BEYOND SYMBOLISM: ACCEPTING THE SUBSTANTIVE VALUE OF DIVERSITY IN LAW CLERK HIRING

Deeva Shah & Greg Washington***

INTRODUCTION

In 2000, then-Professor Sherrilyn Ifill remarked that the federal judiciary "remains 'a powerful tenured institution that is overwhelmingly white, male, and upper-middle class.'"[1] At that time, Barack Obama was a little-known state senator, Beyoncé was still the lead singer of Destiny's Child, and over 90% of all federal appellate

* Deeva Shah and Greg Washington are attorneys at Keker, Van Nest & Peters LLP who specialize in complex commercial litigation and intellectual property matters.

Deeva's pro bono practice focuses on representing individuals who have experienced workplace misconduct while working for the federal judiciary. Deeva was a co-founder of Law Clerks for Workplace Accountability and is on the board of Law Clerks for Diversity. She was a first-generation college and law student who did not know what clerkships were until her 1L summer. She had the honor of clerking for two wonderful judges, Judge Stephen V. Wilson on the Central District of California and Judge Raymond C. Fisher on the Ninth Circuit Court of Appeals. Having benefited personally and professionally from her clerkships, Deeva hopes clerkships become more accessible to the many accomplished, diverse candidates who seek them.

** Greg's pro bono practice focuses on civil rights and immigration. Greg is also on two non-profit boards and is a lecturer at the University of California, Berkeley, School of Law, where he teaches students to use their legal advocacy skills to create social change in a class called *The Court of Public Opinion: Advocacy Outside of the Courtroom*. During law school, Greg never considered clerkships until his second year but had the honor of clerking for Judge Victor Bolden of the District of Connecticut and Judge Adalberto Jordan on the Eleventh Circuit Court of Appeals after a year of working in private practice. Even as someone that has benefitted from the clerkship hiring process, Greg believes that the current system needs structural change to create a better and more just legal profession in the future.

The authors would like to thank Eric Stern, Olivia Warren, Jasmine Virk, Danielle Barondess, and Courtney Liss for their excellent comments and work on improving this paper. The authors would also like to thank the staff of *Notre Dame Law Review* and especially Jenae Longenecker for putting together this important Symposium and for their very helpful thoughts and edits.

1 Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 (2000) (quoting Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & L. 1, 1 (1997)).

judges were white.[2] More than two decades later, Barack Obama is a former President and Beyoncé is a cultural icon, and the federal judiciary has made modest improvements in the racial composition but 77% of federal appellate judges are still white.[3] Although the past twenty-two years have brought modest changes to the racial composition of federal judges, the slight demographic shift has yet to trickle down to the law clerks that staff their chambers.[4]

Over time, the voices in those chambers remain increasingly white. In 2006, 74.5% of law clerks were white.[5] In 2019—the most recent data available[6]—that percentage grew to 79%.[7] Given that white students only comprised 62% of law students in 2019, white people are actually overrepresented among law clerks compared to the potential applicant pool.[8] Despite the societal pressures to make our institutions more representative of the American population, including through an increasingly diverse judiciary, judges are hiring fewer diverse clerks. And it is important to ask why.

This Essay suggests that current efforts to diversify judicial clerks are surface-level, "feel-good" exercises, i.e., increasing diversity to bolster institutional legitimacy and demographic optics.[9] But the focus on optics and legitimacy shifts reform away from the substantive value of diversity—as "an imperative that basic democratic principles

2 *See* AM. BAR ASS'N, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 10 (1998).

3 *March 2020 Snapshot: Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench-march-2020/ [https://perma.cc/XK63-HV9R].

4 To be clear, when we consider state court clerkships, there are modest improvements in the racial composition of law clerks over time; however, that emphasizes the strides state courts have made in hiring diverse law clerks and highlights how the federal courts are falling far behind. *See Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, NAT'L ASS'N FOR L. PLACEMENT (Feb. 2021), https://www.nalp.org/0221research [https://perma.cc/TR7S-X52G] [hereinafter NALP Bulletin].

5 *A Demographic Profile of Judicial Clerks—2006 to 2016*, NAT'L ASS'N FOR L. PLACEMENT (Oct. 2017), https://www.nalp.org/1017research [https://perma.cc/Q7TT-9CCE].

6 The lack of empirical data about clerkship-hiring statistics is a significant problem. We are aware of a few different scholars who are working to rectify this gap at the Berkeley Judicial Institute and the American Bar Foundation and look forward to what their analysis reveals.

7 NALP Bulletin, *supra* note 4.

8 Gabriel Kuris, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS & WORLD REP. (June 8, 2020), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know#:~:text=Among%20the%20top%2030%20law,black%20and%204%25%20Asian%20American [https://perma.cc/Z4YP-UFZ9]. "The representation of Black graduates within federal clerkships is particularly low in comparison to the overall composition of the Class of 2019." NALP Bulletin, *supra* note 4.

9 *See* Ifill, *supra* note 1, at 411 n.11.

compel."[10] The importance of diversity is not in demographics alone or the legitimacy that may flow from those numbers. Rather, the purpose is to ensure that the judiciary benefits from a range of perspectives that more accurately reflect those who are affected by the law.

If this substantive value of diversity is the guiding principle for action, the clerkship pipeline is failing. It is failing the profession, the judiciary, law schools, and generations of future lawyers. Though we claim to value diverse perspectives, those experiences are seemingly anathema to the "gold stars" we actually require of ideal clerkship candidates. The most successful candidates—those who land clerkships—tend to fall into a predictable mold: students at the very top of their class at the highest-ranking law schools; students who have managed to cultivate relationships with the right professors and the right people, frequently by assimilating to typical (white, male, upper-class) law school culture; and students who have acquired the right credentials and avoided taking any unnecessary risks.[11] These criteria allow existing perspectives on the law that have dominated legal analysis for centuries to further entrench themselves in power structures to replicate the existing hierarchy over and over again. The current markers of achievement are skewed against diverse law students because they require law students to signal that their individual perspectives are irrelevant and assimilate to the majority view of success so they too can "pick[] up enough and the right kind of chips."[12]

The root cause of the lack of racial diversity is that the clerkship pipeline does not account for the actual benefit and substantive value of diversity, which stems from having diverse perspectives that accurately represent the communities impacted by the legal system. If we keep valuing the same, stale inputs, the output will never change. If we actually value diversity because of the unique and necessary perspectives diverse law clerks might provide, then we must value the

10 *Id.*

11 Law students who speak out about progressive issues—which often affect diverse students and may align with their interests—risk inadvertently ostracizing recommenders or future employers (including judges). *See, e.g.*, Neil Vigdor, *A Law Student Mocked the Federalist Society. It Jeopardized His Graduation*, N.Y. TIMES (June 3, 2021), https://www.nytimes.com/2021/06/03/us/stanford-federalist-society-nicholas-wallace.html [https://perma.cc/7NYH-BCJU]. Meanwhile, students who hold views that may be more in line with the majority are unlikely to face consequences, even when there are a number of qualified candidates who would be more than willing to take their spot. *See* Ruth Marcus, *Opinion: The Curious Case of the Clerk and the Racist Texts*, WASH. POST (Jan. 18, 2022), https://www.washingtonpost.com/opinions/2022/01/18/clerk-texts-appeals-court-clanton/ [https://perma.cc/FE39-PPNL].

12 Olivia Warren, *Enough is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 448 (2021).

unique positions those diverse candidates are in before and during law school. This Essay argues that we must stop couching clerkship diversity in terms of the legitimacy it offers institutions and the optical benefits. That language diminishes the actual importance of racial diversity, relegating diverse law clerks to statistics that allow those in positions of power to feel good without making actual change. It encourages judges to do the bare minimum: hire a BIPOC law clerk or two every few years and call it a day. Instead, our clerkship pipeline—from law schools to the judiciary to the profession—should use the substantive value of diverse perspectives as a guiding principle to reform every aspect of the clerkship hiring process. Given the lack of racially diverse perspectives in the composition of the federal judiciary itself, the substantive value of hiring diverse clerks is high.

