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ARTICLE

THE SERVANT OF ALL: HUMILITY, HUMANITY, AND JUDICIAL DIVERSITY

MICHAEL NAVA*

Whosoever would be first among you, shall be servant of all.¹

We do not, but we could, demand that those who hold power do so with attentive love, with care, with nurturance, with a responsible sense of one's self as connected to and dependent upon those who are being judged.²

INTRODUCTION

Among the many claims made on behalf of a diverse judiciary, to my knowledge, no judge or academic commentator has argued that such diversity—that is, the inclusion on the bench of people of color, women, gays and lesbians, and similarly underrepresented groups—would infuse the bench with two qualities not ordinarily associated in the public mind with judges: humility and humanity.³ Indeed, my research has revealed

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¹ *Mark* 10:44.

² Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 CAL. L. REV. 1877, 1925 (1988).

³ The dominance on the bench, both at the federal level and in California, by White, upper-class, heterosexual males is so well-documented as to have become a truism. As of 1997, only 3.8% of the state court judges and only six percent of federal judges were African-American. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1111-14 (2003) (cited in James Andrew Wynn, Jr. and Eli Paul Mazur, *Judicial Diversity: Where Independence and*

that virtually no one has given any extended consideration to whether these are even desirable qualities in a judge. On the other hand, there is an almost subterranean current in discussions of what makes a good judge that acknowledges the significance of these interrelated virtues to the task of judging, and it often comes from judges themselves. For example, in an article that solicited the views of three appellate judges and an academician about what makes a good appellate judge, all three of the judges referred either to humanity or humility.⁴ One respondent, a federal circuit court judge, said that being a good appellate judge “means communicating your humanity by feeling compassion for and understanding of the concerns of the litigants as persons.”⁵ The second, a justice of the Colorado Supreme Court, said that a good judge “[s]hould reflect humility and abhor arrogance.”⁶ The third, a justice of the Pennsylvania Supreme Court, added that appellate judges require “a touch of humility” to make them not only good, but great appellate judges.⁷

For the most part, however, as Professor Brett Scharffs observes in his excellent article, *The Role of Humility in Exercising Practical Wisdom*, “[a]cknowledgments of the value of humility in judges are limited primarily to retirement tributes and judicial investiture

Accountability Meet, 67 ALB. L. REV. 775, 781, n.24 (2004).). As of 1999, only two percent of state court judges were Hispanic. Mark S. Hurwiz and Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 1111-14 (2003) (cited in Wynn and Mazur, 67 ALB. L. REV. at 781, n.24.). Furthermore, as a 2001 study revealed only 20% of the federal judiciary and 26% of the justices on the highest courts of the fifty states were comprised of women. AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, CURRENT GLANCE OF WOMEN IN THE LAW 2 (2001), available at <http://www.abanet.org/women/glance.pdf> (cited in Wynn and Mazur, 67 ALB. L. REV. at 781, n.24.). A 2006 survey of California courts undertaken by the Courts Working Group of the state bar's Diversity Pipeline Task Force revealed that African-Americans, Asian Pacific Islanders, and Latino/as together made up only 17.1% of the state's judiciary; women made up 30.3% of the bench. STATE BAR OF CALIFORNIA, DIVERSITY PIPELINE TASK FORCE, COURT WORKING GROUP, FINAL REPORT AND RECOMMENDATIONS 16 (2007), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2007_Courts-Working-Report.pdf. Comparable statistical information on sexual orientation is not available, but it can be safely assumed, in light of the continuing stigma attached to homosexuality, that gays and lesbians are also underrepresented at every level of the judiciary. See *People v. Garcia*, 92 Cal. Rptr. 2d 339, 346 (Cal. Ct. App. 2000) (noting that the court can think of no group, other than racial and religious minorities, which has suffered such “pernicious and sustained hostility” and “such immediate and severe opprobrium as homosexuals” (quoting *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J. dissenting from denial of certiorari))).

⁴ The one academician did not. Ruggero J. Aldisert, et al., *What Makes A Good Appellate Judge? Four Views*, 22 JUDGES' J., Spring 1983, at 17, 50.

⁵ *Id.* at 14.

⁶ *Id.* at 17.

⁷ *Id.* at 51.

speeches.”⁸ But even these references deserve our attention because singling out humility or humanity as a judicial virtue on such occasions—a judge’s arrival on, or departure from, the bench—reminds us that judging is not merely an exercise in syllogisms; it is a difficult, human activity that has far-reaching and often tragic consequences for at least one of the humans who is subject to the judgment. As Professor Cover reminds us: “A judge articulates her understanding of a text, and as result, somebody loses his freedom, his property, his children, even his life.”⁹ Having spent my career as a research attorney for the appellate courts of California, I have been a percipient witness to how heavily the human costs of a judgment can weigh upon the minds of judges. In my mind, the question is not whether humility and humanity are desirable judicial qualities but, rather, how they explicitly fit into the process of judicial decision-making. That question is one I take up in Part I of this article.

