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The Embodiment of Equal Justice Under the Law

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THE EMBODIMENT OF EQUAL JUSTICE UNDER THE LAW

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I. INTRODUCTION

In 1991, when I testified before the Senate Judiciary Committee in the Clarence Thomas confirmation hearings, there were two women in the United States Senate.¹ Nationwide, as of 1997, 19% of seated federal judges were women.² Though the laws protecting against sexual harassment had been in place since the 1970s,³ a woman’s chance of winning a sexual harassment lawsuit was a longshot. The United States Supreme Court had heard only one such case.⁴ In the United States, women earned about seventy cents for each dollar a man earned.⁵

On October 15, 1991, Judge Thomas was confirmed as a justice to the nation’s highest court.⁶ Momentum from the hearings indicated that the issues I raised during the hearing were only of passing interest.⁷ Observers were equally certain that no woman would come forward with a sexual har-

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1. U.S. Senate, Art & History–Historical Minutes, “Year of the Woman” (Jan. 3, 1993), http://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm.

2. ABA, FACTS ABOUT WOMEN AND THE LAW 1 (1998), <http://www.abanet.org/media/factbooks/womenlaw.pdf>.

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (1965).

4. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

5. Women’s Earnings as a Percentage of Men’s, 1951–2005, Infoplease.com, <http://www.infoplease.com/ipa/A0193820.html> (last visited Apr. 14, 2007).

6. *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle: ‘Time for Healing,’ Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

7. Julia Lawlor, *Thomas Battle Leaves Doubts in Workplace*, USA TODAY, Oct. 16, 1991, at B1.

assment complaint after viewing the Senate's treatment of the issue.⁸ In sum, analysts projected that my appearance before the Senate would have a chilling effect on women's voices.⁹ Fortunately, that projection was wrong. In the weeks following my testimony, open discussions of the hearings and the topic of sexual harassment began to reshape public opinion on a variety of gender-related issues.¹⁰

Since the events of 1991, I've had the opportunity to participate as a speaker in hundreds of public forums—some about the hearings, some about sexual harassment, and some about general racial and gender issues. In venues all over the country, as well as in Asia, Africa, and Europe, the hearings still resonate. Far from static, they've evolved and taken on significance as we face new issues of gender equality. The energy the hearings unleashed pushed the issue of sexual harassment far beyond its predicted limits and even beyond the numbers of complaints and amounts of monetary awards.¹¹ Today, sexual harassment is correctly viewed as an assault on women's rights to participate in the economic mainstream as equals to men.

Beyond the harassment issue, Justice Thomas's confirmation hearings evoked a new consciousness about gender equality in leadership.¹² We began to reexamine the role that women's rights play in shaping our society.¹³ We knew that women should take a more active role in fashioning public policy and deciding all the issues of the day, not just those that were seen as typical gender issues.

In 2006, there were seventy-one women in the United States House of Representatives and fourteen women in the United States Senate.¹⁴ Women's earnings improved to 80% of men's.¹⁵ Since the hearings, corporations have instituted anti-harassment policies and countless women have

8. *Id.*

9. *See id.*

10. Susan Deller Ross, *Sexual Harassment Law in the Aftermath of the Hill-Thomas Hearings*, in RACE, GENDER, AND POWER IN AMERICA 237–38 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

11. *Id.* at 237.

12. *See* Guy Gugliotta, *Year of the Woman Becomes Reality as Record Number Win Seats*, WASH. POST, Nov. 4, 1992, at A30.

13. *See* Gwen Ifill, *Female Lawmakers Wrestle with New Public Attitude on 'Women's' Issues*, N.Y. TIMES, Nov. 18, 1991, at B7; *see also* Geraldine A. Ferraro, *Women's Issues Are Now National Issues*, ST. LOUIS POST-DISPATCH, Nov. 3, 1992, at 3B.

14. MILDRED L. AMER, *Women in the United States Congress: 1917–2006*, CRS REPORT FOR CONGRESS 1 (updated Nov. 29, 2006), available at <http://www.senate.gov/reference/resources/pdf/RL30261.pdf>.

15. Molly Hennessy-Fiske, *Women Narrow Wage Gap as Men's Earnings Shrink*, DENVER POST, Dec. 4, 2006.

sought relief using these internal procedures.¹⁶ In 2006, 12,025 sexual harassment complaints were filed with the United States Equal Employment Opportunity Commission (EEOC).¹⁷ Likewise, 15.4% were filed by men.¹⁸ Monetary relief on those resolved by the EEOC without litigation totaled \$48.8 million.¹⁹

In the courts, women and men are filing sexual harassment complaints and winning unprecedented awards.²⁰ The United States Supreme Court has ruled in favor of numerous women in harassment suits and recognized that men who are harassed are equally entitled to sue under federal law.²¹ Currently, women make up over 20% of the federal judiciary figures; however, the percentage of people of color on the federal bench is less clear.²² These are, in fact, better numbers, but they are not good enough.

I argue that a society committed to equal justice under the law must demand a judiciary that embodies that belief. Professor Judith Resnik states the issue clearly: “In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.”²³ Equality and legitimacy require that we increase the inclusiveness of today’s judiciary.

For decades, feminist legal scholars have asked how the law fails to take into account women’s experiences.²⁴ Critical race theorists have similarly asked how the “received tradition in law adversely affects people of

16. See Sherman M. Fridman, *Avoid Sexual Harassment Lawsuits: Sexual Harassment Lawsuits Can Hurt Any Firm’s Bottom Line*, <http://www.office.com/templates/page1.asp?docid=33> (last visited Apr. 14, 2007).