While this overarching discussion of a systemic problem may seem daunting (or even appear to be a frivolous reframing), targeted changes—even at the individual level—are what make broader reform possible. To help explain why, Part II of this Essay provides a brief overview of clerkships and the hiring process. Part III explores how a lack of diverse clerks impacts the legal profession. Part IV discusses the factors that likely contribute to the lack of racial diversity in clerkship hiring. It specifically analyzes the numerous roadblocks before law school, during law school, and in the clerkship application process that systematically remove BIPOC law students from the clerkship pool. And Part V offers concrete ways that various parts of our profession—the judiciary, law school administrators and professors, law clerks, practicing attorneys, and law students themselves—can individually and collectively make changes to the clerkship pipeline and refocus their efforts on the substantive value of racially diverse perspectives.

To be clear, this Essay does not mean to suggest that there is a one-size-fits-all solution to the myriad, unique problems that have cultivated a lack of diversity among judicial law clerks. Indeed, there are significant dangers in assuming that the members of any minority group will think, speak, or act in stereotypical ways or without individual differences.[13] There is no one Black or South Asian or East Asian or Latinx or Native American perspective. But what is evident is that there are many minority perspectives that are rarely represented in the federal judiciary—especially in appellate courts—with white, male, upper-class views as the norm. When minority voices are excluded from

13 *See* Ifill, *supra* note 1, at 410 n.10; *see also, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166–67 (1989) (analyzing anti-discrimination from an intersectional perspective); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588–89 (1990) (arguing that essentialism is dangerous to legal theory and often ignores experiences of black women).

the judiciary and from chambers, their perspectives and experiences—in all their varied forms—are shielded from the ears of the decisionmakers that can change the trajectory of their lives. As other scholars writing about diversity have explained, and even the Supreme Court has acknowledged, excluding discrete groups from participating in our democratic institutions necessarily excludes the perspectives of many individuals within those groups.[14] The point of this Essay is that if an entire swath of perspectives is kept out of our decision-making bodies, those perspectives—in all of their forms—will continue to lack representation and the ability to fully inform the interpretation and application of our laws.

I. BACKGROUND

A. What are clerkships?

This Essay focuses on the federal judiciary and federal clerkships because—as discussed below—the federal clerkship hiring process has significant similarities across the various federal courts (and thus problems that manifest in similar ways).[15] Unlike state court clerkships, the racial composition of federal clerks has become less diverse recently, which suggests the need for broader reform.

Judges in federal, state, and administrative courts hire clerks, and these clerkships can have a range of benefits for clerks, judges, and others. Judicial law clerks are assistants to judges and "can perform a wide range of tasks."[16] These tasks vary based on what a particular judge and a particular court may require; however, most clerks tend to perform at least the following tasks: "researching legal issues, distilling briefs filed by the parties, and helping their judge come to a legal conclusion."[17] Clerks may also perform clerical tasks, such as managing a judge's docket, organizing materials for hearings, and generally assisting a judge with the day-to-day work of running chambers. Some clerks may work for multiple judges during their term; for example, the Central District of California hires "floater" clerks to assist with a

14 *See* Ifill, *supra* note 1, at 410 n.10; 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 a state cannot, as matter of due process, subject a defendant to indictment by grand jury or trial by petit jury that has been selected in an arbitrary and discriminatory manner).

15 Although we have not analyzed the administrative or state court processes for clerkships and hiring in depth, we suspect that our analysis applies to many of those courts as well.

16 Leah M. Litman & Deeva Shah, Essay, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 611 (2020).

17 *Id.*

demanding caseload, as well as specialized "patent" clerks for cases requiring technical knowledge.[18] Other clerks may work for one judge, but their work product may be shared with other judges. This type of work is quite common in appellate courts with multi-judge panels, where judges will often circulate legal analysis by their law clerks to other judges on the panel to elucidate their position.

Because of the sheer amount of work that a law clerk may assist with on any given case, law clerks may be able to shape the work of a particular judge or even a court in minor and major ways. Clerks will help prepare judges for oral argument, write bench memos summarizing—and framing—cases, recommend an outcome, and even produce initial drafts of opinions.[19] They may also have a significant role in determining procedural motions that regularly impact cases—from moving case deadlines to scheduling—or not scheduling—hearings. Clerks will often be tasked with reviewing the record put forth by the parties and distilling the most significant facts and details for their judge. And as many former clerks will proudly tell you, a hard-working clerk can make all the difference in the outcome of a case.

Law students and practicing lawyers may choose to clerk for a number of reasons. Clerkships can provide an in-depth look at how courts work and "how judges make decisions."[20] Clerks will learn about effective advocacy and which arguments are successful—and unsuccessful.[21] For future litigators, this invaluable knowledge offers "seemingly unparalleled access" to the courts in which they will soon practice.[22] Clerks have also expressed that their clerkships led to dramatic improvements in their writing and analytical abilities, while also exposing them to many new areas of law.[23] Some clerks also see the position as public service. And some clerks may also wish to spend their first few years out of law school helping determine the final outcomes in

18 *See Term Law Clerk to U.S. District Judges Participating in the Patent Program*, U.S. DIST. CT.: CENT. DIST. OF CAL., https://www.cacd.uscourts.gov/employment/term-law-clerk-u-s-district-judges-participating-patent-program [https://perma.cc/2CAE-KRFM].

19 Alex Badas & Katelyn E. Stauffer, *Gender and Ambition Among Potential Law Clerks*, J.L. & CTS. (forthcoming) (manuscript at 3) (available at https://www.alexbadas.com/uploads/6/7/8/2/67829045/badasstaufferjlcgenderambition.pdf [https://perma.cc/KY32-4YWX]).

20 Mishkah Ismail, Andrew Kim, David E. Hackett & Michelle L. Tran, *How to Apply for a Clerkship—And What to Expect*, 32 GPSOLO 46, 47 (2015).

21 Mark D. Killian, *Court Staff Attorneys, Clerks Lack Diversity*, FLA. BAR NEWS (Mar. 1, 2006), https://www.floridabar.org/the-florida-bar-news/court-staff-attorneys-clerks-lack-diversity/ [https://perma.cc/5TRC-YVZP].

22 *See* Litman & Shah, *supra* note 16, at 611.

23 *See* Susan Harp, *Clerking—Something Every First Year Law Student Should Know*, 29 STETSON L. REV. 1291, 1293 (2000).

cases, instead of being relegated to administrative tasks and document review, like some of their peers.[24]

Professionally, and as discussed below, many employers see clerkships as prestigious. Clerks may learn not just about the inner workings of their particular chambers, but also about other judges on the same court. "The legal profession prizes access to judges and uses clerkships as a professional proxy to determine employment viability."[25] Former clerks often receive exorbitant bonuses to join law firms after their clerkships.[26] Clerkships are almost necessary credentials for law students who want to become law professors, earn prestigious public-interest or government fellowships, and do appellate work at a large law firm.[27] Clerkship credentials are also a part of an attorney's biography for their entire career, and act as a proxy for early-career success when former clerks are up for partnership at law firms, board positions, and judicial nominations.

