

Seen But Not Heard: A Broad Understanding of Diversity for a Representative Court System

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“The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.” *Sweatt v. Painter*.¹

Legal rights in the United States are shaped by the common law, and are thus heavily influenced by norms; what we as a nation and as individuals see within a right reflects our changing collective backgrounds, cultures, histories, and perspectives. But lawyers often look at rights as static, originating from the isolated text of the Constitution or the meaning of a statute when it was written. For example, our Fourth Amendment jurisprudence relies heavily on the text in the Bill of Rights and the English common law from which it was derived.² Our interpretation of 42 U.S.C. § 1983 depends heavily on what we think the Congressional drafters intended the statute to mean.³ These textual, static interpretations reflect the will of the drafters as it was when lawyers and leaders looked similar: all men, all white, mainly landowners, and the elites of their communities. But the rights arising from these texts are the rights of all, not just the few who wrote them. Yet the people for whom these rights are the most meaningful often get no chance to offer their diverse interpretations of these rights. It is these people whose voices must be heard.

For example, in *Katz v. United States*, the seminal Fourth Amendment case that redefined privacy, Justice Harlan’s concurrence stated that the Fourth Amendment applied where the person “exhibited an actual (subjective) expectation of privacy and . . . that the expectation be one that *society* is prepared to recognize as ‘reasonable.’”⁴ Yet our notion of what “society” is and who decides the subjective expectation of privacy has never been clear.⁵ For example, police can conduct a warrantless search of a person with their consent.⁶ People who have never been subject to a stop-and-frisk search or been worried about the surveillance of their mosque may feel comfortable refusing such consent. But Indian-American families like mine, who have been scarred by the experience of suspicious stares and not-so-random airport searches in post-9/11 America, may not be comfortable refusing consent. Whose interpretation of expected privacy controls? The somewhat cynical answer is: whoever is on the bench.

This subjective notion of rights is but one example of why a broad interpretation of diversity is needed in our legal system generally, and in our courts in particular. To understand

¹ 339 U.S. 629, 634 (1950).

² *See, e.g.* *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (discussing the origins of the Fourth Amendment in common law).

³ *See, e.g.* *Monell v. Dep’t of Social Serv’s*, 436 U.S. 658, 670-676 (1978) (where the Court discusses the intent of the drafters in creating a cause of action against municipalities through the legislative history of the statute in 1871).

⁴ 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added).

⁵ *See, e.g.* *Florida v. Riley*, 484 U.S. 445, 453 (1989) (O’Connor, J, concurring) (noting implausibly that society’s expectation of privacy regarding aerial surveillance directly mirrors the FAA’s safety regulations about how low airplanes can fly); Susan Freiwald, *First Principles of Communications Privacy*, 2007 *Stan. Tech. L. Rev.* 3, 11, n.41 (2007) (stating that “there is no well established method to determine whether society deems any particular expectation of privacy to be reasonable” and that polling people on this issue is difficult.).

⁶ *See, e.g.* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

why, this essay first defines diversity more broadly than just racial or demographic diversity. Second, it outlines the benefits of diversity in the legal field generally. Third, this essay investigates why state courts in particular need the benefits of diversity. Finally, it looks at the challenges to increasing diversity in the legal system.

Diversity is multifaceted. It encompasses race, gender, religion, sexuality, and national origin. But these factors are the tip of the iceberg. To determine what types of diversity we might care about, we must ask what we want to attain by increasing diversity. In the context of the courts, our goal is to develop an appellate system that understands the perspectives, experiences, and issues facing Pennsylvanians. A definition of diversity based solely on facial demographic factors is thus underinclusive, since perspectives, experiences, and issues often transcend what we look like: they also depend on socioeconomic factors, and educational and expertise factors.

