THE COST OF A SILENCED PERSPECTIVE: WHY JUDICIAL DIVERSITY MATTERS

KEVIN NGUYEN*

> *Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.*
>
> Judge Jerome Frank[1]

INTRODUCTION

For as long as concerns have been raised over the non-representative nature of the judiciary, so too has the question been asked:

> *What would be gained by pursuing judicial diversity if non-traditional judges, like all judges, are constrained by the ethical requirement of individual impartiality?*[2]

This criticism- often lobbied at judicial diversity efforts- is underpinned by an ambitious understanding of the judicial role as impervious to the influence of individual ideologies; a role which demands the detached, unemotional application of the letter of the law.[3]

If this interpretation were true, what then would be the added value of appointing trailblazing advocates like William Ah Ket to the bench, as distinct from any other equally qualified lawyer of his time? Beyond redressing the unjust denial of equal opportunity,[4] the impact of William Ah Ket's appointment would have been indistinguishable from any other; assuming that judges were, in reality, "passionless thinking machine[s]".[5]

Of course, such a reality does not exist. Rather, it could be said that all legal practitioners- and almost certainly the public at large- understands that a judge's individual life experiences can shape their moral reasoning and influence their judicial decision-making.[6] As noted by several legal scholars, judicial

---

[1] In re J.P. Linahan, 138 F.2d 650, 652-53 (2d Cir. 1943) 653.
[2] Joy Milligan, 'Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Public Morality' (2006) 81(3) *New York University Law Review*, 1207.
[3] Kathy Mack and Sharyn Anleu. 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35(1) *Law & Social Inquiry*, 137–173.
[4] Ibid.
[5] Kevin R. Johnson and Luis Fuentes-Rohwer, 'A Principled Approach to the Quest for Racial Diversity on the Judiciary' (2004) 10(5) *MICH. J. RACE & L,* 6.
[6] Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2012) 237.

impartiality simply requires that judges be fair and unbiased in their consideration of opposing viewpoints,[7] and 'in reality, has never meant that a judge must abandon all of the knowledge and experience gained in [their] professional and personal life'.[8]

Accordingly, it stands to reason that a judge's racial background and cultural insights may inevitably shape their judicial reasoning. Such perspectives could be expressed on the bench through a unique "voice" that many notable judges, both in Australia and abroad, have been successful in raising.[9] It is upon recognising that there is room on the judiciary for these unique "voices", and understanding that these voices may reveal truths which had previously evaded a homogenous judiciary, that one can fully grasp the value of judicial diversity.

With a focus on racial diversity and the Asian-Australian experience, this essay considers the potential benefits of a more racially inclusive bench; namely the categories of symbolic and substantive benefit.[10] On the basis of the evidence to be discussed, this essay concludes that although a racially inclusive judiciary *will* serve an important symbolic function, any additional substantive value will depend entirely on the willingness of Asian-Australian judges to "speak up" regarding their unique cultural insights. Failing to recognise and encourage the unique voice of minority judges, for fear of offending the principles of neutrality and impartiality, will ensure that the value of increased diversity is largely, if not wholly, wasted.

---

[7] Stuart Chinn, 'The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality' (2020) 2019 (5) *Utah Law Review* 1, 915.

[8] Sherrilyn A. Ifill, 'Racial Diversity on the Bench: Beyond Role Models and Public Confidence' (2000) 57 *Wash & Lee L. Rev,* 405, 457.

[9] See, eg, Law Institute Victoria Farewell, *Justice Michael Kirby (2009) 83(04*) LIJ, 30. < https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-April-2009/Farewell-Justice-Michael-Kirby>; Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 Wash. & Lee L. Rev. 405 (2000), page 457

[10] Although the pursuit of gender diversity is of great importance and warrants extensive discussion-particularly the intersection of gender and racial inequality- for the purposes a highly focused discussion, this essay is strictly constrained to the topic of racial discrimination as it relates to Asian-Australians.

A. *The Diversity Deficit*

Amidst government initiatives to increase judicial diversity in the United Kingdom,[11] the *UK Advisory Panel on Judicial Diversity* ('the UK Panel')- tasked with collecting and analysing diversity data- noted that a 'failure to appoint well-qualified candidates from diverse backgrounds to judicial office represented exclusion from participation in power'.[12] Upon considering the data, the UK Panel argued:

> *[It] is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that reflects neither the diversity of society nor that of the legal profession as a whole.*[13]

Unfortunately, Australia has not had the benefit of a targeted government initiative of equivalent scope or scale. Consequently, there is a shortage of clear and current data regarding the racial and ethnic composition of Australia's judiciary. From the data that is available, a picture can be drawn of the Australian judiciary which appears to align with the "judicial norm" found in the UK,[14] described as dominated by 'the life experience of middle-class, white, heterosexual men, whose entire pre-judicial career has been as barristers in private practice'.[15] Understandably, there are valid concerns that the Australian judiciary, particularly in the superior courts, does not currently reflect the diversity found in the Australian population.[16]

