariously balanced middle-class status – eludes many African Americans. 88

Indeed, the reality of life for blacks and whites continues to be marked by sharply disparate socioeconomic indicators, suggesting that life-conditions for blacks and whites are worlds apart. In income, wealth, health, and life expectancy, the opportunities for most blacks is far below those of whites. 89 Thus, what blacks can expect from life in the United States is vastly different from what most whites can expect. 90 In many urban areas, nearly one-third of young black men are likely to live under the supervision of the criminal justice system. 91 Similarly, the conditions that exist within black communities are often quite different from those in white communities. For example, black communities – regardless of the income of their residents – are significantly more likely than white communities to be located near an environmentally hazardous industrial facility. 92 Blacks also continue to feel the effects of overt

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87. WILLIAMS, supra note 22, at 56 (arguing that "race often defines class in the American context. There is no lower class than being black").

88. See Jonathan D. Glater, Black and White Become Gray Areas in Loan Study; To Critics, "Cultural Affinity" Is Code for "Bias," WASH. POST, July 18, 1995, at D1. Despite the clear economic upward mobility experienced by many blacks since the Civil Rights movement, the size and stability of the black middle class should be kept in proper context. Despite a dramatic increase in the size of the African American middle class in the last 20 years, African Americans and whites continue to be characterized in general by a broad socioeconomic gap. For example in 1993, only 9% of whites lived below the federal poverty level, while 31% of African Americans lived below the poverty level. In 1994, only 12.9% of African Americans had attained a bachelor's degree or more advanced degree, as compared to 22.9% of whites. While a majority of whites in the U.S. own their own homes, only 42.5% of African Americans are homeowners. Whites continue to earn 60% more than African Americans. The average white family's income has increased 9% since 1969, while that of African Americans has remained stagnant. Id.

89. See Earl Lane, U.S. Life Expectancy Hits All-Time High/Gap Between Whites, Blacks Narrows, NEWSDAY, July 30, 1998, at A24 (reporting that mortality rate for black infants is twice that of white infants); Ramon G. McLeod, Black Couples' Income Closing Gap with Whites, SAN FRANCISCO CHRON., Sept. 25, 1992, at A1 (citing statistics showing that blacks generally do not earn as much as whites even when working same jobs and exhibiting same levels of education); Marilyn Milloy, Grim Forecast on Health-Care Reform, NEWSDAY, Jan. 27, 1993, at 17 (noting that 22.4 percent of blacks are uninsured compared to 14.7 percent of blacks).

90. For a disturbing and compelling account of the unequal educational opportunities available to black inner-city children as compared to white suburban children, see generally JONATHAN KOZOL, SAVAGE INEQUABILITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

91. See MARC MAUER, RACE TO INCARCERATE 118 (1999) (asserting that race, crime, and criminal justice system are "inextricably linked").

92. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES
racial discrimination in housing opportunities, mortgage lending, access to employment, treatment in the criminal justice system, and educational opportunities. Almost all economic indicators reveal wide disparities between the economic conditions of similarly situated blacks and whites.

The persistence of residential racial segregation plays a key role in the perpetuation of the distinct social, cultural, and political orientation of blacks and whites. Despite the elimination of legal barriers to residential segregation, blacks and whites continue to live in racially homogenous communities. Practices such as racial steering and redlining ensure that segregation exists within middle-class suburbs as well as in the inner-city. Segregation ensures that blacks and whites rarely interact in ways that might transform firmly-held racialized perspectives or views.

AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13 (1987) (reporting that percentage of minority ethnic groups in community was stronger predictor of level of hazardous waste activity in community than household income).

93. See Alan J. Hears, Pervasive Discrimination an Ugly Foe of Community, BALTIMORE SUN, Jan. 3, 1999, at 8M (stating that housing discrimination exists in real estate industry).

94. See Glater, supra note 88 ( remarking that lenders are twice as likely to deny credit for home loans to African-American applicants as to white applicants); Mitchell Zuckoff, Bias Inquiry Seen Focusing on 36 Banks, BOSTON GLOBE, May 1, 1993, at 8.

95. See Margaret L. Usdansky, College Doesn't Close Blacks' Pay Gap, USA TODAY, Sept. 16, 1993, at 3A (reporting that gap in pay between college-educated blacks and whites results from blacks working in lower paying occupations).

96. See Davis, Race, Cops, and Traffic Stops, supra note 6, at 427-32 (1997) (discussing discretionary nature of pretextual stops and their discriminatory effect on African-Americans and Latinos).

97. See Tamara Henry, Minority Academic Progress Falters, USA TODAY, Dec. 5, 1996, at 1D (stating that blacks lag behind whites in academics because blacks have less access to good instructors and adequate educational resources); Greg Stanford, Narrowing the Education Gap, MILWAUKEE J. SENTINEL, Sept. 7, 1996, at 10 (reporting that blacks and whites now have equal high school graduation rates but gap remains in education quality).

98. See OLIVER & SHAPIRO, supra note 53, at 91 (concluding that "in stark, material terms . . . whites and blacks constitute two nations").


100. See United States v. Starrett City Assocs., 840 F.2d 1096, 1099 (2d Cir. 1988) (addressing housing experts' testimony about white flight and "tipping" phenomena). Moreover, "white flight" from inner cities and neighborhoods where black presence has reached a "tipping point" demonstrates the propensity of many whites to resist actively residential integration. See WILLIAMS, supra note 22, at 40.

101. See MASSEY & DENTON, supra note 62, at 165-82 (discussing differences between white and black cultures). Residential segregation has even more serious consequences for African Americans. Because of the connections among spatial location, high property values
Geographic segregation tells only part of the picture. The chasm between blacks and whites is often wider than the physical distance that separates segregated communities. Although black and white communities may be physically separated by only a railroad track or a river, the breadth of the racial divide in values, interests, and perspectives is often wide and deep.102 Even when racially integrated experiences occur, they are often brief, dynamic experiences lacking in complex or consistent interaction across racial lines.103 Blacks and whites move within their own racial communities, experiencing only brief, compelled forays into integrated environments. Blacks continue to work and play in "a 'black' social milieu," while studies show that whites are the least likely to engage in social experiences outside their own racial group.104

C. Judges as Racially Situated Actors

Judges are no more immune to the community experiences that help shape racial views, perspective, and values than are other members of society. As Judge Cardozo reminded us, "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judge by."105 The

and access to good schools and municipal services, racial segregation in housing keeps blacks -- even middle-class blacks -- from access to the social and economic benefits associated with upward mobility. Id. at 149-53.


104. Melvin L. Oliver, The Urban Black Community as Network: Toward a Social Network Perspective, 29 SOC. Q. 625, 642 (1988). African Americans and whites also continue to show sharply different interests in television viewing, reading, and other forms of entertainment. See Jervis Anderson, Black and Blue, NEW YORKER, Apr. 29 & May 6, 1996, at 64 (reporting survey showing African Americans most frequently read Ebony, Jet, and Essence magazines among periodicals); John Carmody, The TV Column, WASH. POST, May 3, 1996, at D4 (comparing top-rated television shows in black and white households); Richard Huff, DAILY NEWS, May 2, 1996, at 8; Jon Jeter, Alarm over TV Time Highlights Viewing Habits of Black Children, WASH. POST, June 23, 1996, at A8 (stating that black children watch television at three times rate of their white counterparts); Kevin Sack, Gore Denounces Gap in Access to Computers, N.Y. TIMES, Apr. 4, 2000, at A18 (reporting that "digital divide" has left African Americans with unequal access to computers and Internet); see also THE BLACKBOARD; AFRI CAN AMERICAN BEST SELLERS INC. (booklist publishing best selling books at black-owned/ black-operated bookstores in popular black magazines such as Essence and Emerge).

105. CARDOZO, supra note 15, at 168.
mere act of ascending the bench does not strip a judge of his or her preexisting values and deeply imbedded cultural responses. Instead, judges are "situated actors" who like other members of society see the world through the lens of their own knowledge and experiences. Yet, a judge can declare his intention to "strip down, like a runner," without provoking serious questions as to how he might undertake this enormously complicated task or whether such a dramatic act is even necessary. In fact, because perception is a critical part of the judicial function, judges cannot simply jettison the experiences and knowledge that undergird their "sense of justice." The public expects judges to rely upon their knowledge, experience, and "sense of justice" to interpret statutes, to decide on the constitutionality of state conduct, to evaluate the credibility of witnesses, and to determine the fairness of the criminal justice system. 

106. Judge Jerome Frank once observed that "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, and becomes a passionless thinking machine." In re J.P. Linahan, 138 F.2d 650, 652-53 (2d Cir. 1943) (citations omitted). Instead, judges decide cases within the context of their own views of the world and of the law's role in ordering society.


108. Nomination of Judge Clarence Thomas to Be Associate Justice on the Supreme Court of the United States, Senate Comm. on the Judiciary, 102d Cong., 1:203 (1993) [hereinafter Senate Hearings]. Supreme Court nominee Clarence Thomas offered this assurance to the Senate Judiciary Committee in response to questions about how his conservative views would affect his judging. See id.

109. See generally GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1979) (suggesting that mentally "stripping down" is extremely difficult task that must be undertaken deliberately and forcefully in order to be successful). This is particularly true because most biases are subconscious. See Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322-23 (1987) (arguing that most biases are subconscious).

110. See Jack B. Weinstein, Limits on Judges Learning, Speaking and Acting – Part 1 – Tentative First Thoughts: How May Judges Learn?, 36 ARIZ. L. REV. 539, 541-42 (1994) (stating that "[n]o one would expect that Ruth Bader Ginsberg would ignore what she has learned about discrimination against women – both in her personal experience and as an advocate for other women."). As Judge Jerome Frank remarked: "An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded." In re J.P. Linahan, 138 F.2d at 652 (citations omitted).

111. See CARDOZO, supra note 15, at 167-69 (relating difficulties in throwing off prejudices).

nesses, to determine whether to convict and sentence a criminal defendant, to consider whether to impose the death penalty, to choose which of two divorcing parents should receive custody of a child, or to conclude whether a jury award is excessive and should be reduced. In essence, a judge must draw on his "conception of social needs" in making judicial decisions.

("[C]onstitutional principles, like all legal principles, are inevitably created by judges in accordance with their conceptions of moral values and social needs.").

113. See supra note 29 and accompanying text (discussing appellate court’s deference to trial judge’s assessment of witness’s credibility).

114. In several states, judges may hear criminal cases without a jury. See, e.g., N.Y. CRIM. PROC. LAW 340.40 (McKinney 1994) (permitting criminal defendants to waive right to jury trial); TEX. CRIM. P. CODE ANN. § 1.14 (West 1997) (same). For example, the justice system has long accepted that sentencing "is the routine work of judges." Spaziano v. Florida, 468 U.S. 447, 476 (1984) (Stevens, J., concurring in part and dissenting in part). Even mandatory sentencing laws have not entirely removed sentencing discretion from trial judges. State courts issue most criminal convictions, and generally federal mandatory sentencing guidelines do not apply. While many states also have mandatory guidelines, judges still maintain sentencing discretion for most criminal cases and have limited discretion even in mandatory sentencing cases.

115. Colorado, Nebraska, and Arizona are among a group of states that require judges rather than jurors to decide whether to impose death sentences. See ARIZ. REV. STAT. § 13-703(B) (2000) (requiring judge to hold separate sentencing hearing to determine whether to impose death penalty); COLO. REV. STAT. § 16-11-103 (Supp. 1996) (mandating that three-judge panel conduct hearing on imposition of death penalty or life sentence); NEB. REV. STAT. § 29-2522 (1995) (requiring judge or judges to impose life sentence or death penalty). In Colorado, supporters of legislation giving judges sentencing discretion apparently anticipated that judges would more readily impose the death penalty than Colorado juries, who return death sentences in only a fraction of cases in which prosecutors seek capital punishment. Supporters of judicial panels for capital sentencing argued that lone "hold-out" jurors were subverting the will of the majority of Coloradans, who reportedly supported the death penalty. See Ginny McKibben, Death-Penalty Panel May Delay Justice, More Judges Would Be Tied Up, Legal Observers Say, DENV. POST, May 21, 1995, at C1 (weighing arguments over giving panel of judges power to impose death sentence).


117. See Henley v. Phillip Morris, Inc., No. 995172 (Sup. Ct Cal., S.F. County, Apr. 6, 1999) (Munter, J.) (reducing by half $50 million jury verdict award against tobacco company for addiction and smoking-related lung cancer of individual). For a more comprehensive examination of judicial exercise and abuse of judicial power in reducing jury verdicts, see generally Eric Schnapper, Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. REV. 237 (arguing that appellate courts act as super-jurors and subvert Seventh Amendment by reversing or reducing jury awards in majority of cases in which plaintiffs prevail).

118. CARDOZO, supra note 15, at 12.
Although it is clear that a judge’s values and perceptions influence judicial decision-making and that race influences values and perceptions, observers have focused little attention on the likelihood that racial homogeneity on the bench may limit the depth and scope of judicial decision-making. Instead, racially homogenous courts at the both the federal and state level remain the norm in the United States, even in jurisdictions with large minority populations. Unfortunately, nothing inherent in legal training or practice diminishes the force of racial perspectives or trains judges to identify and engage alternative perspectives. The judicial system neither requires judges to engage in any formal training as a prerequisite to serving as a judge nor does it routinely instruct judges in how to identify and examine their racial, gender, or class "situated-ness."120

Judges, like all lawyers, carry the same "cultural baggage" as other members of society.121 A recent American Bar Association/National Bar


120. In most jurisdictions, the formal training offered to most new judges merely consists of familiarizing the new judge with the administrative tasks of their new formal offices. For example, a recent workshop for judges on the Fourth Circuit focused primarily on updates in areas of federal law such as ERISA, the Commerce Clause, and environmental law (unpublished workshop manual on file with author). See generally ORIENTATION SEMINAR FOR NEWLY APPOINTED DISTRICT JUDGES, FEDERAL JUDICIAL CENTER (Oct. 1994). Of course, judges may participate voluntarily in training that focuses on cultural biases and diversity at conferences held by specialized judicial groups or other private law groups concerned with judicial decision-making. Several of these programs are impressive in their approach and rigor. The Foundations in Pluralism Project, conducted by the Alabama Judicial College, for example, immerses judges in the study of literature by black authors to give judges a sense of differing racial realities. See Terry Carter, Divided Justice, A.B.A. J., Feb. 1999, at 45 (describing judicial education programs focusing on racial bias). The National Association of Women Judges also provides an array of programs aimed at promoting judicial education about gender issues.

Even if such training were mandatory (and it should be), it is highly unlikely that any adult can entirely and consistently "strip down" and divest him or herself of culturally rooted perspectives. Other noted scholars in this field share my skepticism. See, e.g., Judith Resnick, On the Bias: Feminist Reconsideration of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877, 1943 (1988) (stating that impartiality is impossible); Lawrence, supra note 109, at 522-23 (noting that most biases are subconsciousness). Justice Cardozo concluded that "[n]o effort or revolution of the mind will overthrow utterly and at all times the empire of... [a judge’s] subconscious loyalties." CARDOZO, supra note 15, at 175. At best, we should train judges to recognize and to acknowledge their stance and should require them affirmatively to consider and to engage alternative perspectives in their judicial decision-making.

121. See Michelle S. Jacobs, People from the Footnotes: The Missing Elements in Client-Centered Counseling, 27 GOLDEN GATE U. L. REV. 345, 377 (1997) (arguing that failure of most clinical practitioners and scholars explicitly to identify and address value differences
Association poll showed sharply different responses among black and white lawyers to questions about the existence of racism in the justice system. For example, 45% of white lawyers believe that less racial bias exists in the justice system than in the rest of society, while more than 90% of black lawyers feel that racism in the justice system is either the same as or greater than in other segments of society. Black and white lawyers also differ in their responses to the propriety of criminal procedures that have a different racial impact. While only 17.8% of black lawyers favor the police use of suspect profiles to combat crime, 48.6% of white lawyers support the use of profiles. Although a majority of both black and white lawyers believe that race should not be a factor in police profiling, 91.2% of black lawyers disfavor racial profiling, as compared to 67.9% of whites. These responses are consistent with the findings of many state bias commissions, whose studies reveal that black and white lawyers see and interact in the legal profession quite differently. These studies also suggest that the shared process of legal training among black and white lawyers does little to eliminate or close the gap between the perspectives and values of blacks and whites. Indeed, black and white law students often experience legal education differently.

122. See Carter, supra note 120, at 42-43 (polling 1,002 lawyers on racial bias in judicial system).
123. Id. In one of the most telling contradictions in the ABA/NBA study, an overwhelming majority of white lawyers polled stated that they did not believe that a great deal of racial bias exists in the justice system, and more than 80% of white lawyers claimed they had not witnessed racial bias in the justice system in the past three years. However, 80.7% of these same white lawyers hoped that the justice system would be able to eliminate racial bias in the future. One wonders how racism in the justice system could be eliminated when most white lawyers claim not to see it.
125. Id.
126. See generally Lani Guinier, Of Gentlemen and Role Models, 6 BERKELEY WOMEN'S L.J. 93 (1990-91) (relating author's experience as black, female law student); Paula Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, 48 J. LEGAL EDUC. 402 (1998) (recognizing need for professors to acknowledge students' differing realities in order to educate entire classes). Minority and women law students often find law school norms alienating. See, e.g., Crenshaw, supra note 17 (addressing problems that minorities face in legal classrooms); Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF THE LAW: A PROGRESSIVE CRITIQUE 40, 56-57 (David Kairys ed., 1982) (discussing law school curricula and non-curricular activities "that train students to accept and participate in the hierarchical structure of life in the law"). Professor Crenshaw explained "that what is understood as objective or neutral is often the embodiment of a white middle-class world view" Crenshaw, supra note 17, at 3. As a result, in law school "when the discussion involves racial minorities, minority students are expected to stand apart from their history, their identity, and
Racial segregation continues to flourish in the legal profession. The American Bar Association reported that "the distribution of minority lawyers remains substantially different from that of whites." African American lawyers are more likely to enter government or public interest work, while white attorneys are more likely to enter private practice. Racial minorities continue to comprise a minute fraction of partners and associates at the nation's elite law firms—the very firms from which many federal judges traditionally have been selected. Racial minorities comprise only 3.5% of tenured law professors.

Given these levels of racial segregation in the legal profession, most judges are likely to have practiced law in a racially segregated environment. Unless they serve on a racially diverse bench, most judges will continue to live and work in a racially segregated world. As products of their legal training and experience judges, therefore, may be as deeply entrenched in their racialized perspectives as nonlawyers. For example, one recent survey of federal judges reflected the same disparities in perception among white and black judges that exists among white and black lawyers. In that study, 83% of white judges surveyed believe that black litigants are treated fairly in the justice system, while only 18% of black judges share that belief. This means that judges are as deeply racially divided as lawyers and average citizens about the role the judicial system plays in perpetuating racial inequity. In sum, judges are as racially "situated" as everyone else in society.

sometimes their own immediate circumstances and discuss issues without making reference to the reality that the 'they' or 'them' being discussed is from their perspective 'we' or 'us.'" Kennedy, supra, at 56-57.

