EQUAL TREATMENT IN JUDICIAL APPOINTMENTS

*Peter Kirsanow**

INTRODUCTION

What is the appropriate role of race, if any, in judicial appointments? The short answer is, "Race should have no role in judicial appointments." As there is considerable literature arguing that race *should* play a role in judicial appointments, I am pleased to have this opportunity to share with you why it should not.

I. WHAT DOES "JUDICIAL DIVERSITY" MEAN?

The use of race in judicial appointments, as in other areas, is usually justified on the basis of "diversity." Proponents of "judicial diversity" offer several rationales for their position. Before addressing these rationales, we must ask, what is meant by "judicial diversity"?[1] It obviously does not solely mean that the bench should be open to attorneys of all races. That is something on which most everyone agrees, and there would be no reason to hold this symposium panel.

What "judicial diversity" means in this context is that nonwhites, particularly blacks, are supposedly "underrepresented" on the bench, and therefore we should engage in racial preferences to appoint more

* Peter Kirsanow is an attorney at Benesch, Friedlander, Coplan & Aronoff LLP, a former member of the National Labor Relations Board, and a member of the U.S. Commission on Civil Rights.

1 *See* Peter W. Wood, *Diversity's Descent*, *in* A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 87, 88 (Gail Heriot & Maimon Schwarzschild eds., 2021).

> *Diversity* is never just one thing. It names several things at once: the ideal of a harmonious social order made of different groups, the apportionment of social goods in relation to the size of an ethnic group's population, a shorthand for "black underrepresentation," an exploitative trick played by white supremacists, and more.

Id.

blacks to the judiciary.[2] (The discussion of "judicial diversity" has spread to encompass all racial minorities but the primary engine driving it, as in all discussions involving race, is concern over black Americans.)

As a preliminary matter, there may have been a colorable argument that it would be salutary to increase the number of, say, black state court judges years ago when racial discrimination was more pervasive. It is at least defensible to argue that the presence of black judges might help build confidence among black litigants that their matters would be fairly and impartially adjudicated. But even then, any inclination toward expanding judicial diversity should have been consistent with the overriding principle of nondiscrimination.

II. RATIONALES FOR "JUDICIAL DIVERSITY"

A common justification for racial preferences in general is that if any institution or body does not "look like America," the public cannot be expected to have confidence in it.[3] Another common justification is that people need to "see people who look like them" in important positions. Others claim that a "diversified bench" might help overcome implicit bias, or would improve judicial decisionmaking by bringing disparate experiences to the bench.[4] Still others may have an unarticulated sense that the criminal justice system discriminates against minorities in general, and blacks in particular, and this could be ameliorated if there were more black judges.

Perhaps the most influential article on judicial diversity, written by Sherrilyn A. Ifill, argues that minority judges serve as representatives of their racial group and should use their position to advance policy positions purportedly held by the racial group.[5]

One of my concerns about the importance placed on judicial diversity is that it implicitly abandons the ideal of neutrality and

---

2 "Underrepresentation" is not, standing alone, problematic. It should only raise concern if it is clear the underrepresentation is due to disparate treatment—note that I say disparate *treatment*, not disparate *impact*. As my colleague Gail Heriot has written, *everything* has a disparate impact. There is no field of human endeavor in which all racial and ethnic groups are represented precisely in proportion to their share of the population. *See* Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 34 (2020).

3 *See* Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 13, 2019), https://www.americanprogress.org/article/building-inclusive-federal-judiciary/ [https://perma.cc/22YU-C76B]; Jenny Rivera, *Diversity and the Law*, 44 HOFSTRA L. REV. 1271, 1273–74 (2016).

4 *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1072 (2019).

5 *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 467 (2000).

correctness in judging. In a recent law review article, the author wrote, "there exist minority group judges making legal claims contrary to minority interests."[6] Some proponents of judicial diversity explicitly argue that judges should issue decisions influenced by the race of the litigants, and advance an "antiracist" agenda through their judicial role:

> If courts are to have any role in addressing the entrenched racial disparities in the criminal legal system, then judges must, *at a minimum*, be willing to take into account the role that race plays in the administration of justice. For that reason, we have called for "color-conscious" judges who are willing to "account for the differences in the experience of Black and white Americans with police, prosecutors, and juries." And we have advocated for judges to adopt an antiracist approach to criminal law, which contemplates how the government has "used its power to punish as a means to subordinate Black people." If we as a society are truly going to reckon with race, then the judiciary must be a part of that reckoning.[7]

