

UNIVERSITY OF IDAHO
CRITICAL LEGAL STUDIES JOURNAL

The Gavel Gap: Promoting Diversity in Idaho's Judiciary

2017 Symposium

April 14, 2017

IDAHO CRITICAL LEGAL STUDIES JOURNAL

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Keynote, University of Idaho Critical Legal Studies Journal/American Constitution Society “Gavel Gap” Symposium, April 14, 2017

The significance of holding this event at the University of Idaho College of Law cannot be overstated. It matters that we as a legal community invest our time and energy to address diversity and inclusion in the justice system. It matters that people outside the legal community see this law school convening such an important conversation. It matters that law students fully participate in this work—yes, I mean 1Ls just embarking on their justice journey, 2Ls who by now may feel ready to quit, and 3Ls who are excited to get out of here and start changing the world.

Our focus is on diversity and inclusion in the legal system—and specifically in the court system. Today we have heard from local, statewide, and national leaders about their experiences, and it is clear that many great things are being accomplished by these amazing individuals. But, as a segment of American democracy, the justice system has no bragging rights when it comes to diversity and inclusion. The significant “gavel gap” between those who judge on our courts and the people they judge must be addressed. In my time this afternoon, I hope to underscore why diversity and inclusion must be addressed as a matter of both personal and professional ethics. As individuals, we are committed to treating one another fairly and with respect, and as members of a legal community, we believe we are part of a system that strives every day to achieve justice. So, when we see ourselves and our profession falling short, it feels in many ways like a personal failure. We need to understand the issue, to own it, and ultimately to make a change.

The Gavel Gap Report, commissioned by the American Constitution Society, is the first comprehensive look at who sits in judgment on state courts. The report’s findings are best understood in the context of other data about who the players are in the justice system. Let’s start

with the most important players – our “customers”: those who access the courts to address their civil legal needs and those who enter the courts because they have been accused of a crime.¹

In many ways, our customers look like the rest of America. According to the 2010 census, as a nation, we are 30% white males, 31% white females, 19% males of color, and 20% females of color. As a point of reference, Idaho is 89% white, with nearly equal numbers of white men and women.² Four states were majority minority as of the 2010 census: California, Hawaii, New Mexico and Texas, and the District of Columbia is majority African American.³

We might expect court customers in civil cases to reflect the general population (though we have not generally collected data on the race or ethnicity of civil litigants). But, we should recognize that a huge swath of our population who experience civil legal needs in fact do not have meaningful access to the courts. Washington State recently completed an updated Civil Legal Needs Study, which found that as of 2013 a full 76% of those surveyed with legal issues had no access to legal help.⁴ Race and socio-economic status were factors. As a consequence, many were unable to access the courts. Thus, we must acknowledge that our civil “customers” are likely wealthier and whiter than our community at large.

On the criminal side of the courts, likely everyone in this room is aware of the disparity between America at large and those who come to court as criminal defendants. Two-thousand-nine data from the 75 largest counties in America showed that 44% of criminal defendants are African American and 24% are Latino. Those figures contrast starkly with general population statistics. The 2010 census found that 17% of all Americans are African American and 12.3% are Latino.

¹ <https://www.acslaw.org/State-Courts>

² <https://www.census.gov/2010census/data/>

³ *Id.*

⁴ http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

So, what about America's judges? And today I want to focus on state court judges. As the Gavel Gap study recognized, state courts in America decide 90% of the nation's judicial business. Moreover, most state court judges are elected (only a handful of states have appointment systems similar to the federal system), and the theory behind judicial elections has generally been to keep the judiciary closer to the people. I'll share a moment from Washington's constitutional history on this score.

The method of selecting judges was hotly debated at the constitutional convention in 1889. Notable Delegate George Turner (a territorial supreme court justice) advocated for a merit-based appointment system, arguing it would produce a higher quality judiciary, but the argument for popular selection of judges won the day. Delegate Lair Hill, of Walla Walla, summed up the prevailing sentiment, saying that appointed judges might be abler and more independent and that "might be the lawyer's view of it and possibly it is correct, though I doubt it," but, he concluded, "the people of this republic have concluded that their courts of justice are of sufficient importance to warrant their being brought into conformity with republican institutions, and they are not going to allow anybody hereafter to force upon them better judges than they think they need."⁵

In principal, I wholly endorse this sentiment. Here in the West, we elect nearly all our government leaders, and I have no doubt that voters are more than capable of selecting judges of the highest caliber, just as they elect port commissioners, fire commissioners, auditors, and treasurers or any other official whose selection turns on resume more than political affiliation. But, in practice, there are legitimate concerns that voters too often have a dearth of information about political races, and there is always a risk that special interest money will skew an election, as we have seen happen in many states, in both open and retention elections.