127. See Executive Summary, in MILES TO GO, supra note 3, at vi.
128. The firms in the study were the top-paying law firms in Chicago, Los Angeles, New York and Washington, D.C. Id. at n.48. In 1990, African Americans constituted 0.8% of partners and 2.6% of associates at the nation's "elite firms." Id. at 5. By 1996, 1.2% of partners at the nation's largest 250 law firms were African American and 3.7% of associates at those firms were black. Id. African Americans at these firms report "that they are isolated from internal social networks for developing majority business" and lack access to clients. Id. at vi.
129. Id. at 12. Asian Americans make up only 1% of all law faculty. Id. Minority law professors have a remarkably higher attrition rate than white professors. Id. at 11.
130. See Tony Mauro, Court Faulted on Diversity, USA TODAY, Mar. 13, 1998, at 12A (discussing lack of black clerks at Supreme Court); see also WILLIAMS, supra note 46, at 278 (pointing to Alice Stovall as first black secretary in Second Circuit).
131. Jerome Frank insisted that the influence of "uniformity in legal education and in the professional experience of lawyers who become judges "does not "penetrate deep enough" to get at the "sub-threshold biases and predilections" of judges. JEROME FRANK, LAW AND THE MODERN MIND xxiii (1949).
The fact that most judges share middle-class status does not significantly alter their racially situated stance. Middle-class status for black judges is often just as precarious as that of most middle-class blacks. Whatever their current economic status black judges tend overwhelmingly to have grown up in financially impoverished families or families of modest financial means. Even when black judges identify their family background as middle-class, their self-identification often reflects a more complex sense of class than traditional class designations may impart. In one study, for example, black judges who were surveyed often described their background as middle class because their parents emphasized hard work and education. Yet the actual economic status of the judges' families corresponded more accurately with lower or working economic status.

Most important, middle-class or even upper-class status appears not to insulate black judges from overt displays of discrimination and racism. As Justice Marshall said in Regents of University of California v. Bakke, "[R]acism in our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." Because combating racism continues to be a unifying experience among blacks without regard to class, geography, or ideology, the existence of racism itself tends to keep many blacks close to shared values and traditions that relate explicitly to race. As Professor Angela Harris has argued, "that well-to-do as well as poor black people are unable to catch taxis at night, are stopped by the police, and suffer.

133. Like Thurgood Marshall before him, Justice Clarence Thomas remains the Supreme Court Justice with the least accumulated wealth. See Marshall's Salary Continues for Life, ATLANTA CONST., June 28, 1991, at A7 (stating that continuing salary and benefits are important to retiring Justice Thurgood Marshall, Court's poorest justice). Compare Tony Mauro, Two High Court Justices Top $1 Million Benchmark, USA TODAY, May 17, 1990, at 2A (estimating Justice Marshall's net worth between $50K and $100K and pointing to savings account as only asset other than home) with Tony Mauro, If Confirmed, He'll Be Richest Justice, USA TODAY, July 12, 1994, at 6A (listing Clarence Thomas, with net worth of approximately $275K, as least wealthy of current Justices). This wealth disparity remains true despite the fact that Marshall and Thomas took very different career paths to the Court. Justice Marshall served as counsel at the NAACP Legal Defense Fund for nearly 30 years before his appointment as Solicitor General and then to the Second Circuit Court of Appeals. Justice Thomas worked in the congressional office of Senator John Danforth (R-MO) and as head of the Equal Employment Opportunity Commission before accepting appointment to the Court of Appeals for the District of Columbia.


135. Id. at 34.

136. As one black judge who was surveyed in the early 1980s said, "Black folks are generally discriminated against, and it's no different for judges." BRUCE WRIGHT, BLACK ROBES, WHITE JUSTICE 84 (1987).

from random racist violence has contributed to a sense of solidarity among all black people, based on the sense that color prejudice serves as a brutal leveler, erasing distinctions of class and status.\footnote{138}

Black judges, despite their elevated professional status, live within this reality. For example, in a widely reported incident in 1993, police publicly handcuffed and arrested a fifty-three year-old African American judge in a Newark, New Jersey department store at an upscale shopping mall.\footnote{139} The police claimed that they detained the judge on suspicion of using a stolen credit card. Despite the judge’s protestations of innocence and production of identification, police took him into custody and chained him to a wall in the police station. They did not release him until store clerks convinced the police that the judge bore no resemblance to the young suspect sought. Several weeks after the incident the judge remarked that "until all persons of color are looked upon with respect, none of us are going to be. And it doesn’t matter whether you’re a lawyer or a judge or a prosecutor."\footnote{140}

In this sense, middle-class, African American judges often maintain a critical and rich experiential tie with average African Americans – the reality of unequal treatment. Perhaps in part because of the precarious nature of their middle-class status, black judges often retain strong ties to their communities.\footnote{141} This connection often continues to exist even when black judges no longer physically reside in majority black communities.

Moreover, anecdotal accounts demonstrate that black judges have unique and distinctive experiences as black judges.\footnote{142} Litigants, colleagues, and the media often challenge black judges in ways that are distinct from the challenges facing their white colleagues. In effect, it is evident that race shapes the experiences of black judges on the bench.

\footnote{138. Leslie Espinoza & Angela P. Harris, Afterward: Embracing the Tar-Baby -- LatCrit Theory and the Sticky Mess of Race, 85 CAL. L. REV. 1585, 1601 (1997).}

\footnote{139. See David Margolick, At the Bar, N.Y. TIMES, Jan. 7, 1994, at A23 (describing events surrounding Judge Claude Coleman’s arrest on suspicion of using stolen credit card).}

\footnote{140. Id.}

\footnote{141. See Interview with Judge Veronica McBeth in BLACK JUDGES ON JUSTICE, supra note 2, at 44 (stating: “there’s one thing about Black judges; no matter how far we’ve moved up the ladder of success, and no matter where we may live now, we always go back at some point to the Black Community. . . . We go there for church or our mother lives there, so we never sever our roots.”); see also Harlon Dalton, The Clouded Prism, 22 HARV. C.R-C.L. L. REV. 435, 439-40 (1987) (describing "unshakeable sense of community" that lives within African Americans). But see WILLIAMS, supra note 46, at 303-04 (describing Justice Marshall’s increasing distance from more radicalized posture of blacks in 1960s).}

\footnote{142. For some biographical and autobiographical accounts of the experiences of black judges, see generally BLACK JUDGES ON JUSTICE, supra note 2; CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY (1998); WILLIAMS, supra note 46; and FRANK H. WRIGHT, supra note 136.}
D. Racial Narratives and Legal Decision-Making

The starkly different viewpoints and experiences of African Americans and whites "are not just different points of view; they produce different realities; different worlds."143 As a result, differences in public opinion among blacks and whites should not be perceived merely as personally-held viewpoints. They reflect the powerful influence of different cultural "narratives" that describe the social and political reality for black and white communities. These cultural narratives are "the stories that are familiar in our culture; stories about how things happen and how things are."144 Stories or "narratives" may function as truths for a community and may permeate all aspects of a community's interpreted reality.145 Cultural narratives also contain the accumulated historical account of that community's relationship to other communities and express the community's values. As expressions of community values, cultural narratives can neither be ignored nor dismissed. Narratives function at a deep psychological level. They are the cultural equivalent of the schemata, which help us process what we see.146 Both African Americans and whites are exposed to "stories" that help us interpret racial stimuli.147

Describing legal, social, and political rules as "narrative" is a highly provocative and potentially disruptive act – one that critical race scholars have undertaken with vigor and precision.148 Their work demonstrates that rules,

144. See Peggy Davis, The Proverbial Woman, 48 REC. ASS'N B. CITY N.Y. 7, 11 n.15 [hereinafter Davis, Proverbial Woman]; see also Aleinikoff, supra note 22, at 1085. A society as deeply divided along racial lines as our own should view cultural stories, often called "narratives," with some suspicion. See Aleinikoff, supra note 22, at 1085. Aleinikoff cautioned that "[e]very group will have reasons for constructing narratives that reflect well on it and poorly on its perceived oppressors." Id. Narratives can be transformed into "prejudice," for example, when we refuse to modify or reject preconceived ideas even in the face of contrary information or logic. See Peggy C. Davis, Law as Microaggression, 98 YALE L.J. 1559, 1568-71 (1989) [hereinafter Davis, Law as Microaggression] (recounting black juror's experience of white jurors ignoring his expertise when assessing guilt of defendant); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1628 (1985) (describing willingness of white jurors to convict black defendants).
145. Cultural narratives also contain the accumulated historical account of that community's relationship to other communities and express the community's values. As expressions of community values, cultural narratives can be neither ignored nor dismissed.
146. Schemata are the categories our minds develop to help us process the millions of stimuli we confront each day. Rather than consciously perceiving each piece of stimuli we confront, the brain develops schemata that "allow us to structure and give coherence to our general knowledge about people and the social world, providing expectations about typical patterns of events and behavior." Donald C. Nugent, Judicial Bias, 42 CLEV. ST. L. REV. 1, 10 (1994).
147. See generally Davis, Proverbial Woman, supra note 144. Cf. generally Davis, Law as Microaggression, supra note 144.
values, and norms thought of as stable truth are merely accounts driven by the perspective of the group empowered to impose its rules on the larger society. Critical race theorists, along with critical feminist and the critical legal studies movement before them, have unmasked the role of narratives in shaping law and legal analysis. Critical feminist writers and critical race theorists, in particular, have shown how racial and gender narratives undergird legal doctrine. Often masquerading as "neutral principles," racial and gender narratives have informed and shaped the construction and interpretation of legal principles such as merit, discrimination, colorblindness, property, parental autonomy, individual rights, and reasonableness.

Alternative racial narratives reveal different and important ways of re-conceiving those same principles. The introduction of outsider "narratives" into legal, political and social rule-making undermines the force of dominant group narratives by suggesting alternative visions of reality. Competing cultural narratives have been described as "master narratives" and "counter-narratives." Master narratives dominate the public consciousness to such an

149. For some examples of critical feminist scholarship in this regard, see generally CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); DEBORAH L. RHODE, JUSTICE & GENDER: SEX DISCRIMINATION AND THE LAW (1989); and Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1988). The work of scholars in the critical legal studies movement has influenced much of the work of critical feminist writers and critical race scholars. For an overview of critical legal studies, see generally POLITICS OF THE LAW, supra note 126; and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

150. See Delgado, supra note 28, at 2418-22 (examining use of "merit" in denial of hiring of black law professor as shield or pretense for discrimination); Harris, supra note 60, at 1771 (stating that "merit is a constructed idea, not an objective fact").

151. See Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 VAND. L. REV. 665, 671 (identifying majoritarian stories such as "without intent, there is no discrimination"); Flagg, supra note 64, at 981-85 (discussing unconscious race discrimination); see also Shaw v. Reno, 509 U.S. 630, 633 (1993) (challenging voter reapportionment plan as discriminatory effort to segregate voters on basis of race).

152. See, e.g., Gotanda, supra note 22, at 2 (arguing that "Supreme Court's use of colorblind constitutionalism... fosters white racial domination"); see also Aleinikoff, supra note 22, at 1060.

153. See generally DAVIS, supra note 6 (arguing that way in which law has historically impacted black families provides opportunity to re-examine basic tenets of family law).

154. See, e.g., Harris, supra note 60, at 1761 (describing how interpretation of constitutional law subordinates racial groups by denying history and refusing to recognize "group" rights); Girardeau A. Spann, Pure Politics, 88 MICH. L. REV. 1971, 1982-90 (1990) (analyzing Supreme Court's majoritarian political function).

155. See infra notes 194-96 and accompanying text (discussing Doe v. Linder Construction, Inc., 845 S.W.2d 173 (Tenn. 1992)). The imposition of dominant values subordinates groups in ways that are not explicitly racial or gendered as well. See generally JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (exploring how cultural values of employers rather than workers shape labor decisions).

156. See Eric K. Yamamoto et al., Courts and the Cultural Performance: Native Hawai-
extent that they assume a kind of super-legitimacy.\textsuperscript{157} They are transformed from stories to truth. The dominant group often describes an outsider group's counter-narrative, which may conflict with or question that "truth," as "narrow," "biased," or "special interest,"\textsuperscript{158} and rarely accords the counter-narrative the kind of legitimacy it reserves for dominant group master narratives.\textsuperscript{159}

Society builds the values embodied in our laws, for example, upon a set of accepted and legitimized narratives. Indeed the law is one of the principal means of effectively managing the imposition of dominant narratives.\textsuperscript{160} In general, the dominant community's narratives form the basis of our approach to legal doctrine, theory, and practice.\textsuperscript{161} When white men were the only group permitted to offer and legitimate narratives in the legal process,\textsuperscript{162} master narratives could function virtually undisturbed as unassailable truths.\textsuperscript{163} But since the abolition of legal barriers to the participation of women and racial minorities as witnesses, litigants, jurors, lawyers, law teachers, scholars,
and judges, sharply different counter-narratives have come into competition with long-accepted master narratives.¹⁶⁴

In a multi-cultural jurisdiction, competing cultural narratives battle for legitimacy in the places where cross-cultural interactions occur. The courthouse is one of these places, and litigation often involves a battle between master narratives and counter-narratives.¹⁶⁵ Legal decision-makers play a key role in legitimizing narratives. Whether jurors or judges, they "interpret the meaning of social phenomenon," in effect constructing and defining societal norms.¹⁶⁶ We charge judges like other legal decision-makers with deciding which reality to legitimate within the context of a particular dispute.¹⁶⁷ By legitimating one story over another, legal decision-makers do more than simply resolve disputes. They convey messages to the public that signal which values are worthy of receiving the law's imprimatur.¹⁶⁸

A fair and effective system of legal decision-making ultimately must reconcile competing narratives. This means that the project of diversity on the bench should not focus on attempting to prove the accuracy of one set of narratives as compared with another. All narratives must be viewed with some skepticism.¹⁶⁹ By ensuring that competing narratives interact in legal decision-making, however, we decrease the opportunity for bias and for one set of narratives to dominate judicial decision-making.

¹⁶⁴ See Posner, supra note 160, at 128 (citing increased diversity in legal profession since the 1950s as one of the causes "of the decline of consensus in our law"); see also Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape, 100 DECK. L. REV. 795, 857 (1996) (crediting increasing numbers of women in legal profession for achieving needed reforms in law of rape). Richard Delgado described how Justice Marshall, in his dissent in City of Memphis v. Greene, 451 U.S. 100 (1981), provided a counter-narrative to the majority's perspective to explain how a black community might perceive the significance of the City's erection of a traffic barrier between a wealthy white neighborhood and a black neighborhood. Delgado, supra note 28, at 2425 n.42.

¹⁶⁵ See Berry, supra note 163, at 6 ("Courts are a theatrical venue where disparate stories interact"); Yamamoto et al., supra note 156, at 17 (citing Gerald Torres, Translating Yannondio by Precedent and Evidence: The Mashpee Indian Case, 1990 DUKEL.J. 625, 628). Torres described the courthouse as a place "where most of the activities making up social life within . . . society simultaneously are represented, contested, and inverted." Id.

¹⁶⁶ Lawrence, supra note 109, at 359.


¹⁶⁸ See Phoebe Haddon, Rethinking the Jury, 3 WM. & MARY BILL RTS. J. 29, 60-61 (1994) (describing adjudication as "defining public values").

¹⁶⁹ See Aleinikoff, supra note 22, at 1085 (cautioning that groups create narratives that are favorable to themselves). Outsider narratives can perpetuate responses to majority group oppression that are themselves oppressive. See Mackinnon, supra note 149; West, supra note 149.
The persistent exclusion and de-legitimation of one community’s values from consideration and recognition in legal decision-making carries grave consequences for multiracial communities. First, and most obviously, it undermines the ability of communities whose reality is best described by counter-narratives to be authentic participants in the administration of justice. Instead, either minority communities must reject their own values, as well as the history, experience, and wisdom that often creates these values, or such communities must accept their role as outsiders—irrelevant to a system that is self-legitimating. Both of these scenarios contemplate preserving the subordinate status of African Americans in our justice system.¹⁷⁰

More importantly, by persistently minimizing the values held by the African American community, the justice system loses the participation of that community in upholding the societal structures that support even those values and community institutions shared by African Americans and whites.¹⁷¹ Once the minority community perceives that the larger community is "callous" to the values it holds, that community loses its incentive to look for commonality or shared values with the larger community.¹⁷² For the minority community, the result is an increasing reluctance to rely on existing legal structures to resolve disputes and to vindicate rights.¹⁷³ Instead, excluded communities increasingly will seek alternative means to impose value-recognition on the larger society.¹⁷⁴ Likewise, the white community is also damaged when it

¹⁷⁰ Aleinikoff surmised that "the power of a dominant culture may well reside in large part in its ability to convince subordinated groups that the stories told about them are true." Aleinikoff, supra note 22, at 1085.

¹⁷¹ In her excellent work on representation and race, Melissa S. Williams argued that opportunities for expression are essential for ensuring the cooperation of groups in a democracy. See generally Melissa S. Williams, Voices, Trust, Memory: Marginalized Groups and the Failings of Liberal Representation (1998). Suppression of disparate voices causes minority groups to withdraw from working cooperatively for the common good of the polity. Id. at 51.

¹⁷² See Michael H. Shapiro, Introduction: Judicial Selection and the Design of Clumsy Institutions, 61 S. Cal. L. Rev. 1555, 1560 (1988) (discussing how losers in judicial process may be more accepting of losses if they do not perceive society as callous to their values).

¹⁷³ See City of Mobile v. Bolden, 446 U.S. 55, 141 (1980) (Marshall J., dissenting) (warning that when Supreme Court fails to prohibit discrimination in accordance with Constitution, "it cannot expect the victims of discrimination to respect political channels of seeking redress").

¹⁷⁴ The destruction and burning of neighborhood stores and business establishments during the urban riots in Los Angeles in 1992, following the acquittal of police officers accused of beating African American motorist Rodney King, might be one example of the excluded minority community’s withdrawal from upholding societal structures that benefitted the entire community. A similar uprising in Liberty City, Florida following the acquittal by an all-white jury of a white police officer in the slaying of an African American motorist may be yet another example of this phenomenon. It is significant that both these uprisings occurred after the justice system failed to produce a result reflective of the values the minority community held. These
engages in an unhealthy form of self-legitimization in that it loses its incentive to try to balance competing values within the community. Maintaining the status quo becomes more important than creating an effective and fair justice system. The inevitable result is a sharply polarized community and an inefficient and unjust judicial system.

Finally, a legal system that excludes the legitimacy of counter-narratives relinquishes access to potential alternative problem-solving techniques and the opportunity to better understand and improve existing legal doctrine and practice. Because whites and African Americans often identify with opposing narratives, an all-white judiciary is particularly troubling in that it excludes minority community values from playing a role in deciding vital questions of law that apply to the entire community. Judge A. Leon Higginbotham, Jr. observed that "the danger of a homogenous court is that there is no 'outsider' within the court to challenge the biases the dominant group accepts as 'self-evident' truths." The challenge of diversity is to include all voices in the process of legal decision-making. As Mary Frances Berry reminded us, "if we want to insure justice we must give voice and power to previously silenced narratives, remembering that what the law does is a part of everyone's stories. Otherwise the law has no validity and is an illegitimate exercise of power."  

1. Judicial Response to Racial Narrative

As situated actors, judges also respond to familiar narratives, which can affect their approach to legal decision-making. Delgado and Stefancic argued that for judges in particular, "society's dominant narratives will seem unexceptionable and 'true' -- demanding no particular improvement or expansion." Judges may even be more susceptible than jurors to an unquestioning acceptance of master narratives. Jurors, who serve only once a year or every two years at most, may be better able temporarily to suspend familiar stereotypes and judgments about facts than can judges. Judges, especially trial

rebellions might be properly viewed as protests against the persistent exclusion of minority community's perspectives from full participation in the justice system. See Charles L. Linder, Riots as a Response to the Law, Nat'l L.J., Aug. 23, 1993, at 15.