The downsides of clerking are discussed "less frequently," but they are an important part of understanding the persistent lack of racial diversity in the federal judiciary.[28] Clerking requires a significant pay cut compared to many private sector positions available to the same students after graduation.[29] Although that may not be a deterrent for wealthy or upper-middle class law students, many law students not on the same financial footing face more than a decade of student loan payments for the hundreds of thousands of dollars it took to finance just three years of law school.[30] This disproportionately disincentivizes first-generation students, many of whom are people of color, from applying to clerkships.[31] In addition, although federal clerkships are available throughout the United States, some applicants do not have the option to leave their families or partners to clerk. And other applicants may be unwilling to move to certain parts of the country where they would have no community in the area or there is a history of

24 *See* Nicholas Alexiou, *To Clerk Or Not To Clerk . . . It's Actually Not Much of a Question*, ABOVE L. (June 7, 2018), https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/ [https://perma.cc/B3B3-LZM6].

25 Litman & Shah, *supra* note 16, at 623.

26 *See* Staci Zaretsky, *$400K Is Now The Official Market Rate For Supreme Court Clerk Bonuses*, ABOVE THE L. (Nov. 15, 2018), https://abovethelaw.com/2018/11/400k-is-now-the-official-market-rate-for-supreme-court-clerk-bonuses/ [https://perma.cc/KX7D-2DSL].

27 *See* Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 765, 767–68 (1993).

28 Litman & Shah, *supra* note 16, at 612.

29 *Id.*

30 *See id.*

31 *See id.*

discrimination toward their community.[32] Clerkships generally do not come with guaranteed vacation time or family leave.[33] And there are a number of unknowns when applying for clerkships that can deter students as well. Applicants who do not have access to information about particular judges may not know whether a judge creates a difficult work environment; demeans their clerks; is verbally abusive; or even makes sexist, homophobic, xenophobic, or racist comments.[34] The same will apply to others with whom a clerk may share chambers for an entire year, e.g., co-clerks or courtroom staff.[35] Nevertheless, for many applicants, the positives of clerking far outweigh the potential negative consequences.

This Essay does not take a position on whether students should clerk or not. The decision is quite personal and will also be informed by a student's career path, family obligations, and countless other considerations. Not all clerkships are created equal either, in terms of the costs or benefits. But the unfortunate reality of our current system is that even progressive legal organizations rely on federal clerkships as an unspoken requirement or a highly preferred credential for hiring.[36] Thus, if minority students continue to face difficulties in obtaining federal clerkships, it may impact their ability to land certain jobs in the future.

B. What is the general hiring process?

Although some judges hire permanent law clerks, most judges tend to hire at least a few clerks annually. Because these positions are temporary, "most lawyers who choose to clerk will do so either immediately after law school or within a few years of graduation."[37] Candidates will typically submit the same set of application materials: a resume, a law school transcript, a writing sample, and recommendation letters from law professors (and occasionally employers).[38]

At minimum, most federal judges will receive hundreds of applications, and some circuits have reported receiving over 10,000

32 For example, Black law students have expressed concerns about moving to predominantly white cities in states where they may lack any support system and will be separated from their families for a year. *See id.* at 612 & 631 n. 130.

33 *Id.*

34 Brief for Named & Unnamed Current & Former Employees of the Federal Judiciary Who Were Subject to or Witnessed Misconduct as Amici Curiae in Support of Appellant Jane Roe at 10–17, Roe v. United States, No. 21-1346 (4th Cir. Aug. 26, 2021).

35 *See id.*

36 *See* @AnitaYandle, TWITTER (Jan. 29, 2022, 6:29 PM) (on file with the *Notre Dame Law Review* editors).

37 Litman & Shah, *supra* note 16, at 613.

38 *See id.*

applications in one cycle, with some districts receiving nearly 10,000 themselves.[39] Judges sort through these applications using a number of factors. Some judges will sort by grades and class rankings. Others prefer to start with students from particular schools—typically T14 law schools.[40] Some judges will also have strict requirements that a candidate be on the staff of their school's law review or have taken certain classes.[41] These factors are more likely to be found in a candidate's application materials, unlike other considerations that may influence whether an applicant moves forward. Judges frequently rely on phone calls or recommendations from their networks to decide which applicants to consider.[42]

Once judges sort through the initial application pool, they will interview a handful of applicants. These interviews vary by judge.[43] Some judges will have multiple rounds of highly substantive questioning; others will have a single conversation focused on getting to know the applicant personally. Judges will frequently ask their current clerks to also interview the candidates. If the interview goes well, judges may offer the applicant a job during the interview. Otherwise, applicants may hear back in a few days or sometimes months (or perhaps never for some unsuccessful candidates).[44]

Given the idiosyncrasies of the hiring process, the most successful applicants tend to be those who have access to information throughout

---

39 In 2017, judges in the Southern District of New York received almost 10,000 applications for sixty-four listed positions on the Online System for Clerkship Application and Review (OSCAR), while the Central District of California (located in Los Angeles) received over 5000 applications for thirty-nine positions. *See CY 2017 Online Positions and Applications by District*, OSCAR, https://oscar.uscourts.gov/2017_district_map [https://perma.cc/899W-ERB9]. "[T]he number of applications received by . . . judges on the Third Circuit in 2005 ranged from 150 to 675. . . . A random sampling of active judges in the Ninth Circuit showed 228, 400 and 784 applications." Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN STATE L. REV. 835, 837 (2006).

40 Derek T. Muller, *Visualizing Law School Federal Clerkship Placement*, EXCESS OF DEMOCRACY (May 15, 2017), https://excessofdemocracy.com/blog/2017/5/visualizing-law-school-federal-judicial-clerkship-placement-2014-2016 [https://perma.cc/4J4Y-T7DB].

41 *See* Norris, *supra* note 27, at 778.

42 *See Judicial Clerkships*, NYU LAW, https://www.law.nyu.edu/careerservices/jdstudents/judicialclerkships [https://perma.cc/W7A5-ML7B] ("A faculty clerkship committee led by the Dean identifies clerkship opportunities and supports students and alumni including by writing recommendation letters and contacting judges."); Aldisert et al., *supra* note 39, at 842; *see also id.* at 842 n.14 (quoting an unnamed judge as saying "the applications no longer mean anything to me. I react only to a judge or professor or lawyer friend who has experience with a student and makes an effort to contact me and strongly recommend the person. Only then will I follow up with the application and possibly an interview.").

43 Litman & Shah, *supra* note 17, at 614.

44 *Id.*

the clerkship pipeline.[45] Applicants who understand the credentials that judges typically value may choose to focus on their grades, cultivate relationships or find research positions with specific professors, or pursue a coveted position on the law review. These applicants will likely know what a clerkship is before entering law school because of their connections to certain legal circles or access to other attorneys. These applicants may know which professors are likely "feeders" to clerkships that may be considered more prestigious. And these applicants may also know which judges to avoid applying to and whether certain judges have specific requirements or may be swayed by a particular hobby listed on a resume.[46] Students in the know may make a number of decisions early on that will inevitably help them during the application process. This system inevitably leads to students with the same perspectives and connections to the same legal circles becoming law clerks and reaping the personal and professional benefits of a clerkship.

II. WHY RACIAL DIVERSITY IN CLERKSHIPS MATTERS

To understand why the pipeline does not explicitly create room to acknowledge and seek diverse perspectives, we need to take a step back and discuss the role of diversity in judicial decisionmaking. Legal formalists see "adjudication as involving the relatively mechanical application of rules to facts."[47] If the primary job of a judge is to "call balls and strikes," as Chief Justice John Roberts stated during his confirmation hearing, then a focus on increasing diverse perspectives is irrelevant at best.[48] At worst, a judge who focuses on her own experiences may be accused of "judicial activism and legislating from the bench," or of letting bias get in the way of objectively interpreting the law.

In questioning the formalistic understanding of objective adjudication, Judge Theodore McKee noted that the balls-and-strikes analogy "is actually counterproductive because it assumes a reality that is based upon an abstract principle rather than our every day reality."[49] Although objective adjudication may seem like a "noble" principle,[50] it

45 Aldisert et al., *supra* note 40, at 846.

46 *See* Shah & Litman, *supra* note 16, at 613–14 (noting that some law schools will have committees who "help students apply to judges with commonalities, e.g., similar political leanings, a bond over an alma mater, or perhaps shared interests").

