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DIVERSITY AND THE LAW

*Jenny Rivera**

Thank you Dean Eric Lane for inviting me to deliver this year's Howard and Iris Kaplan Memorial Lecture.

The goal of this lecture series is to bring jurists to address the community on important and timely legal issues. A worthy goal indeed, of which I am honored to be invited to further by my comments this afternoon. As I was considering what might be an appropriate topic, I thought about the variety of legal issues that our high court decides. I thought a discussion on procedure might be of interest because many a lawyer has failed to appreciate, to the detriment of the client, the scope of our jurisdiction as well as our preservation rules. Perhaps a discussion on some arcane aspect of appealability or the mootness doctrine would stir intellectual curiosity and provide a basis for future conversations.

I eventually settled on a very different topic, but I consider it no less important than the areas mentioned above. Rather than address what might otherwise appear to be the weeds in which we toil as jurists, I have decided to discuss diversity within the legal profession, and specifically, the judiciary. I consider this topic timely and of great concern to the legal profession and the greater society because it requires us to think critically about expectations and hopes for the future of our democratic system of government. The changing demographics of both the profession and our population demand that we approach this issue with an eye to a candid and open dialogue about what these undeniable changes mean for our judiciary, our justice system, and the rule of law.

Diversity, of course, is a regular topic of discussion across a broad spectrum of institutions and professions. It is discussed in academic

* Associate Judge, New York State Court of Appeals. The opinions expressed in this Article are the author's own and do not reflect the views of the New York State Court of Appeals or the New York State Unified Court system. This Article is adapted from the Howard and Iris Kaplan Memorial Lecture, delivered by Judge Rivera on November 6, 2014, at the Maurice A. Deane School of Law at Hofstra University.

circles, legal circles, among politicians, the military, and within the private business sector. For some, talking about diversity is part of the office culture. It can be a controversial topic charged with emotional components, such as who should share in the resources of our country, be offered admission to a particular school, or hold a particular type of job. It can be part of a thought exercise, such as imagining the impact of “sameness” and “difference” on society and individuals.

I cannot explore all of the permutations of this topic that by necessity (and experience) are implicated by the diversity of the concept of “diversity.” Instead, I provide research, data, and the attendant considerations inherent to a discussion of diversity in the legal profession. Be forewarned that I do not speak as to my own conclusions. Rather, I share a variety of the current thoughts on this topic. My hope is to inform even those well versed on the issues and, perhaps, stimulate future discussion, slightly moving the dial towards a greater consideration of this subject.

Let us begin with what diversity means. Diversity is defined as “the quality or state of having many different forms, types, ideas” and “the state of having people who are different races or who have different cultures in a group or organization.”¹ The term dates back to the fourteenth century to the word “diverse,”² which is defined as “differing from one another.”³ Similarly, *Black’s Law Dictionary* defines diversity as “[e]thnic, socioeconomic, and gender heterogeneity within a group” and “the combination within a population of people with different backgrounds.”⁴ It also references our Fourteenth Amendment jurisprudence and states that the U.S. Supreme Court “has found diversity in education to be a compelling government interest.”⁵

I have no quarrel with these definitions, but they are quite general and only get us so far because diversity has meant a particular type of difference—a way of thinking about identity. It has usually focused on racial, ethnic, and gender characteristics. For this discussion, I adopt these same identifiers of self with two important additions, which are not based on physical characteristics but may be influenced by one’s identity. I add to today’s working definition diversity of professional experience and socioeconomic status.

1. *Diversity*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/diversity?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited July 24, 2016).

2. *Id.*

3. *Diverse*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/diverse> (last visited July 24, 2016).

4. *Diversity*, BLACK’S LAW DICTIONARY (9th ed. 2009).

5. *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003)).

Definition without context is, however, only half the story. Diversity must be considered against the backdrop of its historical roots, which I describe as a movement to ensure that those disadvantaged by legally-sanctioned and social inequality have an equal opportunity to participate in society and enjoy the benefits of the fruits of their own and their ancestors' labor. Diversity efforts may reflect attempts to remedy past injuries. While victims of some of the most pernicious wrongs may no longer live to collect compensation, or otherwise benefit from the sacrifices made in the past, diversity remedies inure to the benefit of those who today experience the legacy of former legalized oppression.