175. See Berry, supra note 163, at 6 (observing that "White Americans, who have the power to control most legal decisions, only reluctantly credit stories that differ radically from their own"). Berry chairs the United States Civil Rights Commission.

176. Higginbotham, supra note 4, at 1041.

177. Berry, supra note 163, at 19.

178. As Jerome Frank observed, "[M]inute and distinctly personal biases are operating constantly" as judges listen to witnesses and hear evidence. Frank, supra note 131, at 114-15.

179. Delgado & Stefancic, supra note 107, at 1957.

180. However, race influences how jurors perceive evidence and decide cases. In fact, "the race of prospective jurors has become an important determinant in the outcome of a trial." Hiroshi Fukurai et al., Race and the Jury: Racial Disenfranchisement and the
judges who face an overloaded docket of cases each day, may be more likely unconsciously to fall back on the stereotypes and stories, which we all use as a shorthand to categorize people and events in our lives.\footnote{181} Criminal court judges in many urban centers, in particular, may face case after case in which 99\% of the defendants are African American and more than 80\% of the cases are drug-related.\footnote{182} The phenomenon may be particularly true in jurisdictions where judges administer specialized dockets – like a "drug docket."\footnote{183} In such an environment, battle-fatigued judges might unconsciously rely on the "culturally embedded" stories that help us "simplify" the world we live in.

Professor Peggy Davis has noted that racial "cognitive drifts" in the thinking of legal decision-makers may affect a judge or juror’s response to the defense of a black parent charged with child neglect; the claim that the potential and quality of a black life has been impaired by a white person’s negligence; the defense of a black accused of malpractice; the credibility of a black witness; the worth of the opinion of a black expert; the merits of a black tenant’s request for a stay of eviction [or]; a black woman’s claim of rape.\footnote{184}

Racial disparities in criminal sentences are one indication that judges respond to racial narratives. For example, the fact that sentences for defendants convicted of rape tend to be harsher when the victim is white\footnote{185} may suggest that judges are responding to long-standing racial narratives about white and black women. Narratives that positioned black women as sexually promiscuous, immoral, tough, and overbearing, and white women as virtuous

\footnote{181. See \textit{Allport}, supra note 109, at 20-23 (identifying human mind’s need for "categories"); see also Albert J. Moore, \textit{Trial By Schema: Cognitive Filters in the Courtroom}, 37 UCLA L. REV. 273, 280 (1989) (stating that “when an event exhibits more details than we can attend in the limited time available, we fill in details that we have not actually observed . . . based on preexisting schemes”); Ronald A. Farrell & Malcolm D. Holmes, \textit{The Social and Cognitive Structure of Legal Decision-Making}, 32 SOC. Q. 529, 536-38 (1991).

182. See generally \textit{The Sentencing Project}, supra note 6 (describing "sea of black and brown faces" sitting at defense table or shackled together on bus transporting prisoners in criminal court systems throughout U.S.).

183. See \textit{Nugent}, supra note 146, at 11 (describing "drug offender" schemas).

184. Davis, supra note 144, at 1571.

185. See Shelby A.D. Moore, \textit{Battered Women's Syndrome: Selling the Shadow to Support the Substance}, 38 HOW. L.J. 297, 333 n.201 (1995) (citing studies showing harsher sentences for defendants convicted of raping white women).}
and submissive may continue to influence judges’ sentencing decisions. Even mandatory sentencing has not eliminated racial sentencing disparities. Black criminal defendants continue to receive longer sentences than white criminal defendants for crimes covered by mandatories, even when the nature of the offense and the prior conviction record of the black and white defendants are virtually the same. In fact, it appears from this data that the disparity in sentencing between similarly situated black and white defendants may have increased since the adoption of mandatory sentencing laws. 

Judge Theodore McKee of the Third Circuit Court of Appeals offered an account of how a judge’s response to the "racialized" narrative of a criminal defendant might result in racially disparate application of strict mandatory sentencing.

Judge McKee, who was a federal prosecutor and state judge before his elevation to the federal Third Circuit Court of Appeals in Pennsylvania, contended that

it is easy for a judge to deviate from the standard sentence and give a white middle-class defendant a break by deviating below the sentencing guideline because of all of the subliminal predispositions. But no break will be given the Black urban youth. The circumstances that the judge would use to justify the lighter sentencing of the middle-class defendant are all what we call racial identifiers: he’s from a good family, he is from a good neighborhood, goes to a good school, has the influence of a good community on him, is active in that community. But what about the kid who grows up in a public housing project? What’s good about the community influence in the projects?

Judge McKee then posed an intriguing question that demonstrates how an alternative narrative could shape a judge’s response to the same criminal convict's facing mandatory sentences. Judge McKee asked,

[Who of the two is more salvageable? It may well be the kid in the projects who has committed a first offense at the age of eighteen. He has escaped all that negative stuff for a long time and has never been involved with drugs – but then finally he makes a mistake. He is probably more salvageable than a kid who has had all the opportunity in the world, all the breaks in the world, and is out there screwing up.]

186. Moore noted that under the laws of many states, African American women could not be raped because the law denied them "a presumption of chastity." \textit{Id.} at 332. At the same time, the law presumed sexual relations of any kind between an African American man and a white woman to be rape. \textit{Id.} at 331-36.  
188. \textit{Id.}  
189. \textit{See} Interview with Judge Theodore A. McKee, \textit{in BLACK JUDGES ON JUSTICE}, \textit{supra} note 2, at 70. Judge McKee also served on the Pennsylvania Sentencing Commission. \textit{Id.}  
190. \textit{Id.}  
191. \textit{Id.}
McKee’s account of how judges might view sentencing of black and white criminal defendants demonstrates that familiar racial narratives can play a role in judicial decision-making, even when mandatory sentencing applies.

2. Lessons from Gender Diversity and Judging

The law also contains deeply embedded gender narratives. Judges may be vulnerable to these narratives as well. Stories about the physical strength, emotionalism, vulnerability, virtuousness or wantonness of women can influence how legal decision-makers evaluate cases involving women litigants, witnesses, lawyers, and judges. Feminist scholars have described how women’s narratives can affect legal decision-making. These scholars have explored the unique role that gender perspectives play in the development of legal theory and interpretation. In so doing, they have identified the male-centered narratives that undergird legal norms and doctrine.

In one compelling feminist critique of tort law, for example, Leslie Bender and Perette Lawrence examine the Tennessee Supreme Court’s interpretation of "reasonably foreseeable" risk. Their critique demonstrates how principles of tort law are interpreted through the lens of male experience. In Doe v. Linder Construction, Jane Doe sued the developer, construction company, and realtor of her housing development after she was raped by two men who used a duplicate key to gain entry to her house. The duplicate key was in the unlocked office of the on-site superintendent of the housing development. One of the rapists was the superintendent’s son, who had been hired by his father to do repair work in the homes. The Tennessee Supreme Court

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192. See supra note 149 (citing work of Catherine MacKinnon, Deborah Rhode, and Robin West); see also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). In her empirical study of problem-solving among boys and girls, Gilligan advanced the theory that women seek to solve problems in ways that preserve relationships, while men place a premium on non-interference and preserving individual autonomy. Gilligan has suggested that men and women might approach legal disputes differently because of the differing values men and women place on preserving relationships and protecting autonomy. Id. at 22. Gilligan’s work has been the subject of considerable criticism by feminist scholars for its inherent essentialism and for its failure to identify women’s emphasis on relationship as a manifestation of subordination and powerlessness. See, e.g., MACKINNON, supra note 149, at 38-39 & n.29; West, supra note 149.


194. Doe v. Linder Construction Co., 845 S.W.2d 173, 175 (Tenn. 1992) (concluding that construction company was not responsible for plaintiff’s rape).

195. Id. at 176.

196. Id.
affirmed the trial court's ruling that Doe's injury was not foreseeable. As such, the defendants had no duty to protect against the possibility of Doe being raped. Bender and Lawrence ask,

What kind of world view would one have to have to believe that rape was a not a reasonably foreseeable risk of improper house key handling? To see the world from this perspective, the viewer would have to be someone who does not think or worry about the possibility of rape on a regular basis.

Ultimately, Bender and Lawrence conclude that "the problem . . . is not with the concept of foreseeability itself, but that this central concept . . . ends up meaning 'what is foreseeable to reasonable men.'"

The bench needs gender diversity to introduce and to legitimate women's narratives in legal decision-making. When asked if she thought that the presence of two female justices on the Supreme Court would change the way the male justices looked at the law, Justice Ruth Bader Ginsburg reportedly replied that the female justices would compel the men to "[l]ook at life differently." Justice O'Connor also explicitly has identified the importance of female legal decision-makers to broadening the range of perspectives brought to legal decision-making. In the context of gender, therefore, it is almost universally recognized that the "situated" stance of legal decision-makers will affect their "sense of societal need." This does not mean that the value of a female judge is limited to her gendered perspective anymore than a male judge can be qualified to serve based solely on his gendered perspective. As Judge Shirley Abrahamson of the Wisconsin Supreme Court has said, "[N]obody is just a woman or a man. Each of us is a person with experiences that affect our view of law and life and decision-making." Nevertheless as "'outsiders' in the American legal system," women judges are uniquely

197. Id. at 184.
198. Id.
199. Bender & Lawrence, supra note 193, at 318.
200. Id. at 320. Justice Martha Craig Daughtrey wrote a powerful dissent, finding that a reasonable jury could find that the defendant's illegal conduct was the "foreseeable" result of improper key handling. See Linder Construction, 845 S.W.2d at 203 (Daughtrey, J., dissenting).
204. Abrahamson, supra note 201, at 494.
205. Id.
positioned to recognize, engage, and legitimate outsider narratives in the deliberative process.

II. Connecting Judicial Diversity with Diverse Judicial Decision-Making

A. The Potential Value of Judicial Diversity in Judging Discrimination Cases

1. Viewing Discrimination from Multiple Perspectives

Nowhere is the role of judges in bringing racial perspectives and values into judicial decision-making more relevant than in discrimination cases. In these cases the court’s adherence to majority narratives and values can influence both the legal analysis the court utilizes and the ultimate result the court reaches. Observers should not dismiss the value of diversity to judicial decision-making in discrimination cases as a narrow or marginal concern. Civil rights cases constitute a sizable percentage of the federal court civil docket. For example, civil rights cases constituted 22% of all private civil cases in the Fourth Circuit Court of Appeals in the one year period between September 1997 and 1998. Yet all of the judges on the Fourth Circuit are white. In the Seventh Circuit, which also has no African American judges, one-third of all private civil cases filed during the same one-year period were civil rights cases. Thus, white federal appellate judges decide a large percentage of the nation’s federal civil rights cases.

For obvious reasons, the benefits of a racially diverse bench may be most clearly manifested in these cases. As the preceding section demonstrates, black and white Americans often have "different racial narratives." As a result, their "perception of racial issues" may be different. When 83% of white judges believe that African Americans are treated fairly in the justice system, and only 18% of black judges share this view, one must wonder

206. See Administrative Off. of the U.S. Cts. 1998 Annual Report of the Director, Judicial Business of the United States Courts, Table B7, at 126-27. These figures do not include prisoner civil rights cases and civil rights cases filed by the United States. Id.

207. Recent efforts to bring racial diversity to the Fourth Circuit reportedly have met with resistance from both the Chief Judge of the Fourth Circuit and from North Carolina Senator Jesse Helms. See Debra Baker, Waiting and Wondering, A.B.A. J., Feb. 1999, at 52, 52-53 (reporting on nomination of African American federal district judge James A. Beaty, Jr. to Fourth Circuit). Although nominated by President Clinton to fill a vacancy on the Fourth Circuit three years ago, the Senate Judiciary Committee never has reported out Judge Beaty’s nomination. Two white judges have been nominated by Clinton, approved by the Judiciary Committee bench, and confirmed to the Fourth Circuit since President Clinton first nominated Beaty. Id.

208. Id.


210. Id. at 48.
whether this perception-disparity might also reflect white and black judges' perceptions of discrimination claims brought before them.

In a work specifically focused on the role of the judiciary in privileging majority perspectives, Professor Sylvia Lazos Vargas argues that cases involving intergroup conflict – such as discrimination cases – especially need to include minority perspectives.\(^{211}\) The judiciary's failure to include these perspectives, according to Lazos Vargas, has resulted in a jurisprudence which de-legitimizes the reality and experiences of minorities. In race discrimination cases, for example, Professor Lazos Vargas argues that the Supreme Court's insistence on proof of "intent" in *Keyes v. School District No. 1*\(^{212}\) and *Washington v. Davis\(^{213}\) "fails to acknowledge the experience of racial minorities" and ultimately "reinforc[es] the myth of White racial innocence."\(^{214}\)

Adherence to 'master narratives' can impoverish judicial decision-making in other inter-group conflict cases as well. In analyzing the Supreme Court's decision in *Bowers v. Hardwick*,\(^{215}\) Professor Lazos Vargas argues that "the [Court's] rendition of the supposedly relevant facts and rationale" for the decision engages only the perspective of those not involved in same sex relationships.\(^{216}\) The "implicit and explicit adoption of the view that homosexuals . . . are inherently deviant" is an assertion by the Court of what Professor Lazos Vargas calls a "majority group epistemology."\(^{217}\) Professor Lazos Vargas calls for judges to reach out to include minority or outsider epistemologies in their judicial decision-making.\(^{218}\) Lazos Vargas makes a strong and compelling argument that judicial decisions must include and ultimately must reconcile competing voices to resolve effectively intergroup conflict cases.\(^{219}\)

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\text{211.} & \quad \text{See Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, 58 MD. L. Rev. 150, 214 (1999) (arguing that, in cases of intergroup conflict, majority judges should weigh minority perspectives coequally with their own).}
\text{212.} & \quad 413 U.S. 189, 193, 197-98 (1973) (finding that in de facto segregation cases, plaintiffs must show "segregative intent").
\text{213.} & \quad 426 U.S. 229, 241 (1976) (finding disparate racial impact of police testing insufficient to show discriminatory purpose).
\text{214.} & \quad \text{Lazos Vargas, supra note 211, at 169, 175. Many other scholars have critiqued the "intent" standard as unduly focused on the conscious mindset of the victimizer. See, e.g., Mackinnon, supra note 148, at 63-64 (stating that requiring intent "keeps the definition of victimization in the victimizer's hands"); Alan Freeman, Antidiscrimination Law: A Critical Review, in THE POLITICS OF THE LAW: A PROGRESSIVE CRITIQUE, supra note 126, at 107 (positing that Court, by requiring discrimination to be evident, adopted perpetrator's perspective though this requirement seems "illogical" and "disregard[s] . . . the history and contemporary reality of racial oppression"); Lawrence, supra note 109, at 352-55 (arguing that, regardless of intent, court must address stigmatizing effect).}
\text{215.} & \quad 478 U.S. 186 (1986) (finding state's criminalization of sodomy constitutional).}
\text{216.} & \quad \text{Lazos Vargas, supra note 211, at 179.}
\text{217.} & \quad \text{Id. at 180, 184.}
\text{218.} & \quad \text{Id. at 155.}
\text{219.} & \quad \text{Id. at 214-15; see also Patricia Cain, Good and Bad Bias: A Comment on Feminist}
\end{align*}\)
The need for inclusive judicial decision-making, especially in cases involving inter-group conflict, speaks directly to the efforts to diversify the bench. The judiciary must itself include judges capable of understanding and articulating majority and minority epistemologist, in order to give multiple perspectives legitimacy in judicial decision-making. In this sense, African American judges are needed to give African American counter-narratives force and legitimacy in judicial decision-making.

Minority judges' ability to bring to the bench particular perspectives to help understand racial bias and discrimination should be conceived of as a valuable asset to judicial decision-making. The concept of discrimination is a difficult one, one which has been constantly shaped and re-interpreted over the past thirty years. In the absence of racial diversity on the bench, white judges are left to interpret and to analyze discrimination in the absence of input and analysis by legal decision-makers who can conceptualize legal discrimination from the perspective of the victims of discrimination.

Critical race theorists have identified and described how relying on differing racial narratives can affect a judge's approach to analyzing race discrimination cases. Their work demonstrates how the wholesale adoption of majority community values has shaped and created federal discrimination jurisprudence. Their work further demonstrates how the inclusion of minority community values radically alters both the analysis and the outcome of discrimination cases.

An even more complex set of narratives exist at the intersection of race and gender. Here critical race feminists have demonstrated how judicial reliance on race and gender majority narratives has undermined the discrimination claims of black women. Professor Regina Austin has offered a thoughtful examination of the values clash that underlay the decision of a trial court and

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220. See generally, e.g., Derrick A. Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); David Chang, Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?, 91 Colum. L. Rev. 790 (1991); Gotanda, supra note 22; Lawrence, supra note 109. For a collection of some critical race writings, see, e.g., Kimberle Crenshaw et al., Critical Race Theory: The Key Writings That Formed the Movement (1995).

221. See Paulette M. Caldwell, A Hair Piece: Perspectives in the Intersection of Race and Gender, 1991 Duke L.J. 365, 376 (discussing "interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks"); Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1242-44 (1991) (arguing that neither antiracist nor feminist theory alone offers satisfactory explanation of situation of women of color); Harris, supra note 10, at 585 (stating that gender essentialism is dangerous to feminist legal theory and often ignores the experiences of black women).

222. See Austin, supra note 8, at 549-58.
the Eighth Circuit Court of Appeals in *Chambers v. Omaha Girls Club.* In that case, the Girls' Club's decision to fire African American arts and crafts teacher Crystal Chambers, and the court's affirmation of that decision, reflected majoritarian values about female sexuality and children born out of wedlock. Although similar taboos may exist in African American communities, the sense of punishment and rejection pursued by the Girls Club and upheld by the court is not consistent with the approach of most African American communities to a young woman such as Ms. Chambers or her child.

The court's deference to the Girls' Club's decision that Ms. Chambers's out-of-wedlock pregnancy rendered her unfit to be a role model failed to account for the possibility that a viable, and perhaps more accurate, alternative view would have positioned Ms. Chambers as precisely the kind of role model the Girls' Club sought to promote. Under this alternative view (a view perhaps more consistent with the values of the communities of the girls who utilized the Club) Ms. Chambers's decision to carry her pregnancy to term, to raise her child and to work to support her family, demonstrated a young woman who reflected the ability to "achieve goals and overcome obstacles in her life." Similarly Professor Paulette Caldwell in *A Hair Piece* demonstrates how the court's unquestioning acceptance of the dominant-culture conception of beauty discriminates against black women. In reviewing employment discrimination cases in which black women have been fired or reprimanded for wearing braided hairstyles, Professor Caldwell describes how controlling the appearance of black women has social, political and economic consequences. The decision by almost every court to uphold the right of employers to outlaw braided hairstyles for black women in the workplace is yet another example of how the law and judges express and give force to dominant culture values. More importantly, both the *Girls Club* and the "braids" cases are most relevant to the question of diversity in the judges' failure to

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223. 834 F.2d 697, 705 (8th Cir. 1987) (finding Girls Club's firing of unwed pregnant women not discriminatory).
224. The black community most often does not respond to out-of-wedlock pregnancy by ostracizing the teen or rejecting the baby. See Austin, supra note 8, at 554 (describing tolerance that teenage mothers receive in black community); see also Martha M. Dore & Ana O. Dumois, *Cultural Differences in the Meaning of Adolescent Pregnancy*, FAMS. IN SOC'Y: J. CONTEMP. HUM. SERVICES 93, 94 (1990) (noting general acceptance of both child and mother among extended black families). Latino communities are similarly disinclined to reject such young women and their babies. *Id.* at 95.
225. See *Omaha Girls Club*, 834 F.2d at 698 (noting that 90% of club's 1500 members were black).
226. *Id.* at 698 n.1 (noting this goal as stated mission of Girls Club).
228. *Id.*
explicitly "take account" of the alternative perspectives and values that Professors Austin and Caldwell fully and persuasively described.