47 Richard C. Chen, *The Substantive Value of Diversity in Investment Treaty Arbitration*, 61 VA. J. INT'L L. 431, 445 (2021).

48 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

49 Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1711 (2007).

50 *Id.*

"obscures the reality of personal bias."[51] As Judge McKee noted, "each of us harbors some bias in some degree, and . . . our bias may be impacting a given decision in ways in which we are simply not aware."[52] Thus, "[v]iewing judges merely as objective umpires chills the very introspection required to achieve a more objective jurisprudence."[53]

Legal realism instead acknowledges that "legal analysis not only allows for personal beliefs to impact our jurisprudence, it sometimes requires it."[54] Value judgments are often a part of legal reasoning, whether explicit or implicit.[55] Personal experience undoubtedly informs certain rulings: when is a search *reasonable*, what punishment is *cruel and unusual*, when are allegations of discrimination or harassment *plausible*,[56] or even what evidence is so *probative* that it outweighs *unfair* prejudice.[57] Judges frequently cannot just apply established law; they must rely on their experience and perspectives to inform the decision-making process.[58]

In some ways, our profession thrives on expertise and specialized knowledge, even for judges. The Federal Circuit, for example, has nationwide jurisdiction over certain subject matter, including patents.[59] Patent prosecutors must have the legal, scientific, and technical qualifications necessary to represent clients in the Federal Circuit.[60] Law firms may hire former prosecutors to run internal investigations because of prosecution experience. When nominating judges, we frequently discuss the work experience they will bring to the bench and how that perspective may be important or relevant in some way. We value a diversity of work experience because we understand that "diverse viewpoints . . . can promote better balance in the law."[61]

In a profession that values expertise of all kinds, one would hope that the expertise that comes from a lifetime of diverse experiences is

51 *Id.* at 1712.

52 *Id.*

53 *Id.* at 1715.

54 *Id.* at 1716.

55 *See* Chen, *supra* note 47, at 452.

56 *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1786–88 (2014); *see also* Darrell A. H. Miller, Iqbal *and Empathy*, 78 UMKC L. REV. 999, 1008 (2010) ("[W]hether a judge can accurately assess whether an event is plausible may have much to do with whether, and how, the judge has experienced the event alleged.").

57 *See* McKee, *supra* note 49, at 1720. Justice Stewart's famous line about what constitutes hard-core pornography—"I know it when I see it"—provides another example that inherently requires the use of experience. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

58 *See* Chen, *supra* note 47, at 471.

59 28 U.S.C. § 1295(a)(1) (2018).

60 *See* 37 CFR § 11.7 (2015) (outlining requirements for patent practitioner exam).

61 Chen, *supra* note 47, at 452.

just as valuable. Racial diversity in the judiciary can similarly promote better balance in decisionmaking. The experiences of BIPOC judges provide a form of specialized knowledge that is sorely lacking in our judiciary. For example, "women and minority judges who have firsthand experience with discrimination may be better equipped to recognize problematic conduct," a valuable area of expertise for the federal judiciary.[62] BIPOC judges may also bring other important and necessary perspectives—perspectives of those directly impacted by reproductive justice issues, socio-economic considerations, unique work experience, and nuanced views on how the law impacts different people. If judges have inherent biases, racial diversity is important so that the judiciary does not continue propping up a purportedly objective worldview shaped primarily by white men.[63]

Diverse groups make better decisions.[64] When groups consist of individuals with different experiences and values, there are more viewpoints to inform the decision-making process. More diversity also means there are fewer blindspots or implicit biases that will linger without pushback. In the judicial context, studies have found that having "a black judge on a panel makes nonblack judges more likely to uphold affirmative action programs."[65] Judges from underrepresented groups can provide analysis on practical consequences that might otherwise be ignored.[66] But without racial diversity on the bench, our

62 *Id.* at 452–53 (citing Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RSCH. Q. 788, 789 (2016)).

63 "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." Victoria Macchi, *In Memoriam: Justice Ruth Bader Ginsburg (1933–2020)*, NAT'L ARCHIVES News (Sept. 21, 2020), https://www.archives.gov/news/articles/justice-ginsburg-obituary [https://perma.cc/7V6V-TK92].

64 *See* Chen, *supra* note 47, at 460 ("By contrast, homogeneous and insulated groups are vulnerable to groupthink, which interferes with effective decision making by suppressing alternative viewpoints and encouraging conformity.").

65 *Id.* at 461 (citing Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 178 (2013)). Studies have found that "white judges are [also] more likely . . . to dismiss employment discrimination claims at the summary judgment stage." *Id.* at 450 (citing Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 338–39, 341 (2011)).

66 *See* Ifill, *supra* note 1, at 456 ("The inclusion of alternative or 'non-mainstream approaches' in judicial decision-making can invigorate the law with new and challenging approaches to decision-making . . . ."); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1215–16 (1992) (discussing how Justice Marshall told "stories" about his life experiences to help his colleagues understand his perspectives on racial discrimination and poverty); *id.* at 1216 (highlighting Justice White's observation that Justice Marshall brought to the Court "experience that none of us could claim to match"); Patricia Mazzei & Charlie Savage, *For Ketanji Brown Jackson, View of Criminal Justice Was Shaped by*

judiciary may have systemic blindspots that likely exclude entire perspectives from decisionmaking.

Contrary to overblown fears of judicial activism, most judges likely recognize—and try to minimize—the influence of personal beliefs through conscious choices. But it can be much harder to account for perspectives that a judge may be lacking entirely. As Judge Harry Edwards recognized, "[t]he real threat that a judge's personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat."[67] But as Judge Cardozo acknowledged, albeit in a different context, "[t]he eccentricities of judges balance one another. . . . [O]ut of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."[68] Thus, given the lack of racially diverse perspectives in the composition of the federal judiciary itself (and the difficulties in changing that composition in any immediate way), the substantive value of hiring diverse clerks is high.

Clerks can play significant roles in shaping case outcomes and specific opinion language. Clerks may influence which facts a judge may focus on or what caselaw a judge relies on in coming to a decision.[69] There are some well-known examples of this happening on the Supreme Court. For example, Justice Blackmun's papers reveal that he was inclined to vote to deny certiorari in *Planned Parenthood v. Casey*.[70] His law clerk, Molly McUsic, convinced him that any challenge to *Roe* was better in an election year in which voters could "vote their outrage."[71] In fact, a survey of Supreme Court law clerks revealed that 38% of clerks "thought that they had been able to change the minds of their justices on certiorari decisions" and 32% said "that they had been able to change the minds of their justices regarding opinion content."[72] Clerks may have their own experiences that allow them to see a situation differently or analyze a case in a unique way.

Family, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/01/30/us/politics/supreme-court-ketanji-brown-jackson.html [https://perma.cc/ZUU5-WAPV].

67 Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 410 (1983).

68 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 177 (1921).

69 Badas & Stauffer, *supra* note 19, at 3.

70 Charles Lane, *How Justices Handle a Political Hot Potato,* WASH. POST (Mar. 5, 2004), https://www.washingtonpost.com/archive/politics/2004/03/05/how-justices-handle-a-political-hot-potato/739044b1-c189-42fa-8fb6-9dbb56f70c93/ [https://perma.cc/7B8G-TZ88]; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

71 *Id.*

72 Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 L. & SOC. INQUIRY 741, 747 (2014) (citing ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006)).