The foregoing paragraph incorporates two assumptions popularized by Ibram Kendi. The first is that any racial disparity is evidence of discrimination. For Kendi, it is impossible that a racial disparity can be due to differences in behavior—or rather, if the disparity is due to differences in behavior, then the standard itself is racist.[8] Unfortunately, this assumption has been swallowed by many well-meaning people, because it is easier than confronting the truth that racial disparities are primarily due to differences in behavior. This is certainly true in regard to racial disparities in criminal offending.[9]

---

6 Breger, *supra* note 4, at 1080.

7 Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027, 1028–29 (2021) (footnote omitted) (first quoting Brandon Hasbrouck, *Pack the Court with Color-Conscious Justices*, RICHMOND TIMES-DISPATCH (Oct. 8, 2020), https://richmond.com/opinion/columnists/brandon-hasbrouck-column-pack-the-court-with-color-conscious-justices/article_fbd0ab39-0a70-51d0-a144-a889dd96f158.html [https://perma.cc/9JML-JLCY]; and then quoting Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 719 (2021)).

8 *See, e.g.*, *Amanpour & Co: Bestselling Author Ibram X. Kendi; How to Be an Antiracist* (PBS television broadcast Feb. 13, 2020), https://www.pbs.org/wnet/amanpour-and-company/video/bestselling-author-ibram-kendi-how-to-be-an-antiracist/ [https://perma.cc/55W3-5RT2] ("One either allows racial inequities to persevere, as a racist, or confronts racial inequities, as an anti-racist. There is no in-between, safe space of not racist. The claim of not racist neutrality is a mask for racism.").

9 *See* Peter Kirsanow, *Dissenting Statement*, *in* U.S. COMM'N ON CIV. RIGHTS., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 217, 231–232 (2022) (citing *2019 Crime in the United States: Table 43A; Arrests by Race and Ethnicity*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43 [https://perma.cc/CK9E-CN7R]).

> African-Americans are overrepresented relative to their population share in every crime category except for "drunkenness" and "driving under the influence," where they account for only 14.8 percent and 14 percent of arrests, respectively. Interestingly, whites constitute a huge majority of those arrested on "suspicion,"

The fact that disparate involvement in the criminal justice system is primarily due to racial disparities in criminal offending is supported by self-reports of criminal victimization.[10]

The second assumption is that "antiracism" is necessary to counteract supposed "racism." "Antiracism" does not mean "not

---

which would likely be an easy catch-all charge if the police were truly seeking to discriminate on the basis of race. But here is a sample of black percentages of other crimes:

- Murder and non-negligent manslaughter: 51.2 percent (this is actually larger in both number and percentage than white arrests for murder and non-negligent manslaughter, not just in terms of population share)
- Rape: 26.7 percent
- Robbery: 52.7 percent
- Aggravated assault: 33.2 percent
- Burglary: 28.8 percent
- Larceny-theft: 30.2 percent
- Motor vehicle theft: 28.6 percent
- Fraud: 30.5 percent
- Embezzlement: 36.3 percent
- Weapons; carrying, possessing, etc.: 41.8 percent
- Prostitution and commercialized vice: 42.2 percent
- Drug abuse violations: 26.1 percent
- Offenses against the family and children: 28.3 percent
- Drunkenness: 14.8 percent
- Driving under the influence: 14.1 percent

This is not an exhaustive list even of crimes tracked by the FBI. Again, blacks constitute approximately 13 percent of the U.S. population. Except for crimes pertaining to the personal consumption of alcohol, African Americans are represented among arrests for almost every type of crime at least double their percentage of the population. This includes "white-collar" crimes such as fraud and embezzlement.

Id.

10 Written Testimony from Matt DeLisi to the U.S. Commission on Civil Rights: Civil Rights Implications on Cash Bail 8 (Feb. 2, 2021) (citing ALLEN J. BECK, BUREAU OF JUST. STATISTICS, RACE AND ETHNICITY OF VIOLENT CRIME OFFENDERS AND ARRESTEES, 2018, BUREAU OF JUSTICE STATISTICS (2021)) (on file with the Commission).