Although Australia has seen substantial improvements in judicial gender diversity,[17] there still remains a large 'diversity deficit'[18] with respect to race and ethnicity.[19] A 2015 report by the Asian Australian Lawyers Association ('AALA') found that although Asian-Australians accounted for 9.6% of Australia's population, they only represented 1.6% of Australia's barristers and 0.8% of the judiciary.[20] Additionally, no Asian-Australian judge, nor any judge of non-European background, has ever been appointed to the High Court of Australia.[21]

---

[11] JUSTICE, Nathalie Lieven, *Increasing judicial diversity* (Report, April 2017) <https://files.justice.org.uk/wp-content/uploads/2017/04/06170655/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>
[12] Advisory Panel on Judicial Diversity, Chair, Baroness Neuberger CBE, *The Report of the Advisory Panel on Judicial Diversity 2010,*15.
[13] Ibid.
[14] Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 14.
[15] Sir Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] Public Law 727, 746.
[16] Kcasey Mcloughlin and Joan Williams, 'An Age of Diversity: Where to Next for the Judicial Diversity Project?' (2019) 9(1) *Debating Judicial Appointments in an Age of Diversity* 4.
[17] See Australasian Institute of Judicial Administration's most recent gender statistics, compiled in March 2019; Kcasey Mcloughlin and Joan Williams, 'An Age of Diversity: Where to Next for the Judicial Diversity Project?' (2019) 9(1) *Debating Judicial Appointments in an Age of Diversity* 4.
[18] See, eg, JUSTICE, Increasing Judicial Diversity (Report, April 2017).
[19] Ervin Tankiang, 'Asian Australians and the Judiciary: Does Cultural Diversity Matter?' (2020) No 20(30) *UNSWLJ Student Series*.
[20] Asian Australian Lawyers Association, *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015* (14 April 2014) 4.
[21] Kishor Napier-Raman, *Despite progress, Australian judges are pale, male and stale (2018) <https://www.crikey.com.au/2018/11/09/judges-australia-white-men/>*

The possible reasons advanced to explain this deficit are both numerous and broad. In the UK Panel's Diversity Report, the Panel noted:

> *Under-representation of certain well-qualified groups within the judiciary suggests that factors other than pure talent may be influencing either people's willingness to apply or the selection process, or both.*[22]

The factors alluded to by the UK Panel may be linked to the concept of the 'bamboo ceiling',[23] referring to numerous cultural barriers that may impede the rise of Asians to leadership roles.[24] In assessing this phenomenon, the Diversity Council of Australia ('DCA') observed that although Asian talent is ambitious and capable,[25] it is ultimately underrepresented in the upper echelons of the professional world.[26] The DCA identified four major barriers that may be responsible for this deficit., including cultural bias, difficulties conforming to Westernised leadership models, insufficient relationship capital, and failures at the organizational level to grasp the value of Asian inclusion.[27]

Insufficient relationship capital may be of particular relevance to the issue of Asian-Australian judicial under-representation.[28] Considering that the system of judicial appointments, particularly at the federal level, lacks a formal application process and has been described as both non-transparent[29] and subject to 'unconstrained executive discretion',[30] it has been theorised that the decisive factor in high-level judicial appointments is a candidate's personal network.[31] Thus, with low numbers of Asian judges in superior courts, Asian-Australian judicial aspirants often find themselves with few potential mentors and networking opportunities that could guide their path to judicial appointment.[32]

Regardless of whether these barriers accurately identify the causes of the racial diversity deficit, the fact remains that Asian-Australians are under-represented in the senior rankings of the legal profession; an issue from which numerous benefits can be gained if correctly remedied.

---

[22] Advisory Panel on Judicial Diversity (n 12)
[23] Term coined in 2005 by Jane Hyun; See Jane Hyun, *Breaking the Bamboo Ceiling: Career Strategies for Asians (*Harper Collins 2005).
[24] Peter Wong and Kevin Tran, 'Breaking the Bamboo Ceiling in Australia' (2020) 20(3) *Global Journal of Management and Business Research: G Interdisciplinary*, 2.
[25] 84% plan to advance to a very senior role; See Diversity Council of Australia, Cracking the Cultural Ceiling (2014) <https://www.dca.org.au/research/project/cracking-cultural-ceiling>
[26] Diversity Council of Australia, *Cracking the Cultural Ceiling* (2014) <https://www.dca.org.au/research/project/cracking-cultural-ceiling>
[27] Ibid.
[28] This is suggested by Ervin Tankiang in his article 'Asian Australians and the Judiciary: Does Cultural Diversity Matter?' (n 19)
[29] Justice Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (Speech, Sheraton on the Park, 27 October 2006).
[30] Andrew Lynch, *Diversity without a Judicial Appointments Commission: The Australian Experience* (Routledge, 2018) 101.
[31] Tankiang (n 19).
[32] See, eg, Eric Chung et al. *A PORTRAIT OF ASIAN AMERICANS IN THE LAW (Web Page- Factsheet) <https://law.yale.edu/sites/default/files/documents/pdf/news/factsheet_portraitproject2.pdf>*

B. Social Cost of Under-Representation

The value of judicial diversity is derived from the important role that judges hold within society; particularly their position as community leaders, role-models, and potential engines for societal change.[33] Accordingly, a visible shortage of Asian-Australians assigned to the role can produce a wide range of social costs- often stemming from how the public answers the question:

Why does the shortage of Asian-Australian judges exist?