Demographic diversity informs how different communities interact with the legal system and perceive rights because of who they are. Socioeconomic diversity is equally important in how people experience the law outside of textbooks, like policing in low income neighborhoods or access to effective counsel. Educational and subject matter diversity reflect different understandings societal mechanics. State school students experience a different type of opportunity and exposure than those from private institutions. Engineers, economists, and artists all interact with the law from varying lenses. Taken individually, each facet of diversity adds a dimension to our understanding of law, helping us understand our known unknowns (issues that affect others that we do not know how to empathize with, but know exist). Taken together, this broad notion of diversity creates a holistic and inclusive multiplicity of perspectives, helping us understand our unknown unknowns (those issues that we don't know that we don't know about).

Each dimension of diversity brings unique benefits to the legal field. The most obvious advantages of diversity have long been covered by the courts: creating an “atmosphere of ‘speculation, experiment, and creation’” that provokes a “robust exchange of ideas.”⁷ Diversity also facilitates cross-racial understanding, breaking racial stereotypes, improving workforce performance, improving national security, and improving civic participation.⁸ Beyond these theoretical benefits, which shed light on the known unknowns of experiences we know we haven't shared, there are more tangible examples. The Supreme Court's expansion of women's rights in *Roe v. Wade* came after justices became more familiar with issues of women's health, their perspectives aided by young adult daughters who informed justices of their unknown unknowns, like women's health issues.⁹ Thurgood Marshall's place on the bench allowed him to empathize with the underrepresented, such as African Americans, and craft legal solutions that addressed wounds in the social fabric.¹⁰ The presence of demographically and culturally diverse judges also creates more legitimacy around the judicial branch,¹¹ and provides direction and inspiration for those underrepresented in the profession.¹²

⁷ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310-314 (1978).

⁸ Grutter v. Bollinger, 539 U.S. 306, 330-32 (2003).

⁹ See, e.g. BOB WOODWARD, THE BROTHERS 167 (2005) (discussing the influence of Justice Stewart's daughter on his understanding of abortion).

¹⁰ Joseph A. Greenway Jr., *Diversity in the Law*, 43 LITIG. 6, 9 (2017).

¹¹ Grutter, *supra* note 8, at 332.

¹² There are numerous academic studies around how diversity at the highest levels creates role models that children can aspire to. See, e.g. Aundra Simmons Vaughn, *The Obama Effect on African American High School Males* (2015) (Ph.D. Dissertation, Georgia Southern University) (Digital Commons). However, these studies do not capture the

In addition, this multifaceted definition of diversity brings increased innovation and subject matter expertise. A broad conception of diversity creates an atmosphere where “outside the box ideas are heard,” which is necessary in a field that changes slowly and relies on centuries-old text.¹³ Such ideas often arise from an understanding of a variety of subject matters, such as science and statistics, which is increasingly necessary for a judiciary that is now grappling with issues of climate change, radicalization on the internet, and complex intellectual property issues. Here, our courts fall incredibly short of the mark. While there is limited data on the educational background of state and federal district and appeals court judges, the last Supreme Court justice to hold a science or math degree was Justice Blackmun, who was appointed more than fifty years ago.¹⁴ The lack of educational diversity on our highest court means our jurisprudence falls short on issues that require sophisticated subject matter knowledge, like statistics in gerrymandering cases,¹⁵ government surveillance using cell phones,¹⁶ and genetics and patenting.¹⁷ Given the impact of the internet on our democracy (e.g. the spread of misinformation) and the importance of gene sequencing in public health issues (e.g. the development of vaccinations), we cannot afford to ignore this important dimension of intellectual diversity.

Many benefits of diversity apply to all courts. But diversity on state courts is particularly important, given that state courts are where most people will first encounter the legal system, and where many issues of liberty and justice are resolved, especially for criminal defendants. Though much rights-centric doctrine is first announced in the federal courts, state courts are the ones deciding individual cases for their citizens, and most positive rights are reserved for the states to legislate.¹⁸ And state legislatures, in their roles as laboratories of democracy, often develop and enact new rights that deal with cutting edge issues that federal courts or Congress are unable to address. For example, California recently enacted the California Consumer Privacy Act, which has become the standard of digital privacy across the country.¹⁹ Pennsylvania’s decisions about voter identification and state legislative maps make it a leader in voting rights and redistricting.²⁰

Both because states develop common law and because state and local governments are more closely connected to the people they govern, the real-world development, exercise, and implementation of rights can happen effectively at the state level, and in some cases even provides

value to children, students, and even adults on having leaders who look like them. *I see a vice president that looks like me*, ABC NEWS (Nov. 2020), <https://abc7news.com/kamala-harris-brown-girl-poem-brooklyn-biden/7837108/>. I can say personally that seeing an Indian-American take the oath of office reminded me of the immense possibilities that even I can achieve.