> Of course, allegations of systemic or institutional racism in the criminal justice system would impugn official arrest data due to concerns that police activity itself is biased. *However, large racial differences in criminal victimization undermine that narrative. This is especially important since most criminal victimization is intraracial.* According to the most recent data from the National Crime Victimization Survey, which is a nationally representative survey of households to measure criminal victimization, African Americans accounted for 29% of nonfatal violent crimes including more than half of robberies, a third of aggravated assaults, and nearly one fourth of rape or sexual assaults and simple assaults. Importantly, there are no statistically significant differences by race between offenders identified in the NCVS and offenders arrested in the UCR.

Id. (emphasis added).

racist." It means to intentionally discriminate against (primarily white, but also Asian) people to counteract the effects of facially neutral policies that disproportionately disadvantage black people.[11]

Judges should not represent any interests other than the interest of the law. Their sole concern should be applying the law to the best of their ability, not representing the interests of "their group" or of some group they believe is disadvantaged.

Those who argue that minority judges have a responsibility to represent the interests of their minority group or to promote views ostensibly representative of their minority group are playing a dangerous game. If minority judges have a responsibility to promote the interests of their race, there is no rational argument against white judges having a responsibility to promote the interests of *their* race.

The question then arises whether any litigant can expect fairness from a judge of another race. If a black litigant cannot expect to receive a fair hearing from a white judge, will white litigants expect to receive a fair hearing from a black judge? Perhaps black judges should only hear cases with black litigants, and white judges should only hear cases with white litigants. This seems absurd, but it is a natural outgrowth of the "diversity as fairness" argument.

In arguing for the pursuit of judicial diversity so black judges can "engage the values and perspectives of African Americans in their judicial decision-making," Sherrilyn Ifill attempts to reconcile racially informed judicial decisionmaking with judicial impartiality.[12] She fails in the attempt. It is impossible to reconcile the two positions, but proponents of racially informed judging must pretend it is possible to do so or the public will reject their project from the start.

The examples Ifill provides of how to reconcile racially informed judicial decisionmaking with judicial impartiality are cases from 1974

---

11 *See, e.g.*, *Amanpour & Co.*, *supra* note 8.

> So, typically, Americans of all races tend to define a policy as racist or even discriminatory based on whether it has racial language in the policy, or based on the intent of the policy-maker, not the outcome. And so, if we were to define racist policies as racist by their outcome, what we would then see is, the outcome of all of these polic[ies]—of many of these policies[—]are white people being on the higher end of those outcomes. But, again, if we are—if we're determining by the actual policy itself, and that then allows a white American to say, well, isn't, for instance, affirmative action anti-white? And then that would cause people like me to say, well, isn't a standardized test set of policies anti-black, because the outcome, it's leading to racial disparities, where white people [are] on the higher end? And so I think that one of the things that all Americans need to realize is that we should be defining policies as racist based on their outcome.

Id.

12 Ifill, *supra* note 5, at 415.

and 1975.[13] In both cases, the defendants moved for recusal on the basis of the judges' race and (in the first instance) involvement in African American organizations,[14] and (in the second instance) history as a plaintiffs' lawyer who had represented African Americans.[15]

In the first, Judge A. Leon Higginbotham defended his ability to be impartial while publicly espousing views on Supreme Court decisions involving race and speaking to organizations concerned with African American issues.[16] He did not say that he was on the bench to represent an African American perspective.[17] He stressed that litigants' race would not affect his judgments.[18]

In the second cited case, the defendant moved that the judge recuse herself due to her race, sex, and history as a plaintiffs' lawyer in employment discrimination cases.[19] Judge Motley observed, "The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal."[20] Nowhere in her opinion denying the motion for recusal did Judge Motley state that her race would in some way inform her exercise of the judiciary function. Rather, she reiterated her impartiality and observed that every judge has a race and sex.[21]

One should note that both these cases are from the mid-1970s. Ifill, writing in 2000, cited no more recent cases of black or female judges being asked to recuse on the basis of their race or sex. As a

---

13 *See id.* at 459; Commonwealth v. Loc. Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974); Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).

14 *See* Commonwealth v. Loc. Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974).

15 *See* Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).

16 *See Loc. Union 542*, 388 F. Supp. at 162–71.

17 *See id.* at 180.

18 *See id.*

> Obviously, black judges should not decide legal issues on the basis of race. During my ten years on this court, I have not done so. I have, depending on the facts, sentenced numerous black and white criminal defendants to substantial terms of imprisonment. I have placed other criminal defendants, both black and white, on probation. Depending on the relevant facts, some civil cases have been decided in favor of and others against black litigants. In this case, plaintiffs similarly will enjoy no advantage because they are black; defendants will not be disadvantaged because some of them are white. The outcome of this case will be dictated by what the evidence shows, not by the race of the litigants.