In Part II I discuss how judicial diversity might increase these qualities of humility and humanity on the bench. I close this section with two examples, the first involving two United States Supreme Court justices and the second a judge on the San Francisco Superior Court.

I. HUMILITY, HUMANITY, AND JUDICIAL DECISION MAKING

Before discussing how humanity and humility fit into judicial decision-making, let me define what I mean by those qualities by way of example. My example is drawn from an article written by then-Justice and now Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court, entitled *The Woman Has Robes: Four Questions*. Writing about the generation of women judges who came to the bench in the 1970s and 1980s, Justice Abrahamson said:

We women judges all have had the experience of being “outsiders” in the American legal system, and this experience can make a difference on the bench. Each of us comes from a world that defines a woman’s role as wife, homemaker, mother. We saw this role and some of us embraced it. Nevertheless, each of us said, “I must choose to do something else in life, something different from the traditional role. I am going to choose a path that is right for me and my family.” Each of us said, even though not many lawyers are women, “that a woman can be a lawyer.” . . . [A]ll of us were willing to stand up and say, “I

⁸ Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 157-59 n.88 (1998).

⁹ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

believe in myself. I shall follow the career I think right for me. I do not think being different is the equivalent of being wrong. Being different is okay.”¹⁰

I find one aspect of humility in the passage of Justice Abrahamson’s essay that begins, “I must choose to do something else in life, something different from the traditional role.” You might think it curious that I characterize these assertive words as indications of humility, but that is only because humility is so often conflated with passivity and servility. It is neither of those things. I agree with Professor Scharffs that “[h]umility does not denote weakness, but rather a proper understanding of one’s strength.”¹¹ The opposite of humility is not only arrogance, but also self-abasement. Humility requires a realistic self-appraisal and self-acceptance not only of one’s limitations but, just as vitally, one’s strengths. Once one has accepted one’s strengths then humility also requires that one follow the paths to which one is directed by them, however daunting that journey may appear.

In the nearly quarter-century since Justice Abrahamson wrote those words, a woman’s decision to enter the law may not seem as fraught with conflict as it was when she made her choice.¹² We must remember, however, that women of her generation who set their sights on a career in the law still had to reckon with attitudes about the proper sphere of the female that were largely unchanged from the late nineteenth century when a justice of the Supreme Court could justify denying a woman the right to practice law on the grounds that:

The civil law, *as well as nature herself*, has always recognized a wide difference in the spheres and destinies of man and woman The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, *which is founded in the divine ordinance, as well as in the nature of things*, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹³

¹⁰ Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 495 (1984).

¹¹ Scharff, 32 U.C. DAVIS L. REV. at 163.

¹² In 1956, when Justice Abrahamson graduated from Indiana University’s school of law, women comprised 3% of all law students; as of the school year 2006-2007, that number had risen to 46.9%. See AM. BAR ASS’N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1-2 (2007), available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%2006.pdf>.

¹³ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (emphasis added).

Justice Abrahamson speaks for other people from minority groups—to use that phrase in its political and cultural, rather than in a strictly numerical, sense¹⁴—who have found in themselves a calling, a vocation that challenges them to defy social and cultural norms assertedly ordained by nature or God himself.¹⁵ To persist in their course requires a steady sense of self, not an inflated one, rooted in certainties that perhaps they themselves do not fully understand but to which they bow; it requires, in other words, humility.

This profound self-acceptance is only one aspect of humility. Professor Scharffs has described the other crucial aspect, which is a knowledge of the limitations of one's experience coupled with an openness to the experiences of others as a way of exceeding those limitations. He writes: "Humility also denotes an attitude of open-mindedness and curiosity, a willingness to learn, reassess, and change. One who is humble can be persuaded that her conclusions are wrong; that her perspectives are limited and should be broadened; that her settled opinions merit reconsideration."¹⁶ In short, a humble person is a teachable person.

Let me now address what I have called the quality of humanity. What I mean by humanity is eloquently encapsulated in Justice Abrahamson's remark, "I do not think being different is the equivalent of being wrong."¹⁷ Along the same pithy lines is the familiar axiom from the Roman poet Terence: "I am a man: I hold that nothing human is alien to me."¹⁸ A sense of one's humanity acknowledges the connectedness of all human beings, and, correspondingly, recognizes that one's actions do

¹⁴ "[T]he concepts of 'majority' and 'minority' are not defined by the number of members in a group, but by the social, cultural and political experiences of the members of the group." Sylvia Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 59 MD. L. REV. 150, 195 (1999).

¹⁵ The invocation of natural law or divine order is an all too familiar judicial gambit to justify the rankest kind of bigotry. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 3 (1963) (quoting opinion of the trial judge who found appellants guilty of violating Virginia's miscegenation law: "'Almighty God created the races white, black, yellow, malay and red and he placed them on separate continents . . . The fact that he separated the races shows that he did not intend for the races to mix.'"); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1985) (upholding sodomy laws that applied to homosexual, not heterosexual conduct because "[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.") (Burger, C.J., concurring), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶ Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 164 (1998).

¹⁷ Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 495 (1984).