Any serious consideration of the concept of "diversity" requires an understanding of the purpose for diversification and critical analysis of its application to the legal profession and our system of justice. This alone requires debate and discourse. For the purposes of this discussion, I will simply assert that there appear to be three publicly, generally recognized goals of diversity. All three are transformative in one way or another, and as in all things human, they are limited in the extent to which they effectuate change. Even assuming some other obvious purpose, we can still use this short list of goals as a working basis for our exploration of diversity.

The first goal is to establish a profession that represents the broad diversity of our population. This is change grounded in demographics and data. We accomplish this goal by simply changing the percentages of those in the profession who represent any particular group to match (or approximate) their number in the broader society. This has the attraction of simplicity, even if it seems a rather unsophisticated approach to a complex and contested issue.

The second goal in many ways justifies the effort necessary to achieve the first goal, for this second goal relies on diversity as proof that our legal system is purged of barriers based on race, ethnicity, gender, and other unacceptable forms of categorizing individuals. Supported by research and factual analysis of the impact of heterogeneity on individual and group behavior, this goal relies on the presumption that diversity minimizes the potential for bias and reduces the deployment of stereotypes as a basis for action and decision-making. That is to say, as more of the historical targets of bias are present in the workforce, hold leadership positions, and are treated as equals under the law, co-workers, supervisors, and employers will adjust their behavior to comport with these demonstrated examples of the values of equality. A corollary to this goal is that a system purged of bias results in the selection of highly qualified individuals who are chosen based on merit.

The third goal of diversity is to engender and increase public confidence in the administration of justice and create an environment supporting a popular belief that the system is fair. This strikes me as the most misunderstood of the goals described because it requires an understanding and an acceptance of an outsider's perspective to the law. It requires us to recognize that some members of our population believe there can be no justice if they do not see someone like themselves in positions of power and influence, such as those held by lawyers and judges.

It may be difficult to accept that this perspective applies to legal actors because in our profession we say the rule of law guides us—not prejudice, not bias, and not commonality of economic position. So, this is where the rubber hits the road. It must be recognized that even if a profession of homogenous individuals⁶ could mete out impartial justice, its very existence undermines the goal of equality under the law. Justice cannot be blind if it is imparted by a group that overwhelmingly shares a common experience and appearance to the exclusion of others.

In 2006, John R. Dunne, as vice chair of the Committee for Modern Courts in New York, testified at a public forum on judicial diversity held by the minority leader of the New York State Senate. Advocating for the governor's commitment to diversity on the New York State Court of Appeals, Dunne stated that “[w]here the judiciary does not reflect the diversity of the community it serves, public confidence in the judiciary is undermined.”⁷ He then referenced a survey sponsored by the Commission to Promote Public Confidence in Judicial Elections and conducted by the Marist Institute for Public Opinion in which seventy-one percent of all registered voters in New York State agreed that New York State judges are fair and impartial, a sentiment shared by only fifty-one percent of African American voters.⁸ The New York State Bar Association has also relied on similar statistics, adding “that only sixty percent of Latino voters . . . in New York State trust our state's judges to be fair and impartial.”⁹

Descriptive representation has great symbolic importance. Its impact on racial and ethnic groups cannot be ignored. This is also true for women. According to a 2011 report from the Center for Women in Government and Civil Society (“CWGCS”) at the Rockefeller College

6. Defined here as homogenous based on a small number of characteristics.

7. *Judicial Diversity*, FUND FOR MOD. CTS., <http://moderncourts.org/programs-advocacy/judicial-diversity> (last visited July 24, 2016).