17. EEOC, *Sexual Harassment*, http://www.eeoc.gov/types/sexual_harassment.html (last visited Mar. 24, 2007).

18. *Id.*

19. *Id.*

20. See John Vering, *State Court Juries Continue Employee-Friendly Verdicts*, 16 MO. EMP. L. LETTER 1 (Apr. 2006) (reporting a \$6.8 million award in a sexual harassment complaint); see also *EEOC Wins Big in Chicago on Sexual Harassment Claim*, 8 EMP. PRAC. LIABILITY VERDICTS & SETTLEMENT, Jan. 1, 2007 (reporting a \$2.355 million award against an employer on behalf of three former employers).

21. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

22. See ABA COMM’N ON WOMEN IN THE PROFESSION, *CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY* 5 (2006); see generally Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Apr. 14, 2007).

23. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 597 (2005).

24. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

color not as individuals but as a group.”²⁵ Critical race theorists appropriately challenge us to consider “[w]hat would the legal landscape look like today if people of color were the decision-makers?”²⁶ The relevance of the “woman question” and the “race question” today is clear in light of the recent appointments of Chief Justice John Roberts and Justice Samuel Alito to the withdrawal of Harriet Miers’ name from consideration.²⁷ For the first time since Justice Ruth Bader Ginsburg took office in 1993, the United States Supreme Court had only one female justice.²⁸ The “race question” is similarly relevant. As we contemplate future judicial appointments, critical consideration must be given to the question of whether, in the twenty-first century, the judiciary will be a body that looks more like and reflects the perspectives of the population it serves, as well as engages in discussion about how we can get to a more representative judiciary.

Justice Sandra Day O’Connor’s appointment as the first woman on the United States Supreme Court was a historical event,²⁹ as was her resignation.³⁰ Her resignation was greeted with widespread public speculation about the gender of her replacement.³¹ Within days of Justice Sandra Day O’Connor’s resignation, a reporter asked me if her replacement should be a woman. My response was that the nominee’s respect for gender equality was more important than his or her gender—as though we had to choose between having a woman and having someone committed to gender equality. My sincere, but uninspired response barely masked my ambivalence about being asked whether Justice O’Connor’s replacement had to meet a gender litmus test. My perception was that behind the question was the idea that the O’Connor seat was the woman’s seat—just as many had assumed that the Thurgood Marshall years on the Court secured a seat for an African American.³² Few questioned what was behind such a presumption. The idea of

25. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994).

26. *Id.* at 86.

27. See Anita F. Hill, *Why Harriet Miers Mattered*, MS. MAG., Winter 2006, available at <http://www.ms magazine.com/winter2006/miers.asp>.

28. See Bill Mears, *Reporter’s Notebook: Fun with Dick and Jane—and John*, CNN WASHINGTON BUREAU, Oct. 2, 2006, <http://www.cnn.com/2006/LAW/09/26/scotus.journal/index.html>.

29. See Nat’l Women’s Hall of Fame, *Women of the Hall: Sandra Day O’Connor*, 1995, <http://www.greatwomen.org/women.php?action=viewone&id=115> (last visited Apr. 14, 2007).

30. Adam Liptak, *O’Connor Leap Moved Women Up the Bench*, N.Y. TIMES, July 5, 2005, at A1.

31. See *id.*; Hill, *supra* note 27.

32. Talk of a “black seat” on the court began even before Justice Marshall announced his resignation. See Hal Riedl, Editorial, *Should Supreme Court Have a Black Seat?* ST. LOUIS

setting aside a seat for a woman evoked memories of past special protections for women that often resulted in measures that limited, rather than expanded, their opportunities. For me, the question hinted that a woman would only be chosen if she were given special consideration because the vacancy was left by a woman. Not even the Democrats on the Senate Judiciary Committee seemed to challenge the assumption.³³ None were asking that former Chief Justice William Rehnquist's replacement be a woman.³⁴ Few suggested that it be a woman of color. It was not hard to conclude that, except when a woman resigned, the likely nominee would be male, and the outcome suggests that it will likely be a white male.

With a total of nine seats at stake, simply setting aside Justice O'Connor's seat as a woman's seat seemed more likely to restrict women's interests than to advance them. Both historical experience and contemporary theory suggest that the key to women's advancement is not setting aside a single seat for women, but rejecting the practice of setting aside all the others for men.

The legal profession has come a long way from the time when the only choice for including women was to have special protections or set-asides. We have also moved beyond an era where we believed that we had to ignore the differences in women's and men's experiences in order to treat them equitably and offer meaningful inclusion. Despite the fact that in 2004 a majority (59%) of individuals between the ages of forty and fifty-seven (Baby Boomers) said that the Civil Rights Movement had a "Major Influence" on

POST-DISPATCH, Apr. 1, 1990, at 3B. Shortly after he announced his resignation, Justice Marshall advised that President George Bush not use race to justify "picking the wrong Negro and saying, 'I'm picking him because he's a Negro.'" Howard Fineman et al., *How Far Right*, NEWSWEEK, July 8, 1991, at 19. Although Justice Marshall expressed hope that the nominee would be "a Negro," according to reported accounts, "he did not think there should be a permanent black seat on the high court." Ethan Bronner, *Marshall to Retire from High Court*, BOSTON GLOBE, June 28, 1991, at 1. When President George Bush announced Judge Thomas's nomination, he rejected the suggestion that Thomas's race was a factor in his decision. John Harwood, *Bush Selects Black Judge for Supreme Court Seat*, ST. PETERSBURG TIMES, July 2, 1991, at 1A. "I don't think there should be a black seat on the court, or an ethnic seat." *Id.* Yet others urged that when President Bush selected Justice Thomas for the Court, he took race into account and reinforced the idea of a black seat. See Cynthia Tucker, Editorial, *Filling Court Vacancy: Playing Race Politics*, ATLANTA CONST., July 6, 1991, at A19.