A possible answer that some Asian-Australians may unfortunately subscribe to, although certainly untrue,[34] is that the Australian legal and political system excludes the Asian community and its views intentionally. Holding this belief invariably discourages confidence in the legitimacy of the courts, suggesting to disillusioned members of the community that the judiciary is both unwilling and unable to represent their interests.[35]

A related issue arises when asking the same question to the Anglo-Celtic majority. Although one would hope that the 'unbiased mind [would] naturally enquire' as to what barriers could limit the inclusion of Asians in the judiciary, there is also the possibility that other minds may reason that Asians are not qualified for such roles, or more concerningly, prefer not to pursue them. Although seemingly benign, this dismissive attitude can lead to a broader social cost associated with viewing minorities as 'outsiders worthy of exclusion'.[36]

Such attitudes are problematic in that they may strengthen a perception- either held consciously or sub-consciously- that Asian-Australians are disconnected from the Australian identity.[37] By viewing Asian-Australians as absent or inconsequential spectators in the story of Australian nationhood, one may be more willing to view Asian-Australians as perpetual foreigners.[38]

The negative perception of Asian-Australians and other minority groups as "outsiders"- potentially fostered by under-representation-[39] can produce harmful, substantive costs. An extreme example of this was demonstrated at the outset of the COVID-19 pandemic, which saw a wave of anti-Asian racism

---

[33] See, generally, Isabel Garrido Gómez, 'The Contribution of Judges to Society' (2015) 101(3) *Archives for Philosophy of Law and Social Philosophy* 332-353.
[34] See, eg, *Racial Discrimination Act 1975 (Cth)*
[35] Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 210.
[36] See, eg, Research Council, '*Measuring Racial Discrimination'* (2004) *The National Academies Press*, 59 (See 'Theory of Indirect Prejudice').
[37] See, eg, Qiuping Pan and Jia Gao, University of Melbourne*,* Australia Needs to Embrace 'Asianness' as Part of 'Australianness' (2021) <https://pursuit.unimelb.edu.au/articles/australia-needs-to-embrace-asianness-as-part-of-australianness>
[38] Ibid.
[39] Research Council (n 35) 57.

across Australia,[40] including a rise in physical assaults by strangers.[41] The extent of this 'alarming trend'[42] was captured in a 2020 study which revealed that nearly 85 percent of Asian-Australians had experienced some form of racism during the pandemic.[43] Evidence of rising anti-Asian sentiments- echoing similar sentiments faced by William Ah Ket nearly 100 years ago-[44] has served as a sobering reminder that the goal of true inclusion is yet to be fully realised.

Although this goal appears elusive, it is far from impossible. This essay proposes that shedding the label of "outsider" requires that traditionally excluded perspectives, observations and insights be actively contributed to the broader social discourse. Although the aim of "fitting in" is commendable, these efforts must be bolstered by a willingness to "speak up" about the value of one's diverse voice and its capacity to shape a more inclusive and equitable social framework. Particularly in the context of judicial diversity, it is only upon the substantive inclusion of diverse viewpoints that a more considerate judicial dialogue can be fashioned.[45]

Those of the Asian-Australian community with the widest-reaching voices- particularly those who hold representative roles such as judges and politicians- must be willing to lead the discussion on the value that can be gained from "outsider" views and contributions. To do so would thoroughly align with the philosophy of William Ah Ket, a proponent of 'building bridges between East and West'. [46] His forward-thinking philosophy involved the encouragement of constructive dialogues on race, and a willingness to convey the value of one's unique cultural perspective.[47] Although William Ah Ket embodied a conviction to affect change, his progression into the highest rungs of the legal profession- where he would have had the greatest capacity to do so- was halted by the discriminatory policies of the time.[48]

With the battle against discrimination enshrined in law[49] having been fought and won by the contributions of advocates like William Ah Ket, the issue for contemporary Asian-Australian lawyers is no longer whether it is *possible* to reach the judicial role, but rather what is one willing to do once

---

[40] Max Walden, 'More than eight in 10 Asian Australians report discrimination during coronavirus pandemic' *ABC News* (online, 2 November 2020) <https://www.abc.net.au/news/2020-11-02/asian-australians-suffer-covid-19-discrimination-anu-survey/12834324>