8. *Id.*

9. JUDICIAL SECTION, N.Y. STATE BAR ASS'N, JUDICIAL DIVERSITY: A WORK IN PROGRESS 1 (2014).

of Public Affairs and Policy, State University of New York at Albany, the empirical literature establishes that female representation in elected and appointed offices, including the judiciary, matters.¹⁰ The report, in pertinent part, provides:

Descriptive representation, or having a number of women judges who are representative of the population they serve is believed to be of critical symbolic and material importance, since it generates group empowerment and leads to greater *confidence* in the judicial system and in government in general. It has been shown that descriptive representation can send signals that women (and minorities) are respected and have a place in government. These messages can increase *trust*, improve levels of participation and interest, enhance perceived government legitimacy, and combat political alienation of under-represented groups.¹¹

Further, I would add a fourth goal of diversity, which continues to be researched, debated, and contested. This goal asserts that diversity serves as a proxy to establish a system of justice structurally and analytically sounder than the current system by enhancing the decision-making process. In other words, diversity not only holds the promise of individual access in a system marked by equal opportunity, which eventually will result in numerical balance or proportionality, but also ensures a better system because it is based on heterogeneity or difference, rather than homogeneity or sameness.

The arguments in support of diversity as a vehicle for improving decision-making within our legal system are based, in part, on two hypotheses. One hypothesis asserts that there must be a certain number of individuals representative of a minority class in order for those individuals to feel comfortable and be taken seriously within the larger group. In a sense, it allows for their voices to develop and be heard. Researchers note that one-third the membership of a group constitutes a critical mass, which, in the context of female representation, “is defined as the point at which the presence of women becomes significant enough to instigate change in the stereotypical conception of gender roles.”¹² However, critical mass is a concept that “has been applied in a wide variety of contexts and settings, though all applications share a common trait: the notion that relative numbers matter in terms of the dynamics of demographically heterogeneous groups.”¹³

10. DINA REFKI ET AL., *CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS 1* (2011).

11. *Id.* (citations omitted).

12. *Id.* at 8.

13. Lissa Lamkin Broome et al., *Does Critical Mass Matter? Views from the Boardroom*, 34

The other hypothesis purports that improved decision-making is inherent in a diverse group, based on the ability to draw on experiences that vary among individuals of different professional and personal backgrounds. The data exploring this hypothesis appears somewhat mixed. Some data supports the argument that judges of different races, ethnicities, and genders may reach different conclusions. Some data finds no support for such a conclusion. Some data finds limited areas in which there is a statistically significant difference in decision-making among judges of different racial groups and between men and women. Below, examples of this last research category are referenced briefly because studies have noted some anecdotal support for the outcomes found in this data.

The *Harvard Journal of Racial and Ethnic Justice* published an article in 2012, setting forth a recent empirical study of all reported racial harassment cases brought under Title VII of the Civil Rights Act of 1964¹⁴ in the federal district courts of six representative circuits between 2002 and 2008 (a total of 473 opinions), that found the race of judges and the race, but not the gender, of plaintiffs has a statistically significant impact on judicial decision-making in employment discrimination cases.¹⁵ Specifically, the data showed that African American plaintiffs have substantially lower success rates than Latino, Asian, and White plaintiffs, and that Latino¹⁶ plaintiffs have the highest success rates of the groups.¹⁷ The data also showed that the majority of cases were decided by White judges—no surprise given that the majority of judges are Caucasian males—and further found that plaintiffs had comparatively worse outcomes when appearing before White and Latino judges than before African American judges.¹⁸ Plaintiffs were successful in 42.2% of the cases before African American judges, against a baseline success rate of 22.2%, and compared with a success rate of 20.6% before White judges and 15.6% before Latino judges.¹⁹

Analyzing the interaction of the judges' and plaintiffs' race, the study made three findings:

SEATTLE U. L. REV. 1049, 1051 (2011).

14. 42 U.S.C. § 2000e-2(a)(1) (2012).

15. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 96 (2012).

16. This Article uses the term "Latino" throughout, except where referencing a direct quotation.

17. *Id.* at 99-101.

18. *Id.* at 103-04.

19. *Id.*

First and most notably, Hispanic plaintiffs succeed at the highest rates in front of every judge group (African American judges 60%; Hispanic judges 50%; White judges 32.5%), which helps account for their overall success rate of 37% Second, White and African American judges rule much more favorably for plaintiffs of their own race (same-race pairings) than of another race, with White judges and White plaintiffs at 28%; and African American judges and African American plaintiffs at 47%. Third, different-race pairings (excluding Hispanic plaintiffs who are treated most favorably by all judges) have success rates lower than the baseline (White judges and African American plaintiffs at 19%; African American judges and White plaintiffs at 17%; Hispanic judges and White plaintiffs at 0% or African American plaintiffs at 9.5%).²⁰