Clerks can have an impact on culture as well. "[I]f 'courthouses belong to the people who come to them daily—as workers,' a more racially balanced court workforce may change the entire culture of the courthouse."[73] Judges do not often receive feedback, both on their decisionmaking (appeals may take months or years to finish) and on their management style. The judge-clerk relationship, however, provides an immediate method for a judge to receive another perspective, to solicit feedback on an opinion, or to debate the challenges and impact of a particular decision. An increase in the racial diversity of clerks will help provide underrepresented perspectives and challenge preconceived views and implicit biases in decisionmaking.

By increasing the racial diversity of clerks, we can also make the legal profession more just and equal. As discussed above, law clerks are more likely to find opportunities in legal academia, practice in particularly selective fields (e.g., appellate law),[74] and even be appointed to judgeships.[75] Thus, diversity amongst law clerks may not just influence judicial decisionmaking, it may influence some of the most elite institutions in our profession.

III. THE CLERKSHIP PIPELINE MINIMIZES RACIALLY DIVERSE EXPERIENCES

Given the structure of the clerkship hiring pipeline, it comes as no surprise that "certain underrepresented minority groups—Asian Americans, African Americans, and Latinxs" have not obtained federal clerkships in proportion to their numbers, even at top law schools.[76] "[T]he demographic profile of judicial clerks continues to remain highly homogenous and unreflective of the changing demographics of law schools."[77] Most current scholarship on diversity in judicial clerkships focuses on Supreme Court clerkships;[78] however, even the pipeline for

73 Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 140 (1997) (footnote omitted).

74 *See, e.g.*, *Mentorship Program*, The APP. PROJECT, https://theappellateproject.org/mentorship-program [https://perma.cc/5EFM-CWU7].

75 *See* Badas & Stauffer, *supra* note 19, at 1.

76 Shih-Chun Steven Chien, Ajay K. Mehrotra & Xiangnong Wang, *Sociolegal Research, the Law School Survey of Student Engagement, and Studying Diversity in Judicial Clerkships*, 69 J. LEGAL EDUC. 530, 538 (2020).

77 *Id.* at 540 (citing 2019–2020 INST. FOR INCLUSION IN THE LEGAL PRO., IILP REVIEW 2019–2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION (2020)).

78 *Id.* at 541; *see also* Sarah Isgur, *The New Trend Keeping Women Out of the Country's Top Legal Ranks*, POLITICO (May 4, 2021) https://www.politico.com/news/magazine/2021/05/04/women-supreme-court-clerkships-485249 [https://perma.cc/XRL5-LZNY] (noting that the trend of multiple clerkships has led to a reduction in the total number of people clerking and likely impacted the overall diversity of clerks on the Supreme Court and lower courts as well).

Supreme Court clerkships is heavily influenced by the pipeline for federal clerkships as a whole.[79]

Scholars have provided a number of theories for the continued lack of diversity, from a hiring system that "places less-well-informed applicants, such as minorities and first-generation law students, at a disadvantage" to "ideological sorting" by judges and students that "limits the pool of potential candidates who enter the application process or who view a clerkship as valuable."[80] Some scholars have even suggested that "despite the continuously growing interest in and support for diversity and inclusion in the profession, judges might lack the awareness or the sources to build a more diverse and inclusive chamber of clerks."[81] While all of these theories are true in their own way, they point to symptoms of the problem instead of the root cause. Our focus is on diversity for the sake of optics and institutional legitimacy, not its substantive value.

The root cause for the lack of racial diversity is that the clerkship pipeline does not account for the actual benefit and substantive value of diversity, which stems from having diverse perspectives that accurately represent the communities impacted by the legal system. The pipeline is not intended to solicit candidates who might more accurately represent the entire range of people who are impacted by the law; the pipeline is instead set up to highlight the occasional diverse candidate that may rise to the top despite encountering a mold that was never made for them. Federal judges may struggle to hire diverse candidates because they are not looking for candidates with diverse experiences and perspectives. Rather, they are looking for diverse candidates who have made it through hoops created for the very same backgrounds and viewpoints that already exist in these chambers.

Thus, the pipeline that created the lack of diversity we currently see sorts candidates by the same credentials that led to the initial problem. A singular focus on candidates from top schools, with great grades, the right recommendations, and similar work experiences and accolades that judges have seen from clerks in the past will never create space for new and diverse candidates.[82] Students who don't know the right people—or won't assimilate to fit in—don't stand a chance; loud voices

79 Most—if not all—Supreme Court clerks have previously served on a U.S. Court of Appeals.

80 Chien et al., *supra* note 76, at 542.

81 *Id.* This implicitly suggests that there are somehow fewer sources of diverse candidates instead of recognizing that our current framework creates gating mechanisms that inherently limit the sources of diverse candidates that law schools, judges, and the profession deem "acceptable" or "qualified."

82 We should pause to think about why we've always respected these accolades and what they signify.

who may ostracize their law school administrators may not have the same support; and students who choose to spend their time making their communities better—often at the cost of getting less-than-perfect grades—are passed over because they are good candidates, but not good enough.

This Part provides a brief outline of some of the many elements of the pipeline that are skewed against candidates who may otherwise bring diverse perspectives to judicial chambers. This Part is not intended to provide an exhaustive list of all the ways in which the clerkship pipeline is skewed against minority candidates; the goal is to pinpoint specific ways in which the pipeline may minimize the substantive value of diversity.

A. The Path to Law School

Law school admissions practices have "a disparate impact on minority students" and are a significant obstacle in diversifying law schools, especially at the highest-ranked schools.[83] In terms of admissions, schools continue to raise their 25th percentile LSAT scores, which has been statistically linked to a downward trend in African-American student enrollment.[84] Multiple studies have shown little to no correlation though between a candidate's LSAT score and eventual lawyering skills.[85] Tests like the LSAT "tend to favor white upper class individuals while devaluing the talents of underrepresented groups."[86] Nevertheless, LSAT scores continue to be one of the most important credentials for admission.

Relatedly, even when diverse applicants are accepted to law schools, diverse students are not distributed equally among law schools. In 2019, among the top thirty law schools only 9% of law students identified as Hispanic and 6% as Black.[87] Among the lowest-ranked schools, however, 23% of students were Hispanic and 16% were Black.[88] The consequences of this divide are particularly important for federal judicial clerkships because not all law schools are created equal.

---

83 John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 170 (2006).

84 *See id.* at 174.

85 *See* Scott Jaschik, *Do Law Schools Limit Black Enrollment With LSAT?*, INSIDE HIGHER ED (Apr. 15, 2019), https://www.insidehighered.com/admissions/article/2019/04/15/study-argues-law-schools-limit-black-enrollment-through-lsat [https://perma.cc/6W8L-BCKW].

86 Brief of *Amicus Curiae* UCLA School of Law Students of Color in Support of Respondents at 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02–241).

87 Kuris, *supra* note 8.

88 *Id.*

The top thirty law schools disproportionately place the highest percentage of graduates in federal judicial clerkships.[89] As noted above, some judges may even filter their candidates to first consider candidates from preferred schools, which frequently are schools that are higher ranked. Thus, some diverse candidates may already be at a disadvantage before they start law school in terms of the likelihood of landing a clerkship.

B. The Impact of 1L on Clerkship Diversity

Once diverse law students reach law school, a number of other factors may also impact whether they apply and are selected for clerkships. As described above, grades are one of the most important ways a candidate can distinguish herself in the clerkship candidate pool. But "first-semester grades mark one of the first moments where the measurable consequences of racial unevenness" in law school occur.[90] For reasons similar to the LSAT, the one-final-exam model of law school also tends to favor white, upper-class individuals, who do not face stereotype threat in the same way and who have been prepared for tests like these in many facets of their life.