[41] Naaman Zhou, 'Survey of Covid-19 racism against Asian Australians records 178 incidents in two weeks' *The Guardian* (online, 17 April 2020) <https://www.theguardian.com/world/2020/apr/17/survey-of-covid-19-racism-against-asian-australians-records-178-incidents-in-two-weeks>

[42] Australian Human Rights Commission, 'Racism undermines COVID-19 Response' (online, 8 April 2020) <https://humanrights.gov.au/about/news/racism-undermines-covid-19-response>

[43] Nicholas Biddle, Matthew Gray and Jieh Yung Lo, 'The experience of Asian-Australians during the COVID-19 pandemic: Discrimination and wellbeing' (2020) *The ANU Centre for Social Research and Methods,* 7.

[44] See, eg, Toylaan Ah Ket, 'William Ah Ket - Building Bridges between Occident and Orient in Australia, 1900-1936' (paper delivered at the Conference of the Chinese Studies Association in Australia held at Macquarie University on 5 July 1995), available at <https://arrow.latrobe.edu.au/store/3/4/5/5/1/public/stories/wahket.html>

[45] Ifill (n 8) 411.

[46] Toylaan Ah Ket (n 44).

[47] Ibid.

[48] Andrew Godwin, 'William Ah Ket - A Life of Diversity and Service' (2020*) Asian Law Centre Melbourne Law School*, 2.

[49] See, eg, *Shops and Factories Act 1873*; *Factories and Shops Act 1905.*

they get there? In the pursuit of true inclusion, the answer cannot be constrained by a satisfaction with token judicial appointments. Rather, it should be inspired by the need for a robust racial dialogue that shapes a more inclusive rule of law.

C. Symbolic Effects of Judicial Diversity

Efforts to increase the number of judges from Asian and other minority backgrounds can have a powerful symbolic effect- these being capable of addressing many of the social costs of under-representation.[50] Such efforts, however, should be grounded in the need for a diversity of viewpoints, rather than simply signalling that Asian-Australians can have a seat on the judicial stage if they so choose. Regardless, greater symbolic representation can and should have the effect of appointing judges with unique cultural perspectives; a requisite towards the goal of including previously silenced narratives in the process of legal decision-making.[51]

The first of the symbolic benefits falls within the *public confidence rationale*. This rationale focuses on the inherent value of a representative judiciary which reflects the diversity found in the community subject to its power.[52] Studies have shown that a lack of cultural diversity in the judiciary reduces public confidence in its ability to fairly serve all people.[53] In the interest of attaching greater legitimacy to court opinions,[54] the goal of increasing the number of judges from minority communities is an important one. By doing so, the judiciary signals to these communities that they are valued members of the Australian community, and counters fears that the legal system actively excludes their participation. As it is true that 'nothing breeds social unrest as quickly as a sense of injustice', the appearance of a reflective judiciary can fend off the social costs of marginalized communities withdrawing from institutions that they deem "unjust", and instead inspires confidence in these institutions. [55]

Secondly, there is additional symbolic value described under the *role model rationale*. This rationale recognises that an increased presence of Asian-Australians on the judiciary- in and of itself- has the capacity to inspire others in the community to pursue similar career paths.[56] By virtue of the importance of the role, the symbolic value of Asian-Australian inclusion on the bench can help dispel the fear that Asians are inevitably limited in their ability to climb the corporate or political ladder. Although a

---

[50] Maya Sen, 'Diversity, Qualifications, And Ideology: How Female And Minority Judges Have Changed, Or Not Changed, Over Time' (2017) 2017(2) *Wisconsin Law Review*, 371-373

[51] Michael Nava, 'The Servant of All: Humility, Humanity, and Judicial Diversity' (2008) 38(2) *Golden Gate University Law Review,* 187.

[52] Sen (n 50) 374.

53 Sybil Dunlop and Jenny Gassman-Pines, 'Why the Legal Profession is the Nation's Least Diverse (And How to Fix It)' ((2021) 47(1) *Mitchell Hamline Law Review*, 6.

[54] See, generally, Samuel Krislov, 'Representative Bureaucracy' (1974) 89(4*) Academy of Political Science*, 868-870.

55 Michael Hudson McHugh AC, WOMEN JUSTICES FOR THE HIGH COURT (Speech delivered at the High Court Dinner hosted by the Western Australia Law Society 27 October 2004)

[56] See Michael Nava, 'The Servant of All: Humility, Humanity, and Judicial Diversity' (2008) 38(2) *Golden Gate University Law Review,* 185.

'bamboo ceiling' undoubtedly exists,[57] working to close the substantial diversity deficit in both the judiciary and other public institutions can begin to dismantle, in a practical way, the various barriers which comprise it.