This study confirmed earlier results by the same researchers who stated that the results of their most recent study “do not appear to support the formalism model of judicial decision-making, where judges’ legal analyses are considered largely a mechanical and value-neutral exercise.”²¹ Rather, the results indicated that “judicial decision-making appears to be a more complicated, and human activity where judges’ backgrounds, including their race and their conscious or unconscious worldview of other races, affect case outcomes.”²² They cautioned, as other researchers have warned, that “judges typically exercise discretion in a principled fashion, not in a strategic self-interested way, thereby protecting judicial legitimacy.” After all, “[judges] are not ‘merely politicians in robes.’”²³ As a consequence, “consistent with a ‘principled discretion’ version of a realism model of judicial decision-making, it appears that the life experiences of judges of different races result in different relevant ‘pools of information’ that have real-world consequences for plaintiffs of different races in racial harassment cases.”²⁴

The researchers and study authors concluded that “[a] more integrated judiciary that is representative of American society would expand judicial perspectives, prompt a more deliberative process, and help assure more accountable and responsive decision-making for ‘citizens of all walks of life,’ thus facilitating a more fully-functioning democracy.”²⁵

20. *Id.* at 108.

21. *Id.* at 113.

22. *Id.*

23. *Id.* (quoting James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 *LAW & SOC’Y REV.* 195, 214 (2011)).

24. *Id.* at 115.

25. *Id.*

In a 2010 study of the causal effects of sex on judging, researchers examined thirteen legal areas ranging from disability law to sex discrimination, to analyze whether a judge's gender affected decision-making.²⁶ The researchers found that only in sex discrimination cases did sex impact the outcomes. They stated:

[T]he probability of a judge deciding in favor of the party alleging discrimination decreases by [ten] percentage points when the judge is a male. Likewise, when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant. More generally, [the] findings are consistent with informational accounts of gendered judging and are inconsistent with several others.²⁷

The researchers subjected a preexisting data set, developed by Cass Sunstein and his co-authors for a book published in 2006, to a propensity score matching methodology.²⁸ Utilizing this expansive data base, the researchers described several empirical results. They found that “almost without exception, female and male judges do not reach different decisions” within the thirteen legal subject areas.²⁹ The one exception they identified was that “[f]emale and male judges differ significantly in their treatment of Title VII sex discrimination suits. On average, the probability of female judges voting in favor of the plaintiff in a sex discrimination case is around 0.10 higher than it is for male judges—a difference with meaning.”³⁰

Notably, the researchers also found that while male judges serving on a mixed-sex panel (a panel with female judges) did not vote differently than male judges on all-male panels, with one exception.³¹ As was the case with the data on the individual effects on judging, the data on the effects on panels showed that “[f]or males at relatively average levels of ideology, the likelihood of a liberal, pro-plaintiff vote increases by almost [eighty-five percent] when sitting with a female judge.”³² In light of these results, the researchers concluded:

[T]he presence of women in the federal appellate judiciary *rarely* has an appreciable empirical effect on judicial outcomes. Rarely, though, is

26. Christina Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 397 (2010).

27. *Id.* at 397.

28. *Id.*; see CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

29. Boyd et al., *supra* note 26, at 401.

30. *Id.*

31. *Id.* at 402.

32. *Id.* at 406.

not never. . . . [W]e observe consistent and statistically significant individual and panel effects in sex discrimination disputes: not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not—in favor of plaintiffs. Characterized this way, [the] results are consistent with an informational account of gendered judging; they also serve to reinforce other studies that identified gender effects in the employment area.³³

The data on judicial decision-making has also been recognized by the New York State Bar Association, as provided in its 2012 report:

No one can seriously question that the life experiences of people differ, and that those differences impact individuals' views and perceptions. Men and women, and Caucasians and minorities, do not always view the world in the same way. It is this common sense premise that has shaped the increasing body of law protecting defendants' fundamental right to a true jury of their peers. Every day judges apply the law to the facts or real life experiences of the litigants appearing before them; it is only logical that judges' own life experiences may color their perceptions of those facts. Since more cases are decided by judges than juries, it is just as critical to ensure that the state's judiciary reflects the population it serves.