But the stratification of law students by race begins before the exam. The case method of analysis—traditional legal pedagogy that focuses on teaching legal concepts through caselaw—appears to be race-neutral. But as many law students learn, caselaw is not in fact race-neutral, despite being presented as the natural, logical conclusions of (mostly white, male) jurists. Diverse law students are forced to engage in a purportedly objective analysis that asks them to suspend disbelief and ignore their relevant and necessary perspectives. Facts in a discrimination case that may seem irrelevant to the judge are facts a BIPOC law student may consider highly relevant. But to succeed, that law student must not only learn the underlying black letter law but also take the extra step—unlike their white peers—of learning "objective" legal analysis that ignores their lived experience.[91] And on the final exam, the student must apply this purportedly objective view they do not hold, which "suppress[es] the worldview they have always known."[92] If the student chooses to speak up, they may be ostracized or professors may assume the student just does not understand the law because the student cannot "detach law and . . . see it as a system that

89 Muller, *supra* note 40.

90 Jonathan P. Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 95–96 (2013) (describing stereotype threat as a major factor in racial discrepancies in final exam grades).

91 *Id.* at 96–97.

92 *Id.* at 98.

makes sense only from a particular viewpoint."[93] The stress—whether to speak out, when to speak up, how to speak a personal truth without receiving blowback—impacts every part of law school life, including the ability to perform well.[94]

This stress trickles into other aspects of the clerkship pipeline. During 1L year, many law students will need to cultivate relationships with law professors, who will later serve as references and recommenders for clerkships. Law school professors are "largely still white and male."[95] Minority law students may find it difficult to connect with professors who also teach this "objective" view of the law, professors who may ask students to suspend disbelief of their own perspectives and experiences in favor of the majority view. Diverse students may also not know that cultivating these relationships is important, thus missing out on important mentorship opportunities. Students may also feel the need to hide political affiliations to appear more recommendable for clerkships with judges that have different ideologies, especially for certain networking groups that may lead to better clerkship opportunities and recommendations.[96]

All the issues below will just compound the potential knowledge gap between diverse law students and their white peers. As studies have found, at the beginning of law school, "white students overwhelmingly prefer clerkships at a higher rate than their Asian American, Latinx, and African American classmates."[97] During law school, however, more minority law students become interested in

93 Mari J. Matsuda, Assoc. Professor of L., Univ. of Haw., When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Keynote Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), *in* 11 WOMEN'S RTS. L. REP. 7, 8 (1989).

94 *See* @carlissc, TWITTER (Jan. 29, 2022, 10:23 AM), https://twitter.com/carlissc/status/1487446185245921282 [https://perma.cc/7UXZ-UB8Q]; @GeorgetownBLSA, TWITTER (Jan. 28, 2022, 9:51 AM), https://twitter.com/GeorgetownBLSA/status/1487121210039230469 [https://perma.cc/WRB5-8C88].

95 Tiffany D. Atkins, *#ForTheCulture: Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 141 (2020).

96 *See, e.g.*, Genevieve Redsten, *Notre Dame Law School's Conservative Clout*, SCHOLASTIC (Nov. 11, 2021), https://scholastic.nd.edu/issues/notre-dame-law-schools-conservative-clout/ [https://perma.cc/S8GL-XDAE]. This Essay does not discuss in significant detail the role of political ideology in clerkship recommendations and hiring because diverse candidates subscribe to a wide range of political ideologies. Nevertheless, many diverse candidates tend to have more liberal or progressive beliefs, which may not allow them to access primarily conservative networking groups that have created clerkship pipelines for judges of a certain ideology. Given that law students tend to be more liberal than conservative, there are arguably more clerkship positions available for ideologically conservative candidates, who also may tend to be less diverse than their more liberal counterparts.

97 Chien et al., *supra* note 76, at 544.

clerking.[98] This discrepancy shows that diverse law students—who may not have had access to the same legal circles and mentorship prior to law school—may be unaware of clerkships as an option when they first start law school. And by the time these students understand what clerkships are and how they might be helpful, diverse students may have missed a number of opportunities to best situate themselves for clerkships. As a result, diverse candidates are less likely to land clerkships in the years immediately after graduation and must then decide whether the benefits of clerking justify interrupting their first few years of practice just as they start to get comfortable with their first legal job. Although this Essay does not advise students to make choices based on what decisions may best help a clerkship application, many students may not even have the option to do so because they do not have access to that information.

C. Application Process

Finally, the clerkship application process itself devalues and minimizes the importance of diverse perspectives. The application materials themselves are limited, and any mention of diversity must be shoehorned into a resume or cover letter, or even smuggled in through recommendation letters.

The recommended one-page resume barely allows students to provide basic information about a past position, let alone significant detail. And as many students know, students are encouraged to remove any details that are not legally significant, which frequently includes removing the very details that may hint at the diverse perspectives an applicant might bring to chambers. For example, when applying to clerk, one of the authors of this Essay was advised to remove the following information: she had worked throughout college to finance her education, and she had been significantly involved in diversity-focused groups in her previous workplace. This recommended sanitization of her resume would have failed to show where she spent a lot of time in college, her ability to multi-task, and the skills she learned from working at small businesses. It also would have further disguised her background, an interest in establishing community in the workplace, and the new perspectives she might share as a clerk. She did not remove those details, and when she interviewed for clerkships, both judges she clerked for asked about those specific experiences; however, many law students may follow this advice to sanitize their resumes. Guidance aimed at making a student a more "appropriate" or "proper" candidate masks what makes those perspectives valuable; nevertheless,

98 *Id.*

the advice comes from a developed understanding that diverse perspectives themselves may not be valuable to some judges, who appear to be more interested in diversity as window dressing.

Relatedly, cover letters may also minimize the value of diverse perspectives. Unlike law school admissions, clerkship applications do not allow applicants to submit a diversity statement or an explanation of the unique perspective a candidate may offer. While some students may try to include those details in their cover letter—as we both did—the common practice is to avoid anything more than a short, nondescript cover letter. The typical cover letters further sanitize any notion of considering an applicant's diverse perspectives.

Moreover, recommendation letters are fraught with issues for diverse applicants. As an initial matter, some law students may not know who to ask or may not have spent as much time cultivating those relationships as others. Also, if there are certain professors who hold themselves out as "feeder" professors, the power imbalance can lead to awkward issues and even inappropriate conduct.[99] Law students may also not know how to broach the subject or may ask recommenders who may not know as much about the candidate specifically. Implicit biases also find their way into letters of recommendation, including more tentative statements about the candidate or a lack of specific examples.[100] Even if diverse applicants are able to find high-quality recommendations, the letters themselves may not include much about the diverse perspective a candidate may bring to chambers.

Finally, as noted above, connections to a specific judge are fairly important to ensuring a candidate's application is pulled out of the pile of hundreds of other applications. Those students who have personal connections that can put in a phone call to chambers will stand a much better chance of making it to the interview stage. Once there, those students will also know more about the judge's interview process and style, including commonalities to emphasize and pitfalls to avoid. A diverse candidate may not have access to those same resources or may have to work harder to access them. Even then, a diverse candidate may never have a chance during the interview to talk about their perspective, what makes them unique outside of their grades and resume, once again ignoring the substantive value of the experiences those clerks may bring to chambers.

99 *See, e.g.*, Lizzie Widdicombe, *What is Going on at Yale Law School?*, THE NEW YORKER (June 19, 2021), https://www.newyorker.com/news/annals-of-education/what-is-going-on-at-yale-law-school [https://perma.cc/KG9H-LQZB].

100 Chris Houser & Kelly Lemmons, *Implicit Bias in Letters of Recommendation for an Undergraduate Research Internship*, 42 J. FURTHER & HIGHER EDUC. 585 (2018).