¹⁸ TERENCE, *The Self-Tormentor* act 1, sc. 1 in 1 TERENCE (John Sargeaunt trans., Harvard U. Press 1939).

not occur in a vacuum but have both intended and unintended consequences on others.¹⁹ This sense of connection allows a person to acknowledge differences among members of the human family without necessarily sitting in judgment of them. This sense of connection would inevitably lead a person imbued with it to seek common ground and to strive for collaboration and cooperation rather than confrontation. Finally, knowing the impact that one's actions may have on others would encourage a mindfulness that would not shy away from action but which would weigh its costs in the most thoughtful manner possible.

How could these qualities be integrated in judicial decision-making? Before answering that question, I first address my view of what that decision-making involves. My view has been formed by my career as a judicial staff attorney in the California appellate courts—both the Court of Appeal and the Supreme Court—where I have worked for most of the past twenty-three years. In that time, I have never encountered an appellate judge who approached his or her job with full-blown and meticulously worked out jurisprudence; such judges exist largely in the imagination of law school professors.²⁰

What I have observed is that the best appellate judges are intensely pragmatic in their approach to the cases before them and also tend toward intellectual flexibility, a quality absolutely essential in a position that requires the concurrence of a majority of justices to dispose of a case. These superior appellate justices are well aware of the legal and institutional constraints on the third branch of government of which they are part. As far as institutional constraints, they are aware, for instance, that unlike the executive or legislative branches, the courts are not free to propose or carry out new legal initiatives; they understand that their law-making is essentially reactive because it arises in the cases that come

¹⁹ Few Western writers have expressed this idea of our connectedness more eloquently than John Donne who in Meditation XVII wrote his famous words:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send out to know for whom the bell tolls; it tolls for thee.

JOHN DONNE, *Devotions Upon Emergent Occasions XVII*, in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE 445-46 (Charles M. Coffin ed., Modern Library, 2001) (1623).

²⁰ Thus, I am constantly bemused by the phrase "judicial activism" because it implies a range and freedom of action on the part of appellate judges that does not exist. See, e.g., Robert Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 19-21 (2003) (railing against "activist courts"). Of course, there are judges, on the right and left, who approach their work with a particular political agenda that leads them to distort appellate principles to reach a particular result. But having a political ideology is not the same as having a philosophy of the law.

before them, over which they have, at most, minimal control if they are courts of discretionary review, and in the context of particular sets of facts by which they are bound. Furthermore, they are aware that their role is not to make vatic legal pronouncements, but to resolve the conflicting interests of the particular parties in the lawsuit.

When I speak of legal constraints, I refer to the entire body of appellate procedures and principles that often determine the outcome of cases on appeal whatever a judge's personal preferences might be. For example, as every appellate judge knows, the applicable standard of review will usually be dispositive of a case.²¹ Similarly, the principle that requires an appellant not simply to point to error but to demonstrate that the appellant was prejudiced may often be decisive.²² A final point rarely noted in law school or law review articles is that the vast majority of the cases that come before the appellate courts, whether intermediate or supreme courts, are utterly routine, involving factual claims that can easily be disposed of by settled principles of law. Thus, judicial decision-making at the appellate level involves a limited range of motion; these constraints upon the power of judges are, perhaps, the price that the courts pay for their relative insulation from the political process.

This is not to say that appellate judges are automatons—far from it. Within the range of motion in which they are free to act they enjoy considerable discretion.²³ As Professor Ifill cogently observes: “The traditional view that judges simply interpret the will of legislators fails to account for the complexity of the judicial task. Judges are at once interpreters, fact-finders, and policy makers. In each of these areas, judges exercise discretion.”²⁴ For example, although the interpretation of ambiguous statutory language is governed by well-established appellate principles, what an ambiguous word or phrase in a statute means where there is a range of possible meanings is, ultimately, the choice to which a

²¹ “In every appeal, the threshold matter to be determined is the proper standard of review—the prism through which we view the issues presented to us.” *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 372 (Cal. Ct. App. 1999).

²² “The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial.” *Vaughn v. Jones*, 31 Cal.2d 586, 601 (Cal. 1948).

²³ “A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment” *Rodriguez v. Solis*, 2 Cal. Rptr. 2d 50, 53 (Cal. Ct. App. 1991).

²⁴ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 475 (2000).

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majority of judges subscribe.²⁵ Similarly, although the assessment of whether an error in a criminal case is prejudicial or harmless to the defendant is governed by well-settled standards and requires a consideration of the specific facts of the case, the result is not preordained but depends, in the last analysis, on the assessment of the particular judge or judges.²⁶

How, then, do judges make these discretionary choices? What are the factors that dictate their judgments? I largely agree with Justice Holmes's assertion that:

The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned. For every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to view of public policy in the last analysis."²⁷

What I find persuasive in this statement is Holmes's recognition that judges, as members of the community, are motivated as decision makers by what serves the communal good.