. . . There is a value in symbolic representation—seeing someone who looks like you on the bench. Yet it is more than just the perception of fairness that impacts judicial efficacy. It is the actual quality of justice that suffers when judicial diversity is lacking. Although we know this intuitively, empirical studies have also confirmed that diverse judges decide certain types of cases differently than their white male colleagues and that minority and female judges on appellate benches can also influence the decisions of their colleagues and improve the collective decision-making process.³⁴

These ideas are longstanding. In 1992, the Task Force on Minority Representation on the Bench (commonly referred to as the Task Force on Judicial Diversity), established by executive order³⁵ of then-Governor Mario M. Cuomo, concluded that “diversity is vital because it is required by our constitutional and legal commitment to inclusiveness and because it greatly improves the ability of the judiciary to fulfill its function.”³⁶ The Task Force identified two key areas in which diversity

33. *Id.* at 406.

34. JUDICIAL SECTION, *supra* note 9, at 1-2.

35. N.Y. COMP. CODES R. & REGS. tit. 9, § 4.149 (1991).

36. N.Y. TASK FORCE ON MINORITY REPRESENTATION ON THE BENCH, EXEC. OFFICE OF THE GOVERNOR, TASK FORCE ON JUDICIAL DIVERSITY REPORT 5 (1992).

makes a difference. First, and according to the Task Force the “most important” area, was the “improve[d] public confidence in the fairness of the justice system,” which thereby “strengthens the [r]ule of [l]aw.”³⁷ Second, is the “improve[d] . . . quality of judicial decisions.”³⁸ The latter is accomplished by expanding the experience of the bench. As the Task Force stated:

For the law to develop in light of the experience of the whole society, it is better if the bench is pluralistic, diverse and inclusive. The experience of men and women, whites and racial minorities, rich and poor, advantaged and disadvantaged all differ, as do the experiences of persons of varying national origin, sexual preference or disability status. A judiciary with jurisdiction over each and every person should find wisdom in all those experiences and thereby keep the law rooted in the experience of our whole society. Although this can happen without the diversity of the bench being exactly proportional to the diversity of the population, the judicial experience factor will more accurately reflect the experience of the whole society if the diversity is real and substantial.³⁹

The impact of gender is similarly recognized and no less meaningful, as supported by the CWGCS report: “[R]esearch has documented that women’s descriptive representation on elected and appointed bodies can be correlated to substantive representation. Women’s unique experiences as women are believed to inform their interpretation and shape the lens with which they make decisions as judges especially in cases where women’s experiences are central.”⁴⁰ Justice Shirley S. Abrahamson appointed in 1976 as the first woman on the Wisconsin Supreme Court has said:

I think that when people ask if “being a woman” brings anything special to the court, they really are asking whether there is any special sensitivity that a person’s background might bring to the court. My gender—or, more properly, the experiences that my gender has forced upon me—has, of course, made me sensitive to certain issues, both legal and nonlegal. So have other parts of my background. My point is that nobody is just a woman or a man. Each of us is a person with diverse experiences. Each of us brings to the bench experiences that affect our view of law and life and decision-making. The concept of a collegial court is to bring together people who will have different life

37. *Id.*

38. *Id.*

39. *Id.* at 8.

40. REFKIE ET AL., *supra* note 10, at 1.

and legal experiences, who may have different views of law and facts. If all the judges were the same, why have seven?⁴¹

In addition to experience born of difference based on race, ethnicity, gender, and other identity characteristics, there is also experience born of the practice of law. In this vein, several U.S. Supreme Court Justices appear to agree that diversity of legal practice experience is important to an appellate court.

Referring to Justice Thurgood Marshall, a civil rights litigator and icon, Justice Byron White stated that Justice Marshall “brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match.”⁴² Justice Sandra Day O’Connor noted how Justice Marshall’s life and professional experiences brought an experience not otherwise heard from the Supreme Court’s bench:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. . . .

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.⁴³

Alliance for Justice has argued:

[J]udges are the product of their background and experiences, including their professional lives before taking the bench. . . . [W]hen judges come from all corners of the legal profession—and particularly when they’ve worked in the public interest, representing those whose voices are otherwise rarely heard—they are equipped to understand the views of each litigant before them, and to render more informed, thorough decisions.⁴⁴

41. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 493-94 (1984).

42. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

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

44. ALL FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 5 (2016), <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf>.

As they point out, the data indicates that professional experience, at least on the federal bench, is tilted against public interest service.⁴⁵

It seems likely that the findings in these studies and the arguments propounded by advocates for diversity will continue to be discussed and debated. While some may believe the case has not yet been made for diversity in the legal profession in furtherance of the fourth goal this Article identifies, the private sector appears convinced that diversity makes for better outcomes and increases profits. We need only read the amici briefs submitted by fortune 500 businesses in *Grutter v. Bollinger* for statements from the business community extolling the virtues of a diverse workforce.⁴⁶ One asserted that “[t]o be successful in the global marketplace, multinational . . . companies . . . must cultivate and maintain a diverse workforce comprised of the most talented and skilled people.”⁴⁷ Another stated that “a diverse workforce creates a competitive advantage by allowing a business to leverage the diverse perspectives of its employees to improve decision-making and increase productivity.”⁴⁸ It quoted one commentator as saying, “[T]here has come a uniform recognition by top management that diversity adds a significantly valuable dimension to problem-solving and decision-making, and therefore that diverse groups possess important advantages over homogeneous groups as units of creative and competitive productivity.”⁴⁹ Yet another company asserted:

[A]bundant evidence suggests that heterogeneous work teams create better and more innovative products and ideas than homogeneous teams. Homogeneity often causes teams to suffer from lock-step “group think.” The most innovative companies therefore deliberately establish heterogeneous teams in order to “‘create a marketplace of ideas,’ recognizing that a multiplicity of points of view need to be brought to bear on a problem.”⁵⁰

45. *Id.* at 6.

46. Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of BP America Inc. as Amici Curiae in Support of Neither Party, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

47. *Id.* at 7.

48. Motion for Leave to File Brief and Brief of Exxon Mobil Corp. as Amicus Curiae in Support of Neither Party at 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

49. *Id.* (quoting Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REV., Jan. 1, 1988, at 317).

50. Brief of General Motors Corp. as Amicus Curiae in Support of Respondents 24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (citations omitted) (quoting ROSABETH MOSS KANTER, *THE CHANGE MASTER: INNOVATIONS FOR PRODUCTIVITY IN THE AMERICAN CORPORATION* 167 (1983)).

If diversity matters for all the reasons articulated by scholars and leaders within the legal profession, and by the business community, then how have the profession and the larger society responded? Is diversity a priority? If so, what have we done to bring us closer to diversity that is “real and substantial”? How have the demographics of the United States and the profession shaped these efforts? What does our report card look like?

To explore these questions, we must look at the status of our profession, and just on the numbers, it makes clear that there are great challenges ahead. In 2015, according to the Federal Bureau of Labor Statistics, 34.5% of lawyers were women, 4.6% were African American, 5.1% were Latino, and 4.8% were Asian-Pacific American.⁵¹ The numbers are clearly under-representative of these groups as well as the percentage of women in society. Turning specifically to the judiciary, the data shows that women constitute half of the United States population and approximately 50% of the Juris Doctor degrees awarded, yet women remain under-represented on the bench.⁵² Currently, of the federal judiciary bench, women account for approximately 33% of active federal trial court judges, yet six districts have never had a female judge.⁵³ Women constitute 35% of circuit courts of appeal judges with at least two circuits significantly under-represented.⁵⁴ Women are 33.3% of U.S. Supreme Court justices.⁵⁵ The numbers are smaller for women of Color, with eighty-three active federal judges, twelve of which are on the circuit courts of appeal.⁵⁶ Six circuit courts, including the Second Circuit, have no women of Color as active judges.⁵⁷

In New York State courts, women have recently passed the one-third mark. Women account for approximately 35% of all state court judges, or about 434 out of approximately 1247 judges.⁵⁸ Women are 40% of the Appellate Division of the N.Y. Supreme Court, with representation varying widely by judicial department. In the First Department, 48.4% are women, in the Second Department 51.5%, in the

51. BUREAU OF LABOR STATISTICS, FED. STATISTICAL SYS. OF THE U.S., EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 3 (2013), <http://www.bls.gov/cps/aa2013/cpsaat11.pdf>.