More specifically, the visibility of Asian judges reinforces the promise of equality of opportunity in the legal profession.[58] Their presence on the judiciary serves as visible evidence to Asian-Australian lawyers that the judicial appointment process is what it is claimed to be; 'fair, meritocratic, and non-discriminatory'.[59]

Additionally, where Asian-Australian judges engage in active mentoring of minority lawyers, a more substantive benefit can be realised beyond the symbolic value of increased representation.[60] Considering that the DCA identified the lack of relationship capital as being a potential barrier to Asian-Australian leadership aspirations,[61] the value of having active mentors in the judicial position could be of immeasurable practical value in closing the racial diversity deficit.

D. The Need for Substantive Change

Beyond the capacity to inspire confidence and further diversity in the industry, a greater Asian-Australian judicial presence also has the potential to enrich judicial discourse, correct unrecognised biases, and- most importantly- generate substantively different outcomes.[62] The need for a more diverse and considerate judicial dialogue, which ultimately determine these outcomes, was effectively captured by the words of American Justice Byron White:

> *Even the most conscientious judge will have difficulty imagining the thoughts and feelings of people who have grown up in groups that [their] culture has trained [them] to see as outsiders.*[63]

This statement speaks to the need for substantive change in judicial discourse, and is predicated on the idea that the decision-making of *all* judges is shaped by their individual life experiences and values.[64] As the Australian judiciary has been dominated by the life-experiences of a very narrow subset of the

---

[57] Diversity Council of Australia, Cracking the Cultural Ceiling (2014) <https://www.dca.org.au/research/project/cracking-cultural-ceiling>
[58] Anne Oakes and Haydn Davies, 'Justice Must Be Seen to Be Done: A Contextual Reappraisal' (2016) 37(2) *Adelaide Law Review,* 460-494.
[59] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 *Current Legal Problem* 119-141.
[60] Oakes (n 58)
[61] See Diversity Council of Australia, Cracking the Cultural Ceiling (2014) <https://www.dca.org.au/research/project/cracking-cultural-ceiling>
[62] Tankiang (n 19).
[63] Byron R. White, A Tribute to Justice Thurgood Marshall, (1992) 44 *Stan. L. Rev*. 1215, (quoted in Michael Nava, 'The Servant of All: Humility, Humanity, and Judicial Diversity' (2008) 38 *Golden Gate U. L. Rev*, 182).
[64] Ifill (n 8) 411.

population, the supposedly "neutral" and well-settled standards of judicial reasoning may- in reality- be the result of various unrealised biases that have persisted upon the lack of diversity over the years.[65] A greater plurality of perspectives on the bench is therefore needed to address potential biases, allowing for a more considerate judicial dialogue within appellate panels and courts, ultimately leading to fairer decision-making.

To this end, the increased inclusion of Asian-Australians on the bench is an improvement. However, unlike the symbolic benefits that come with greater inclusion, the substantive effects of judicial diversity are by no means guaranteed upon the improvement of diversity metrics.[66] Instead, substantive change invariably requires the willingness of Asian-Australian judges to *actively* affect change by offering some degree of cultural insight to the judicial role.

Reconciling Diverse Perspectives with Impartiality and Neutrality

The concepts of judicial neutrality and impartiality are quite similar, and in essence, requires that a judge not become personally invested in the outcome of a case. Specifically*, personal impartiality* refers to the requirement that a judge hold no stake in the outcome of a proceeding,[67] whilst judicial *neutrality* requires a judge to be free of political or ideological bias when interpreting and applying the law.[68] Understandably, minority judges are cautious of revealing an explicit racial voice for fear of running afoul of these concepts.[69]

Minority judges who offer "outsider" perspectives in matters with cultural undertones may be led to believe that their racial identity must stripped away to ensure the integrity of the judicial role. A theory of adjudication which justifies this reasoning, referred to as *traditional adjudication theory*,[70] understands the judicial role as being constrained entirely by the application of relevant legal principles and precedents.[71] This school of thought is meant to be the death knell for the substantive benefits of judicial diversity, as the inclusion of "outsider" perspectives goes well beyond the neutral application of legal norms.[72]

However, in reality, impartiality and diversity of viewpoints are not irreconcilable interests. While judges are expected to base their decisions on the law and well-settled standards of interpretation, it is

---

[65] Ibid.
[66] Oakes (n 62)
[67] Stuart Chinn, 'The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality' (2020) 2019 (5) *Utah Law Review*, 915.
[68] Diego M. Papayannis, 'Independence, impartiality and neutrality in legal adjudication' (2016) 28(1) *Issues in Contemporary Jurisprudence* 33-52.
[69] Ifill (n 8) 457.
[70] See Raymond Finkelstein, 'Decision-Making in a Vacuum?' (2003) 29(1) *Monash University Law Review* 11.
[71] Ibid 12.
[72] Papayannis (n 47).

now widely accepted that a judge's personal identity can play a substantial role in how they adjudicate.[73] Although precedent may constrain decision-making, there are also numerous other factors capable of influencing judicial outcomes, such as individual perspective, social context, and professional consensus regarding judicial standards.[74] Importantly, it is at the intersection of judicial discretion and personal life-experiences, where many of our well-settled standards of law had been shaped *initially*- and can be further refined today.