What I find missing from Holmes's statement is the further recognition that judges, like most of the rest of us, define their communities according to their life experiences, which may skew their assessment of what constitutes the communal good. As the late Justice Byron White admitted in a moment of candor, "Even the most conscientious judge will have difficulty in imagining the thoughts and feelings of people who have grown up in groups that [the judge's] culture has trained him to see as outsiders."²⁸ If, therefore, one's view of his or her community is limited to those among whom one has spent most of

²⁵ See e.g., *Professional Engineers in California v. Kempton*, 40 Cal. 4th 1016, 1037-48 (Cal. 2007) (holding unanimously that language in an initiative that explicitly repealed a state constitutional ban against the use of private contractors by state agencies for architectural and engineering services also impliedly repealed certain statutes derived from the constitutional ban).

²⁶ Compare the majority opinion in *People v. Vasquez*, 39 Cal. 4th 47, 59 (Cal. 2006), concluding that the denial of the defendant's motion to recuse the prosecutor's office was error but not a due process violation with the contrary conclusion reached by the dissenting justices. *Id.* at 72-76 (Moreno, J., concurring and dissenting).

²⁷ O.W. HOLMES, *THE COMMON LAW* 7 (Little Brown 1923) (1881).

²⁸ Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) (quoted in James Andrew Wynn, Jr. and Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 788 (2004)).

his or her life, one's view of what serves the public good may be similarly limited. Added to this, of course, is the further problem to which White alludes, that a person of limited life experience may also tend to regard people outside of his or her communal sphere as "outsiders," which betokens not merely indifference but some degree of hostility. Such an attitude is problematic enough in one's day-to-day interactions with one's fellow human beings, but for a judge who exercises authority over everyone it is disastrous.

It is at the intersection of judicial discretion and the limitations of personal experience to which all of us, including judges, are subject that humility and humanity become relevant factors in judicial decision-making. At this point, a sense of humility would require a judge to recognize the limits of his or her experience while a sense of humanity would compel the judge to understand the impacts that his or her decision will have on segments of the human community about which he or she has no personal knowledge. At this point both humility and humanity would compel the judge to rigorously acknowledge his or her biases and to consciously seek out counterweights to them. Humility and humanity would operate to remind the judge that he or she occupies an office of authority not as a sovereign, but as a servant and a servant to all, not only to a particular community of interests. The humble judge with a powerful sense of his or her connectedness to every member of the human family would be conscious of "judging as a terrible and terrifying job, as a burden of inflicting pain by virtue of judgment."²⁹

Humility would also require that, notwithstanding such consciousness, a judgment must still be rendered. To acknowledge and to welcome humanity and humility as desirable and even essential qualities for a judge would give judges permission to explicitly work toward an accommodation of competing interests. This, in turn, would allow judges to serve the broadest communal good, rather than being straitjacketed by a sense of adjudication as a winner/loser proposition in which one chooses the winner and, of necessity, creates a loser.³⁰ What this might mean in practice is not, of course, that both sides would get the relief they seek but that in rendering relief to one side, judicial opinions would not pretend to speak infallibly like the judges in W.H

²⁹ Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 CAL. L. REV. 1877, 1925 (1988).

³⁰ In this connection I agree with Professor Resnik that even now "[m]uch adjudication is not a win/lose proposition but an effort at accommodation, with judges and juries responding to both sides but currently without vocabulary or permission to express empathy with competing claims. Many verdicts allocate victory to both sides, but our tradition is to mask that allocation rather than to endorse the practice of seeing multiple claims of right." *See id.*

Auden's poem who "[s]peaking clearly and most severely" declare "Law is the Law."³¹ Instead of having to feign omniscience, a judge would speak as one human to other humans.

Recognizing humility and humanity as desirable qualities in a judge and in judicial decision-making might inspire better decision-making in the sense that competing interests would be more explicitly accounted for and respected. This kind of inclusiveness might, in turn, bolster the credibility of the judicial process, particularly among those who currently feel excluded and unrepresented in that process.

II. HUMILITY, HUMANITY, AND THE MINORITY JUDGE

The lack of diversity on the bench has many unfortunate consequences for the legal system, not the least of which is a devolution into a kind of apartheid system in which members of one racial minority—Whites—exercise judicial authority over a majority of people of color. Such is already the situation in California where Whites are no longer a majority, but rather a minority among minorities.³² Yet, the judiciary in California is overwhelmingly composed of White, heterosexual men. Unlike the other branches of government in which the people have concrete and frequent opportunities to literally change the faces of officeholders to more closely mirror the face of the people, the judiciary, in California at least, is largely impervious to such wholesale electoral changes.³³ At the same time, however, more than the executive and legislative branches, the legitimacy of the judiciary relies as much on the perception that it renders just results as the reality that it does so. The lack of diversity on the bench—that is, the absence of people of color, women and gays and lesbians for example—is a phenomenon that, over time, may erode the legitimacy of the third branch of government among these unrepresented groups.³⁴

³¹ W.H. AUDEN, *Law Like Love*, THE COLLECTED POETRY OF W.H. AUDEN 74-76 (Random House 1966) (1945), available at <http://www.poemhunter.com/best-poems/wh-auden/law-like-love/>.