The above examples are just some of the ways that the clerkship pipeline diminishes and erases diverse experiences and perspectives.[101] The pipeline forces diverse students who do make it to a top law school to adopt models of legal education and reasoning that are not made for them. Diverse students must frequently work harder and longer to recontextualize their lived experiences just to do well in their classes, find recommenders, and traverse the clerkship application process. And diverse students must frequently sanitize their own experiences and perspectives throughout law school and the application process because those experiences are deemed irrelevant. But if we accept that diverse experiences and perspectives have their own value—and not just for optics or legitimacy—then it is easy to see all the ways in which the clerkship pipeline actively erases that value and limits the ability to create a more diverse composition of clerks.

IV. CHANGES TO THE CLERKSHIP PIPELINE

To ensure we have more racially diverse clerks, we must change the underlying values of the clerkship pipeline. Instead of expecting that the same inputs in the same mold will one day give us a new output, we need to take a step back and recognize all the ways in which the pipeline erases diverse perspectives. This may appear to be a daunting task because it requires collective action and change on a wholescale level. But acknowledging collective responsibility for the failures of this system may be a good thing: "Our collective responsibility, in other words, might eliminate some of the discomfort with acknowledging our fault."[102] If we can all admit that we all have contributed to upholding a system that ignores the substantive value of diversity, then it is much easier to accept that we can all make even small, incremental changes to start fixing the problem.

To be fair, lack of diversity is common across many industries. And we are under no illusions that every job opening necessarily means that a broad search follows. Because of the reality of insider hiring—for public interest, private, and government roles—we understand that

101 This Essay does not specifically address the new clerkship hiring plan that some—but not all—judges have adopted. Although this plan encourages judges to wait to hire students until after their second year of law school, there are few incentives to follow it. The idea is to incentivize judges to consider information beyond 1L in assessing a candidate; however, the plan does not account for a number of the variables above and also is disregarded by a number of judges, still creating pressure for all judges to hire earlier to avoid missing any candidates that apply to judges who are not following the plan. *See* Sarah Isgur, *The New Trend Keeping Women Out of the Country's Top Legal Ranks*, POLITICO (May 4, 2021), https://www.politico.com/news/magazine/2021/05/04/women-supreme-court-clerkships-485249/ [https://perma.cc/9RMD-AKXE].

102 Litman & Shah, *supra* note 16, at 644.

many job searches end when a trusted adviser or friend refers a candidate for a position. But it would be irresponsible for the profession charged with ensuring the equity and fairness of our society to allow the present lack of diversity among law clerks to continue simply for the sake of upholding these practices.

While this Essay does not ask for a complete overhaul of the law school admissions process or legal education (yet),[103] it does suggest immediate ways through which individuals and specific groups may be able to reframe the current pipeline to better serve the need for racial diversity in clerkships.

A. Judiciary

The Judiciary may be able to implement a number of changes to the clerkship application process to encourage judges to hire more racially diverse applicants. First, judges should explicitly allow for more fluidity in the application materials they request so that racially diverse applicants can provide more relevant information. For example, judges could explicitly instruct applicants to include in their cover letters what diverse perspectives an applicant may bring to chambers. Judges can also instruct recommenders to include similar information in recommendation letters, signaling their interest in receiving more information related to a candidate's experiences and perspectives.

Second, the federal judiciary has recently begun providing more educational content to judges around implicit bias and the importance of diversity.[104] While these conversations are important, judicial programs—often sponsored by the Federal Judicial Center or the Administrative Office—may want to explicitly focus on law clerk hiring and the ways in which current markers of achievement are likely to limit the racial diversity of a pool of clerkship applicants. For example, some judges may benefit from a discussion on how law school admissions and grading may create racial stratifications that also impact the pool of candidates a judge is willing to hire.

Third, judges may wish to reconsider how they sort through clerkship applicants and the heavy reliance on personal connections to flag candidates with potential. Relying on friends to recommend their favorite students may result in the same perspectives, same values, and same backgrounds being replicated in chambers year after year.[105] A

103 Maybe a future essay can take those gigantic steps.

104 *See, e.g.*, *Federal and State Court Cooperation: Reducing Bias*, FED. JUD. CTR., https://www.fjc.gov/content/352779/reducing-bias [https://perma.cc/9GBE-2P8U]

105 Similarly, judges who heavily favor applicants with a geographic connection to their location may also replicate the same biases, especially if the clerkship is in a particularly homogenous state or city.

simple way to increase the potential of hiring a diverse law clerk may be to adopt a version of Judge Vince Chhabria's hiring practices. Judge Chhabria noted that when he became a judge, he was "struck by how many law clerks are white and from privileged backgrounds."[106] He realized that this was "to the detriment of the legal profession (in which people from all walks of life should have a chance to rise to the top) and the judiciary (which benefits from having people with different perspectives involved in the decision-making process)."[107] So he implemented a personal rule that he would not fill a law clerk position until he interviewed "at least one minority candidate and at least one candidate from a non-'T-14' law school (since those schools tend to have more students from less-privileged backgrounds)."[108] He concluded that his overall hiring process "has been better because of this practice, and it has resulted in stronger chambers."[109] Judges may be able to create their own rules based on their current standards (e.g., interview an applicant below the usual grade cut-off, interview at least one applicant who did not have a professor or personal connection, place a call to chambers, etc.).

The future success—or failure—of increasing diversity among law clerks rests at the feet of the judges doing the hiring.[110] We entrust these judges to solve the most complex and difficult legal problems we face. Judges are lawyers that have often gone through rigorous confirmation hearings that touch on their training, intelligence, qualifications, and ability to manage. Simply defaulting to the notion that judges cannot hire diverse clerks because of a pipeline problem is not just highly problematic; it asks us all to suspend disbelief. It asks us all to assume that the people with the intelligence, creativity, and analytical acumen we typically require to become a judge still lack the capacity to find diverse clerkship candidates. If that is actually true, we need to be honest about how little we expect out of those judges given the already

106 Vince Chhabria, *Why We Should Adopt a Rooney Rule for Law Clerks*, THE NAT'L L.J. (Jan. 4, 2019), https://www.law.com/nationallawjournal/2019/01/04/why-we-should-adopt-a-rooney-rule-for-law-clerks/ [https://perma.cc/Z3MJ-Y3ME].

107 *Id.*

108 *Id.*

109 *Id.*

110 Any changes must include more than just interviewing a candidate for the sake of saying that it was done. In fact, it could be even worse to bring in promising candidates for the sake of appearance when they have no shot at the job. That sort of hollow gesture would lead to cynicism and distrust that would further erode any goodwill the judiciary has when it comes to diversity. Judge Chhabria's model is based on the NFL's Rooney Rule, but recent events have shown how the Rooney Rule—when used simply for optics but not to actually increase diversity—can lead to even less diversity and more cynicism and distrust. *See* Jonathan Franklin, *Civil Rights Leaders Call on the NFL to Replace the Rooney Rule*, NPR (Feb. 7, 2022), https://www.npr.org/2022/02/07/1078999857/nfl-rooney-rule-civil-rights-leaders [https://perma.cc/JBB5-37TY].

existing vast pools of diverse lawyers and law students who are interested in clerking.

B. Law School Administrators and Professors

Law school administrators and professors can also make small changes to increase the racial diversity of the clerkship pool. Although law school admissions is an obvious place to start (as is hiring more diverse faculty members), this Essay is not the right place to dig into those discussions, which deserve much fuller attention than we can give the topic here.

In the near future, however, law schools can make much more of an effort to educate students about clerkships early on and to level the playing field for students who may be interested. "Underrepresented minority students, particularly those without existing knowledge or networks, may enter law school with very limited information about clerkships and how to attain them."[111] Law schools can ensure that these students understand the value of a clerkship early on and have time to amass the credentials and recommendations necessary to get them.[112] Even if students decide a clerkship is not for them, they will have more information to make that choice and may still benefit from cultivating relationships with professors.