⁵ Hill (1889).

But, the theory is that elected judges, in contrast to appointed judges, are “of the people.” So, do our elected judges in Idaho and Washington look like the rest of the states’ people? We wouldn’t be talking about a “gavel gap” if they did. Here is what the Gavel Gap study found: women comprise 49.92% of the population in Idaho, but only 16.98% of Idaho judges are women. People of color represent 17% of the Idaho population and 13% of judges. By the metric of the study, there is a relatively modest race/ethnicity gavel gap of just over 23% (11th best), but a nearly 66% gender gavel gap (ranking 50th of 51, the District of Columbia is included in the study; Idaho bested West Virginia). The combined gavel gap in Idaho is measured as 53%, placing Idaho 38th in rank.

By comparison, Washington has an overall gavel gap of 33%, ranking 13th nationwide. But before the Washingtonians in the room get too proud, Washington’s gavel gap between people of color in the population and on the bench is 66.4%, ranking Washington 40th out of 51 jurisdictions in terms of racial or ethnic representation on the bench. It is only the relatively strong representation of women, comprising nearly 38% of all Washington judges, that smooths out the curve. And I feel somewhat personally responsible for that as one of the six women on Washington’s nine-member Supreme Court.

I should say a word about Oregon, which ranks 3rd best overall on the gavel gap measure. Oregon has a similar disparity between gender representation and minority representation on the bench. While Oregon is number one in the representation of women on the bench (44% of all judges), it has a 57.63% race/ethnicity gavel gap, ranking 34th.

And, I know you want to hear about Utah. Yes, Idaho does better. While Utah’s population is about half female, only 17% of Utah judges are women. Racial and ethnic minorities comprise about 20% of the population but only 8% of Utah judges are people of color. The overall gavel

gap in Utah is measured at 66%, dead last. Interestingly, when this fact caught the attention of the Utah legislature, there was some backlash.

One representative (Rep. Merrill Nelson, R-Grantsville), argued that the Utah Constitution and merit selection statutes prohibit considering diversity in appointing judges. He said people shouldn't be concerned about the disparity between the population and the bench. "We have a fine judiciary, and my only interest is maintaining the highest quality of our judiciary," Nelson said. "When we start basing judicial office on factors or considerations other than legal ability, then we get into a deep slippery slope where anything goes, and we are no longer assured we have the best quality." "Nobody, whether it is in a civil or criminal case, goes to a courtroom entitled to a judge who is the same race or gender," Nelson said. He continued: "Whenever anybody comes into a court, [do] we need to go in search of a judge that has the closest experience to the litigant in the court? That's just crazy, but that's the result of the argument being made," he said. "What a litigant can expect is that judges will be entirely impartial, entirely fair, and equal to everyone who comes into the court, regardless of race or gender or so-called life experience."

Is it crazy to expect the composition of the bench to reflect the composition of the community? I agree we should expect fair and impartial justice from every judge who dons a robe. But, I also believe, because I know this in myself, that the desire to be fair and impartial cannot fully compensate for gaps in our individual experience. Judges are human beings. We approach our jobs, as we do other aspects of life, using our personal experiences, and personal experience is necessarily limited. Additionally, we all have "comfort zones" and we make decisions – especially those made under time constraints – based on shorthand thinking, whether we use the sanitized term, "heuristics" or the more pejorative, "stereotypes." When we say, "that just makes common sense," we are really saying, "that accords with my own life experience."

How many here have ever taken one of the Implicit Association Tests (IAT)? These are available online (<https://implicit.harvard.edu>). The tests measure the strength of our automatic associations between concepts and objects. For example: positive or negative traits, or types of activities and groups of people. The goal is to reveal attitudes and beliefs that we may be unwilling to report or not even consciously know we have. For example, I might believe that women and men should be equally associated with science; but my automatic associations show that I, like many others, associate men with science more than I associate women with science. As an aside, I should mention that one of the creators of the IAT is Doctor Tony Greenwald at the University of Washington. He is currently working with us on a judicial education program to explore how judges can benefit from research on implicit bias to improve our court processes and achieve fairer outcomes. Doctor Greenwald emphasizes that it is not enough to know we have implicit biases, but that our biases need to be actively and persistently challenged. One important way this happens is when we are confronted with information and ideas that do not conform to our deep-seated way of thinking (i.e., we meet new people). Research confirms that when we interact with people of a different gender, race or ethnicity, cultural heritage, or social background we learn.⁶