Accordingly, Asian-Australian judges must realise that their "outsider" perspectives are not a departure from a "neutral" baseline of judicial norms- but rather a departure from the collective values of a narrow subset of the population which has dominated the judiciary for most of its history.[75] As noted by the legal scholar John Hart Ely:

> *[There is] a systemic bias in judicial choice of fundamental values, unsurprisingly in favour of the values of the [majority] upper-middle, professional class from which most judges...are drawn.*[76]

Consequently, the over-representation of the values and life experiences of this specific demographic has resulted in a legal landscape that is far from neutral. Rather, the maintenance of homogeneity has largely been mistaken for neutrality.[77]

A more accurate understanding of the judicial role is therefore the *realist theory;* which acknowledges that all judges bring 'a mind imprinted with previous experiences' to the bench, and these experiences ultimately influence their judicial reasoning.[78] As a judge's professional contributions are ultimately influenced by their personal world-views, implicit cultural assumptions and biases, which unintentionally disadvantage minority groups, may become ingrained in a legal system which lacks a diverse viewpoints.[79] In the interest of correcting these biases, it is therefore necessary to not only ensure the proportionate inclusion of minority groups on the bench, but also to encourage the inclusion of their unique insights in judicial discussion.

Under the realist interpretation, increased judicial diversity can ultimately result in beneficial change. The consideration of alternative viewpoints and counter-narratives can expose a legal system to new ways of approaching complex cultural matters, and offers opportunities to improve upon existing legal doctrine and practice.[80]

---

[73] See "Other Theories" in Finkelstein (n 70) 15.
[74] Ibid.
[75] Appleby et al (n 14).
[76] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) Harvard University Press 57.
[77]Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013).
[78] See, eg, Raymond Finkelstein, 'Decision-Making in a Vacuum?' (2003) 29(1) Monash University Law Review 15; W Rehnquist, 'Remarks on the Process of Judging' (1992) 49 Washington and Lee Law Review 263,266.
[79] This was recognised in Australian Law Reform Commission, Multiculturalism and the Law, ALRC Report No 57 (1992).
[80] Ifill (n 8) (at 444)

The Realization of Substantive Value

Greater judicial racial diversity can substantively impact outcomes in several ways- particularly on appellate courts where alternative opinions may influence collegial decision-making.[81] Primarily, the inclusion of minority groups on multi-member courts can cause judicial colleagues to become more cognizant of the different cultural views and practices.

The need for greater judicial cultural awareness was addressed by Professor Andrew Godwin, who noted that the judicial role often involves the consideration- whether consciously or unconsciously- of complex cultural issues.[82] An example of a conscious consideration provided by Professor Godwin is the decision to accept or reject 'evidence that someone acted in a certain way on account of their culture'.[83] When matters such as these arise, the presence of a minority judge on a multi-member court can be of great substantive value. Of course, this value is only realised where the minority judge contributes a unique perspective which contradicts the standard approach to a particular cultural consideration.[84]

By contributing a practical understanding of cultural sensitivities, gestures, and philosophies,[85] a minority judge potentially enhances the fairness of not only one instance of judicial reasoning, but many others as well. This is because by "speaking up" about their insights, minority judges can diffuse a greater deal of cultural awareness to judicial colleagues, ensuring that discourse within the broader legal system is shaped by a wider range of human experiences.[86]

Although judges are provided with benchbooks which list practical cultural insights- including, for example, the tendency for Vietnamese and Chinese families to express support through an absence from the courtroom-[87] a more nuanced understanding of such matters is often required. A theoretical understanding- derived from limited notes about a person's culture- may not be enough to afford complex cultural issues fair consideration. In such matters, the presence of additional "outsider" perspectives is inevitably required.

---

[81] Nava (n 51) 186.
[82] Andrew Godwin (Quoted in Blake Connell, University of Melbourne, *Workshop aims to bring Asian cultural awareness into the courtroom, (*19 April 2016) < https://law.unimelb.edu.au/news/archive/workshop-aims-to-bring-asian-cultural-awareness-into-the-courtroom>
[83] Ibid.
[84] Hunter (n 59) 142.
[85]Cam Truong and William Lye, 'The Rise of Asian Litigants in Commercial Disputes' (2017) Foley's List, 13.
[86] Robert French AC, 'Equal Justice and Cultural Diversity- The General Meets the Particular' (2015) *Cultural Diversity and the Law Conference* 5-8.
[87] Ibid 13.