52. NAT'L WOMEN'S LAW CENTER, WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1 (2016), <https://nwlc.org/wp-content/uploads/2016/03/JudgesCourtsWomeninFedJud6.23.pdf>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. JUDICIAL SECTION, *supra* note 9, at 54.

Third Department 23.2%, and in the Fourth Department 17.7%.⁵⁹ The 2011 CWGCS report, discussed above, ranked New York twelfth based on women's share of federal and state judgeships, which at the time was 30.9%. (Idaho ranked fifty-first with 11.3% women, and Vermont ranked first with 39.6% women).⁶⁰ Notably, today, our state's high court, the New York State Court of Appeals, leads our state bench. A majority of the court is female, with women holding four of the seven seats on the court, or 57% of our bench.⁶¹ This is the third time in the court's history where women have been in the majority.⁶²

In 2014, according to a New York State Bar Association report, the total percentage of judges of Color in the New York State court system was 19.3% (about 239 out of 1247).⁶³ Among our state's judiciary, 144 judges were African American, 72 Latino, 22 Asian, and 1 was Native American.⁶⁴ In the Appellate Division, 27.3% of judges are People of Color, or fifteen jurists, of which seven were female, eight African American, five Hispanic, and two Asian.⁶⁵

The Appellate Division, First Department was comprised of fourteen justices, of whom seven were People of Color—three African American, three Latino, and one Asian.⁶⁶ In the Second Department, thirty-five percent of the judges were People of Color, or seven out of the twenty justices, comprised of four African Americans, two Latinos, and one Asian.⁶⁷ In the Third Department, there were no judges who are People of Color.⁶⁸ Finally, in the Fourth Department, there was one sole justice of Color, and she is African American.⁶⁹ There were no Native American justices in the Appellate Division. The presiding justices of the First and Second Departments were People of Color, Latino and

59. *Id.*

60. REFKI ET AL., *supra* note 10, at 7.

61. See CT. APPEALS STATE N.Y., <https://www.nycourts.gov/ctapps> (last visited July 24, 2016).

62. From 2003 to 2009, the female majority of the New York State Court of Appeals consisted of Chief Judge Kaye, Senior Associate Judge Ciparick, and Judges Graffeo and Read. From 2013 to 2015, the female majority consisted of Judge Read, Judge Rivera, Judge Abdus-Salaam, and either Judge Graffeo or Judge Stein. Recently, and for the second time in the court's history, the Governor appointed a woman as Chief Judge. The appointment of Janet DiFiore maintained a female majority on the court.

63. JUDICIAL SECTION, *supra* note 9, at 54.

64. *Id.*

65. *Id.* at 53-54.

66. *Id.* at 57.

67. *Id.*

68. *Id.* However, in 2016, the Governor appointed the first African American female justice to the Third Department bench, Sharon Aarons.

69. *Id.*

Asian, respectively, and the presiding justice of the Third Department was a white woman.

If we consider national numbers, we see that men constitute half the U.S. population, yet constitute almost seventy-four percent of all federal and state judgeships. No doubt the judiciary is an exclusive club—one based on qualifications. However, exclusiveness obtained and maintained by selection protocols that result in racial, ethnic, and gender disparities is far from beneficial to society.

Where does this leave us? In *Women, Judging and the Judiciary: From Difference to Diversity*, Erika Rackley argues that “who the judge is matters,” and she states:

Male judges, just as women, resort to their own perspectives, experiences and values when deciding cases and insofar as this has gone unnoticed this is largely because the *absence* of judicial diversity has meant that we have not been exposed to a wider array of arguments [W]omen judges will on occasion judge differently to their male colleagues because there will be times when they will and are required to draw on their own (different) perspectives. The mistake is to think that male judges have not been doing this all along *and* to think—in either case—that this is problematic.⁷⁰

As the number of women and People of Color on the judiciary increases so will the ability “to put these statements to the test.”⁷¹ It is certain that in the future, with newfound information and insights, we will consider the effects of diversity in ways not currently understood or appreciated.

70. ERICA RACKLEY, *WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY* 196 (2013); see Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1928-33 (1988).

71. RACKLEY, *supra* note 70, at 196.