2. Some Empirical Evidence: Race Matters

Empirical studies of judicial decision-making during the past twenty years have shown nominal differences in the outcomes of cases decided by white and minority judges.\textsuperscript{229} For several reasons, we must view empirical studies of this sort with skepticism. First, the size of these studies’ samples limits most of them.\textsuperscript{230} Second, most studies only focus on case outcomes, not the process of judicial decision-making itself. Case outcomes is only one area in which judicial diversity may play a role. Other important indicators might include changes in the culture of the courthouse, the diversity of court personnel, and the fair treatment of women and minority litigants, lawyers, witnesses, and observers in the courtroom.\textsuperscript{231} Moreover, by focusing on case outcomes, many studies appear to ignore the range of pre-trial decisions which can determine the outcome of a case.\textsuperscript{232} Additionally, no empirical study has attempted to determine whether racial diversity on the bench influences the way white judges decide cases. In other words, the interaction between white and black judges on a racially diverse bench, may change the way some white judges approach aspects of legal or factual analysis.\textsuperscript{233}

One recent empirical study of race and judicial outcomes which finds that white and black judges respond differently to discrimination claims may signal the beginning of a more explicit rift between the judicial decision-making of


\textsuperscript{230} The bulk of the studies were conducted in the 1980s when there were very few African Americans on the federal bench, most of whom had served only a short period of time. President Jimmy Carter appointed most African American federal judges during his 1976-1980 term. See Jon Gottschall, Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals, 67 JUDICATURE 165, 173 (1983). Most state courts were only beginning to have African American judges during this period.

\textsuperscript{231} See Ifill, supra note 12, at 137-40 (noting importance of judge's role in areas other than substantive decision-making).

\textsuperscript{232} Such decisions might include whether to set bail, whom to appoint as counsel in a capital case, evidentiary decisions suppressing or refusing to suppress evidence, deciding to change the venue of the trial, whether to grant class certification or whether to award temporary child support payments.

\textsuperscript{233} See Susan Maloney Smith, Comment, Diversifying the Judiciary: The Influence of Gender and Race on Judging, 28 U. RICH. L. REV. 179 (1994) (discussing possible effects of both racial and gender diversity).
white and black judges. The findings in this study may illustrate how judicial diversity can overcome majority-view domination in judicial decision-making. This study, which focused on case outcomes in race discrimination cases in federal court, found that: (1) black federal judges regardless of political party affiliation decide cases in favor of plaintiffs in race discrimination cases at statistically significantly higher levels than white male and female judges; and that (2) black federal judges are more likely than even white female judges to decide cases in favor of plaintiffs in sex discrimination cases. The data from the study further reveals that an appellate panel of three white Republican judges is likely to result in a verdict in favor of the plaintiff in a discrimination case only 10% of the time. The likelihood of drawing an appellate panel with even one African American judge is only 20%. Based on these findings, the study author concludes that if "the number of blacks and whites on Appellate Court[s] reflected their proportion in the nation," . . . it would "make a difference in how race discrimination cases [would] . . . be decided." The figures in this study are startling. They suggest that the lack of full racial diversity on federal appellate courts determines the outcome of discrimination cases at the appellate level. Given the significance of circuit court opinions in defining legal understanding and interpretation of federal law, the results of the Crowe study suggest that racial homogeneity on the Circuit courts may be shaping the development of federal anti-discrimination law. The empirical work of Professor Crowe supports the weight of anecdotal evidence which suggests that


235. See id. at 110-25, 84. The study also found other trends among federal judges. For example, white, male, Republican judges rule in favor of male plaintiffs in discrimination cases 21% of the time, but for female plaintiffs only 15% of the time. Id. at 127. While white, male, Democratic judges decide cases in favor of plaintiffs in discrimination at a significantly higher rate than white, male, Republican judges, the gender of the plaintiffs has a similar effect on their voting patterns: white, male, Democratic judges rule in favor of male plaintiffs at a rate of 51% as compared to 42% for female plaintiffs. Id.

236. Id. at 17. A panel with three white, Democratic judges will produce an outcome favorable to the plaintiff 49% of the time. Id.

237. Id. at 92.

238. Id. at 122.

239. Of course, they also suggest that political party affiliation significantly influences how white judges decide discrimination cases. This is consistent with my view that race alone does not tell us enough about a judicial candidate to determine whether the selection of that candidate furthers the goal of promoting diversity in judicial decision-making. The Crowe study may demonstrate, however, that race is among the most telling characteristics for determining whether a judicial candidate is likely to promote diversity in judicial decision-making. Id. at 165.

240. In light of the vast reduction in the number of cases the Supreme Court has decided to review on writs of certiorari, the decisions of federal appellate courts have taken on greater significance.
African American and white judges see racial bias differently. At the very least, Professor Crowe's work demonstrates the potential importance of judicial diversity to affect judicial case outcomes.

B. Diversity's Role in Other Cases

Moreover, the effect of racial diversity on judicial decision-making should not be measured solely by looking at case outcomes in discrimination cases. As the experience of jury deliberations reveal, racial perspectives can affect how legal decision-makers hear claims and weigh evidence, even in cases where race is not explicitly at issue. Similarly race may influence how judges hear and examine legal arguments and evidence. Nor can we measure the benefits of judicial diversity by focusing only on case outcomes. Instead, as in the jury venire cases, the value of diversity should be measured by its effect on the deliberative process. Even if black and white judges reach the same outcomes, we should value racial diversity if it brings alternative perspectives and analysis to the process and enriches the legal decision-making.

At least one new empirical study, impressive in its scope and depth, suggests that race can affect judges' legal reasoning and analysis. The findings on the connection between race and judicial reasoning confirms that society must focus on judicial decision-making itself rather than merely on case outcomes to assess fully the value of judicial diversity. The Sisk-Heise-Morriss study analyzes the results of cases challenging sentencing guidelines in federal court. The study found that white and minority judges differ greatly in their willingness to find validity in claims raising due process objections to the sentencing guidelines, revealing vast disparities between white and minority judges. Ninety percent of minority judges who addressed due process claims in challenges to sentencing guidelines relied upon the due process argument to strike down the guidelines, as compared to fifty-eight percent of

241. See BLACK JUDGES ON JUSTICE, supra note 2, at 84 (discussing comments of Fred Banks of Mississippi Supreme Court, who described unique perspective of African American judges, as "born out of an experience that one has had growing up in a Black community as opposed to a white community"). Judges from other minority groups also may have a heightened sensitivity to racial bias. See, e.g., David Margolick, Japanese-American Judges Reflect on Internment, N.Y. TIMES, May 19, 1995, at A27. Reflecting on the effect of his family's internment during World War II, Japanese American Judge A. Wallace Tashima reportedly stated that the internment made him "keenly aware that the Government can make mistakes and probably more conscious than I otherwise would have been of the persecution of minorities." Id.; see also Justice Ming W. Chin, Keynote Address: Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary, 4 ASIAN L.J. 181, 182 (1997) (recounting childhood experiences of anti-Chinese bias).

242. 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, 1384 (1998) (stating that, while case outcomes in sentencing guideline cases were similar, judicial reasoning of blacks was different from that of whites).
As a matter of statistical significance, the study authors found that "RACE emerged as significant at the ninety-nine percent probability level" for judges "who addressed the claim that due process guarantees a defendant's right to an individualized sentence imposed by a judge with full discretion."244

This disparity is particularly salient because, according to the study authors, most judges viewed the "due process theory" as a "somewhat irregular approach to the sentencing guidelines questions," and some white judges deemed it "weak" or "absurd." Sisk, Heise, and Morriss conclude that minority judges demonstrate "a tendency to adopt a non-mainstream approach [to legal analysis], even if these judges reached the same general outcome at basically the same rate as white judges." Thus even when they reached the same outcome, black and white judges often took a vastly different path of legal reasoning to reach their conclusions.

Although the authors of the study ultimately conclude that the race of the judge only nominally affects outcomes on cases challenging the constitutionality of sentencing guidelines, the potential effect of racial diversity on judicial reasoning should not be undervalued. The inclusion of alternative or "non-mainstream approaches" in judicial decision-making can invigorate the law with new and challenging approaches to decision-making and create opportunities for better, richer judicial decision-making. In this sense, diversity benefits not only minority litigants but the entire justice system. Focusing narrowly on case outcomes obscures this potential benefit of diversity.249

The idea that judicial diversity may affect the process of judicial decision-making in non-discrimination cases, and even where case outcomes remain unchanged, is consistent with the description of Justice Marshall’s contribution to the Supreme Court, by Justices O’Connor, White, and Powell. Each described Justice Marshall’s inclusion of "counter-narrative" in the Court’s deliberative processes. Marshall forced the other Justices to confront and

243. Id. at 1457.
244. Id.
245. Id. at 1458.
246. Id. (quoting CHARLES FRIED, ORDER AND LAW 165 & 239 n.61 (1991)).
247. Id. at 1459. The authors also recognize, as I do, that "prior research focusing on outcome and ignoring reasoning may have neglected underlying evidence of influence." Id.
248. Id. at 1457 (finding that "although minority judges invalidated the Guidelines by a larger percentage than white judges (71% vs.60%), this difference was not statistically significant" (citations omitted)).
249. It is also true that increased inclusive reasoning and judicial decision-making which includes alternative viewpoints and theories also may ultimately result in statistically significant differences in case outcomes.
250. See generally O’Connor, supra note 9, at 1220 (describing how Justice Marshall’s stories affected O’Connor’s world-view as well as her view of cases); White, supra note 9, at 1216 (stating that Marshall "characteristically tell us things we know but would rather forget; and
address the reality of life for the poor, for women, for African Americans, and
for other marginalized groups. By raising the perspectives of these groups,
Marshall forced the law to reckon with alternative realities. In so doing,
Marshall pushed the law and those judges charged with interpreting the law to
reconcile legal norms with outsider realities. That process of reconciliation
presents opportunities for judges to transform or interpret law in ways which
can both broaden and narrow its scope. And the interaction of diverse perspec-
tives in legal decision-making may be the best way to achieve judicial impartiality. In this sense, the judiciary should affirmatively seek judges who can bring contrasting perspectives to the bench.

III. Reconciling Judicial Impartiality with Diversity

Yet the impartiality myth which surrounds judicial decision-making
severely hampers the potential for a racially diverse judiciary to bring diverse
perspectives to judging. Judges who bring outsider perspectives to the bench
are encouraged to believe that judges do and indeed must "strip down like a runner" in order to execute faithfully the judicial oath. But impartiality in
reality has never meant that a judge must abandon all of the knowledge and
experience he has gained in his professional and personal life. Nor has it ever
meant that a judge lacks a "perspective" or view of the world which shapes his
decision-making. Tributes to some of our nation's most revered judges often
describe the judge's "voice" which can be felt and heard in the judge's written
opinions. The "voice" of a great judge is not only a style, but it is also
that judge's own construction of reality which he conveys over time through
numerous opinions.

Often minority judges and judicial candidates are cautious of, and quite
rightly, conscious of revealing an explicit racial voice. Revealing such a voice

he told us much that we did not know due to the limitations of our own experience."), William.
that "Justice Marshall’s voice was often persuasive, but whether or not he prevailed in a given
instance, he always had an impact . . . . [He spoke for those who might otherwise be forgotten.").

251. See, e.g., Regina Austin, "Write on Brother" and the Revolution Next Time: Justice
Marshall’s Challenge to Black Scholars, 6 HARV. BLACK LETTER J. 79, 81-82 (1989) (discuss-
ing Marshall’s opinions that challenged Court’s notions of poor and blacks).

252. This is precisely the kind of judicial decision-making advocated by Sylvia Lazos
Vargas. See supra notes 211, 218 and accompanying text.

253. See, e.g., Robert C. Post, Remembering Justice Brennan: A Eulogy, 37 WASHBURN
L.J. xix (1997); Richard W. Rose, A Tribute to Judge A. Leon Higginbotham, Jr.: Farewell to
a Giant, 4 ROGER WILLIAMS U. L. REV. 387, 393 (1999); Nadine Strossen, Tribute to Justice

254. See Richard A. Posner, Special Issue: Judicial Opinion Writing: Judges’ Writing

255. Id.
may mean sure defeat at the polls, scuttled nominations, charges of bias, or recusal motions in racially sensitive cases. We cannot fully realize the benefits of racial diversity on the bench, therefore, until the discourse about judging accurately defines impartiality. In doing so, judicial commentators must embrace the concept articulated by the Supreme Court, that the interaction of diverse viewpoints best achieves impartiality. Thus judges and judicial commentators must admit that experience, perspective, and values constitute legitimate sources of authority for judicial decision-making.

A. Impartiality vs. Diversity: Challenges to Black Judges

Judicial diversity efforts premised on the desire to include diverse perspectives and viewpoints in judicial decision-making inevitably raise questions about whether one can reconcile the individual impartiality requirement of the Fourteenth Amendment with the effort to include identifiable perspectives in judicial decision-making. Can judges at once represent excluded voices in judicial decision-making and guarantee impartial decision-making?

It is perhaps no accident that some of the richest and most compelling efforts to define the parameters of impartiality have been made by black judges. Because they face unique challenges from white litigants, black judges have particular contributions to make to the discourse about judicial challenges to their impartiality.

256. See supra note 13.

257. Attempting to reconcile substantive diversity in judicial decision-making with impartiality highlights the appeal of the role model justification for diversity. So long as diversity is promoted only to produce role models, the question of whether minority judges will be impartial does not arise. The implicit assumption of the role model rationale, which values the inclusion of black judges for the sake of appearances, is that black judges will exercise their judicial function in precisely the same way as white judges. Black judges are valuable under this theory due to the visual signal they send to the populace. A diverse bench may encourage potential minority judicial aspirants, or might be a signal to the minority and majority community that they should have confidence in a judicial system that includes minorities.

258. See, e.g., LeRoy v. City of Houston, 592 F. Supp. 415 (S.D. Tex. 1984), mandamus denied, In re City of Houston, 745 F.2d 925 (5th Cir. 1984); Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 388 F. Supp. 155 (E.D. Pa. 1974); see also Shaun Assael, The New York Newsday Interview with Bruce Wright, NEWSDAY, Jan. 19, 1995, at A29 (responding to criticisms of Judge Wright’s propensity to grant bail and give light sentences to black criminal offenders in New York City). There is some evidence that challenges to the impartiality of minority judges may have increasingly international dimensions. In a widely publicized case Judge Corinne Sparks, Canada’s first African Canadian female judge and the only black judge in Nova Scotia, was charged by the Crown with racial bias for crediting the testimony of a young African Canadian criminal defendant over that of a white police officer. The Crown appealed Judge Sparks’s decision acquitting the youth on the grounds that she was racially “biased” in favor of the African Canadian defendant. The Canadian Supreme Court ultimately upheld Judge Sparks’s decision. See R.D.S. v. The Queen [1997] 151 D.L.R. 4th 193, 196 (Can.) (finding “contextualized judging ... entirely proper and conducive to a fair and just resolution of the case.” (L’Heureux-Dubé and McLachlin JJ.).
black judges often face challenges to their racial impartiality. Judge A. Leon Higginbotham and Judge Constance Baker Motley's decisions in *Commonwealth of Pennsylvania v. Local Union 5442*,\(^{259}\) and *Blank v. Sullivan & Cromwell*,\(^{260}\) respectively, expose the sham of an impartiality definition that assumes "whiteness" (and "maleness") as the standard for measuring judicial bias.\(^{261}\) In those cases, Judges Higginbotham and Motley refused to grant the recusal motions that defendants in employment discrimination cases \(^{262}\) filed challenging the impartiality of the judges. The challenges suggested that the race, gender (in the case of Judge Motley), and the judges' professional backgrounds as civil rights advocates rendered them incapable of impartially deciding employment discrimination cases.\(^{263}\) The judges in each case rejected the notion that an "appearance of bias" attaches to black judges deciding discrimination cases. Instead, they insisted that determinations of judicial bias must begin by first assuming that all judges have a race, a gender, and a professional background.\(^{264}\) This means that if black and female judges are suspected of bringing racialized or genderized perspectives to bear on issues of discrimination, then we must assume that white and male judges also bring race and gender perspectives to their decision-making.

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262. The federal system provides two avenues for judicial disqualification from a case. 28 U.S.C. §§ 144 and 455 provide mechanisms for judicial disqualification. See 28 U.S.C. §§ 144, 455 (1994 & Supp. 1999). Section 144 requires that a judge be disqualified from a case whenever a party submits an application which alleges with sufficiency that the judge "has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144 (1988). The judge against whom a § 144 motion and affidavit has been filed can pass on the sufficiency of the affidavit. See Berger v. United States, 255 U.S. 22, 30-31, 32-36 (1921). The facts alleged in the affidavit are taken to be true. Id. at 32-34. However, mere conclusory allegations are insufficient to warrant recusal. Instead, the party seeking recusal must allege specific facts showing "a bent of mind that may prevent or impede impartiality of judgement." Id. at 33-34. Section 455 provides the framework for those situations in which the judge, sua sponte, believes recusal is necessary. See 28 U.S.C. § 455 (1994 & Supp. 1999).

263. Counsel premised its challenge to Judge Motley in the *Blank* case on perceived gender bias and on her illustrious career as a civil rights lawyer. In *Local Union 542*, the challenge to Judge Higginbotham stemmed from his race, his overt racial self-identification and his background as a civil rights advocate.

264. Judge Motley observed:

If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Judge Higginbotham’s decision denying the recusal motion is particularly revealing because the motion itself was based in part on statements Judge Higginbotham made in a speech about African American history. In the address before a group of black historians, Judge Higginbotham espoused efforts by blacks to obtain full and equal rights under the law. The recusal motion specifically identified Judge Higginbotham’s use of the word "we" in describing black people in his speech, as evidence of his racial bias.265 In rejecting the motion, Judge Higginbotham denounces the defendant’s efforts to impose an impartiality standard on black judges that would require them to "disavow or not discuss the legitimacy of blacks’ aspiration to full first-class citizenship."266 Judge Higginbotham asserted for black judges the right to positively identify themselves as black, as well as the right to articulate openly their support for racial equality and full citizenship for all blacks. The recusal motions filed in Local Union 142, Blank, and subsequent cases demonstrate that in cases where race is at issue parties may view black judges with suspicion and can subject them to greater scrutiny.

Yet, every judge brings to the bench a range of professional and life experiences which will influence his judicial decision-making. A judge may be deemed "qualified" to serve based on his experience as a trial lawyer, as a partner in a prestigious firm engaged in commercial law practice, as a government lawyer, or as an esteemed legal academic. These experiences, and a judge’s "thinking" about law, are part of the bundle of qualifications a judge brings to the bench.