³² As of 2006, the percentage of California's population described by the United States Census Bureau as "White persons not Hispanic" was 43.1 %. U.S. Census Bureau, State and County Quick Facts: California, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Mar. 18, 2008).

³³ In California, appellate court judges are subject to retention elections which are non-competitive and require only a yes or no vote; the term of office is twelve years. Superior court judges—California's trial judiciary—serve six year terms, and while superior court elections are competitive, though not partisan, in reality few sitting superior court judges are ever challenged. See CAL. CONST., art. VI, § 16.

³⁴ This may already be happening, even among judges themselves. See Sherrilyn A. Ifill,

In discussions of the need for judicial diversity, there may be some concern about whether the role of the judiciary would be compromised by an explicit policy of diversifying the bench with representatives of various “outsider” groups.³⁵ Such concerns are misplaced. First, as has been noted by other commentators, the bench *is* currently representative of the particular life experience of members of a specific racial group, gender, and sexual orientation—heterosexual, White men. Whether or not such individuals acknowledge or are even aware of their representative status, the fact remains that race, for example, is not merely the experience of people of color. The difference is, as Professor Ifill notes, that

[T]he most important and elusive benefit of white racial identity is the ability of whites to deny the existence of whiteness at all. Thus, an important privilege of whiteness may be the ability to think of oneself without regard to race—to see oneself instead as neutral, unbiased or impartial.³⁶

A similar observation could be made with respect to sexual orientation.

Lesbians and gay men are saturated with images, products, incentives and rewards that encourage heterosexuality; they are bombarded with gender stereotypes and heterosexual conditioning . . . Since these outward images correspond to their inner desires, most heterosexuals see nothing remarkable in such representations. To them, they are merely cultural reflections of “natural” sexuality. But homosexuals notice what heterosexuals do not—not only that these images fail to recognize homosexual desire, but that homosexual desire is ruthlessly expunged from them.³⁷

Gender, also: “When asked if she thought that the presence of two female justices at the Supreme Court would change the way the male

Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 WASH. & LEE L. REV. 405, 435-36 (2000) (citing survey of federal judges in which only 18% of African-American judges believed that black litigants are treated fairly in the justice system).

³⁵ See James Andrew Wynn, Jr. and Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 788 (2004) (“Unquestionably, the subject of judicial selection continues to be a hot topic for legal forums, bar journals, and law reviews. The challenge continues to be how to balance the competing interests of judicial independent and judicial accountability.”).

³⁶ Ifill, 57 WASH. & LEE L. REV. at 423.

³⁷ MICHAEL NAVA & ROBERT DAWIDOFF, *CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA* 115-16 (St. Martin’s Press 1994).

justices looked at the law, Justice Ruth Bader Ginsburg reportedly replied that the female justices would compel the men to “[l]ook at life differently.”³⁸ Justice Ginsburg’s statement would be meaningless if underlying it was not the assumption that her male colleagues viewed life in a manner that did not fully account for the life experiences of women. Her comment highlights both the existence and the limitations of a male perspective. This same limited perspective exists in relation to race, ethnicity, and sexual orientation.³⁹

Second, to argue on behalf of a diverse judiciary on the grounds that the views of minority communities deserve representation is not to argue that minority judges would act parochially to advance the perceived goals of their communities by reaching particular results. No advocate of a diverse bench is suggesting that judges should behave like neighborhood aldermen delivering the political goods to their constituents. “The representative role of judges requires only that judges give constituent communities the opportunity for the expression of their values and views in public policy.”⁴⁰ Such diversity of views is already a structural part of the judicial system and serves the crucial purpose of widening the understanding of the law.

Within judicial panels, collegial deliberation allows alternative conceptions to be aired and passed from judge to judge. As judicial panels vary over time, this allows further diffusion. On a larger scale, the creation of new precedents upholding alternative conceptions of equality or fairness alters the legal framework itself and transmits new conceptions to different judges.⁴¹ Ultimately, “[b]y allowing judges to compare various answers, the system helps judges produce better answers.”⁴²

Third, judicial diversity, far from compromising judicial impartiality, will advance it. Of course, this requires a different definition of impartiality than one that would require minority judges to

³⁸ Ifill, 57 WASH. & LEE L. REV. at 448.

³⁹ Another notorious example of the limitations of judicial perspectives on the high court is recounted in, among other places, Jeffrey Toobin’s book about the Supreme Court, *The Nine*. There he tells the story of how then Justice Lewis Powell, who cast the deciding vote upholding sodomy laws in the *Hardwick* decision, went to his clerk and reportedly told him that he, Powell, did not know any homosexuals and wondered why homosexuals did not have sex with women. Unbeknownst to Powell, his law clerk was himself gay. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 187-88* (2007).

⁴⁰ Ifill, 57 WASH. & LEE L. REV. at 416.

⁴¹ Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1202, 1238 (2006).