Importantly, the substantive value of a minority judge's voice is magnified where cultural considerations are considered unconsciously- that is, where clear cultural issues have not been raised, but can nonetheless affect judicial decision-making. In such instances, the presence of a minority judge- aware of their duty to address cultural concerns where recognised- can substantively influence judicial reasoning and contribute to an outcome that is more fair and well-considered.[88] As noted by Justice Michael Kirby:

> *[It is at] the margins of legal doctrine, [that] the approach of individuals is frequently decisive.... For an appellate court to reach great strengths there is a need for diversity amongst its members.*[89]

Are Substantive Benefits Guaranteed?

Considering that the substantive effects of judicial diversity are only realised when minority judges choose to take action, it is therefore worth asking:

How often does this occur in reality?

In the article, *More than Just a Different Face? Judicial Diversity and Decision-making,* Rosemary Hunter suggests that although a more diverse judiciary *may* sometimes generate substantively different outcomes, such changes are certainly not inevitable.[90] According to Hunter, in order for substantive benefits to materialize, there needs to be the right combination of opportunity- that is, the appropriate subject matter in a case- and, more importantly, sufficient personal commitment from the minority judge and external encouragement from the legal system.[91]

As Asians represent such a small portion of the Western judiciary,[92] there is very little data on the substantive impacts of increased Asian inclusion on the bench. However, we can look to comparable studies regarding other minority groups- particularly African-American judges in the US legal system- to assess whether diverse views actually affect judicial outcomes. Research in this area has suggested that African-American judges are significantly more likely than Anglo-Celtic judges to support affirmative action programs, and these views can have a substantial causal effect on determining judicial outcomes where these matters arise.[93]

---

[88] Ibid.
[89] Justice Michael Kirby, Diversity as the protectress of freedom (Speech delivered at: Judges and Masters of the Supreme Court of New South Wales, Sydney, 12 February 2004) See <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_feb04a.html>
[90] Hunter (n 59) 142.
[91] Ibid 140.
[92] Asian Australian Lawyers Association, *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015* (14 April 2014) 4.
[93] See, eg, Jonathan P Kastellac, 'Racial Diversity and Judicial Influence on Appellate Courts' (2013) 57(1) American Journal of Political Science, 167-183.

Additionally, studies also suggest that female judges who identify as holding feminist ideals can sometimes be the catalyst for substantively different judicial outcomes.[94] These studies, however, also point to a general unwillingness on the part of female and racial minority judges to 'step out of line', associated with a belief that they must 'distance themselves from any notion of difference in order to... be taken seriously by their peers and the judicial hierarchy'.[95]

Importantly, it must be noted that a minority judge's capacity to substantively effect judicial outcomes is not limited to their individual votes on multi-member courts; particularly as these judges are likely to be outnumbered on any given judicial panel. [96] Rather, as mentioned, the power of a minority judge to affect substantive change is often seen in their ability to influence their judicial colleagues by raising the possibility and salience of cultural issues. In this regard, several studies have documented the existence of "panel effects", which is the influence that a single judge can have on the decision-making of their colleagues.[97] As they are often outnumbered on multi-member courts, the "panel effect" is often a minority judge's primary tool for affecting real, substantive change.

With limited empirical evidence on the topic, Hunter suggests that the substantive effects of increased judicial diversity- although rarely measured- does often materialize in practice.[98] A key determinant of this occurring is the minority judge's level of aversion to being criticised for alternative views, the conviction of the minority judge to affect change, and the encouragement that they receive to do so.[99]

E. Proposal

As the purpose of this essay is to demonstrate the need to maximize the benefits of judicial diversity, this proposal will *not* focus on how to increase Asian-Australian judicial appointments, but rather how the substantive benefits of these appointments can be ensured. Although numerous initiatives may be relied upon to increase the number of minorities on the bench- including, for example, a more transparent appointment criteria, appointment quotas, and a dedicated judicial diversity commission-[100] there is only *one* initiative capable of ensuring substantive change.

This essay therefore proposes that the primary focus of any racial diversity initiative should be the selection and guidance of minority judicial aspirants who are *willing* to represent different attitudes, experiences, and cultural insights. A shift away from the 'discouragement or at best toleration of judicial

---

[94] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) ch 3.
[95] Hunter (n 59) 128.
[96] Kastellac (n 93) 167.
[97] Sen (n 50) 377.
[98] Hunter (n 59) 140.
[99] Ibid 129.
[100] See generally: Advisory Panel on Judicial Diversity, Chair, Baroness Neuberger CBE, *The Report of the Advisory Panel on Judicial Diversity 2010* <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

difference'[101] is required, which must be rooted in the active encouragement of minority judges to "speak up" and dictate a more inclusive judicial dialogue.

Where targeted initiatives are instituted with the aim of increasing diversity, these programs should be grounded in the recognition that improved diversity metrics must also increase the number of distinct voices on the bench. Under these initiatives, 'appointable pools'[102] should be established, which could identify and promote judicial aspirants with strong commitments to representing "outsider" insights. Ultimately, desirable applicants should be those that recognise the role of minority judges as representatives of their community's previously excluded perspective, rather than simply role-models of symbolic value.