Judges also bring an ideological background to the bench. In some instances, as in the case of the partner at the law firm, a judge’s political ideology may not be known publicly. But this does not mean that the judge does not have an ideology. Judges — as mature, engaged, and powerful actors in the legal profession — cannot be expected to have developed no ideological views at all. Indeed, if a mature and experienced lawyer operating at the highest levels of her profession has not developed ideas about important areas of law and public policy, one might suspect that such a judicial nominee lacks the requisite thoughtfulness and intellectual rigor to take on the difficult and awesome task of judging.267

At the very least, a judge should have developed a sense of how he or she would like to order the world. A judge’s "outlook on life" or "conception of

266. Id. at 178.
267. In Laird v. Tatum, Justice William Rehnquist remarked that "[p]roof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." Laird v. Tatum, 409 U.S. 824, 835 (1972).
social needs" is the context in which a judge decides "where choice shall fall." Given the enduring power of our socially constructed racial identities, we should expect a judge's experience as a white man or black woman, for example, to influence his or her "outlook on life" or "conception of social needs." This means that we should expect both black and white judges to be influenced in some part by their racial experiences. Yet, the challenges to black judges in Local Union 142, Blank, and later cases suggest that white judges may be enjoying a perception of built-in racial impartiality that parties deny to black judges. In this way, whiteness is "transparent," appearing to have no racial significance. Blackness, however, is equated with ideology, bias and "special interest."

These cases tell us that the individual impartiality cannot require that judges strip themselves of their racial or gender identity, unless we are prepared to examine and challenge the impartiality of white, male judges. Seeking a form of impartiality that is neither "raced" nor "gendered" is both impractical and impossible. As Martha Minow cautioned sometime ago "[i]t is just that - an aspiration rather than a description - because it may suppress the inevitability of the existence of a perspective." Nor can we demand that judges distance themselves from the legal or moral principles in which they believe. Impartiality requires that judges keep their minds open enough to be persuaded by contrary arguments or principles as applied to a particularized legal conflict. Thus, individual impartiality leaves room for judges to engage and to draw upon their multiple identities and experiences.

In essence, the focus of impartiality - like diversity - should be on the process of judicial decision-making rather than simply on case outcomes.

268. CARDOZO, supra note 15, at 12.

269. Other minority judges may also be subject to disproportionate scrutiny. See generally United States v. El-Gabrowny, 844 F. Supp. 955 (S.D.N.Y. 1994) (denying World Trade Center bombing defendant's motion for recusal of judge because judge was an orthodox Jew).

270. See Flagg, supra note 64, at 953, 957 (describing the "transparency phenomenon" which insulates white decision-making from challenge).


272. Despite his contempt for critical race theory, even Richard Posner has conceded that the "[l]itigation commonly involves persons at different social distances from the judge, and the more proximate will garner the more sympathetic response regardless of actual desert." POSNER, supra note 160, at 412. In his searing critique of critical race theory Judge Posner refers to the "core" writing of critical race theorists as "lunatic." Richard Posner, Beyond All Reason: The Radical Assault on Truth in American Law, NEW REPUBLIC, Oct. 13, 1997, at 40. 42. One wonders whether a lawyer appearing before Judge Posner who writes in this area or who seeks to advance critical race arguments on behalf of a client, could successfully seek Judge Posner's recusal on the grounds that the judge could not "impartially" decide the case.

273. One African American Baltimore City trial judge contends that "more than any other job, I bring the sum total of all I've been, all I've done to my job as a judge." Interview with Judge Mabel Houze Hubbard, in Baltimore, Md. (May 12, 1996).
B. Impartiality vs. Diversity: LULAC and the Voting Rights Judges Cases

Nevertheless, despite the work of Judge Higginbothanm, Judge Motley, and other judges, a racial double standard for determining impartiality continues to plague judicial diversity efforts. The most concerted and far-reaching application of this double standard has come from federal appellate courts reviewing claims brought by minority voters who have challenged the judicial election processes, primarily in southern states. In a series of these cases, federal appellate courts have identified the need for judicial impartiality as a principal rationale for denying minority voters’ claims.274 In *League of United Latin American Citizens v. Clements*275 (LULAC II), the Fifth Circuit Court of Appeals first advanced the argument that efforts of minority voters to elect state trial judges of their choice would threaten the impartiality of the bench.276 In *LULAC*, the court held that the relief the plaintiffs sought would undermine "the fact and appearance of judicial fairness."277 African American and Mexican American voters in that case had challenged the countywide electoral district for trial judges. In Harris County, Texas, the largest and most populous county in the state the countywide election system consistently had resulted in an all-white bench, although 20% of the county’s electorate was African American and 22% Mexican American. The trial judge found that white voters, voting as a bloc, consistently defeated the judicial candidate whom African American voters favored when that candidate was also African American.278 The plaintiffs sought to change to a system of sub-districts for the election of judicial candidates. The minority voters demonstrated that under such a sub-district election scheme minority voters could elect between nine

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275. 914 F.2d 620 (5th Cir. 1990).

276. *See LULAC II*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev’d sub nom.* Houston Lawyers’ Ass’n v. Attorney Gen., 501 U.S. 419 (1991) (holding congressional amendments to Voting Rights Act to increase minority voting strength did not apply to election of judges). Four appellate opinions were issued in the *LULAC* case over the five years that the case moved up to the Supreme Court and back to the appellate court. Two of those opinions were en banc decisions of the court. In each of those opinions, either the majority or concurring opinion concluded that the plaintiffs’ efforts conflicted with the State’s obligation to maintain fair and impartial courts. *See generally LULAC II*, 914 F.2d 620 (5th Cir. 1990) (en banc); *LULAC IV*, 999 F.2d 831 (5th Cir. 1993) (en banc) (discussing state interest in maintaining impartial judiciary), *cert. denied*, 510 U.S. 1071 (1994).

277. *LULAC IV*, 999 F.2d at 869.

and eleven of the fifty-nine trial judges then serving the county. In the alternative, plaintiffs proposed that Texas use modified at-large election systems, such as cumulative or limited voting, which would also give minority voters an opportunity to elect candidates of their choice to the bench. Although the plaintiffs prevailed at trial, the Fifth Circuit Court of Appeals reversed the district court's decision granting relief to the plaintiffs. In a panel and subsequent en banc opinion, the Fifth Circuit dismissed the plaintiffs' claims on the ground that judges—especially trial judges—are not "representatives" and are not therefore covered by the language of the Voting Rights Act.279

The Supreme Court rejected the Fifth Circuit's narrow interpretation of the word "representatives." Reversing the en banc Fifth Circuit in Houston Lawyers, the Supreme Court held that both the elected appellate judges at issue in Chisom and the trial judges in Houston Lawyers were "representatives" within the meaning of the Voting Rights Act.280 Through these decisions, the Court recognized that judges have a representative relationship with the communities they serve. In holding that minority voters are entitled to an equal opportunity to elect judges of their choice, the Court also recognized the potential for judges to represent politically-cohesive racial communities. This means that the Court at least implicitly acknowledged the potential for minority judges to "represent" minority communities.281

Nevertheless, in Chisom and Houston Lawyers, the Supreme Court avoided articulating precisely how judges can "represent." This was a particularly important question for resolution in Houston Lawyers' Association, 279. See LULAC II, 914 F.2d at 625-26 (concluding that judiciary serves no representative function); League of United Latin American Citizens v. Clements, 902 F.2d 293, 308 (5th Cir. 1990) [hereinafter LULAC I] (determining that trial judges, as single member officers, are not within scope of Voting Rights Act).


281. Strangely enough, however, the Court in Chisom never explicitly engaged the issue of race and representation. Michael Herz notes that the Court failed to acknowledge the very reasons why the black plaintiffs in Chisom brought the case—to be able to elect minority judges. See Michael Herz, Choosing Between Normative and Descriptive Versions of the Judicial Role, 75 MARQ. L. REV. 725, 749 (1992) (arguing that Chisom Court's hostility to elected judges shows belief that more representative judiciary would be destructive).

282. In avoiding this discussion, the Court also failed to describe how the "representative" function of judges should be reconciled with the requirement of judicial impartiality. See Chisom, 501 U.S. at 400-01. The Court's failure in this regard left the door open for lower courts reviewing these cases on remand to deny minority voter challenges to racially dilutive election schemes for judges on the grounds that the remedy minority voters sought—whether the creation of majority-minority sub-districts or alternative at-large remedies—would undermine judicial impartiality. See infra notes 286-87 and accompanying text (discussing LULAC IV).
because the Fifth Circuit panel opinion denying the minority voters' claims in
that case had focused on the fact the trial judges exercise their decision-making
function independently. Because of that fact, the panel held that minority
voters could not seek representation of a "single judicial officer."283 The panel
contrasted the decision-making function of trial judges with that of appellate
judges, who make decisions as part of a collegial decision-making body.284 In
effect, the Fifth Circuit panel drew a distinction between the Chisom and
LULAC cases, conceding that judicial representation was possible on an
appellate court but not on the trial court bench.285 In remanding the case to the
Fifth Circuit, the Supreme Court left open the question in Houston Lawyers'
Association of whether it was possible to remedy the vote dilution of which the
plaintiffs complained regarding the election of trial court officers. Latching on
to this opening, the Fifth Circuit ultimately dismissed the plaintiffs' case in
LULAC.

The Fifth Circuit rejected the parties' subsequent efforts to settle the
case.286 The court found that no settlement was warranted because the plain-
tiffs failed to prove their substantive claim and the relief sought by plaintiffs
would undermine judicial impartiality.287 According to the court, Texas's
need to preserve "the fact and appearance of judicial fairness"288 outweighed
the injury to minority voters. The court concluded that electing trial judges
from majority black sub-districts within a county, rather than county-wide
would "diminish the appearance if not fact of . . . judicial independence,"
because judicial decision-making would be made "by judges representing only
a small fraction of the electorate."289

The decision in LULAC effectively subverted the Supreme Court's
decisions in Chisom and Houston Lawyers' Association that judges are repre-
sentatives. By basing its decision on the need to maintain judicial impartiality,
the Fifth Circuit avoided challenging directly the Supreme Court's decision.
Instead, the Fifth Circuit positioned the representative role of judges that the
Supreme Court identified as being in conflict with judicial impartiality. In so
doing, the Court introduced a balancing test, which weighed the minority
voters' interest in judicial representation against the state's interest in judicial
impartiality into the vote dilution analysis.

283. LULAC I, 902 F.2d at 308.
284. Id. at 306.
285. Id.
286. See LULAC IV, 999 F.2d 831, 845-47 (5th Cir. 1993) (discussing rationale for
    rejection of parties' consent decree).
287. Id.
288. Id. at 869.
289. LULAC II, 914 F.2d 620, 650 (5th Cir. 1990), rev'd sub nom. Houston Lawyers'
The presumption implicit in this balancing test, of course, was that the minority plaintiffs in LULAC were seeking to elect "partial" judges. The court also presumed that black voters were the only members of the electorate interested in judicial representation. The court ignored the fact that white voters, as evidenced by their persistent refusal to support black judicial candidates favored by black voters, regularly expressed their desire for particularized representation on the bench. In effect, white judges already had been acting as representatives for the white electorate.

Yet another implication was that minority judges elected by minority voters could not be impartial judges. In effect, the court imposed a different standard of impartiality on black judges elected by black voters than it was prepared to apply to white judges elected by white voters. The judges elected under the new election system sought by black plaintiffs would, according to the court, feel compelled to exhibit "bias or favoritism" towards the black voters who elected them. But, under the existing at-large countywide election system that the Fifth Circuit upheld, white judges in Harris County routinely win election without the electoral support of African American voters. These white judges, however, could be trusted to "remain accountable to all voters" in the county. At bottom, the court's expectation was that black judges elected by black voters would be incapable of impartial decision-making. At the same time the court assumed the impartiality of white judges, who were and often are elected solely by white voters in Harris County.

In effect, the Fifth Circuit's analysis imposed a stricter standard of impartiality on black and Mexican American judges, whom minority voters potentially would elect, than it was prepared to impose on white judges whom white voters elected. This double standard exposes the way in which impartiality and the appearance of impartiality can operate differently for black judges than for white judges. Other courts have relied upon the reasoning in LULAC on this issue to guide their decisions rejecting minority voter challenges to discriminatory judicial election schemes.

IV. Judges as Impartial Representatives

The Fifth Circuit's troubling analysis in LULAC and the challenges black judges experience from white litigants in cases involving racial issues illus-
trate why the role model argument cannot justify judicial diversity efforts. Premising the need for minority judges on the development of role models is both dishonest and dissembling. It denies the fact that minorities often seek representation on the bench, and it avoids or delays the inevitable confrontation between judicial impartiality and representation. The majority in LULAC recognized that the minority plaintiffs in that case were not attempting to change the method of electing judges merely in order to elect "role models." The LULAC plaintiffs' claims were premised on the demand that minority voters have the same opportunity as white voters to elect representatives to the bench. The minority voters' claims were a demand for inclusion in the justice system. They sought to elect judges who could represent their communities on the bench. They expected that diversity on the bench would bring more than cosmetic change, but would affect the nature and substance of judicial decision-making on the trial bench. Although this demand for inclusion in judicial decision-making was an implicit, rather than an explicit prayer for relief, the Fifth Circuit recognized the focus of the minority plaintiffs' demand for inclusion and for substantive representation on the bench. In this sense, the Fifth Circuit's decisions in LULAC can be read as a challenge to diversity advocates to abandon the role model rhetoric and to address how racial diversity promotes or is consistent with judicial impartiality.

A. The Boundaries of Judicial Representation

Judges can serve as impartial representatives. They can do this by ensuring that the perspectives and values of disparate elements in the community are heard and included in judicial decision-making. Contrary to the majority's view in LULAC, this does not mean that judges must decide cases in accordance with the wishes of particularized constituents in the community.

To conceive of judges as representatives does not mean that judges must adhere to the views of the public in judicial decisions. Instead, a representative - even a legislative representative - need only offer her constituents the

294. But see LULAC II, 914 F.2d at 659 n.14 (Johnson J., dissenting) (noting that "Black and Hispanic judges serve as role models for other minority group members."), rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991). Judge Johnson was the only Fifth Circuit judge to dissent from the en banc court's decision that judges are not representatives - a decision the Supreme Court later reversed in Houston Lawyers' Association. See supra notes 280-81 and accompanying text (discussing Supreme Court reversal of LULAC II).

295. See Voting Rights Act of 1965 § 2(b), 42 U.S.C. § 1973(b) (1986) (protecting black voters' rights "to participate in the political process and to elect candidates of their choice").

296. The plaintiffs demonstrated that the existing judiciary was distinctly unrepresentative. In addition to being all-white, judges on the trial bench resided in largely the same neighborhoods.
opportunity to have their views translated into public policy. Although the ability to translate the wishes or views of a constituency is without question an important component of representation, it is not always essential to the act of representing. Even in the legislative arena, the act of representation is often a more complex and textured exercise than simply transmitting constituent viewpoints to a deliberative body.

Representation also requires leadership. In the exercise of leadership, deciding issues contrary to the will of one's constituency is sometimes an effective and critical function of representation. Representatives need not guarantee strict adherence to constituent views. This is more true for judges than for other kinds of representatives. Judges represent more than just the constituents in their district. They serve the multiple constituencies of the justice system, the legal profession, the community, and the bench itself. As a result judges must exercise a more disciplined form of representation than legislators.

Concern that conceiving of judges as representatives will result in a special interest free-for-all on the bench can ignore the reality that judges are institutional actors. Judges have unique obligations which restrain them from exercising a pure legislative model of representation. For example, judges -- all judges -- are bound by legal and ethical obligations, as well as

297. In this regard, I agree with the 19th-century British parliamentarian Edmund Burke's conception of the representative function. He denounced those who believed that a representative must sacrifice "his unbiased opinion[,] . . . [his] mature judgment[,] . . . [and] his enlightened conscience" to the will of his constituents. Edmund Burke, Burke's Politics: Selected Writings and Speeches 115 (Ross Hoffman & Paul Levack eds., Alfred A. Knopf, Inc., 1949) (1774). In Burke's view, although a representative should "most seriously . . . consider" the opinion of his constituents, those views should not serve as "authoritative instructions" which outweigh the "conviction of . . . [a representative's] judgment and conscience." Id. at 116.

298. Nevertheless, representation requires at the very least a strong consideration of the views of one's constituents. Persistent dismissal or denigration of the well-considered views of one's constituency, or refusal to hear those views, is inconsistent with the act of representation.

299. Legislators, who exercise representation in its purest form, must, therefore, in some instances vote in ways that are at odds with the popular will of their constituents. In the recent vote to impeach President Clinton, for example, several legislators voted for or against impeachment despite their constituents' views to the contrary.

300. See Hanna Pitkin, The Concept of Representation 117-18 (1967) (discussing role of judiciary as representative of both public and legal system).

301. See Edward L. Rubin, Legal Reasoning, Legal Process and the Judiciary as an Institution, 85 Cal. L. Rev. 265, 277 (1997) (analyzing judiciary as ordinary government institution). Rubin points out that "[m]ost judges, by accepting their appointment, have already made certain normative choices: one of the most notable of these is that they will uphold the existing social order." Id. See generally Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4 (1983) (describing judges as committed to process that defers to violence of state).
standards of professionalism that govern their behavior. Other institutional pressures also circumscribe judges. Judges are trained as lawyers, bound by precedent, and checked by appeal. Indeed, adherence to precedent is a critical influence on judicial decision-making, although it may not matter at all to the public. Judges often must present their judgments in written decisions. Judges must respond to these influences whether they are elected or appointed. The due process requirement of impartiality compels judges to refrain from "pre-judging" issues in advance of hearing the facts of a case and restricts judges to deciding issues based on facts in evidence in a particular case. All of these factors constrict the parameters of judicial decision-making.

B. Impartial Representation on the Bench

Put simply, judges can be impartial representatives. This means that in approaching, analyzing, and deciding legal and factual issues, judges can at once decide cases without prejudgment and yet represent values and perspectives. The representative function does not run afoul of the need for impartiality because the representation function expresses itself in the process of decision-making, rather than in a judge's ultimate decision about criminal guilt or innocence, sentencing, or the civil liability of a litigant.

A judge can represent by expressly including alternative perspectives in the deliberative process. Justice Thurgood Marshall is the prime example of this kind of judicial representation. He often represented the perspectives of African Americans, women, prisoners, and other marginalized groups by bringing the stories of these groups to Supreme Court deliberations. In so doing, Marshall enriched the Court's process of judicial decision-making by insisting that the Justices consider "outsider" narratives and perspectives in their deliberations. Judges can represent impartially by affirmatively including and engaging the perspective of constituent communities in judicial decision-making.

An important step in accepting this exercise of judicial representation lies in acknowledging that white judges also function as representatives. They

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302. Requiring judges to issue written opinions is one way of encouraging judges to justify their decision-making to the profession and to the public. For example, Colorado law requires that three judge panels convened to determine sentencing in capital cases make "specific written findings" supporting the sentence — whether death or life imprisonment. See COLO. REV. STAT. § 16-11-103(2)(b)(II) (1997) (describing process for imposing sentence in class I felonies under Colorado law); FED. R. CIV. P. 52 (requiring trial judges to make written findings of fact and conclusions of law). But see William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 282 (1996) (noting that federal appellate judges write and publish opinions in less than one-third of cases which they dispose). Professors Richman and Reynolds argue that this trend may compromise judicial accountability and the quality of judicial decision-making on federal appellate courts. Id. at 284.
articulate, engage and affirm narratives with which they are familiar and with which they share with their constituent communities. Certainly some data suggests that this is true in discrimination cases. This does not mean that white judges are "biased" or "partial;" instead, they are "situated." They are steeped in and bound by narratives which appear not to be narratives at all because they are cloaked in the transparency of whiteness.