⁴² *Id.* at 1240.

recuse themselves whenever a case touching upon their community comes before them. This is precisely the situation encountered by the late Judge Leon Higgenbotham, Jr., who was the first African-American to sit on the United States District Court for the Eastern District of Pennsylvania, and later as Chief Judge of the Third Circuit Court of Appeals. As Judge Higginbotham observed in denying a motion seeking his recusal in a racial discrimination case because he identified with “causes of blacks, including the cause of correction of social injustice:”

Perhaps, among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of black litigants and black citizens and thus assure that brand of ‘impartiality’ which some whites think they deserve.⁴³

There is no conflict between representation by minority groups on the bench and judicial impartiality if the latter concept is properly understood. As Professor Ifill points out, “impartiality in reality has never meant that a judge must abandon all of the knowledge and experience he has gained in his professional and personal life. Nor has it ever meant that a judge lacks a ‘perspective’ or a view of the world which shapes his decision-making.”⁴⁴ Rather, “[i]mpartiality requires that judges keep their minds open enough to be persuaded by contrary arguments or principles as applied to a particularized legal conflict. Thus, impartiality leaves room for the judge to engage in and draw upon their multiple identities and experiences.”⁴⁵ Indeed, if impartiality is understood in this manner, minority group judges would actually have a broader reference of life experience upon which to draw which would tend to make them more, rather than less, impartial. Minority judges swim simultaneously in the waters of their particular group experience and the wider waters of the mainstream in which they have made their professional lives. For example, as Professor Ifill notes:

[W]hile African-American perspectives are likely to be unfamiliar to many white judges, an African-American judge regardless of his or

⁴³ *Commonwealth v. Local Union 543, Int’l Union of Operating Eng’rs*, 388 F. Supp. 155, 158, 177 (E.D. Pa. 1974).

⁴⁴ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 458 (2000).

⁴⁵ *Id.*, at 461.

her background will have had to confront and engage white community perspectives in order to successfully navigate their professional lives as lawyers and often politicians. In contrast, white judges rarely face the obligations to be familiar with African-American perspectives and values in order to ascend to the bench.⁴⁶

Minority judges live in, at minimum, two cultures, and this cultural bilingualism (sometimes literal bilingualism in the case of Latino or Asian judges) may have salutary effect of broader judicial perspectives.

To argue then for greater representation of minority communities in the judiciary is not to advocate for particular results but for a wider diversity of viewpoints in the judicial decision-making process that more accurately reflects the viewpoints of the various communities over which the judges exercise their authority. "The balance of these diverse perspectives ensures that no one perspective dominates legal decision-making and lessens the opportunity for bias to taint judicial decision-making."⁴⁷

To these familiar arguments in favor of a diverse judiciary, I would add my own view that minority judges tend to bring the qualities of humility and humanity to the job of judging. I want to begin by stating clearly that these qualities are neither the exclusive property of people from minority groups, nor that all such people or minority judges necessarily possess these qualities. People of color, women, gays and lesbians, or other people from groups against whom there has been a historical pattern of discrimination do not necessarily respond to such discrimination with a deepened sense of their own humanity and that of other people. It is just as likely, in fact, perhaps likelier, that oppression causes bitterness, anger and a constricted sense of self. I am not talking about oppressed people in general but about individuals from these and other similarly situated groups who have achieved the kind of professional and personal success that would qualify them to sit on the bench.

Such people, I would argue, may have a deeper sense of humility than the privileged for whom achievement is perceived to be in the natural order of things. This is because people from traditionally disenfranchised groups who succeed in the mainstream of the legal professional will have a keener sense that their success is not simply the product of their own abilities but the result, as well, of the many hands that have helped them on the way. If it is true, as Professor Scharffs

⁴⁶ *Id.* at 469-470.

⁴⁷ *Id.* at 411-412.

observes, that “[r]arely will one encounter someone who is humble and considers himself to be a ‘self-made’ person, because humility will compel him to acknowledge the substance and assistance he has received from others,” then minority judges will almost always demonstrate this quality of humility.⁴⁸ At the same time, however, members of minority groups who succeed in the legal profession will have had to demonstrate that deep acceptance of themselves and their vocations that allowed them to persist in their goal of becoming lawyers even though to do so they had to defy the social and cultural norms that discourage minority people from pursuing legal careers in myriad ways, large and small. As I argued previously, while this may look like assertive conduct, and is assertive, its well-spring is humility; the acceptance of one’s path and the cultivation of the qualities of persistence, forbearance, and endurance necessary to follow that path in the face of what seem at times to be insurmountable obstacles.⁴⁹ Finally, because such people have invariably had the experience of meeting people who were able to see past the stereotypes ascribed to various minority communities and to empathize with the individual before them, minority judges may themselves have that quality of openness and teachability that is also a quality of humility.