33. See, e.g., Adam Nagourney, *Democrats Adopt O'Connor as Model for Bush Court Pick*, N.Y. TIMES, July 7, 2005, at A1; David D. Kirkpatrick, *Senate Democrats Are Shifting Focus from Roberts to Other Seat*, N.Y. TIMES, Sept. 9, 2005, at A16.

34. See Nagourney, *supra* note 33; Kirkpatrick, *supra* note 33.

their views about governance and politics,³⁵ the gender and racial make-up of the courts has changed only incrementally in the past twenty years.³⁶

I argue that for a variety of reasons with regard to substantive changes in the law as well as perceptions of fairness and the role the judiciary plays in our society, women judges do make a difference and that race, ethnic, and gender diversity should be the norm, not the exception. I also assert that judges, women, and people of color, are making a difference in a variety of ways, including legal reasoning and public engagement. I offer three examples: Madam Justice Bertha Wilson of the Supreme Court of Canada, Justice Sandra Day O'Connor of the United States Supreme Court, and Chief Justice Constance Baker Motley of the Second Circuit Court of Appeals. They are aided in doing so by the legal scholarship of feminist, critical race, and intersectionality legal theorists.

The “woman question” is not a new one, even with regard to judges.³⁷ However, in 1982, Madam Justice Bertha Wilson, the first woman to sit on the Supreme Court of Canada,³⁸ gave that question new prominence. The title of her widely publicized lecture posed the issue directly: *Will Women Judges Really Make a Difference?*³⁹ According to Madam Justice Wilson’s assessment, the life experiences of women and men cause them to think and approach the law and legal decision-making differently.⁴⁰

Madam Justice Wilson’s treatment of the question was presented at Osgoode Hall Law School and, not surprisingly, she approached the question as one approaches a legal issue.⁴¹ She carefully laid out her arguments for how the appointment of women to the bench would: 1) help “shatter stereotypes about the role of women in society that are held by male judges and lawyers, as well as by litigants, jurors, and witnesses;”⁴² 2) help preserve the public

35. Jeffrey Love, *Political Behavior and Values Across the Generations: A Summary of Selected Findings*, STRATEGIC ISSUES RESEARCH (AARP), July 2004, at 11, http://assets.aarp.org/rgcenter/general/politics_values.pdf.

36. Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 248, 253 (2006).

37. See Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143, 2145–46 (1993).

38. Mimi Liu, *A “Prophet With Honour”: An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada*, 25 QUEEN’S L.J. 417, 423 n.20 (2000); see The Honourable Madam Justice Bertha Wilson, *The Supreme Court of Canada*, http://www.scc-csc.gc.ca/AboutCourt/judges/wilson/index_e.asp (last visited Apr. 14, 2007).

39. Madam Justice Bertha Wilson, *Will Women Judges Really Make a Difference?* 28 OSGOODE HALL L.J. 507, 507 (1990).

40. *Id.* at 519–22.

41. See *id.* at 507.

42. *Id.* at 517.

trust by fostering perceptions of diverse representation in the judiciary;⁴³ 3) reduce problems for women counsel;⁴⁴ 4) alter “the process of judicial decision-making;”⁴⁵ and 5) reform legal doctrine, particularly in such areas as tort, criminal, and family law.⁴⁶

Madam Justice Wilson’s conclusions about women’s potential to change the law fell into two categories.⁴⁷ She first argued that the appointment of women judges would alter public perceptions.⁴⁸ In addition, she argued that the presence of women on the bench would modify law itself.⁴⁹ According to Madam Justice Wilson, the presence of women in the role of judicial decision-makers and leaders would change the way fellow judges, as well as lawyers and litigants, saw all women in the judicial process.⁵⁰ This, she concluded, would also change the behavior of women and men.⁵¹ So too, with more women as judges, the public at large would see the justice system as more representative of diversity and, presumably, more fair.⁵²

Madam Justice Wilson’s conclusions about women’s potential to change the substance and processes of the law proved to be the most controversial of her claims. She argued that because of their gendered experiences, women were more willing to contextualize the law and its processes than were men, who were more formalistic in their approach to decision-making.⁵³ These assertions drew fire from critics who challenged many of Madam Justice Wilson’s premises.⁵⁴ Her conclusions were understandably most offensive to those who view the law as gender, race, and class neutral, notwithstanding the different life experiences of women and men.⁵⁵ For those who believe in law’s neutrality, Madam Justice Wilson’s arguments raise the question of whether any effort to appoint more women is misguided if it is done for the sake of adding the female perspective.⁵⁶ For those with a particularly traditional view of the law, the appointment of women who are

43. *Id.* at 518.

44. Wilson, *supra* note 39, at 518–19.

45. *Id.* at 519.

46. *Id.* at 516.

47. *See id.* at 517–18.

48. *Id.*

49. Wilson, *supra* note 39, at 519.

50. *Id.* at 517.

51. *Id.* at 521–22.

52. *Id.* at 518.

53. *Id.* at 519–20.

54. *See* Robert E. Hawkins & Robert Martin, *Democracy, Judging and Bertha Wilson*, 41 MCGILL L.J. 1, 34 (1995).

55. *Id.* at 54.