Id.

19 *See* Blank v. Sullivan & Cromwell, 418 F.Supp.1, 3–5 (S.D.N.Y. 1975).

20 *Id.* at 4.

21 *See id.*

litigator of over forty years, it is almost inconceivable to me that such a motion would be made today, or indeed would have been made at any time after 1980. The American people largely embraced the ideal of colorblindness that emerged from the mainstream civil rights movement. Thus, it was not accurate in 2000, and is less accurate today, to claim that minority and female judges "face unique challenges from white litigants" in regard to their impartiality.[22] Ifill likely knew that at the time, or she would have cited examples that were less than a quarter-century old.

Some proponents of "judicial diversity" claim that they do not want race to affect a judge's decisions but their other statements belie these disclaimers.[23] Other proponents of "judicial diversity" openly admit that they hope black judges will use concern about racial justice to adopt progressive judicial philosophies.[24]

This is not to suggest that it is appropriate for white male judges to allow their race and sex to influence their decisionmaking. It is not appropriate. Nor does it mean that only minority judges can inappropriately make decisions with an eye toward supposedly representing minority viewpoints. Ifill writes, "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."[25]

There are no credible studies that show that a more "diverse" judiciary would yield "better" decisions. Indeed, it is unclear how that would even be measured. One might compare rates of reversals, but

---

22 Ifill, *supra* note 5, at 458.

23 *See id.* at 451.

> 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.

Id. *See also* Natalie Gomez-Velez, *Judicial Selection: Diversity, Discretion, Inclusion, and* the Idea of Justice, 45 CAP. U. L. REV. 285, 325 (2020).

> Given the general rejection of traditional formalist views of judges as neutral arbiters of static legal principles, there is broad recognition of the role of race, ethnicity, gender, and class in societal interactions including engagement with the justice system. In short, human experience, including race, class, ethnicity, gender, etc., matters in the process of dispensing justice.

Id. (footnote omitted).

24 Harawa & Hasbrouck, *supra* note 7, at 1032 ("While the Supreme Court's [Fourth Amendment] jurisprudence is mostly colorblind, Judge Gregory's is not. He has successfully deployed the Supreme Court's colorblind cases in a way that recognizes and protects the rights of minorities.") (footnote omitted).

25 Ifill, *supra* note 5, at 488.

that would not be particularly helpful. For example, the Ninth Circuit is the most-reversed circuit in the country.[26] Yet according to the Center for American Progress, the Ninth Circuit has neither the greatest disparity between the percentage of white judges compared to the population in its circuit, nor the smallest disparity.[27]

It also seems unlikely that diversifying the federal judiciary, at least, would lead to appreciably different outcomes, even if one believes that judges' decisions are influenced by explicit or implicit bias. The decisions of federal appellate judges in particular tend to pertain to highly technical questions. Do white judges and black judges have different interpretations of standing requirements, Section 1 of the Sherman Act, or Section 8(a)(3) of the National Labor Relations Act?

It is certainly possible that white judges and black judges could, on average, come to different decisions in some cases. Is that because of their race, or because black judges may be more likely to have, say, progressive political views? Perhaps black judges are more disposed toward black plaintiffs in a discrimination case, but perhaps they would be more likely to be inclined toward *any* plaintiffs in a discrimination case.[28]

Proponents of judicial diversity leave an important question unanswered: What is the "correct" outcome in a given case? Let us assume that black judges, in general, are more likely to rule in favor of plaintiffs in employment discrimination cases and in favor of

---

26 *See* David G. Savage & Maura Dolan, *With Trump Appointees, Supreme Court Delivers 9th Circuit Another Year of Reversals*, L.A. TIMES (July 13, 2021), https://www.latimes.com/politics/story/2021-07-13/with-trump-appointees-9th-circuit-suffers-another-year-of-reversals-at-supreme-court [https://perma.cc/QUU4-7PGH] (noting that the Supreme Court reversed fifteen of sixteen Ninth Circuit decisions that came before it).

27 *See* Root, Faleschini & Oyenubi, *supra* note 3, at Fig. 6.