This empathic quality is also a hallmark of humanity. Someone who belongs to a denigrated community, for example, a gay person who grows up in a culture that condemns homosexuality as a sickness or a moral failing, and yet experiences himself as a decent and capable human being and who conducts his life in accordance with this self-knowledge rather than cultural beliefs has learned a lesson in empathy—here, empathy with his own situation—that may equip him to empathize with other people who, like him, are similarly ostracized for their differences. The most powerful form of compassion begins with compassion for one’s self because it is not a response to external situations, a response that may be transient, but a component of self. The compassion of which I speak is not a form of pity but a penetrating sense that beneath their differences, however profound those differences may appear, there is a

⁴⁸ Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 164 (1998).

⁴⁹ I believe the psychological state of such people was described by the psychiatrist Alice Miller who wrote of people who “want to be true to themselves. Rejection, ostracism, loss of love, and name calling will not fail to affect them; they will suffer as a result and they will dread them, but once they have their authentic self they will not want to lose it. And when they sense something is being demanded of them to which their whole being says no, they cannot do it. They simply cannot.” ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD REARING AND THE ROOTS OF VIOLENCE* 85 (Farrar, Straus, Giroux 1989).

commonality among humans that requires in a moral as much a legal sense equal treatment. A judge whose notion of equal protection arises from personal experience rather than simply constitutional text may be more likely to see inequality where a judge who had no such personal experience would not.⁵⁰

Thus far, I have spoken in generalities but I would like to close this essay with two examples that demonstrate the link between judicial diversity and humility and humanity. The first involves the friendship between Justices Thurgood Marshall, the first African-American Supreme Court Justice, and Sandra Day O'Connor, the first woman justice, as it was related by Justice O'Connor in a tribute she wrote to Justice Marshall on the occasion of his retirement.⁵¹ What is striking to me about O'Connor's article is that, while she clearly intended in it to show Marshall's humanity and humility, she just as clearly reveals her own.⁵²

Thurgood Marshall not only fought against the worst forms of Jim Crow segregation but he was personally subjected to them from the time he was a child in Baltimore throughout his professional career as a lawyer. He told Justice O'Connor of how he was run out of a Mississippi town in the 1940s by an armed man who told him, "Listen up boy because I'm only tell you this once. The last train through here is at 4 p.m. and you better be on it cuz niggers ain't welcome in these parts after dark."⁵³ Even as a Supreme Court Justice he continued to confront racism in less mortally dangerous, but nonetheless still pernicious, forms. A former law clerk remembered that one of Marshall's stories involved being mistaken by another Justice's visitor "for a Court messenger."⁵⁴ Marshall met these threats and indignities with an equanimity that seems, at least in the re-telling, nearly beatific; an equanimity that reflected a deep humility on his part. As Justice O'Connor wrote about her friend, "these hardships warranted no comment; they [were] simply the natural

⁵⁰ See Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1202, 1209 n.8 (2006). (discussing studies regarding the possible link between race and judicial votes).

⁵¹ Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

⁵² Equally striking is the warm and intimate tone of Justice O'Connor's article, particularly when compared to the articles of some of her colleagues. It is especially notable that the stories Justice O'Connor found so morally compelling were condescendingly characterized by then-Chief Justice Rehnquist as "'tall tales'." Compare *id.* at 1218-20, and William H. Rehnquist, *Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1213, 1213 (1992).

⁵³ O'Connor, 44 STAN. L. REV. at 1219.

⁵⁴ Janet Cooper Alexander, *TM*, 44 STAN. L. REV. 1231, 1234 (1992).

extension of a lifetime credo of ‘doing the best you can with what you’ve got.’”⁵⁵

If Marshall accepted these experiences as the price he paid for the road that he had been given to travel, he did not accept that others deemed “Other” should pay the same price. “Coupled with TM’s trial lawyer’s wisdom was a deep empathy, born of personal experience, for the poor, the powerless, and all those who are discriminated against—African American, Native American, other racial minorities, women, homosexuals, and criminal defendants.”⁵⁶ He represented the viewpoints of these groups in personal terms, cutting through the rhetorical fabrications with which appellate opinions all too often disguise the human costs of judgment. In a dissent in which his colleagues upheld a statute requiring an indigent person to pay a filing fee before obtaining discharge from bankruptcy on the grounds that the amount, less than \$2 a day, was not beyond the reach of indigent people, Marshall wrote:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival most of them are. A sudden illness, for example, may destroy what savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. . . . It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.⁵⁷

It was Marshall’s task, increasingly lonely as he become more isolated at the Court, to challenge such unfounded assumptions. He was a man for whom, as another colleague observed, the treatment of all people as equals was more than a legal notion but “the fascinating reality of his life.”⁵⁸

In Justice O’Connor, at least, he found a kindred soul. Although she acknowledged that growing up in Arizona she had not been personally exposed to terrain of racial conflict in which Marshall had moved all his life, Justice O’Connor had undergone her own encounter with discrimination based on her gender.⁵⁹ The experience of being a

⁵⁵ O’Connor, 44 STAN. L. REV. at 1219.

⁵⁶ Alexander, 44 STAN. L. REV. at 1233-34.

⁵⁷ *United States v. Kras*, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting).

⁵⁸ See Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1221 (1992).

⁵⁹ O’Connor, 44 STAN. L. REV. at 1219.