But as the data above illustrates, race affects how all judges – black and white – see the world. The "transparency" of whiteness permits the racially situated responses of white judges to go undetected by traditional impartiality discourse. But white judges may hear, assess, and analyze discrimination cases differently than black judges. The significance of the difference between the way white and black judges may be deciding discrimination cases does not lie in determining whether white or black judges are correctly deciding these cases. For purposes of diversity discourse, the significance of the disparity between the way white and black judges decide discrimination cases is the disparity itself. It is the apparent reality that white and black judges hear and decide these cases differently that challenges the conception of "impartiality" that results in closer scrutiny of black judicial decision-makers than of white decision-makers. Unless we are prepared to condemn wholesale black judges as biased, or condemn wholesale white judges as racist, we must be prepared to acknowledge that race makes a difference in how judges develop a "sense of justice," and we must look for opportunities for judges with disparate "senses" to interact with one another in judicial decision-making.

Ironically, because African American judges, like most middle-class African Americans, will tend to be exposed to more varied experiences across race and class lines than their white counterparts, they may be better equipped than white judges to draw on and utilize a range of perspectives and values from communities throughout the society. African American judges are likely to be familiar with the dominant cultural, political, and social perspectives.

303. It would be a mistake to romanticize the narratives familiar to black judges or to demonize the perspectives and values familiar to white judges. The mere fact that a judge is a minority does not automatically mean that the voice heard is morally superior to other voices. Minority group members can adopt views that are racist, sexist, or that otherwise reflect adherence to oppressive master narratives, including oppressive or negative social roles or relationships. See West, supra note 149, at 55-58.

304. Justice Thurgood Marshall reportedly remarked that the problem with the approach of his colleagues on the Court to race cases lay in their lack of exposure to African Americans. See Williams, supra note 46, at 389 (quoting Marshall, in discussion about future equal protection jurisprudence, as saying, "[w]hy can't name one member of this Court who knows anything about Negroes before he came to this Court. Name me one.").

305. African Americans, like other traditionally subordinated groups, often are able to observe whites more readily than whites can observe African Americans. Many African Americans continue to clean or care for children in the homes of white families, work in businesses that whites own and control, and live in a culture in which images of white, middle-class norms
While African American perspectives are often unfamiliar to many white judges, an African American judge regardless of his or her background will have had to confront and engage white community perspectives in order to successfully navigate their professional lives as lawyers and often politicians. In contrast, white judges rarely face the obligation to be familiar with African American perspectives and values in order to ascend to the bench. In this sense the all-white bench needs the presence of African American judges in order to balance the "systemic blindspot" created by a racially homogenous bench.

Obviously appellate judges interact in deliberations to a greater degree than trial judges. But trial judges also interact in ways sufficient to reap the rewards of diversity. Judge Jack Weinstein has described the myriad ways that trial judges interact on the bench in the Eastern District of New York. Prior to the imposition of Sentencing Guidelines, judges in the Eastern District used a procedure for sentencing in which a sentencing judge would meet with two other district judges and the probation officer in charge. All of the judges would discuss the sentence, although the sentencing judge ultimately imposed the final judgment. According to Judge Weinstein, federal trial judges handling asbestos cases also met informally "to discuss substantive and precedential issues." Weinstein also points out that trial judges routinely work closely with magistrate judges on resolving procedural issues and setting the parameters of litigation. Moreover, the informal opportunities for interaction among

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306. See White, supra note 9, at 1216 (noting value of Justice Marshall's perspective in judicial conferences because, as Justice White stated, Marshall could impart "that which we did not know due to the limitations of our own experience"). White judges also may unconsciously deny the reality of African American experiences. Justice White noted that Justice Marshall "would tell us things that we knew but would rather forget." Id.


308. Id. at 15.

309. Id. at 15 n.74. Judge Weinstein also points out that state judges formed the Mass Torts Litigation Committee.

310. See id. at 17 (discussing interaction between trial and magistrate judges on discovery issues).
Racial Diversity on the Bench

Trial court judges – on specialized judicial committees, in administrative meetings, and even in social interactions – may provide opportunities for diversity to effect judicial decision-making. Given the role of race in influencing judicial decision-making, the most compelling project may be to devise more opportunities for judges to interact with one another in judicial decision-making. If impartiality and informed legal decision-making are achieved best by the interaction of diverse viewpoints – "a balancing of eccentricities" in Justice Cardozo's words – then promoting greater interaction among judges with diverse perspectives may be a better method for improving fairness in judicial decision-making rather than seeking individual judges who are mentally "stripped" of their connection with the values of the communities they represent, or branding judges who articulate "outsider" voices as biased.

C. Constituent Expression and Policymaking in Judicial Decision-Making

Advancing judges as impartial representatives also will require that we rethink traditional conceptions of the limits of the judicial branch and the judicial function. Without question the Fifth Circuit's resistance to the plaintiffs efforts in LULAC was based in part on the court's traditional conception of the judicial branch of government as restrained, limited in power and detached from the community. Because the judicial branch has rarely

311. Moreover, trial judges exercise authority in other ways which provide opportunities to represent communities. See Lill, supra note 12, at 137-41 (noting that in areas of political patronage, hiring of court personnel, appointment of counsel for indigent defendants, law clerk hiring, and judicial training, judges represent perspectives and interests of their constituencies). There is no question that the hiring of black court personnel including secretaries, bailiffs and judicial clerks, correlates positively with the number of black judges on the bench. By providing opportunities for excluded groups to work in the courthouse, black judges provide communities with opportunities to participate more fully in the judicial system. Id. at 139. Similarly, black judges help bring black lawyers into the mainstream by recognizing them in the appointment of counsel for indigent defendants and in recommending minority lawyers for service on important bar association and other professional development committees. Id. at 140.

312. Cardozo, supra note 15, at 177.

313. Judith Resnick has suggested that perhaps judging should abandon the single judge model. See Resnick, supra note 120, at 1924-35 (advocating greater representation of feminist perspective on bench). Instead, Professor Resnick suggests that we should promote "more communal modes of decision-making, insisting upon groups of two, three, or four judges to share the honor, the obligation, and the pain of decision." Id. at 1924-25; see also Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201, 1209 (1992) (arguing that "a collaborative decision-making process involving people reflecting . . . multiple perspectives exhibits the special virtue of a jury or multi-judge panel compared with a single judge").

314. Alexander Hamilton's description of the judiciary as "the least dangerous" branch of government was premised on the idea that judges have "neither force, nor will, but merely judgment." The Federalist No. 78, at 396 (Alexander Hamilton) (Max Beloff ed., 1948).
been regarded as a locus for community expression and representation, courts may be at a loss to envision how minority judges can engage minority community perspectives and values in judicial decision-making. Thus, conceiving of judges as representatives also requires that we recognize the judicial branch of government as an appropriate forum for community expression.

As discussed above, Sylvia Lazos Vargas in "Democracy and Inclusion" offers a compelling analysis of the role judges can play in recognizing, including, and legitimizing "the multitude of views and perspectives that exist in our society." Lazos Vargas contemplates the judiciary as playing a key role in "emphasizing pluralist democratic values of inclusiveness and participatory co-equality" in addressing cases involving intergroup conflict. Judges can do this by explicitly recognizing and addressing conflicting minority and majority "epistemologist."

Lazos Vargas’s vision of judges engaging and utilizing multiple perspectives in judicial decision-making implicitly recognizes why diversity can contribute to rich judicial decision-making. As representatives, judges should seek out opportunities to infuse judicial decision-making with expression and dialogue. In so doing, judges can exercise an "expressive" form of representation – one which values the expression of conflicting views over the suppression of competing voices. Melissa Wilson, in her excellent work on representation and race, describes the theory of "expressive representation" as premised on the idea that "the expression of group interests [is] a valuable and indispensable part of the process of good government." By contrast, "suppressive representation" views "intergroup differences as dangerous and destabilizing."

Traditionally, judicial decision-making has reflected a suppressive form of representation. Unanimous opinions – which purport to speak in a unified voice of truth – carry greater weight and authority, particularly where controversial public policy issues are at stake. Acknowledging the representative

315. Lazos Vargas, supra note 211, at 154.
316. Id. at 154-55.
317. Lazos Vargas uses the word epistemology to describe "the conflicts in perspective between majorities and minorities that are reflected on constitutional law." Id. at 155 n.13.
318. Williams, supra note 171, at 51. Melissa Williams explores expressive and suppressive representation theories in her analysis of the representation theories of Edmund Burke, John Stuart Mill, J.C. Calhoun, and James Madison. Id.
319. Id. at 9.
role of judges invites us to reconsider the value of monologue in judicial decision-making and encourages us to value judicial decision-making which expresses multiple or even disparate perspectives. Seeking diversity among judges positions judges as "expressive" representatives, capable of engaging multiple and competing perspectives in the exercise of the judicial function.

Rather than pronouncements of obvious and absolute truths, judicial decisions articulate "at most, a hypothesis about meaning at one point in time situated in a continuing dialogue." As such, we should value dissents as evidence that the judiciary is impartial, balanced, and engaged in a rigorous analysis of important questions. Concurring opinions should be encouraged when they introduce alternative perspectives and analyses of complex problems. In sum, the value of uniformity in judicial decision-making should be tempered with the need for the judiciary to create opportunities for expressive representation.

Likewise the courtroom has long been viewed as "a forum with strictly defined limits for discussion." Many judges still adhere to Justice Douglas's description of the courtroom as "a hallowed place of quiet dignity as far

officials obey its desegregation order. See generally Cooper v. Aaron, 358 U.S. 1 (1958) (finding state officials to the dictates of the Brown decision). See also Deborah Hellman, The Importance of Appearing Principled, 37 ARIZ. L. REV. 1107, 1143 n.162 (1995) (citing Kent Greenwalt and other scholars who contend that there are reasons for Justices "not to write separately in cases dealing with important issues").

321. See Robert Rubinson, The Polyphonic Courtroom, 101 DICKINSON L. REV. 1, 18 (1996) (criticizing judicial opinions which "typically act like a monologic crucible combining multiple perspectives into a "unified accent"). In this way, Rubinson argues, most judicial opinions "subordinate not only the perspectives of the litigants, but the perspectives of other judges." Id. at 18.

322. As Hanna Pitkin observes, "This kind of argument can be made only if we ascribe to the courts . . . a good deal of freedom to act and to choose. If we adhere to the older jurisprudential doctrine, that the judge merely discovers and expounds the law, we cannot regard him as the representative of group pressures." PITKIN, supra note 300, at 117.


324. See Weinstein, supra note 307, at 29-30 (recognizing that dissents may reduce public respect for judicial institutions but acknowledging value of dissents as "a wake-up call to legislators" or as "precursor for [en banc] review"). Weinstein cites the dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), and Korematsu v. United States, 323 U.S. 214 (1944), as instances in which dissents have formed the basis for future majority opinions or expressions of constitutional interpretation. See Weinstein, supra note 307, at 29 n.143.

325. Judges should explicitly acknowledge that alternative voices speak in litigation. As David Luban has commented, there are many possible views of "justice within the system" – otherwise every appellate judicial opinion would be unanimous. David Luban, The Quality of Justice, 66 DENV. U. L. REV. 381, 384 (1989) (detailing two senses of justice – "justice within the system and "revisionary justice").

326. See Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) (explaining how Constitution, laws, and tradition demand judicial restraint in application of First Amendment protections).
removed as possible from the emotions of the street." But Justice Thurgood Marshall once described courtrooms as "perhaps the most accurate barometer of the extent to which we've succeeded in building a just society." The "outsider" communication style of many minority litigants frequently puts them at a disadvantage in the courtroom. Assigning greater value to expression in courtroom proceedings also may be an important part of the process of reconceptualizing the opportunity for expression and representation in the judicial branch. Judges, who enjoy virtually unfettered power to control the parameters of litigant and witness expression in the courtroom, can play a crucial role in bringing greater expressive opportunities to litigation.

Accepting judges as representatives also requires acknowledging the policymaking function of judging. In Gregory v. Ashcroft, decided the same day as Chisom and Houston Lawyers' Association, the Supreme Court held that state judges are policymakers, because judges "exercise . . . discretion concerning issues of public importance." According to the Court in Ashcroft, the common-law judges at bottom exercise "a well-considered judgment of what is best for the community." Determining "what is best for the community" remains the essential policymaking function of judging.

327. Mayberry v. Pennsylvania, 400 U.S. 455, 457 (1971) (asserting that petitioner's contemptuous conduct would shock "those raised in the Western tradition").


332. See Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419, 426 (1991) (holding that § 2 of Voting Rights Act of 1965 covers even those judges "whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected").

333. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) (holding that state's mandatory retirement provision for judges did not violate Age Discrimination in Employment Act because Act excluded from coverage "appointed[s] on the policymaking level").

334. Id. at 466. The Court echoed Justice Holmes's view that in describing the sources of their judicial decision-making, the "considerations which judges most rarely mention, and always
The traditional view that judges simply interpret the will of legislators fails to account for the complexity of the judicial task. Judges are at once interpreters, fact-finders, and policy-makers. In each of these areas, judges exercise discretion. The fact-finding role of trial judges is well-known. In this capacity, judges exercise the awesome and virtually "uncontrollable power ('discretion') to choose the facts — that is, to choose to believe one witness rather than another." This fact-finding power is perhaps the principal area in which judges exercise discretion and perform the complex task of judicial decision-making. As one judge put it "the art of judging begins with the portrayal of the facts." Even the act of interpretation is not free from discretion. "[T]he judge who relies on plain language, like the one who looks to legislative history or statutory purpose, makes value judgments."
Policymaking is a distinct and important aspect of what judges do. While the policymaking function of judging is often perceived of and critiqued as a product of modern-day judicial decision-making, policymaking is an intrinsic aspect of the judicial function. Both Justices Holmes and Cardozo openly described the policymaking or "legislative" aspect of judging. Holmes contended that "every important principle which is developed by litigation is in fact and at bottom the result of public policy.

Critics of judicial policymaking suggest that policymaking falls outside the judicial function. In their view, judges who make "policy" decisions, therefore, usurp the power of the legislative and executive branches. But it is not clear that we can draw strict and recognizable lines between judicial "policymaking" and "interpretation." Very often judges advance public policy under the guise of interpretation or fact-finding. In these instances "interpretation" and "fact-finding" are tools which serve the policymaking function of judging. A federal court's departure from established precedent, for exam-

340. Indeed, Malcolm Feeley and Edward Rubin argue that modern government is so different in its configuration and function from the conception of government at the formation of the republic, that the traditional rationale for resisting a policymaking role for judges no longer exists. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY-MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 20-21 (1998) (arguing that modern administrative state has diminished importance of separation of powers and federalism, concepts long-regarded as strongest barriers to judicial policymaking).

341. See HOLMES, supra note 334, at 32 (recognizing courts' unconscious yet pervasive legislative function); CARDOZO, supra note 15, at 115-20 (reasoning that history forces judge to "shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing himself to regulate the question").

342. HOLMES, supra note 334, at 35.

343. See Herbert Wechsler, Toward Neutral Principles in Constitutional Law, 73 HARV. L. REV. 1, 19 (1959) (calling for "principled" decision-making based on reasons that "transcend any immediate result that is involved"). See generally Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975) (suggesting that judges base their decisions on principle arguments rather than on their own discretion).

344. For an analysis and critique of this view, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 356-62 (1990) (questioning existence of clear boundaries between branches of government).

345. See FEELEY & RUBIN, supra note 340, at 7-11 (postulating that society recognize policymaking as distinct aspect of judicial function, existing independently of "interpretive" or fact-finding function of judges).

346. Judge Weinstein has described the "nullification" practices of some Northern judges who used "the standard interpretive practices and the distinguishing of cases" to avoid applying the Dred Scott decision. Weinstein, supra note 307, at 27 (citation omitted). Judge Weinstein reminds us that "[t]he Nazi judges' silence, acquiescence, and active participation in the gravest injustices serves as a reminder that the duty to decide cases in accordance with statutes or precedent is not absolute." Id. at 25 (citing Markus Dirk Dubber, Judicial Positivism and Hitler's Injustice, 93 COLUM. L. REV. 1807 (1993)). Justice Holmes expressed confidence in the fact that "the law is administered by able and experienced men who know too much to sacrifice good sense for a syllogism." HOLMES, supra note 334, at 36.
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pie, is often a recognition of new, different, and compelling public policy considerations which demand a different interpretation of legal precepts. For example, the text of the Fourteenth Amendment did not change between 1896, when *Plessy v. Ferguson*\(^{347}\) was decided, and 1954, when the Court reversed the decision in *Brown v. Board of Education*.\(^{348}\) Yet the post-World War II reality of American life, combined with the United States position as the pre-eminent democratic world power, compelled a departure from the Jim Crow interpretation of the Fourteenth Amendment that the *Plessy* majority had endorsed.\(^{349}\)

The policymaking function of judges reminds us that judges do not exist outside of the community and are not immune to the public discourse that takes place within communities.\(^{350}\) Judges are key participants in our public discourse about critical issues. In fact, the leadership function of judicial representation makes it entirely appropriate for the judicial branch to contribute to, or in some instances, lead our national, state or local community discourse about issues of public importance. The language of the Supreme Court's decision in *Brown*, for example, describing the effect of racial segregation on the "hearts and minds" of black children,\(^{351}\) shaped our national discussion about racism for decades. Similarly, prison condition cases brought

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347. 163 U.S. 537 (1896) (determining that forced segregation did not violate Thirteenth or Fourteenth amendments).
348. 347 U.S. 483 (1954) (concluding that "separate but equal" public schools violated Fourteenth Amendment's Equal Protection clause).
349. See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 524 (1980) (contending that America's domestic image of equality and inclusion served nation's foreign policy objectives). The same transformation occurred in the federal courts' interpretation of prison condition cases brought under the Eighth Amendment. In their study of judicial policymaking, Malcolm Feeley and Edward Rubin note that from the 1930s through the mid-1960s, when prisoners challenged prison conditions as violative of the Eighth Amendment, courts routinely held those claims non-justiciable. See generally Feeley & Rubin, supra note 340. Beginning in 1965, however, federal courts began to uphold prison condition challenges brought under the Eighth Amendment. For the next 20 years federal courts, which had previously found no authority for federal courts to enjoin state prison practices under the Eighth Amendment, aggressively entered the area of prison reform, and interpreted the Eighth Amendment as authorizing federal courts to monitor and supervise "the square footage of the cells, the nutritional content of [prisoner] meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoner's cells." Id. at 13.
350. See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897) (remarking that "we do not realize how large a part our law is open to reconsideration upon a slight change in the habit of the public mind"). For example, the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was, without question, strongly affected by a post-World War II understanding of oppression and freedom. America's nearly solidified role as the leader of the "free world" during this period increased the expectation that America's international rhetoric matched its domestic practices. The Justices on the Court could not and should not have been immune to the national and international discourse that was developing about the meaning of equality and freedom.
351. See *Brown*, 347 U.S. at 494 (discussing segregation's effect on childhood development).
during the 1960s and 1970s emerged within the context of a national discourse about civil rights. That discourse highlighted the racialized nature of infamous prison plantations such as Cummins Farm in Arkansas and Parchman in Mississippi which maintained black prisoners in conditions described as "worse than slavery." The action of federal judges in the prison condition cases created a framework within which the nation could begin a discourse about the inherent humanity of prisoners.