56. *See id.* at 55.

perceived as particularly “feminist” in their approach to the law and decision-making remains very troublesome.⁵⁷

Canadian law professor Constance Backhouse chronicles the response to one such judge—Madam Justice Claire L’Heureux-Dubé, the second woman appointed to the Supreme Court of Canada.⁵⁸ Madam Justice L’Heureux-Dubé came under fire for the concurring opinion she wrote in *R. v. Ewanchuk*,⁵⁹ a criminal case involving the question of whether an alleged sexual assault was actually consensual sex.⁶⁰ Madam Justice L’Heureux-Dubé’s opinion concurred with the full Court’s decision to overturn the dismissal of the complaint and to enter a conviction of the defendant.⁶¹ The opinion also criticized her colleague, Justice John Wesley McClung, who voted to dismiss the conviction, suggesting that the complainant’s repeated “no”’s during the alleged attack were irrelevant.⁶² He also implied that a woman who had had a child out of wedlock, while living with a male partner, was not capable of refusing consent.⁶³ Madam Justice L’Heureux-Dubé’s opinion advised that judges should avoid the use of “language . . . which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.”⁶⁴ Even further, the opinion noted that judicial bias, such as that suggested in Justice McClung’s opinion, adversely affected a complainant’s ability “to rely on a system free from myths and stereotypes” and on a reasonable expectation of judicial impartiality.⁶⁵

Although her colleague, Justice Charles Doherty Gonthier, also signed the opinion, Madam Justice L’Heureux-Dubé received the brunt of the public criticism.⁶⁶ The first came in the form of a letter written by Justice McClung, which was published in a national newspaper, where he accused Madam Justice L’Heureux-Dubé of having a “feminist bias” and suggested that her interjection of “personal invective” into the law could be responsible “for the disparate (and growing) number of male suicides being reported in

57. See, e.g., Lynne Cohen, *Gender Irrelevant When Judging a Judge*, OTTAWA CITIZEN, June 2, 1998, at C4.

58. The Honourable Madam Justice Claire L’Heureux-Dubé, The Supreme Court of Canada, http://www.scc-csc.gc.ca/AboutCourt/judges/lheureux-dube/index_e.asp (last visited Apr. 14, 2007); Liu, *supra* note 38, at 423.

59. [1999] 1 S.C.R. 330 (Can.).

60. *Id.*

61. *Id.* at ¶ 68 (L’Heureux-Dubé, J., concurring).

62. *Id.* at ¶ 88–89.

63. *Id.* at ¶ 88.

64. *Ewanchuk*, [1999] 1 S.C.R. 330, ¶ 95.

65. *Id.*

66. Janice Tibbetts & Shawn Ohler, *Judges Clash Over Landmark Sex-Assault Ruling: No Definitely Means No*, NAT’L POST, Feb. 26, 1999, at A1.

[Quebec Province].”⁶⁷ In the public attacks that followed, lawyers and representatives from national organizations criticized Madam Justice L’Heureux-Dubé for feminist judicial activism.⁶⁸ Despite the criticism, Madam Justice L’Heureux-Dubé did not shy away from the feminist label.

Throughout their careers both Madam Justice L’Heureux-Dubé and Madam Justice Wilson expressed opinions that were characterized as feminist, although Madam Justice L’Heureux-Dubé came under particular scrutiny for challenging what she believed were sexist ideas.⁶⁹ While Madam Justice Wilson certainly received public criticism for raising the “woman question,” her willingness to do so may have had a notably positive effect.⁷⁰ At the time this article was written, of the nine justices on the Supreme Court of Canada, four were women.⁷¹ Three of the appointments came between 2002 and 2004.⁷² The Chief Justice of the Supreme Court of Canada is Madam Justice Beverley McLachlin.⁷³ In the context of advising President Bush on the appointment of women to the United States Supreme Court, Senator Patrick Leahy of Vermont pointed to the Supreme Court of Canada as an example of gender equity.⁷⁴ As many commentators have noted, the United States has much to learn about diversity on the bench from Canada’s highest court.⁷⁵ By raising the question in a convincing and reasoned manner, Madam Justice Wilson began a dialogue among the bar and the public at large. She urged change that may not have taken place but for her positions.

II. JUST HOW WILL WOMEN JUDGES MAKE A DIFFERENCE?

Scholars have identified several dominant theories employed by the United States Supreme Court in gender discrimination cases that are relevant to judicial appointments.⁷⁶ One involves difference theory.⁷⁷ Though

67. *Id.*

68. *Id.*

69. Justice Claire L’Heureux-Dubé, *Conversations on Equality*, 26 MAN. L.J. 273 (1999).

70. See Hawkins & Martin, *supra* note 54, at 1.

71. Supreme Court of Canada, Current Judges, http://www.scc-csc.gc.ca/aboutcourt/judges/curjudges_e.asp (last visited Apr. 14, 2007).

72. Supreme Court of Canada, Current and Former Puisne Judges, http://www.scc-csc.gc.ca/AboutCourt/judges/curformpuisne/index_e.asp (last visited Apr. 14, 2007).

73. Supreme Court of Canada, Current and Former Chief Justices, http://www.scc-csc.gc.ca/AboutCourt/judges/curformchief/index_e.asp (last visited Apr. 14, 2007).

74. Richard Foot, *Canadian Top Court Held as Example in U.S.*, THE GAZETTE, July 13, 2005, at A13.

75. Clare Dyer, *Law: Where Are the Women? Our Judges Are Still Overwhelmingly Male, White and Public School Educated*, THE GUARDIAN, July 8, 2003, at 16.

76. However, the United States Supreme Court has not incorporated difference theory in its jurisprudence. See generally Katharine T. Bartlett, Essay, *Gender Law*, 1 DUKE J. GENDER

Madam Justice Wilson relied on difference theory to support her position that women judges would change the law, a review of the research reveals no definitive evidence to confirm that reliance.⁷⁸ Empirical and anecdotal accounts do not conclusively establish the idea that individual women or women as a group judge differently than men. However, at least some research finds gender differences.⁷⁹ For example, political scientists Elaine Martin and Barry Pyle studied high courts in all fifty states, concluding that, in divorce decisions, “a judge’s gender [tended] to be the primary predictor of a judge’s vote.”⁸⁰ In addition, Brenda Kruse’s research has concluded that Justice Sandra Day O’Connor and Justice Ruth Bader Ginsburg are also influenced by their gendered experiences in deciding employment cases.⁸¹ However, empirical research testing the impact of race on judicial decision-making is inconclusive.⁸²

There is also considerable evidence that some male judges’ perspectives cause them to view women’s experiences very differently than women might.⁸³ Professor Shirley Wiegand has chronicled numerous examples that demonstrate a judge’s apparently limited vision.⁸⁴ One of her examples comes from the case that served as the basis for the 2005 movie *North Country*, a grim and painful, if sometimes fictionalized, account of sexual harassment at a mine in Minnesota.⁸⁵ The fictionalized version was apparently no

L. & POL’Y 1 (1994) [hereinafter Bartlett, *Gender Law*]. The primary theories relied on by the Court are: 1) separate spheres, which allows different treatment based on cultural expectations and biological differences; 2) formal equality, which requires that women and men be treated the same; and 3) substantive equality, which calls for rules such as affirmative action that can produce equality in results. *Id.* at 2–6; Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 CARDOZO WOMEN’S L.J. 501, 519–521 (2004).

77. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW 19, 20 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987).

78. Wilson, *supra* note 39, at 522.

79. For an overview, see KATHERINE BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (4th ed., 2006).

80. Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 923 (2005).

81. Brenda Kruse, Comment, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions?* 36 U. TOL. L. REV. 995, 1021 (2005).

82. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 316 (2004).

83. Kruse, *supra* note 81, at 996.

84. See generally Shirley A. Wiegand, *Deception and Artifice: Thelma, Louise, and the Legal Hermeneutic*, 22 OKLA. CITY U. L. REV. 25 (1997).

85. NORTH COUNTRY (Warner Bros. Pictures 2005).

more grim and painful than the real experience the women faced in the mine or the hostility they faced because of the suit.⁸⁶ According to Wiegand, Judge Patrick McNulty's opinion:

[R]evealed that he could not understand why one woman

was fearful when a man who she said had exposed himself to her several years earlier began driving his truck in circles, over and over, around her work area. "This court has difficulty understanding why the appearance of a suspected flasher outside the building in which she was working . . . would cause great fear—of something—in a reasonable woman."

The judge also could not understand why a woman would fear rape simply because "a man who had repeatedly and crudely propositioned her suddenly lunged at her one night at work with his arms spread, only stopping when she began screaming."⁸⁷

Yet such decisions and other evidence of male bias do not establish sweeping gender differences in judging. And considerable evidence suggests that other factors, such as ideology, are better predictors than sex in accounting for judicial decisions.⁸⁸ So, for example, commentators who have looked specifically at Justice O'Connor's and Justice Ginsburg's voting records generally find that gender is not a compelling factor in their judging.⁸⁹

Unlike their Canadian counterpart, Madam Justice Bertha Wilson, both Justice O'Connor and Justice Ginsburg reject the notion that their gender guides their judicial decision-making.⁹⁰ In responding to questions of "whether women judges speak with a different voice," Justice O'Connor refers to the lack of "empirical evidence that gender differences lead to discernible differences in rendering judgments."⁹¹ Moreover, she warns that

86. Wiegand, *supra* note 84, at 46–47.

87. *Id.* at 47 (quoting Kirsten Downey Grimsley, *Judge Put Small Price on Pain; Damage Award Paled by Litigation Norms*, WASH. POST, Oct. 28, 1996, at A13.). It is worth noting that the trial judge who adopted this language was overturned on appeal some eleven months later. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1304 (8th Cir. 1997).

88. Farhang & Wawro, *supra* note 82, at 302–03.

89. *See, e.g.*, Tony Mauro, *O'Connor and Ginsburg: Together and Apart*, LEGAL TIMES, June 9, 2003, at 14. Mauro notes that Justice O'Connor and Justice Ginsburg voted for the same result approximately 75% of the time. *Id.* Justice O'Connor agreed with Justice Kennedy 83% of the time, while Justice Ginsburg agreed with Justice Breyer and Justice Souter in 94% of the decisions. *Id.*

90. *Id.*

91. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 190–91 (Craig Joyce ed., 2003).

such ideas may rely on troubling myths and stereotypes.⁹² Instead, she suggests that male and female judges alike should seek a collective wisdom gained through different struggles and different victories.⁹³

Justice Ginsburg draws on her experiences as a judge and as a law teacher to conclude that there is no discernible difference in the way women and men reason: “In class or in grading papers . . . and now in reading briefs and listening to [oral] arguments in court . . . , I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.”⁹⁴

It is difficult to argue with these two women, in particular, about whether women judges speak with a different voice, especially given that there is no clear definition of what a “different voice” means. Moreover, difference theory is not without its feminist critics.⁹⁵ Some feminists advocate for gender equity under the theory of substantive equality.⁹⁶ Rather than look at whether a rule or law treats women and men the same or differently, substantive equality theory questions whether a law or rule has the effect of disadvantaging individuals due to their gender.⁹⁷ Thus, substantive equality frameworks acknowledge differences, but with the goal of eliminating or leveling them to encourage more equal outcomes.⁹⁸ Affirmative action and pay equity are the kinds of strategies that advocates of substantive equality support.⁹⁹

Instead of focusing on the question of whether men and women are different, non-subordination theory looks at what meaning society attributes to those differences.¹⁰⁰ Assuming that the consequences of male power are more significant than gender similarities or differences, non-subordination frameworks concentrate on eliminating power imbalances.¹⁰¹ According to the theory’s major proponent, Catharine A. MacKinnon:

[A] rule or practice is discriminatory . . . if it participates in the systemic social deprivation of one sex because of sex. The only question for litigation is whether the policy or practice in question

92. *Id.* at 192.

93. *Id.* at 193.

94. Justice Ruth Bader Ginsburg, *Remarks for California Women Lawyers, September 22, 1994*, 22 PEPP. L. REV. 1, 5 (1994) [hereinafter Ginsburg, *Remarks*].

95. See Bartlett, *Gender Law*, *supra* note 76, at 11–13.

96. *Id.* at 4–6.