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woman in the law at a time when the only job a law firm could conceive of offering her was a legal secretary undoubtedly allowed her to hear Justice Marshall's stories about his experience as an African-American with ears sensitive to the similarities between them. This sensitivity allowed her to be open to the legal points she clearly recognized were the point of Marshall's stories. She recognized, with remarkable acuity, that Marshall's stories "reflect. . . the perspective of a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand."⁶⁰ Reflecting upon his departure from the court, she ended her piece, "I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, *perhaps change the way I see the world.*"⁶¹

O'Connor's reminiscences about Marshall reveal her own humility—the knowledge of the limitations of her experience and her openness to the experience of another that might change "the way [she] see[s] the world"—and humanity—the identification with Marshall despite their profound dissimilarities: he, an African-American man who grew up in Jim Crow America and as liberal a justice who ever sat on the high court, and she, an Arizona rancher's daughter who had been a conservative Republican state legislator before her elevation. Their relationship as recounted by Justice O'Connor illustrates the points I have tried to make in advancing the argument that humility and humanity should be acknowledged and prized judicial virtues and that judicial diversity may increase these qualities on the bench.

I close with the story of another judge who occupied a much humbler position than a seat on the United States Supreme Court. In 1982, Herbert Donaldson, a lawyer who had a long career as a gay activist, was appointed to the San Francisco Municipal Court by then-Governor Edmund Brown, Jr. Judge Donaldson's activism on behalf of the gay and lesbian community reached back into the 1960s including, memorably, his arrest in 1965 when he and another attorney, Evander Smith, attempted to prevent police from entering a fundraiser for the fledgling gay rights movement sponsored by the Council on Religion and the Homosexual, a group of San Francisco ministers who believed that gay and lesbians were being mistreated.⁶²

⁶⁰ *Id.* at 1220.

⁶¹ *Id.* (emphasis added).

⁶² Patricia A. Cain, RAINBOW RIGHTS THE ROLE OF LAWYERS AND THE COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 53-54 (Westview Press 2000).

At the time of Judge Donaldson's appointment, the Municipal Court was the lowest rung of the judicial ladder in California.⁶³ It was Judge Donaldson's choice to sit on the Municipal Court rather than the more prestigious Superior Court to which the Governor wished to appoint him because Judge Donaldson felt that serving on the Municipal Court would keep him closer to the people who he would serve as a judge.⁶⁴ Later, Judge Donaldson was instrumental in the 2002 creation of San Francisco's Behavioral Health Court, the purpose of which is to remove people with mental illness from the criminal system and connect them to treatment services in the community. A profile of Judge Donaldson noted that his "fairness and compassion for people with mental illness was well-known (in the criminal court house) long before he took the bench in Behavioral Health Court," and commended him for his "appreciation of the plight of people with mental illness in the criminal justice system and his willingness to employ an innovative approach to address the problem."⁶⁵

What is important in Judge Donaldson's story is that his concern for the mentally ill undoubtedly reflects his own experiences as a gay man in the 1950s and 1960s when homosexuality was considered a form of mental illness. His fairness and compassion toward a group of humans who are generally viewed as marginal at best reflects his own experience as a member of another marginalized group of human beings, and his identification with their suffering surely arises from his experience of the suffering of gay men and women. Thus, Judge Donaldson's judicial career—his decision to sit on the municipal rather than the superior court and his advocacy on behalf of the mentally ill—demonstrates how humility and humanity can transform our conventional notions of what it is to be a judge. In Judge Donaldson, we experience a judge not as a remote figure of authority but as a human being actively involved in the search for the communal good. Surely, his conception of the role of a judge is rooted in his experience as a member of an often persecuted minority group.

⁶³ As of 1998, the process of unifying the superior and municipal courts began in each of California's counties and, as result, those courts are now consolidated. See CAL. GOV. CODE, § 70200 (Westlaw 2008).

⁶⁴ Pat Murphy, *Cry San Francisco A River, Starbucks - This Mayor Stocks Only Peet's Coffee for Home and Hearth*, S.F. SENTINEL, Aug. 19, 2007, <http://www.sanfranciscosentinel.com/?p=4213> (last visited Mar. 10, 2008).

⁶⁵ *Spotlight on Judge Herbert Donaldson, San Francisco Behavioral Court*, JUDGES CRIMINAL JUSTICE/MENTAL HEALTH LEADERSHIP INITIATIVE NEWSLETTER, Vol. 2, No. 1 (Spring 2006) at 3.

III. CONCLUSION

In my view, it is time to rethink what a judge is and what judging requires. I do not advocate by this certain results in particular cases but the recasting of the judiciary as a branch of representative government in which the values and life perspectives of the entire community are acknowledged and respected in the ways by which judicial results are reached. To proceed in this manner requires a diverse bench where, particularly, the values and views of traditionally disenfranchised groups are presented and it requires that judicial decision be approached in a spirit of humility and humanity. A diverse bench would also increase these qualities and give them their rightful place in the constellation of judicial virtues.