28 A 2012 study published in the *Harvard Journal on Racial & Ethnic Justice* found that African American judges were far more likely to rule in favor of plaintiffs in federal racial harassment cases than were white or Hispanic judges. Pat K. Chew & Robert E. Kelley, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 103–04 (2012).

> The statistical analyses indicate that judges of different racial and ethnic groups have different decision-making patterns. Simply put, the race of the judge matters in predicting how these racial harassment cases turn out. As shown in Table 1, descriptive and chi-square analyses found that African American judges were the most likely to hold for the plaintiffs; plaintiffs were successful in 42.2% of their cases before African American judges compared to the plaintiffs' baseline success rate of 22.2%. In contrast, plaintiffs had comparatively worse outcomes before White judges with a 20.6% success rate, and before Hispanic judges with a 15.6% success rate. These differences among case outcomes on the basis of judges' race are statistically significant (p=.01), meaning that these differences would occur by chance only 1 in 100 times. The difference between African American judges and all other judges (p-.001) [sic] primarily drives the overall result.

Id.

defendants in criminal cases. Does that mean they are reaching correct decisions? Does it mean that white and Hispanic judges are reaching wrong decisions? Proponents of judicial diversity seem to take the view that there *are* differences in black judges' decisions, there should be differences in black judges' decisions, and we need to consciously appoint more black judges to get *more* of these decisions. This focus on outcomes suggests that there is another interest at play here.

III. JUDICIAL DIVERSITY AND IDEOLOGY: HEADS I WIN, TAILS YOU LOSE

Proponents of "judicial diversity" seem primarily interested in the nomination of judges who not only have the right amount of melanin, but who also hold the "correct" political views. In law review article after law review article arguing for increasing racial diversity among the judiciary, the author pauses to add something like this: "of course, it must be noted that there exist minority group judges making legal claims contrary to minority interests, such as many commentators might say of United States Supreme Court Justice Clarence Thomas."[29]

Many of the motivations for judicial diversity are similar to those for racial preferences in university admissions. This raises the question of who is and is not diverse. As one author explains in an article discussing the racial preferences cases *Gratz*[30] and *Grutter*[31] in the context of judicial diversity, "[t]o give clearer guidelines [regarding the use of racial preferences], the Court would have to articulate a theory of why race matters in academic discussion or why disagreements between reasonable people might be centered around different racial perspectives."[32] Thus, in this academic's view, a "White Argentinean" from an elite Latin American family would not qualify for racial preferences in admission, but a Vietnamese immigrant or an African American from an affluent family in the Washington suburbs would.[33]

Elevating racial diversity as a qualification for the judiciary has the attraction of being a "heads I win, tails you lose" situation for progressives. As Dean Kevin R. Johnson of the UC-Davis School of Law has written, "In modern times, ideology—not racial and gender

29 Breger, *supra* note 4, at 1080; *see also* Gomez-Velez, *supra* note 23, at 310; Ifill, *supra* note 5, at 484–85.

30 Gratz v. Bollinger, 539 U.S. 244 (2003).

31 Grutter v. Bollinger, 539 U.S. 306 (2003).

32 Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That is Inclusive?: What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 118 (2004).

33 *See id.*

diversity—appears to more significantly influence the nominations by the president, especially Republican presidents, to the federal bench."[34]

In the past, our nation aspired to elevate people based on their accomplishments, not on their skin color or sex. The Left has abandoned this aspiration. For various reasons, there are somewhat more minority lawyers who are on the Left than on the Right. Thus, Democratic presidents can easily appoint minority and women judges who are ideologically sympathetic with the Left. Although Republican presidents do appoint minorities and women as judges—most notably here at Notre Dame, Justice Amy Coney Barrett—it is somewhat more difficult for them to find judges who also share their judicial philosophy. Therefore, agitating for the greater use of race in judicial appointments is an easy cudgel for progressives. They can hammer conservatives for appointing an insufficient number of racial minorities, while knowing that a) it is difficult for conservatives to do so; and b) if conservatives gave greater priority to the use of race in appointments, they would likely nominate judges who are less conservative.

CLOSING THOUGHTS

The invitation to panelists referred to the death of George Floyd. This Symposium was obviously planned before Derek Chauvin was convicted of murdering George Floyd. It is unclear how having a black judge preside over the trial would have produced a different outcome, let alone a more "just" or legally "better" one.

34 Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years*, 2017 WIS. L. REV. 345, 360 (2017).