97. *Id.* at 4.

98. *Id.*

99. See *id.*

100. Bartlett, *Gender Law*, *supra* note 76, at 6.

101. See *id.*

integrally contributes to the maintenance of an underclass or a deprived position because of gender status.¹⁰²

For example, under non-subordination theory, sexual harassment violates principles of equality and should be prohibited because it reinforces men's power over women.¹⁰³ The violation flows from the domination it supports—not the boorish, bad, or even assaultive behavior itself.¹⁰⁴

Despite the opportunities that difference and non-subordination theories offer for positive change, they are not without their feminist critics. Some commentators, Justice Ginsburg among them, argue that difference theory risks reinforcing gender-based stereotypes that perpetuate gender-based inequality.¹⁰⁵ By attempting to articulate an all-encompassing meta-narrative, both theories are criticized for denying class, racial, sexual orientation, and religious differences among women, making the experiences of white, middle-class women the model.¹⁰⁶ In addition to criticizing MacKinnon's theory on the grounds that it promotes what amounts to gender "essentialism," some feminists criticize Catharine MacKinnon for what they call "gender imperialism," namely the assumption that gender is the most important source of oppression.¹⁰⁷

Critical race theorists have similarly questioned the ways in which the "received tradition in law adversely affects people of color not as individuals but as a group."¹⁰⁸ Critical race theorists appropriately challenge us to consider: "What would the legal landscape look like today if people of color were the decision-makers?"¹⁰⁹ Critical race theorists point to similar modes of racial justice, including one based on ideas of racial pluralism, and another based on racial diversity.¹¹⁰ Moreover, they have a "vision of legal knowledge that includes the perspectives and experiences of oppressed people in the critique and reformulation of legal doctrine" and eschews the notion that law is value neutral.¹¹¹ But they too are susceptible to criticism by Black

102. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979).

103. *Id.*

104. *Id.*

105. Ginsburg, *Remarks*, *supra* note 94, at 4–5.

106. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585, 590 (1990); see also BARTLETT & RHODE, *supra* note 79, at 15.

107. See, e.g., Harris, *supra* note 106, at 585; Bartlett, *Gender Law*, *supra* note 76, at 16.

108. Brooks, *supra* note 25, at 85.

109. *Id.* at 86.

110. See *id.* at 92–93.

111. *Id.* at 96 (quoting Linda S. Greene, "Breaking Form", 44 *STAN. L. REV.* 909, 922 (1992)).

women and Latina scholars for racial essentialism and neglecting the role of class and gender in their analysis.

However, failure to reach a consensus about whether women and racial minority jurists reach different conclusions or even reason differently does not resolve the question of whether there should be more women on the bench. Whether women judges will make a difference is a larger question than whether women and men will reach different outcomes in particular cases. Whether women judges make a difference depends on the role that judges and judging play in our legal system and must take into account a variety of professional and community activities in which judges participate. As the research from various judicial task forces suggests, judging involves collegiality and a diverse bench enables members to influence each other.¹¹²

In addition, the role of a judge also has significance in terms of perceptions about representation. The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perceptions of fairness. Finally, diversity among judges is a reflection of how power is distributed in the justice system.

Political constituents in the United States rely on several forms of representation, including anticipatory representation, introspective representation, and surrogate representation.¹¹³ The concept of anticipatory representation is best explained by the idea that constituents in today's political climate make selections based on the achievement of specific outcomes rather than "policy preferences" of representatives.¹¹⁴ In the introspective representation model, representatives rely on "a set of principles and commitments that derive partly from their own ideals and partly from their commitment to the collective decisions of the party" in making decisions.¹¹⁵ Surrogate representation is a form of non-territorial representation.¹¹⁶ Thus, an individual without a certain characteristic or perspective may serve as a representative for "the interests and perspectives" of others with the same characteristic or perspective, "even when members of these groups do not constitute a large fraction of their constituents."¹¹⁷ Though typically applied to elected political officials, the ideas behind these forms of representation can be applied to the judiciary and can serve as a basis for arguing for greater diversity and inclu-

112. See *infra* notes 130–32.

113. Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003).

114. *Id.* at 517 (citing R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 17 (1990)).

115. *Id.* at 521.

116. *Id.* at 522.

117. *Id.* at 523.

sion.¹¹⁸ As judicial selection becomes more openly ideological and political, it is time for a more open discussion about what representation can legitimately be sought in the courts. Yet, many of us are uncomfortable with aggressively pursuing diversity in the judiciary given the lack of confidence in, and outright discomfort with, the idea of different outcomes based on race and gender.

However, there are other reasons for supporting judicial diversity. I call the model which I would choose for including women and people of color on the bench the representative perspective frame. My model borrows ideas from both difference and non-subordination theories and attempts to address some of the criticisms of racial and gender essentialism and gender imperialism. As applied to the appointment of judges, my representative perspective theory rests on three premises: 1) that gender, racial, and ethnic experiences influence perspectives and worldviews, including one's sense of justice and how it should be achieved; 2) that the contribution of representative perspectives is substantial and reaffirms the promise of equality under the law by suggesting that all citizens have the chance to take part in democracy; and 3) that the failure to have a broad array of perspectives represented undermines judicial integrity and contributes to false ideas about intellect and competency.

III. JUSTICE O'CONNOR AND THE INCLUSIVE COURT

Theories of equality, as well as the law adopted by the United States Supreme Court in recent years, support greater inclusion in the judiciary. Despite the fact that Justice O'Connor has been labeled a conservative by some, and denies that her gender influences her reasoning, she has provided some important language to support the idea of greater gender inclusion on the judiciary.¹¹⁹

"A basic tenet of [feminist thinking] is that perspective matters . . . , [meaning] understanding women's life experiences requires a different lens" and a point of view that comes "from living life as a woman and developing [a gendered] consciousness."¹²⁰ Critical race theorists argue that people of color develop a race consciousness as well.¹²¹

118. See generally Mansbridge, *supra* note 113, at 521–27.

119. See Kruse, *supra* note 81, at 996–98.

120. Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV. (Jan./Feb. 2006), available at <http://bostonreview.net/BR31.1/hansonbenforado.html>.