'Talent management programs'[103] could also be established to further mentor these judicial aspirants. Under such programs, candidates should be encouraged to embrace their unique cultural understandings, and should be advised that it is not wrong to do so, but rather desirable and necessary. To this end, mentoring programs must dispel the myth that the concepts of judicial impartiality and neutrality precludes the inclusion of "outsider" perspectives. Minority judges have often indicated that it is the fear of appearing impartial that ultimately discourages them from acting in ways which could distinguish them from others judges.[104] Therefore, the harm of equating the introduction of "outsider" perspectives with the introduction of potential bias into the legal system must be corrected in the minds of not only minority judges, but the minds of all members of the legal community.

Mentoring programs which seek to do this must therefore promote a realist interpretation of the judicial role; an interpretation which recognizes the unique ability of "outsider" perspectives to identify and challenge unrealised biases that homogenous judiciaries often accept as 'self-evident' truths."[105] Ultimately, the goal of these programs should be to instil in the minds of future Asian-Australian judges that their most powerful tool towards true inclusion is their unique racial voice; a voice capable of tempering the over-representation of majority perspectives, correcting unrealised biases, and producing judicial outcomes that are *more* impartial, not less.

---

[101] Hunter (n 59) 141.
[102] See, eg, the UK initiatives described in: JUSTICE, Nathalie Lieven, *Increasing judicial diversity* (Report, April 2017) <https://files.justice.org.uk/wp-content/uploads/2017/04/06170655/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf> 8.
[103] Ibid.
[104] Ifill (n 8) 459.
[105] Ibid 444.

CONCLUSION

The pathway towards *true inclusion* is paradoxical, in that inclusion is both necessary yet ultimately insufficient. As a fierce advocate for Asian-Australian rights, William Ah Ket understood the complexity of this elusive goal, and most importantly, realised the key step in capturing it.

'Building bridges between East and West', this was the personal philosophy of William Ah Ket. This philosophy drove him to establish foundations and host lectures in the interest of extolling the values of his cultural background, and encouraging Western knowledge of the arts, sciences, and history of the Chinese people.[106] His philosophy, even today, provides a useful blueprint for Asian-Australians seeking true inclusion, either in the legal field, political stage or society at large. It provides a metaphor of connection; a step beyond mere presence or symbolic inclusion.

To build a bridge implies the pursuit of a substantive link. It requires building upon one's inclusion in a desirable position so as to add value to the place that they have reached, and to assist the journey of those following in their footsteps. It not only implies a desire to reach the other side of a divide, but suggests inherent value in the side from which you came.

Although breaking down barriers, particularly those that comprise the bamboo ceiling, has been a necessary and hard-fought goal for Asian-Australians, the philosophy of William Ah Ket suggests that this is just one crucial step in the journey towards true inclusion. The final step requires that a person shape and add value to the positions that they have reached, by contributing to these positions that which makes them different.

Certainly, in the context of judicial diversity, the inclusion of one's unique cultural perspectives is the active ingredient which gives value to diversity efforts. It is solely upon the willingness to "speak up" about one's unique perspective that a more inclusive rule of law can be shaped.

In light of the inherent value of unique perspectives, this essay again asks:

> W*hat would be the added value of appointing William Ah Ket to the bench, as distinct from any other equally qualified practitioner of his day?*

However, considering his immense ambition- effectively captured by his personal philosophy- it may be more appropriate to frame this question as:

---

[106] Toylaan Ah Ket (n 44).

What was lost by his exclusion from the judicial role?

Although this is purely speculative, there is the obvious cost to the potency of the Australian legal system, which as noted by Justice Kirby amounts to a weakening of the Courts for want of additional judicial philosophies.[107]

Secondly, and more importantly, there is the unquantifiable cost to the Australian people; both Asian-Australian and otherwise. The presence of William Ah Ket on the judiciary, at such an early stage in our nation's conception, would have served as an immeasurably powerful symbol to both the marginalized Chinese community, and the 'unbiased mind[s]' of the Anglo-Celtic majority, that Asian-Australians were valued members of the Australian story. Most importantly, his immense drive and capacity to affect substantive change- amplified by a position on the judiciary- could have ensured that discriminatory legal doctrines and practices were amended more quickly and more substantially.

It can only be speculated what value was lost by the failures of the past to address under-representation and the problem of silenced cultural perspectives. However, it is in recognising the importance of listening to these perspectives, that we may begin to ensure that diverse voices, capable of contributing important stories, are not lost in our future.

[107] Justice Michael Kirby, Diversity as the protectress of freedom (Speech delivered at: Judges and Masters of the Supreme Court of New South Wales, Sydney, 12 February 2004) See <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_feb04a.html>