Finally, judges also advance public policy through their procedural and administrative decisions. Judges collectively act as policymakers through collegial administrative bodies. The federal United States Judicial Conference, which advises Congress on judicial administration, has issued statements expressing disapproval of mandatory sentencing and the federalization of traditional state crimes. Judicial administrative and procedural policies favoring settlement, alternative dispute resolution, and mediation constitute expressions of policy. Like new federal rules that compel opposing counsel to serve one another with unrequested discovery disclosures, these rules contemplate a more limited role for judges in adjudication and endorse a move away from adversarial litigation and toward consensus resolution of legal conflict. The Supreme Court's decision to reduce dramatically the number of cases heard on writs of certiorari is ostensibly an internal administrative decision, but remains one that has enormous public policy effect.


353. Feeley and Rubin discuss one of the most famous cases of this time in which Judge Henley of Arkansas wrote:

For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world that is administered by criminals under unwritten rules and customs completely foreign to free world culture.


354. See Weinstein, supra note 307, at 11 & n.51 (citing statements by Chief Justice Rehnquist and Administrative Office of Courts in 1993 and 1994). Weinstein is one of several senior federal judges who, in protest of draconian mandatory sentencing requirements, has refused to hear drug cases. Id. at 11-12 (citing Joseph B. Treaster, Two Judges Decline Drug Cases, Protesting Sentencing Rules, N.Y. TIMES, Apr. 17, 1993, §1 at 1); see also Jonathan M. Moses, Many Judges Skirt Sentencing Guidelines, WALL ST. J., May 7, 1993, at B12 (noting that fifty senior federal district court judges refuse to hear drug cases).

355. See Fed. R. Civ. P. 26(a) (detailing mandatory disclosures parties must provide "without awaiting a discovery request").

356. See Owen Fiss, Against Settlement, 93 YALE L.J. 1073, 1075 (1984) (noting that moving toward more consensus oriented resolution may result in need for fewer judges).

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dural decisions are sometimes explicitly reflective of public policy considerations. Recently federal appellate courts have premised opinions reversing trial judge grants of class certification in major products liability cases, for example, on the appellate courts’ concern that class certification in those cases could affect public policy. \(^\text{358}\) In sum, recognizing the policymaking function of judging helps us begin to see how judges serve a representative function.

V. Seeking Diversity in the Judicial Decision-Making: Focusing on the Community’s Perspective Rather Than the Judge’s

A. Beyond Role Models and Public Confidence

As reflected in the preceding discussion, regarding minority judges as role models discourages an examination of the potential for the minority judges to include, to engage and to represent "outsider" voices in judicial decision-making. \(^\text{359}\) By their very nature, role models promote the legitimacy of the status quo. They serve as examples of those who have successfully navigated their way through the existing system to attain success. \(^\text{360}\) While this message has obvious appeal and value, the image of a minority role model judge ignores the unique and transformative contribution minority judges can make to judicial decision-making. \(^\text{361}\)

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358. See Castano v. American Tobacco Co., 84 F.3d 734, 740-52 (5th Cir. 1996) (decertifying class of nicotine dependent persons because of variations in state law and individual nature of each plaintiff’s claim); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1296-99 (7th Cir. 1995) (holding that class certification of hemophiliacs infected with AIDS was improper at least in part because of distrust of jury’s capabilities).


360. See LULAC II, 914 F.2d 620, 659 n.14 (5th Cir. 1990) (Johnson, J., dissenting) (hypothesizing that minority electoral victories encourage minority voting participation because "Black and Hispanic judges serve as role models for other minority group members, who may not have envisioned a legal or judicial career as a real possibility in the past"). At the confirmation hearing of Justice Clarence Thomas to the U.S. Supreme Court, Wyoming Senator Alan Simpson praised the nominee stating "[y]ou exemplify what all of us might be able to accomplish... if we were to stop making excuses... So, you are an inspiration to us all." The Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 102d Cong. 62 (1991) (Opening Statement of Hon. Alan K. Simpson, U.S. Senator from State of Wyoming).

361. The current role-model image also masks the reality of what it takes to become a judge for most black lawyers. Most African American lawyers need much more than moxie, smarts and determination to become judges. The use of at-large election districts to elect judges, the
By obscuring the potential for minority judges to transform judicial decision-making, the role model argument positions black judges as cosmetic symbols, rather than as democratic representatives. This emphasis draws attention to the racial "face" of the judge, rather than to the substance of a judge's decision-making or contribution to broadening the scope of judicial decision-making. A black "role model" judge is credited solely for being black and inspiring others, rather than assessed for his competence, performance or effectiveness as a representative. By contrast, connecting diver-
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sity efforts to increasing cultural pluralism in judicial decision-making compels a deeper and closer look at a minority judge’s potential to contribute to and enrich judicial decision-making. Acknowledging the unique contribution that minority judges can make to judicial decision-making also compels us to examine the impoverished nature of judicial discourse which excludes minority voices.

Likewise, the "public confidence" rationale fails as a sufficiently persuasive basis for mandating racial diversity on the bench. The public confidence rationale is, in fact, a distinctly disempowering justification for racial inclusion on the bench. It bases the value of diversity on the questionable aim of strengthening the appearance of justice, rather than on the goal of increasing actual fairness in the administration of justice. Given the wealth of evidence demonstrating that racial discrimination pervades the justice system in most states,\(^3\) prescribing "the appearance of justice" as a palliative to the African American community without the promise of actual fairness, invites rather than ameliorates a deepening crisis of confidence in our judicial system. It suggests that the appearance of justice is the best we can achieve.

B. The Challenge of the Clarence Thomas Nomination

The 1992 nomination and confirmation battle of Clarence Thomas for a seat on the United States Supreme Court revealed the urgent need for a reassessment of our judicial diversity discourse. Thomas was the first Supreme Court nominee who came to the nomination proceedings almost exclusively as a role model. Distinguishing himself in neither the world of big law firm practice nor academia prior to becoming a judge on the District of Columbia Court of Appeals, Thomas’s supporters advanced his race and his perseverance in overcoming childhood poverty and racism to the public as his principal qualifications for service on the Court. In what U.S. Civil Rights Commissioner Mary Frances Berry calls an "up from Southern poverty" strategy,\(^3\) Thomas and his backers used Thomas’s race and his experience with poverty to create an image of Thomas as the ultimate role model. The repeated references to Thomas’s impoverished childhood, along with his seem-

\(^3\) A majority of states have undertaken studies of gender and race bias in the courts. The findings of these states provide startling and overwhelming evidence that the justice system continues to be infected with bias. See, e.g., Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission Final Report (Dec. 11, 1991); Minnesota Supreme Court Task Force on Racial Bias in the Judicial System Final Report (May 1993); New Jersey Supreme Court Task Force on Minority Concerns Final Report (June 1992); Report of the New York State Judicial Commission on Minorities (Apr. 1991).

\(^4\) See BERRY, supra note 163, at 18.
ing lack of bitterness about his humble beginnings and about racism, conveyed the image of Thomas as a quintessentially American figure—strong, simple, humble, an everyman. But as a role model, Thomas presented an alluring image to many white Americans. Thomas offered the promise that if other blacks simply would persevere, and leave behind concerns about racism, they could go as far as Thomas had gone in his meteoric rise to High Court nominee. In short, Thomas offered a kind of white fantasy of what blacks could be like if they would only put race issues behind them.

While Thomas’s backers viewed him as a black role model, to many blacks, Thomas was not a role model. In fact, given his record at the U.S. Equal Employment Opportunity Commission, his political views, his public taunting of his sister as a "welfare queen," and his disparaging remarks about well-regarded black leaders, most blacks would have considered Thomas the very opposite of a role model.

Thomas’s nomination threw many black leaders and civil rights organizations into turmoil in deciding whether or not to oppose his nomination to the High Court. Despite their disagreement with nearly all of Thomas’s posi-

365. While these qualities might be valuable in a generic role model, these were not the qualities one would tend to associate with service on the nation’s highest court—a job widely viewed as among the most intellectually challenging in the nation.

366. Wyoming Senator Alan Simpson essentially said this out-right when he remarked during the first hearings:

[T]here are too many people giving groups excuses for various things that happened in their lives . . . . But I think that the last thing anyone needs right now in this country, white, brown, yellow, or black is more excuses for everything. Excuse time is over . . . . You exemplify what all of us might be able to accomplish . . . .


369. See Stuart Alan Clarke, Fear of a Black Planet, SOCIALIST REV. 37, 42-43 (1992) (explaining that if black groups had supported Thomas’s nomination, it could isolate them from allies on left and could aid attacks on affirmative action as well as confuse some of their black constituency); Dele Olojede, Quandary for Black Leaders, NEWSDAY, Aug. 1, 1991, at 4 (stating that NAACP’s position against Thomas’s nomination has failed to close divisions in black community); Gary Lee, Nominee Thomas Finds No Middle Ground; In Behind-Scenes Campaign, Black Legal Community Exhibits Extremes of Mind," WASH. POST, Aug. 9, 1991, at A4 (stating that black lawyers’ attitudes about Thomas were very divisive).
tions on civil rights issues, a majority of blacks supported Thomas at the time of his confirmation. Some advocated supporting Thomas because they feared that if Thomas were not confirmed, President Bush would appoint a white candidate to fill the position. Others believed that as a black man Thomas ultimately would prove himself committed to the advancement of civil rights in his decision-making on the Court. Other blacks and civil rights leaders and organizations, however, opposed Thomas’s nomination. They explicitly recognized that the value of diversity is inextricably connected to the willingness of a racial representative to advance the viewpoints and values of the excluded group he represents. To these diversity advocates, the open seat on the Court was not merely "a black seat." That seat had been held by a particular black man – Thurgood Marshall.

Marshall’s role on the court was not defined solely by his being black. Instead, Marshall’s contribution to the Court was measured by his willingness to forcefully advance the perspective and values of blacks in interpreting legal doctrine – a perspective that had theretofore been absent from Supreme Court deliberations. Justice Marshall’s willingness to share these perspectives and to use them to persuade his court colleagues to rethink legal doctrine in the context of the lives of marginalized people, is an example of the power of

370. See Robert A. Jordan, After Marshall, A Dilemma for Blacks, BOSTON GLOBE, June 30, 1991, at 61 (noting that "Bush can easily nominate a white conservative and not be concerned about political ramifications from black leadership or electorate").

371. See, e.g., Maya Angelou, I Dare to Hope, N.Y. TIMES, Aug. 25, 1991, at A15 (remarking that "[b]ecause Clarence Thomas has been poor, has been nearly suffocated by the acrid odor of racial discrimination, is intelligent, well trained, black and young enough to be won over again, I support him."). Many blacks who initially supported Thomas have since denounced him in light of his hostile record on civil rights issues. See Coleman, supra note 367, at 38, 39.


374. For a powerful analysis of Thurgood Marshall’s contribution to the Court and a persuasive argument that Justice Thomas should see his judicial role in historical context, see generally Judge A. Leon Higginbotham Jr., An Open Letter to Clarence Thomas, 140 U. PA. L. REV. 1005 (1992), and see also LAWRENCE & MATSUDA, supra note 32, at 123-24 (criticizing Justice Thomas for undeserved self-comparison to Justice Thurgood Marshall).
diversity to enhance judicial decision-making. Thus, Marshall functioned as more than a role model or symbol on the Court. Marshall functioned as a representative for blacks and other marginalized groups.

Thus, while President Bush and Thomas's supporters were promoting Thomas as a role model, many African Americans were clamoring for something different. They sought a "representative" on the Court, someone like Thurgood Marshall, who could tell and include the stories of black people and other marginalized groups in the work of the Court. Blacks, in particular, sought a judge who could represent the perspectives shared by most black people on issues related to race, poverty and inclusion. These issues might have included recognizing the continuing power and effect of discrimination in the lives of blacks, favoring affirmative action, and supporting the role of the government in alleviating societal inequity. In desiring a black rather than a white nominee who could advance those views on the Court, blacks also may have legitimately sought a Justice whose adherence to these views would derive from a common racial connection, understanding, and experience. In essence, blacks sought substantive diversity rather than just cosmetic diversity.

Based on the views that Thomas had espoused in the years prior to his nomination to the Court, it was evident that Thomas was unlikely to fulfill the representative function that most blacks envisioned. Even if Thomas

375. See Byron R. White, A Tribute to Justice Thurgood Marshall, 44 STAN. L. REV. 1215, 1216 (1992) (remembering that Marshall "brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match").

376. Compare James Bock, Polls Find Big Divide in Views on Race: Blacks and Whites Reported Far Apart in Perceptions, BALT. SUN, June 11, 1997, at 1A (reporting that vast majority of blacks believe discrimination is common) with Whren v. U.S., 517 U.S. 806, 813 (1996) (reflecting Thomas's acceptance of majority decision that reasonableness of traffic stop does not depend on actual motivation of individual officer). Given the frequency that blacks are pulled over for being black, see supra note 6 and accompanying text, this decision perpetuates the daily discrimination in the lives of black people.

377. Compare Bock, supra note 376 (stating that 59% of African Americans support federal action to improve position of non-whites) with Adarand v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (arguing that "'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence").


380. Since his confirmation, Thomas has demonstrated his unwillingness and/or inability to serve the representative function envisioned by many blacks. This is evident not only because his decisions are persistently at odds with the views of most blacks, but most importantly because
could be held out as "representing" the small fraction of the African American population that shares his views, the idea that this subset of the African American population should be represented on the Court, while a majority of African Americans remain unrepresented, turns the concepts of both diversity and representation on its head.

Thomas's performance shows that linking diversity to the creation of role models invites the "personalization" of diversity efforts. The personal story of the judicial nominee, becomes more important than the connection of the nominee to a community or constituency. Thomas's personal accomplishments and struggles, for example, were lauded without regard to how those experiences connected him with, or disconnected him from, most African Americans. This "personalized" sense of his qualification for service on the Court permitted Thomas to be held up as a role model for a community with which he is fundamentally at odds on almost every critical legal issue affecting race. By contrast, assessing Thomas as a potential "representative" rather than role model, would have necessitated a very different presentation and confirmation process than the one undertaken by President Bush, Thomas, and the Judiciary Committee. Such a process would have required Thomas to answer coherently the tough questions about the basis for his positions on racial issues with greater clarity. It would have required that Thomas

Thomas appears unwilling to seriously consider and engage the perspective of most blacks in his judicial decision-making on race issues. See, e.g., Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring) (stating that Voting Rights Act will not provide basis for claim of a "dilutive practice"); Hudson v. McMillan, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (disagreeing with "pervasive view that the Federal Constitution must address all ills in our society"). Indeed, Thomas's posture has been one of contempt for the views of most blacks. See, e.g., Justice Clarence Thomas, Remarks to the National Bar Association (July 29, 1998) (explaining that critics take issue not with his opinions, but rather "the principle problem seems to be a deeper, antecedent offense: I have no right to think the way I do because I am black").

Indeed both before and after joining the Court, Thomas has demonstrated contempt for the views and positions of most African Americans around issues related to race and the law. See, e.g., Thomas, supra note 380. This is yet another reason why Clarence Thomas cannot serve as a representative on the Court. As discussed earlier, a representative cannot persistently dismiss or denigrate the well-considered views of his constituency. See supra notes 298-300 and accompanying text (discussing need for representative to give voice to constituent's views).

For Thomas's views in his own words, see Adarand, 515 U.S. at 240 (Thomas, J., concurring) (stating: "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law"); Clarence Thomas, Affirmative Action Goals and Time-tables: Too Tough? Not Tough Enough!, 5 YALE L. & POL'Y REV. 402 (1987); Clarence Thomas, Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation, 30 HOWARD L.J. 983, 985-87(1987).

In response to the questions that were asked of him in this regard, Thomas's answers were often simplistic, opaque, or incoherent. Often, the committee permitted Thomas to loop his answers to substantive questions back around to tales about his personal life. No other nominee to the Court, including Thurgood Marshall and Sandra Day O'Connor, the first woman Justice on the Court, relied upon his or her compelling personal story in their confirmation
explain how he had gone about "stripping down like a runner" and might have demanded that he identify which qualities, perspectives, and values he had stripped from himself in his ostensible pursuit of impartiality.

Instead, Thomas was able to manipulate the desire of many for judicial diversity by simultaneously promising both impartiality and racial empathy. Recognizing the value of his race to conveying the appearance of diversity on the Court, Thomas needed to assure the Senate Judiciary Committee that he would be sensitive to minorities on race and poverty issues. To do so, Thomas needed to pull back from his "stripped down" stance to suggest that he "had not forgotten where he came from." In so doing, Thomas's message to the Judiciary Committee amounted to an indication that he would be entirely impartial and detached from the political agenda he had supported as an appointee of President Reagan, but that the nation nevertheless could count on him to demonstrate racial sensitivity. Thus, on the one hand Thomas would be "stripped down like a runner" from the conservative political views he had espoused in speeches and writings, while on the other hand Thomas would empathize with the poor and with minorities. For example, Thomas offered descriptions of his boyhood experiences encountering racism and living in poverty in order to convey a sense of racial empathy. To suggest his continued sense of racial connection, Thomas described his reaction to seeing busloads of undoubtedly mostly black prisoners outside the window of his judicial chambers in Washington, D.C. as: "but for the grace of God, there go I." Thomas thus signaled to the committee that he had not "stripped down" his sense of racial connection.

process to the extent Thomas did. Indeed, by contrast, Thurgood Marshall, during his confirmation hearings to the Court of Appeals for the Second Circuit, was grilled over months almost entirely on his record of work as a civil rights lawyer with the NAACP. He spent hours before the Judiciary Committee refuting accusations that he was a Communist or affiliated with the Communist Party. For an account of the Senate hearings on Marshall's confirmation to the Court of Appeals for the Second Circuit, see Williams, supra note 46, at 298-303.

384. Minow, supra note 313, at 1201 (describing Thomas's efforts to convey empathy for poor and for blacks while promising that he had no political agenda).

385. The Nomination of Clarence Thomas, supra note 360, at 260.

386. And by strategically flashing his race and class credentials to the all-white, wealthy members of the Judiciary Committee, Thomas avoided coherently answering direct questions about his views and silenced many of his white Congressional critics. Utah Senator Orrin Hatch, the ranking Republican member of the Judiciary Committee, reportedly remarked, "Anybody who takes [Thomas] on in the area of civil rights is taking on the grandson of a sharecropper." Stephen Wermiel & Paul M. Barrett, The Marshall Seat: Bush's Court Nominee, A Black Republican, Is Deft Political Choice, WALL ST. J., July 2, 1991, at A1. Some blacks were not similarly intimidated by Thomas's humble background. See, e.g., Mary McGrory, Scenarios for Thomas, WASH. POST, Aug. 15, 1991, at A2 (challenging Thomas's intimidation of Committee in this regard, Elaine Jones, then Deputy Director-Counsel of NAACP Legal Defense & Educational Fund, Inc. was quoted as saying, "[a]ll of us who grew up in the South have an outdoor privy in our background not too far back").
The post-mortem on Thomas's confirmation performance is sobering. On the Court, Thomas has shown himself to be committed to the conservative positions he embraced as a policymaker in the Reagan administration but from which he distanced himself at his confirmation hearings. And he is, apparently, willing to use his racial credentials in furtherance of those positions. No longer distancing himself from his long-held conservative views, Thomas now relies on the tactic of Thurgood Marshall — using stories from his past — to convince members of the Court to take positions directly counter to those that Thurgood Marshall and a majority of African Americans would have embraced. The irony here is rich.