121. See *id.*; see also Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?* 18 HARV. BLACKLETTER L.J. 1, 20 (2002).

Perspectives and experiences may influence the outcome, but that influence is not limited to outcome in terms of which party prevails. It can have other influences on the overall direction the law takes. As Justice O'Connor stated in her concurring opinion in *J. E. B v. Alabama ex rel. T. B.*,¹²² a case which challenged the exclusion of women from juries, "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case Individuals are not expected to ignore as jurors what they know as men—or women."¹²³ The idea that perspective matters is not limited to feminist scholars or female jurists.¹²⁴ Jon Hanson and Adam Benforado made precisely that point in their recent *Boston Review* article, stating that "[m]ost legal scholars recognize that a judge's antecedent presumptions and perspectives often influence judicial decisions as much or more than her purported principles and precedents."¹²⁵ As noted earlier, gender is only one of the antecedents that influence judicial decisions and decision making; race, class, and sexual orientation, as well as previous areas of practice, are others.¹²⁶

Even conservative supporters of Justice Samuel Alito recognized the importance of a judge's perspective.¹²⁷ During his confirmation hearing, they argued that his experience as the son of an Italian immigrant father would be a positive influence on his ability to relate to the little guy in cases that might come before him as a United States Supreme Court Justice.¹²⁸ It is hard to imagine that the experience of being an immigrant's son could be any more influential than the experience of being a man is for now eight of the nine members of the Court.

In addressing whether women judges will make a difference, we also should not overlook the symbolic and representational role that members of the judiciary play. Beginning in the 1970s, the federal and state judicial systems launched initiatives on racial and gender bias.¹²⁹ To date, numerous states and members of the federal circuit courts have taken steps to respond to bias.¹³⁰ The need for responses is well documented in task force re-

122. 511 U.S. 127 (1994).

123. *Id.* at 149 (O'Connor, J., concurring).

124. *See* Hanson & Benforado, *supra* note 120.

125. *Id.*

126. *See supra* Part II.

127. *See* Hanson & Benforado, *supra* note 120.

128. *See* Patty Reinert, *Confirmation Hearings: Alito Vows No "Agenda"*, HOUSTON CHRON., Jan. 10, 2006, at 1.

129. *E.g.*, Equal Employment Opportunity Act, 42 U.S.C. § 2000e-8 (2000).

130. *See* Marcia Coyle, *How Deep Is the Pool for Supreme Court Picks?* FULTON COUNTY DAILY REPORT, Sept. 28, 2005.

ports.¹³¹ They found bias in a broad range of substantive areas such as family law, domestic violence, and criminal law, as well as in administrative areas such as the appointment and election of judges.¹³²

It is hard to deny, though perhaps impossible to measure, how bias against women and people of color undermines the integrity of the American judicial system. However, a measurement of the actual impact is not necessary. Justice O'Connor herself recognized that even the perception of bias injures the judicial system. As she wrote in the introduction to the Ninth Circuit Court of Appeals task force: "When people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."¹³³ Virtually all of the task forces concluded that at least some reforms were necessary to reduce the potential for gender bias and better serve the ultimate objective of equal justice under the law.¹³⁴ In particular, many of the task force reports advocate measures that will increase the number of women on the bench.¹³⁵ These reports cite the educational role women judges play with their male counterparts in addition to the greater public confidence in the judiciary that come from more diverse representation on the bench.¹³⁶

Given the history of gender and racial bias in our legal system, the overrepresentation of white, male perspectives on the United States Supreme Court undermines the integrity of the American judicial system. Law professor Lani Guinier has argued that United States Supreme Court appointments have carried important symbolic messages.¹³⁷ In *Grutter v. Bollinger*,¹³⁸ the Court affirmed, recognizing that a university had a compelling interest in a racially diverse student body.¹³⁹ Writing for the majority, Justice O'Connor concluded that for "legitimacy in the eyes of the citizenry, it is necessary that

131. See generally John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 N.Y.U. ANN. SURV. AM. L. 117 (1997).

132. See, e.g., THE FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. (1990), reprinted in 22 CONN. L. REV. 733, 733 (1990) [hereinafter FEDERAL COURTS STUDY COMM.]; see Doyle et al., *supra* note 131, at 168–77; *Report of Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 687–704 (1993).

133. JUDGE DOROTHY W. NELSON, INTRODUCTION TO THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), reprinted in 67 S. CAL. L. REV. 731, 760 (1994).

134. See *id.* at 760–61.

135. See *id.*

136. *Id.*

137. See generally Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

138. 539 U.S. 306 (2003).

139. *Id.* at 333.

the path to leadership be visibly open to talented and [all] qualified individuals of every race and ethnicity.”¹⁴⁰ Professor Guinier argues that the same is said for leadership in the judiciary; and that it too must be open regardless of race, ethnicity, and gender.¹⁴¹ Professor Sylvia R. Lazos Vargas argues that the *Grutter* decision goes further and demands a critical mass of minority judges.¹⁴² The Court itself recognized in *J. E. B. v. Alabama* that exclusion of women and people of color from juries “causes harm to the litigants, the community, and the individual jurors” who are excluded.¹⁴³ Similarly, the failure to include diverse perspectives on the bench has an adverse impact on litigants, the community, and the underrepresented groups that are excluded.