Of course, we know this on a personal level. We've all heard, "He needs to get out more," "she lives in a bubble," and similar expressions, and we can see how our perspectives change when we

⁶ Measures to address implicit bias should be research based. The judges in the room are probably familiar with proposals to directly instruct juries about implicit bias, the goal being to reduce the effects of jury bias in deliberations. The limited research on the effects of such instructions does not demonstrate their effectiveness. E.g., J. Elek & P. Hannaford-Agor, "Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction." (National Center for State Courts 2014). And there is always a concern that instructions might "put a thumb on the scale." Research in a related area involving the effects of implicit bias on a witness's ability to make an accurate eye-witness identification, recent research suggests that instructions may have an unintended effect. Specifically, one study demonstrated that juries given instructions about the fallibility of eye-witness identification became overly skeptical of eye-witness testimony, but no more able to determine when an eye-witness was reliable. *See* Yokum, Papailiou & Robertson, "The Novel New Jersey Eyewitness Instruction Induces Skepticism but No Sensitivity." (PlosOne 10 2015).

meet new people: whether through work, travel, school, or moving to a new community. First-hand experience teaches us the personal benefit of diversity.

What is true at the personal level is true at the systemic level. Diversity in workgroups promotes creativity and growth. Diversity in educational settings promotes learning, and diversity in the judicial system promotes a richer, fuller, more complete sense of justice. Let me share just a few concrete examples.

The federal bench is currently more diverse than ever, in part because of an emphasis on increasing diversity in the Obama administration's appointment process (only 38% of Obama appointees were white men). But, there is just one woman of color on the United States Supreme Court, Justice Sonia Sotomayor. Let me read a passage from her dissent in the 6-3 case of *Utah v. Strieff*, involving the constitutionality of a suspicionless stop under the Fourth Amendment. Recognizing that the defendant was a white man, Justice Sotomayor observed:

But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, e.g., W. E. B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015). By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, *The Miner's Canary* 274–283(2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.⁷

⁷ *Utah v. Strieff*, 136 S.Ct. 2056, 2070-71 (2016).

Whether you agree or disagree with Justice Sotomayor’s dissenting view is not the point. What I want us to notice is that—as she expresses elsewhere in her dissent—she felt empowered to write this dissent because of her life experiences. Notice also the literary and social works she cites. Other than Michelle Alexander’s book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, these are not familiar citations in court opinions. Notice how the dissent expands the conversation beyond the purely public realm to recognize the “double consciousness” that is well known to victims of historical discrimination. Not just anyone could have written this dissent. I should note that the other signers of the dissent were the other two women on the court.

As another example, we also see how diversity matters in juries. Several studies have shown that the presence of even one minority juror on a jury panel impacts group dynamics and shapes deliberations. One researcher observed that diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements. People of different races—akin to people with varied economic statuses, social hierarchies, sexual orientations, or national origins—consider and evaluate the same information in different ways and often arrive at different conclusions.⁸ We also know that simply injecting questions about race and bias into *voir dire* tends to result in a jury that is ultimately seated being more sympathetic to a minority defendant.⁹

As a final example, let me tell you about my court. As I mentioned, we have 6 women and 3 men. Two of my colleagues share Latino heritage, with one also having Chinese heritage. One justice is openly gay. We have some who grew up in large cities: New York, Chicago, suburban

⁸ Ashish S. Joshi &, Ashish S., and Christina C. Kline., 2015. *Lack of Jury Diversity: A National Problem with Individual Consequences.*, AM. BAR ASS’N (2015), <https://www.americanbar.org/publications/litigation-committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences.html>.

⁹ Samuel R. Sommers, “On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations.”, *Journal of Personality and Social Psychology*, 90, no. 4 (October 28, 2006): Vol. 90 pp. 597-612.

Los Angeles, and others who lived in towns as small as Forks and Steptoe. Some have school-aged children; some have grandchildren; some have no children. We come from different personal and professional backgrounds in just about every way I can imagine. I find that our diverse perspectives foster rich discussions, and sometimes the result is what we like to call “richly divided” opinions. Yes, diversity can be messy, but as one of my former colleagues often said, “If we’re all thinking alike, somebody’s not thinking.”