Relatedly, professors should ensure that they are equally offering opportunities to underrepresented students. Underrepresented students may not have as much access to or knowledge about research assistant positions or other opportunities to work directly with professors; a concerted effort to diversify those positions may also provide more opportunities for those students to develop relationships and find recommenders. Professors can also actively help combat stereotype threat and imposter syndrome by validating diverse law students in different ways: encourage them to speak up in class, acknowledge their contributions, and be open to discussing the ways in which objective legal theory may not match the lived experiences of these students.

Law schools may also be able to shape the hiring process in unique ways. Law school clerkship committees should reevaluate how they

111 Chien et al., *supra* note 76, at 551.

112 A lot of this work is currently done by students, which creates significant issues. For example, student groups aimed at helping first-generation law students often impart this type of knowledge early on, but they may not be able to reach every student that falls into this category. Moreover, most of these groups are led by first-generation or minority students who realized they needed a support system to help them understand the unspoken curriculum of law school. Those students spend valuable time—away from focusing on their own efforts—to take on this educational responsibility that is more appropriate for law school administrators and professors.

choose which students to individually encourage to apply to clerkships. Although students with high grades after 1L year are obvious contenders, there may be underrepresented students who show an interest in clerking but may not have fared as well on exams due to a number of institutional factors. Clerkship committees must invest more time, energy, effort, and resources in supporting diverse students early to ensure that those students who want to apply for clerkships will have the information they need to compete for those positions. Clerkship committees can also provide guidance to faculty on how best to support the applications of underrepresented law students. For example, if these students cannot talk about their unique and diverse backgrounds in their own cover letters or resumes, professors should proactively talk to those students about what information may be helpful to include in a recommendation letter.[113] Similarly, law school career offices should ensure that underrepresented students do not feel obligated to minimize their prior experiences and backgrounds that may add to the diversity of our judicial system and our profession. Instead, they should work with students on how to frame those experiences to highlight the unique perspectives and skills each student has to offer. To the extent that law schools engage in proactive outreach with certain courts and judges, they should consider how to frame those communications to highlight underrepresented students and emphasize the value and importance of hiring diverse clerks.

C. Current and Former Law Clerks

Current and former law clerks can also help change the clerkship pipeline. Clerks who have gone through the clerkship application and interview process can offer unique insights to diverse applicants and ensure they have as much information as possible. There are a number of ways that clerks can provide mentorship to these students; clerks may be able to reach out to their law schools and specifically volunteer to speak to diverse students interested in clerking on a specific court. There are also mentorship programs that match former clerks with diverse law students interested in clerking; the two that immediately

113 For example, many underrepresented law students provide diversity statements when they apply to law school. Law professors could proactively ask all students for whom they are writing recommendation letters to provide any diversity statements that might help highlight a student's background or perspective. Career services offices could ask students to fill out a questionnaire that provides this information to recommenders. Recommenders could also receive training about how they might initiate such conversations with students so that the student does not have to proactively make any such request.

come to mind are Law Clerks for Diversity[114] and The Appellate Project.[115]

Current and former clerks can also impact the clerkship pipeline by talking to their judges. Current clerks may be able to encourage their judges to interview diverse applicants and to ask questions geared to move beyond an applicant's resume. Clerks may also want to encourage their judges to adopt some version of Judge Chhabria's hiring practices. Former clerks may be able to refer more diverse applicants to their judges, increasing the chances of an applicant getting an interview.

D. Practicing Attorneys

Practicing attorneys, even if they are not former clerks, can also help improve the clerkship pipeline. Diverse law students need mentorship and they also need recommenders who will go to bat for them. Diverse law students could also benefit from having access to other lawyers, who may also be able to help them connect with a judge or apply for a clerkship. Create ways for your mentees to network and meet other attorneys. Separately, practitioners should acknowledge ways they contribute to upholding and relying on the same markers of achievement and success that the judiciary does. Pushing back on those skewed markers may create more room to discuss how our profession can value diverse perspectives in a more meaningful way. In short, the profession as a whole must commit to fostering opportunities for diverse candidates, candidates who are too often overlooked for prestigious clerkships.

E. Law Students

Finally, underrepresented law students who are interested in clerking should not have to bear the burden of fixing the broken clerkship pipeline. It is not on diverse law students to fix what has long been broken in the clerkship hiring system. As others have acknowledged, law students have already done a great amount of actual reflection on the structural problems in the profession they are about to enter, far more reflection than many of the attorneys already in the profession.[116] So instead of asking you to fix the problems that you have inherited, we offer some validation, encouragement, and unsolicited advice.

---

114 L. CLERKS FOR DIVERSITY, https://lawclerksfordiversity.com/ [https://perma.cc/VM8W-K4RJ].

115 *See supra* note 74 (discussing The Appellate Project's Mentorship Program).

116 *See* Litman & Shah, *supra* note 16, at 644.

First, you are not alone if it feels like parts of law school and the profession are not made for you. When you sit in your classes and feel like the black letter law does not accurately reflect the realities of our imperfect judicial system, you are right. When you feel conflicted about whether to speak up, you are not alone. When you are exhausted from suspending disbelief and from hearing your peers play devil's advocate about issues they have never personally experienced, you have every right to be frustrated and annoyed and upset. We hope you also know that there are people in the profession who are trying to fix those issues.

Second, to the extent possible, do not count yourself out without talking to your mentors (peer mentors count!). You may not think you are qualified for a clerkship, but you may also be discounting yourself based on criteria and factors that were not created to include you.[117] For every law student we talk to that has opted out of applying to clerkships, we find another underrepresented law student who was told not to apply and still got a clerkship.[118] If you do choose to apply to clerkships, find mentors and champions to walk you through the process. Many people do want to help you land these jobs; they just need to connect with you.

Third, do not discount the importance of your perspective and your background. You may feel inclined to hide the parts of you that are unique, that do not match the mold. But there are professors and judges and employers who will see the value in having your voice in the room. Find creative ways to highlight your diverse experiences in your application materials. Make sure your recommenders have the information and the ability to discuss you holistically. Clerking can be an extremely rewarding experience, not just for you but for your judge. Whether the current pipeline reflects it or not, your experiences and your perspectives are important and valuable in this profession.

CONCLUSION

Unfortunately, much of the future of diversity among law clerks is out of the hands of law students themselves. What is far more problematic, hurtful, and even insulting is the idea that there are simply not enough diverse candidates either inside or outside the traditional legal pipeline. There are tens of thousands of diverse candidates that

117 The point of this Essay is not to encourage law students to take chances on positions that really may not be attainable. The reality of the current system is that there are some students who may be less likely to land federal clerkships, at least without personal connections or significant networking. Those students may not want to expend their time—a valuable resource—on chasing clerkships. But for those students who are anywhere close to the cusp of viable clerkship credentials, self-selecting out may invariably close doors that did not need to be closed.

118 One of the authors of this Essay was one of those students.

are more than qualified for these positions. To blame the lack of diversity on the law clerk pipeline, as commentators too often do, needlessly shifts the blame on the diverse applicants for not being worthy of meeting inartful criteria and ineffective requirements in a system designed to ignore their experiences. It allows all of us to only care about diversity for the potential optics and not the substantive importance of diverse perspectives. We believe that adopting such a framework renders the stories and experiences of these diverse candidates invisible, which is something that judges, practitioners, and law schools should no longer accept.

At the end of the day, anything beyond symbolism requires both commitment and accountability. Judges, lawyers, and law schools must all commit to addressing the lack of diversity among law clerks while being accountable for the part they have to play in the current lack of diversity. Without owning their individual roles in creating this problem or committing to solve it, nothing will truly change—we will continue robotically requesting the same inputs and be dismayed at the same, stale outcomes. We owe it to the future of the profession to do better than what we are doing now.