Yet Thomas's cynical and masterful use of his role model status could not have been achieved but for the impoverished and timid diversity discourse that characterizes the value of black judges as role models rather than as representatives. For this reason, Thomas's nomination, confirmation, and subsequent jurisprudence on the Court is a wake-up call, reminding us how easily manipulable the idea of cosmetic racial diversity can be.

C. Looking Beyond the Race of the Judge

As the work of Sylvia Lazos Vargas suggests, and as the Clarence Thomas nomination demonstrated, efforts to promote diversity on the bench are, at their core, attempts to increase cultural pluralism in judicial decision-making. The goal is to increase not just cosmetic diversity, but to increase the number of judges who can authentically articulate and legitimate the perspectives and values of "outsider voices" in judicial decision-making. If this is indeed the goal, then we must keenly focus our judicial diversity efforts on

387. Thomas's decisions on the Court are among the most hostile towards the civil rights of racial minorities and the poor. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 129 (1996) (Thomas, J., dissenting) (arguing that Mississippi may require indigent mother whose parental rights have been terminated to pay more than $2,000 for trial transcripts required for appeal); Shaw v. Reno, 509 U.S. 630, 636, 658 (1993) (reflecting that Justice Thomas joined majority to overrule proposed North Carolina redistricting plan that would have created two majority black congressional districts in that state).

388. See, e.g., Jeffrey Rosen, Moving On, NEW YORKER, Apr. 29 & May 6, 1996, at 66 (describing reports of Thomas's "personal appeal" to colleagues during the deliberations for the Adarand v. Pena affirmative action case). Based on interviews with Supreme Court clerks, Rosen reports that Thomas "talked about his grandfather . . . . His grandfather had worked hard, Thomas declared; he never asked for handouts from the State. He hadn't made a great living, and his business had been restricted to black neighborhoods; but he had not needed affirmative action to get his contracts." Id.

389. This is yet another reason to reject the "role model" rationale for diversity. It's simply a poor rhetorical choice. As one critic of the "role model" justification for racial diversity reminds us "[e]ven a racist can embrace the role model argument." Allen, supra note 8, at 34.

390. Indeed judges should be encouraged to expose themselves to a wide range of ideas and experiences.
those candidates who are both capable of and willing to include outsider narratives to judicial decision-making.

As this paper suggests, African American judicial candidates often are very qualified to perform these tasks. Some African American judicial candidates, however, may be both unwilling to and/or unable to "represent" outsider voices. Not every black judicial candidate must serve the purposes of diversity. But when a candidate garners support, even in part, for his or her ability to bring "diversity" to the bench, then the supporters must define the substance of that diversity by more than the candidate's racial membership.

When the value of diversity is focused on a candidate’s ability and willingness to represent outsider voices in judicial decision-making, then it becomes clear that even white judges will, in some instances, be qualified "diversity" candidates. White judges will not share the common historical and experiential bonds of racial subordination with blacks. As a result, white "diversity" candidates cannot replace the need for black judges. Blacks will continue to seek judicial representatives who share these bonds. Yet in some instances, white judges will have experienced and internalized counter-narratives and will be willing to rely on those narratives in their judicial decision-making. White judicial candidates who are both able to and prepared to represent outsider voices in judicial decision-making should be supported as furthering the goals of cultural pluralism in judicial decision-making. The harsh condemnation confronting white judges when they perform such a representative role suggests that the danger of racial homogeneity on the bench may be less about preserving the bench for white judges than it is about preserving the dominance of white norms and values in legal decision-making.

D. The Case of Judge Harold Baer: Including Outsider Voices in Judicial Decision-Making

The 1996 highly charged case of Harold Baer, a white federal judge in the Southern District of New York, whom President Clinton appointed in 1994, dramatizes this phenomenon. In 1996 Judge Baer ruled in favor of an African American, female defendant who moved to suppress the use at trial of 34 kilograms of cocaine and 2 kilograms of heroin that police officers found in the trunk of her car.391 The defendant, Ms. Bayless, contended that the drugs were found pursuant to an illegal search and that the drugs represented "fruit of the poisonous tree."392 The police supported the legality of their search, contending that they had a reasonable suspicion that Ms. Bayless

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392. Id. at 238 (citing Wong Sun v. United States, 371 U.S. 471, 484-85 (1963)).
was involved in illegal conduct.\textsuperscript{393} As evidence in support of that suspicion the police contended that according the police testimony, some young men placed several duffel bags in the trunk of Ms. Bayless’s car and then walked away from the car. Upon noticing the police scrutiny, the young men spoke with one another, and several of them began to run. The police cited the fact that the young men fled as evidence supporting their reasonable suspicion that criminal activity had taken place.\textsuperscript{394}

Soon after her arrest, Ms. Bayless, described as "a middle-aged black woman,"\textsuperscript{395} gave a videotaped confession in which she described in great detail her role as a drug "mule," traveling between Detroit and New York on at least twenty occasions to transport drugs and/or large sums of money.\textsuperscript{396} Judge Baer found Ms. Bayless’s taped confession to be most credible, based in part on her incrimination of both herself and her son, the fact that she had been offered "no immunity or even special consideration" in exchange for the confession, and the detailed nature of her confession.\textsuperscript{397} Given the credibility of Ms. Bayless’s description of the events leading up to the search, in contrast to the arresting officer’s less credible account of the search, Judge Baer found that the search violated the Fourth Amendment and as such suppressed the evidence as illegally obtained.\textsuperscript{398}

Less than four months later, Judge Baer had reversed his decision, apologized for statements he made in his opinion, and removed himself from further participation in the case.\textsuperscript{399} Baer’s reversal followed a vicious and highly visible condemnation of his opinion. Presidential candidate Bob Dole, Speaker of the House Newt Gingrich, and other Republican political leaders publicly denounced Judge Baer and suggested that he should be impeached.\textsuperscript{400}

\textsuperscript{393} Id. at 235.
\textsuperscript{394} Id. at 236.
\textsuperscript{395} Id. at 234.
\textsuperscript{396} Id. at 236.
\textsuperscript{397} See id. (finding that defendant Bayless’s "candor and the breadth and nature of her statements give her statements credibility"). Judge Baer also place[d] considerable weight on the defendant’s statements because of how they incriminate her, her son and others and because at the time the statements were made, the defendant unlike the Officer, had no reason to color the facts. Furthermore, the defendant’s version of the events, recorded twelve hours or less after her arrest, is likely to be a more accurate statement of what occurred that morning than an officer’s testimony offered more than eight months after the events took place. \textit{Id. at 239.}

\textsuperscript{398} Id. at 243.

President Clinton, who had appointed Judge Baer, called the decision "wrong-headed" and through his press secretary indicated that the White House would be closely monitoring the outcome of the Motion for Reconsideration that the U.S. Attorney filed in the case.\footnote{401}

Why did Judge Baer’s opinion elicit such a strong public response? Although it formed a brief part of the opinion, Judge Baer’s interpretation of the actions of the young black men who placed the illegal drugs in the trunk of Ms. Bayless’s car became the focus of the greatest media attention and political condemnation.\footnote{402} In assessing the "reasonableness" of the police officers’ conduct in the context of their articulated reasons for searching Ms. Bayless’s car to a search Judge Baer stated:

Police officers, even those traveling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney’s Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.\footnote{403} The power of this finding lies in Judge Baer’s decision to analyze the behavior of these young men from the perspective of young African American men from the Washington Heights community. From the perspective of these young men, it would be perfectly logical to flee from the attention of the police. Judge Baer contextualized the behavior of the young men. He noted that the Washington Heights neighborhood had become infamous for the

\footnote{401. Linda Greenhouse, Judges as Political Issues, N.Y. TIMES, Mar. 23, 1996, at A1 (describing political fall-out from Judge Baer’s decision); Allison Mitchell, Clinton Pressing Judge to Relent, N.Y. TIMES, Mar. 22, 1996, at A1 (same). Judge Baer did receive support from judicial colleagues on the Second Circuit Court of Appeals who authored a letter decrying the vilification of judges for their opinions. Second Circuit Chief Judges Criticize Attacks on Judge Baer, N.Y. L.J., Mar. 29, 1996, at 4. The Second Circuit judges were particularly concerned with political threats to the judicial independence of Article III judges. \textit{Id}.}

\footnote{402. Although Baer’s opinion contains more pointed and explicit criticism of the police and of racist law enforcement policies, his finding that the decision to run from the police was a logical and sensible act within the context of the lives of young black men in Washington Heights received the greatest public condemnation and vitriol. For example, Baer remarks, "[w]hat I find shattering is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person." United States v. Bayless, 913 F. Supp. 232, 240 (S.D.N.Y. 1996). This comment is among the most inflammatory in the opinion in part because it is entirely unrelated to any of the facts alleged by either the police or the defendant in the \textit{Bayless} case.}

\footnote{403. \textit{Id}. at 243 (emphasis added) (footnotes omitted).}
indictment of corrupt police officers who engaged in corrupt practices, including stealing from drug dealers, planting evidence and falsely arresting persons. The illegal practices of cops in Washington Heights was widely reported and known to most of all to residents of the neighborhood, most of whom had lived for years under the occupation of a band of corrupt police officers.

Judge Baer was well acquainted with the hostile relationship between police and the Washington Heights community. Judge Baer himself had served for two years on the very mayoral task force that uncovered the vast network of police corruption in precincts throughout the city, including Washington Heights. Thus, Judge Baer’s recognition of the highly-charged relationship between the police and residents in Washington Heights shaped his account of the young men’s behavior in the Bayless incident. Judge Baer also emphasized that the tense relationship between the police and young black and Latino men in Washington Heights was, as a result of the Mollen Commission, well-known to the public. Certainly the police officers who patrolled the community should have known the nature of that relationship. As such, the police officers could not legitimately base their suspicion that the young men were engaged in illegal activity on the fact that the men fled when they saw the police watching them.

It is, perhaps, precisely because Judge Baer insisted on including and articulating an account of "reasonable behavior" and "suspicious activity" from the perspective of Washington Heights residents that this section of his opinion raised such concern. Baer’s endorsement of the conduct of the young men who ran from the police is a condemnation of our society’s persistent criminalization of urban black youth. His analysis of the young men’s flight from the police is remarkable simply because it gives voice to the residents who live in communities policed by corrupt cops. In essence, Baer states the obvious: Community members respond rationally to police misconduct. By refusing to credit the police account that the decision of the men to flee was indicative of criminal conduct, Baer refuses to participate in the criminali-
zation of the community’s response to corrupt cops. Baer’s assessment of the relationship between the residents of urban minority communities and the local police force presents a more complex and troubling picture of law enforcement than the viewpoint most mainstream media outlets and most politicians offer. Baer’s discussion suggests that just as law enforcement, politicians, and the general public have responded to increased levels of urban criminality with more cops, tougher laws, and stiffer prison sentences, so too are urban, minority residents responding to criminality among law enforcement personnel with increased suspicion, insularity and self-protection.

Judge Baer did not limit his effort to interpret the facts surrounding the search and drug seizure from the perspective of the defendant and the Washington Heights community to his analysis of the relationship between the police and local residents. Baer’s opinion serves as a more generalized critique of the negative race and class stereotypes which underpin the conduct of law enforcement officers in New York. In nearly every paragraph of the opinion, Baer challenges the police account of the search incident by questioning the policemen’s implicit assumptions about the Washington Heights neighborhood, African American men and women, and poor, inner city New York residents. For example, the police officer stated that his initial suspicion of Ms. Bayless was aroused by the fact that she drove a car with Michigan license plates at 5 a.m. The clear implication of the police account is that the police officer found it unusual for an African American woman to drive a car with Michigan plates in Washington Heights, especially at 5 a.m. Judge Baer challenges the police attempt to paint these facts as evidence of "suspicious activity." Judge Baer states:

Here, the defendant was observed in an area allegedly known for its drug trading. Yet, I find nothing unusual about the time at which she was observed. In New York City, people travel to and from work at all hours of the day and night . . . . Officer Carroll puts great stock in the fact that defendant was driving a car with an out-of-state license plate at the time of her arrest and that she double parked on a city street. In a city which considers itself "The Capital of the World" and which is regularly crowded with out of state and foreign visitors . . . it is not odd to see a license plate from another state.

Baer isolates three critical police observations and reinterprets them from the perspective of a hypothetical black resident of Washington Heights. First, he positions the Washington Heights neighborhood as part of New York City — "the Capitol of the World." Baer rejects the attempt by the police to depict Washington Heights as a generic poor, black and Latino neighborhood. Baer firmly puts the neighborhood in context, endowing it with its rightful

408. Bayless, 913 F. Supp. at 236.
409. Id. at 240 (footnotes omitted).
position as part of the great New York and part of Manhattan. This view is
directly contrary to the manner that police and the media describe most poor,
minority neighborhoods in New York. When the facts the arresting officers
provide are put in the geographic, social, and cultural context of New York,
rather than just Washington Heights, the officers’ suspicion that Ms. Bayless
was engaged in illegal behavior becomes less "reasonable."

Second, Baer, by providing the most likely lawful rationale for why Ms.
Bayless might have been double-parked on the street at an early hour, reveals
the proclivity of the police to dismiss the possibility that black residents of
poor neighborhoods lead lives filled with many of the same activities as that
of white New Yorkers in middle-class neighborhoods. Baer imagines, for
example, that Ms. Bayless might have been a Michigan resident on a visit to
New York "returning to her home state and want[ing] to get there before
nightfall." 410 By offering this hypothetical explanation, Baer demonstrates
that in the mind of the police, such average stories do not exist for inner city
blacks.

Finally, Judge Baer reveals and condemns what he believes is the funda-
mental premise of the police decision to observe and ultimately to search Ms.
Bayless— that the mere presence of any individual on the street of a neigh-
borhood designated "high crime" is itself suspicious. 411 Judge Baer forcefully
reminds the police that "[t]he mere presence of an individual in a neigh-
borhood known for its drug activity . . . fails to raise a reasonable suspicion that
the person observed is there to purchase drugs." 412 Baer exposes and con-
demns law enforcement’s cavalier dismissal of poor minority neighborhoods
as places where only criminals live. Instead Baer, through the image of his
hypothetical traveler from Michigan who seeks to return home early "after
visiting relatives in New York City," 413 envisions the lives of Washington
Heights residents as potentially as familiar as the lives of any average Ameri-
cans. Washington Heights is not just "a hub for the drug trade," 414 insists
Judge Baer, but also a place where ordinary people with ordinary families,
relationships, and habits live.

410.  Id.
411.  In fact, Judge Baer chides the police for failing to offer any evidence that the neigh-
borhood "is a known hub for the drug trade."  Id. at n.12.
412.  Id. at 240.
413.  Id. at 242.
414.  Id. at 240 n.12.  Judge Baer also criticizes the broad net cast by the police in describ-
ing "the high crime area" and remarks upon the failure of the police to offer "proof to corrobo-
rate their statement that the area surrounding 176th Street and St. Nicholas Avenue is a known
hub for the drug trade."  Id. Although few would probably dispute that the drug trade is quite
prevalent in this area, Judge Baer, by requiring proof of this fact again seeks to compel the
police to exercise care in condemning whole neighborhoods simply because they are poor and
minority.
In effect, Baer offers a counter-narrative of the life of poor blacks and Latinos living in New York. In so doing, he offers a critique of widely used law enforcement procedures from the perspective of "outsiders." He exposes the fact that activity which would be unremarkable in white, middle-class neighborhoods raises suspicion among white police officers when it occurs in a poor, minority community. Baer’s analysis returns us to the admonition he quotes at the outset of his opinion, that "[t]he great enemy of truth is very often not the lie – deliberate, contrived, and dishonest – but the myth – persistent, pervasive and realistic." The effect of Judge Baer’s decision is potentially powerful. It serves not only as an indictment of the police in this case, whose testimony he finds "incredible," but it is also an indictment of the cultural assumptions and racialized perspective that are deeply embedded in the criminal justice system in New York. But the potential power of Judge Baer’s decision is extinguished by his subsequent reversal and apology for the very language in the opinion that gave voice to black and Latino Washington Heights residents.

What the Baer case reveals is that if a white judge explicitly represents and relies upon perspectives and values from minority communities, he too may face public denunciation. If this is true, it further suggests that it is diversity of perspective in judicial decision-making, rather than just the cosmetic diversity of decision-makers, that remains the real challenge. In sum, while the race of the judge often will be an appropriate and legitimate indicator of a judge’s potential to bring diverse perspectives to adjudication, diversity efforts must focus as well on a judicial candidate’s ability and willingness – regardless of his race – to articulate and utilize the perspectives of marginalized communities in his judicial decision-making. Where a white judge demonstrates this capacity, then he/she should be supported by diversity advocates as well.

415. Implicit in his decision to expose the stereotype is Baer’s recognition that the use of such images as a basis for law enforcement decisions gives police virtual free reign within poor communities of color. It is not surprising then that the most egregious incidences of police corruption and misconduct often occur in poor communities.

416. Bayless, 913 F. Supp. at 234 (quoting President John F. Kennedy, Commencement Speech at Yale University (1962)).

417. Id. at 239-40. Judge Baer refers to Officer Carroll’s testimony as "gossamer." Id. at 239.

418. The representation of this perspective may have been particularly unexpected from Judge Baer who had enjoyed a successful career as a federal criminal prosecutor in the U.S. Attorney’s office. Judge Baer served as Chief of the Organized Crime and Racketeering Unit in the U.S. Attorneys’ office from 1961-1967 and was First Assistant U.S. Attorney in the Criminal Division from 1970-1972.
Conclusion

Ongoing challenges to the impartiality of minority judges, condemnation of white judges who articulate "outsider" perspectives, and the LULAC line of cases, together suggest that advocates of judicial diversity no longer can avoid describing why "race matters" in judging. A public discourse that challenges prevailing assumptions about judicial impartiality and articulates the potential contribution of black judges to judicial decision-making must undergird cases challenging discriminatory judicial election schemes, as well as other judicial diversity efforts. Arguments advancing judicial diversity must challenge the idea that the all-white bench is racially impartial. Most importantly, diversity strategies must focus on the need to include the perspectives and views of blacks and other outsiders in judicial decision-making, rather than focus on promoting minority role models. This will mean supporting and promoting the nomination of more black judges to the bench, and examining the potential of those judicial aspirants to represent outsider communities. It will also mean supporting white judges who are capable of bringing outsider voices to judicial decision-making.

Charges of judicial activism, essentialism, and racism undoubtedly will surround these efforts. Workable solutions will remain hard to find. Judicial selections systems which yield diversity and highly qualified judges must be identified. The creation of mandatory judicial education programs which engage judges in examining their situated stance and the existence and the relevance of alternative perspectives will play a key role in meeting the goals of diversity. All of these tasks will be difficult. But given the continued exclusion of blacks and other racial minorities from full participation on the bench, and the vilification of white judges who articulate outsider perspectives, diversity advocates have no choice but to wade through these muddy waters. Judicial diversity advocates can help explore and promote the potential for all judges affirmatively to identify and to engage multiple perspectives in their judicial decision-making. By focusing specifically on the exclusion of outsider voices from judicial decision-making, rather than just the exclusion of outsider faces from the judiciary, judicial diversity advocates challenge all judges — not just minority judges — to recognize their situated stance, and to reach out to engage other realities in judicial decision-making.