From my personal example, to the example of Justice Sotomayor’s personal dissent, it is not difficult to see how diversity matters in the judicial system. Making America’s courts look more like America at large should be a goal we embrace, because it fosters better decision-making and moves us closer to achieving justice. But, achieving this goal requires us to look beyond the court system to the broader legal community, and ultimately, to legal doctrines that many believe make it even harder to achieve equity. First, as to the legal community, we cannot talk about the gavel gap without recognizing that most judges are lawyers first – and diversity in the legal community lags behind other segments of the economy. The American Bar Association (ABA) released a 2017 report on gender equality, which found that women still lag behind men in moving up the law firm ranks. We know that half of all Americans are women, and that women make up half of all lawyers. But, there is still a glass ceiling. The ABA study noted that nearly 49% of all summer associates are women, but more men than women are hired. Of the 45% of new associates who are women, most do not become equity partners. Only 18% of equity partners in the 100 largest firms surveyed were women. Women make partner (equity or nonequity) in lower numbers than men, accounting for factors such as time off or law school grades. And, women still earn less than men for comparable work. At best, annual measures show women earning 89% of what men earn, but the percentage was only 78.9% in 2013, and there is no clear pattern of a steady rise. (For example,

women earned 86.6% in 2011). Two-thousand-seventeen ABA data showed that women equity partners in the largest 100 firms earn about eighty cents on the dollar compared to their male counterparts.

The situation is worse for racial and ethnic minorities. According to the National Association on Law Placement in 2016, minority representation among new law firm associates hovers around 20%. While the percentage rose from 19.5% in 2010 to 22.72% in 2015, that increase largely reflected the experience of one group, Asian attorneys. Moving up the law firm food chain, ethnic minorities make up about 5% of all equity partners, with African American lawyers at only about 1.8% of all equity partners in the 100 largest firms. That metric has remained nearly flat since 2009, when it was 1.7%. It is clear that among those attorneys who suffered layoffs during the economic downturn starting in 2009, both minorities and women were quite well represented. Bear in mind that 20% of all law grads are people of color. Comparing the legal profession with similar, partnership-based professions, we're the most white (88%) among a really white group (81% of architects/engineers are white; 78% of accountants; 72% of physicians).

I highlight this data about the legal community (or at least about private law firms) because it helps put the Gavel Gap Study in context. We cannot say that women and minorities are not joining the bench because they are thriving in private practice.

The final issue I ask us to collectively consider is whether there is anything about legal doctrine – not just the legal profession – that undermines achieving diversity and inclusion. I've thought a lot about this because the judicial branch is intended to protect the rights of minorities against majority oppression. Our courts are, as the cowboy poet said, "that place in America where the smallest dog can raise his leg against the biggest tree." Yet, the path of the law weaves and backtracks at times, consider policies such as affirmative action and anti-discrimination laws. I

wonder if some of the tension comes from a clash of ideals: a deeply rooted belief in individual autonomy and the equal rights of all individuals. And the recognition that remedying historical inequality may require valuing equality of outcomes over purely equal treatment. Our dominant legal philosophy is unapologetically rights-focused. I believe we are a great society because we so highly value the rights of individuals. But we must consider whether there is more to individual rights than protecting individual autonomy. Alexis de Tocqueville, writing *Democracy in America*, observed that our system of rights was built with an understanding that rights carry correlative responsibilities, and a common commitment to the greater good of society. It is, after all, a vibrant democratic society we are striving to maintain. In the long run, only a strong social system that values and promotes diversity and inclusion will protect the values we hold so dear. Simply put, we should not misconstrue the law to protect individuals only in theory and allow them to be oppressed in reality.

As I mentioned at the outset, striving to achieve greater diversity and inclusion in the justice system is a matter of both personal and professional ethics. I was pleased when the ABA proposed Model Rule 8.4(g) a few years ago to address discriminatory and demeaning conduct as misconduct. The rule has been incorporated into RPC 8.4(g) in Washington and is reflected in a comment to Idaho RPC 8.4(d). In sum, the rule states that it is misconduct to “commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities.”

Both the Idaho and Washington rules make accommodations for legitimate advocacy, and Idaho's comment to Idaho RPC 8.4(d) notes that a finding of purposeful discrimination in the context of a *Batson* challenge to a peremptory strike is not per se misconduct. I think adoption of

these rules sends an important message. It underscores that, as a justice system, we cannot tolerate discriminatory and demeaning behavior toward minority groups.

In conclusion, diversity and inclusion are to be valued and pursued in the justice system. But, there is a gavel gap; there is a justice gap. I do not call this out to depress us or to invoke a sense of hopelessness. We must understand the problem; we must own it; and we must know we have the ability, if we have the collective will, to make our history of inequality a relic of our past and not our future.

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