Throughout this essay, I have been asking the “woman question.” How does the judicial selection process disadvantage women or disregard their experiences? Perhaps one way to answer that question is to ask the “man question.” How do the judicial selection process and unchallenged selection standards advantage typically white male experiences and perspectives? In this context it is important to note that most legal experts believe that there is an ample number of women and people of color who are qualified to sit on the Court.¹⁴⁴ Of course, that depends on how one determines qualifications. Much was made of Chief Justice John Roberts’ United States Supreme Court clerkship¹⁴⁵ and Justice Samuel Alito’s long experience on the federal bench,¹⁴⁶ in addition to both men’s Ivy League education and law review experiences.¹⁴⁷ But surely state court experience or other forms of service to the profession and to the public constitutes equally valuable qualifications. Had the qualities that Chief Justice Roberts and Justice Alito brought to the nomination process been the primary criteria in 1983, Justice O’Connor would not have been nominated to the Court.¹⁴⁸ Her distinguished service

140. *Id.* at 332.

141. See Guinier, *supra* note 137, at 175.

142. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 143 (2004).

143. 511 U.S. 127, 140 (1994).

144. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 955–59 (1998); Coyle, *supra* note 130.

145. The Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 25, 2007) [hereinafter Supreme Court Biographies].

146. *Id.*

147. The White House, Judicial Nominations, Chief Justice John G. Roberts, Jr., <http://www.whitehouse.gov/infocus/judicialnominees/roberts.html>, (last visited Mar. 24, 2007); The White House, Judicial Nominations, Justice Samuel A. Alito, <http://www.whitehouse.gov/infocus/judicialnominees/alito.html> (last visited Apr. 14, 2007).

148. Supreme Court Biographies, *supra* note 145.

makes clear that other, less traditional backgrounds are equally valuable. The judicial process, in fact and in appearance, is strengthened by members with diverse talents, backgrounds, and perspectives.¹⁴⁹

IV. JUDGE CONSTANCE BAKER MOTLEY: EMBRACING RACE AND GENDER

Will women judges make a difference? In fact, they already have. Madam Justice Bertha Wilson made a difference by raising the question and by unapologetically answering it in the affirmative.¹⁵⁰ An example of true leadership, her answer moved the discussion of women's inclusion in the judiciary forward in an unprecedented manner. Also, Justice Sandra Day O'Connor's legal opinions and public addresses provide language and ideas that legal scholars will continue to draw upon to support gender and racial inclusion in the courts. Other women judges provide similar inspiration. Judge Constance Baker Motley, the first African American woman selected for the federal judiciary, is a fitting example on which to close.¹⁵¹

In 1946, just out of Columbia Law School, Judge Motley began her legal career in New York as an attorney with what is now the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund.¹⁵² She was the sole female attorney among those who assisted Justice Thurgood Marshall in *Brown v. Board of Education*.¹⁵³ She also argued successfully in several higher education integration cases, including the integration of the University of Mississippi and the University of Alabama.¹⁵⁴ When President Lyndon B. Johnson appointed her to the bench in 1966, she had appeared before the United States Supreme Court ten times and won nine of those cases.¹⁵⁵ Her contributions to my appreciation of the role of judges is numerous, but perhaps her most famous decision came when she refused to excuse herself from a gender discrimination case involving an African American woman plaintiff.¹⁵⁶ In rejecting the defendants' claim that her general background and status as an African American female somehow

149. See, e.g., Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373, 398 (2006).

150. See Wilson, *supra* note 39, at 517–22.

151. See Columbia University, C250 Celebrates Columbians Ahead of Their Time: Constance Baker Motley, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/constance_motley.html (last visited Apr. 14, 2007).

152. *Id.*

153. 349 U.S. 294, 296 (1955).

154. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 515 (2004).

155. See *id.* at 515.

156. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 2–4 (S.D.N.Y. 1975).

prejudiced her in the matter, Judge Motley noted that she was not the only member of the judiciary who possessed both race and gender:

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, *ipso facto*, indicate or even suggest [heightened] personal bias or prejudice Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case¹⁵⁷

To her credit, Judge Motley unapologetically embraced both her race and her gender as well as the wisdom she had gained through her particular struggles as a civil rights advocate.¹⁵⁸ In a tribute to Judge Motley before the American Bar Association, Justice Ruth Bader Ginsburg said of her,

I count it my great good fortune to be among the legions whose lives Judge Motley touched. She taught me and others of my generation that law and courts could become positive forces in achieving our nation's high aspiration—as carved above the entrance to the U.S. Supreme Court—Equal Justice under Law.¹⁵⁹

Judge Motley embodied our country's high aspirations in her role as lawyer as well as in her role as a jurist, making her an example for the public at large, practicing attorneys, and members of the judiciary. In addition to her personification of the high ideals of the United States Supreme Court, perhaps no one spoke more persuasively about the need for diversity in the judiciary than Judge Motley:

There is a need for more women and more minorities in the federal judiciary, but not because I think they bring something totally different to the bench than white men. I don't think women and minorities have a particular view on contract law that's totally different from white men. Rather, I believe that having more women and minorities in the federal judiciary—and the federal courts are a major part of the national government—builds confidence in the government. It makes people feel that the government is fair, in that it includes people from all segments of the population. It says

157. *Id.* at 4.

158. *See id.*

159. Justice Ruth Bader Ginsburg, *Tribute to Constance Baker Motley*, 32 HUM. RTS. 26, 26 (2005).

that the courts are fair, in that women, Blacks, Hispanics, Asians, and other minorities are included among the judges. It says that the court system is not an all-white male institution as it once was.¹⁶⁰

V. CONCLUSION

Madam Justice Wilson, and Justice O'Connor, like Judge Motley, are notable examples of how women judges, in different ways, make a difference. They give us a greater appreciation for having women as members of the judiciary and bring us further along the path of achieving a judiciary which reflects the equality principles we espouse and the legitimacy to which we aspire. The question of whether we will have the courage to follow their leadership remains.

160. Clark, *supra* note 154, at 518–19.