¹³ Sylvia Ann Hewlett, Melinda Marshall, & Laura Sherbin, *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013).

¹⁴ *Harry A. Blackmun*, OYEZ (last accessed Feb. 27, 2021), https://www.oyez.org/justices/harry_a_blackmun.

¹⁵ See, e.g. Transcript of Oral Argument at 40, 1-7, *Gill v. Whitford*, 137 S.Ct. 1916 (2018) (in discussing data analytics influencing partisan gerrymandering, Chief Justice Roberts notes that “it may be simply my educational background, but I can only describe [this] as sociological gobbledygook.”).

¹⁶ See, e.g. *Carpenter United States*, 138 S.Ct. 2206, 2224 (2018) (Kennedy, J, dissenting) (calling the distinction between cell site location information, which portrays a granular and consistent record of an individual’s data, and financial and telephone records, “illogical”).

¹⁷ See, e.g. *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 596 (2013) (Scalia, J, concurring) (“I am unable to affirm [details of molecular biology] on my own knowledge or my own belief.”).

¹⁸ U.S. CONST. amend. X.

¹⁹ Cal. Civ. Code § 1798.

²⁰ *Applewhite v. Commonwealth*, 617 Pa. 563 (Pa. 2012) (voter ID); *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287 (Pa. 2018) (gerrymandering).

guidance for federal jurisprudence.²¹ State courts that lack demographic, socioeconomic, and educational diversity will be unable to develop the law quickly and effectively in order to govern the changing needs of their citizens. This is especially pertinent as Pennsylvania and the nation face a set of quickly evolving challenges that impact the most vulnerable populations and require diverse perspectives: an intertwined pandemic and economic crisis impacting state health insurance and housing; issues around race and local policing; the dangers of online radicalization; and weather crises caused by climate change.

The benefits of diversity generally, and to state courts particularly, are unarguable. But the means by which the legal field and state courts achieve diversity are equally important. There are three risks that policies must address to successfully improve diversity. First, systems that emphasize facial diversity risk creating incentives to improve the demographic makeup of their bodies, without going further to address systemic issues of underrepresentation. In fact, groups or individuals might enjoy moral licensing, where taking small steps towards diversity gives them justification to do more harmful things that undermine diversity.²² Second, a ham-handed policy to increase diversity risks tokenizing “diverse” judges and lawyers, instead of burnishing their credentials and establishing their rightful presence in the courts.²³ This may have the long-term effect of disincentivizing diverse lawyers from finding a place on the bench. And finally, given the political polarization of our society, a conversation about diversity risks becoming one-dimensional and political if courts and legislators do not show results or procedural fairness.

Rights fundamentally depend on interpretation. Our current focus on judicial textualism and the lack of diversity in the courts means that our field of vision is narrow: even where we know it is true, we are unable to see how our varied perspectives inform our conception of our rights. By focusing only on one reading, we lose the vision of what others see and need. Judges’ experiences inform their interpretations of our laws, which in turn determine everyone’s rights. Without a focus on diversity, much is lost in translation across different languages, experiences, and perspectives—and many people lose out on a legal system that does not protect them. By focusing on diversity, the state courts are not just creating a more colorful bench: they are creating a more just legal system.

²¹ See, e.g. *Alabama v. Shelton*, 535 U.S. 654, 668-669 (2002) (finding that most states already provide a right to appointed counsel “more generous than that afforded by the Federal Constitution”).

²² See, e.g. Daniel Effron, Jessica S. Cameron & Benoît Monin, *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCH. 590 (2009).

²³ Mariateresa Torchia, Andrea Carabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299 (2011).