ANTICIPATING THE WISE LATINA JUDGE

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ABSTRACT

Sonia Sotomayor's famous "wise Latina" quote provoked a conservative critique. The first part of the critique proposes that Judge Sotomayor's gender and racial background would affect her judicial decision making. The second part fears that her Latina background would result in bias, prejudice, and unfair judicial decisions.

This Essay explores this conservative critique and discusses it more generally. It reviews the realism model of judicial decision making, social science research on salience theory, and empirical research on judges' race and gender—ultimately concluding that the first part of the conservative critique is correct: judges' gender and racial backgrounds affect their decision making, at least in some cases. The Essay, however, discusses why the second part of the critique is problematic. It argues that we should have the same positive associations, and the same anticipation of judicial insights, about judges' gender and racial backgrounds that we do about the other biographical details of judges' backgrounds. It suggests that judges engaging in "deep analysis" of alternative gender and racial perspectives would move them toward empathic understanding rather than fear of bias, prejudice, and unfair results.

TABLE OF CONTENTS

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INTRODUCTION

President Barack Obama nominated Sonia Sotomayor to the U.S. Supreme Court in 2009.[1] She became the first Hispanic and only the third female judge to serve on the Court.[2] She was such an impressive candidate, credentialed in all the traditional ways,[3] that you would think that her appointment process would have been smooth sailing with no objections.

Instead, there were publicized attempts to derail her nomination.[4] This was prompted in part by Judge Sotomayor's now famous quote: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[5] The language in this quote puts gender and race front and center, given that, for instance, the term "Latina" indicates both gender and race simultaneously.

There were a variety of responses to her statement. Some were supportive.[6] Others were critical, as illustrated by the strong conservative reactions of Senator Jeff Sessions, the ranking Republican on the Senate Judiciary Committee.[7] He interpreted her quote in the following way: that her background and experiences as a Latina were indicative of her potential bias and prejudice in judicial decision making, thereby suggesting that she would not be suitable or qualified as a Supreme Court Justice.[8] He feared that her personal preferences would prevail over a commitment to upholding the law, thus resulting in unfair judicial decisions.[9]

This conservative critique of the "wise Latina" quote can best be understood by breaking it down into its two parts. The first part is the belief that Judge Sotomayor's gender and racial background would affect her judicial decision making. The second part is the fear that her gender and racial background would affect her judicial decision-making process

1. Peter Hamby et al., *Obama Nominates Sonia Sotomayor to Supreme Court*, CNN (May 26, 2009, 20:27 EDT), http://www.cnn.com/2009/POLITICS/05/26/supreme.court.

2. *Id.*

3. She was educated at Princeton and Yale and was an experienced federal court judge. *Id.*

4. *See Sen. Jeff Sessions Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASH. POST (July 14, 2009, 10:35 AM), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071401155.html (transcript of hearing).

5. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002); *see also* Dana Bash & Emily Sherman, *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, CNN (June 8, 2009, 13:39 EDT), http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/ (indicating Sotomayor's use of the phrase in other speeches).

6. Caitlin Taylor, *Sotomayor's Controversial 2001 Remarks—and Their Context*, ABC NEWS (May 27, 2009, 8:46 AM), http://abcnews.go.com/blogs/politics/2009/05/sotomayors-cont.

7. *See Sen. Jeff Sessions Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, *supra* note 4.

8. *See id.*

9. *See id.*

negatively, namely that the effect would be bias, prejudice, and unfair results.

This Essay explores this critique of the "wise Latina" quote in a broader context. We consider the first part of the critique by reviewing the realism model of judicial decision making, highlighting social science research on the salience theory, and finally, discussing the empirical research on judges' gender and race. Part II of the Essay explores the second part of the critique, the problematic inference of judicial bias and unfair results. Part III suggests a methodology of "deep analysis" to consciously integrate the full array of judicial experience into judicial decision making.

I. CONFIRMING THAT GENDER AND RACIAL BACKGROUNDS MATTER

A. Realist Model of Judicial Decision Making

Described in dozens of books on legal reasoning, law students are tutored in the basic lawyerly skills[10]: spotting the legal issues, identifying the legal principles, determining the relevant facts, and applying the principles to the facts to reach a legal conclusion. Students learn to use judicial opinions and statutes to convince judges of their particular advocacy position.

As law students learn, however, the process of judicial analysis and decision making is not as cut and dry as it might first appear.[11] Judges are required to filter and interpret. Among other inquires, judges must ask the following: Which are the appropriate legal principles? What do they mean? Which are the believable facts, and of these, which are relevant given the applicable legal inquiries? When parties disagree about the facts—which almost always occurs—which version is the most persuasive and how is that determination made?

How do judges engage in this complicated and often nuanced process of legal filtering and interpreting? Two models of judicial decision making offer contrasting answers.[12] The formalist model envisions these processes of judicial filtering and interpreting as systematic and uniformly executed.[13] Judges meticulously utilize the appropriate legal formula

10. *See, e.g.*, TERESA KISSANE BROSTOFF & ANN SINSHEIMER, UNITED STATES LEGAL LANGUAGE AND CULTURE 77–211 (3d ed. 2013) (describing in detail for beginning students the American legal system using cases, using statutes, synthesizing cases, and appellate advocacy); E. SCOTT FRUEHWALD, THINK LIKE A LAWYER: LEGAL REASONING FOR LAW STUDENTS AND BUSINESS PROFESSIONALS (2013) (similarly describing the fundamentals of basic legal reasoning).

11. *See* LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? (1999) (acknowledging and explaining further the complexity of judicial decision making).

12. *See* RICHARD A. POSNER, HOW JUDGES THINK 19–56 (2008) (describing nine theories of judicial behavior).

13. *See* Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 420–21 (1992) (describing formalist judges).

for the dispute at hand, following the specified steps and ending up with reasonably predictable results. The formalist model suggests there is little opportunity for a judge's particular experiences and background to play a role in his or her decision making, since judges have very few degrees of freedom to exercise latitude in their interpretation. The process is presumed to be unambiguous and dictated; the "humanness" of judges is not relevant.

As described by Judge Posner, the formalist model, what he labels as "legalism," envisions the following:

> The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the "canons of construction"), so that interpretation too becomes a rule-bound activity, purging judicial discretion.[14]

In contrast, a realist model of judicial decision making acknowledges that judges are individuals who bring their background and life experiences with them to the bench. When judges put on their formal robes and enter the courtroom, they do not leave their gender, race, education, religion, former occupations, and upbringing behind.[15] Their humanness brings a contextual richness to their thinking. On the other hand, judges also bring their stereotypes and cognitive biases.[16]

Nonetheless, the realism model is not contrary to principled legal analysis. Gibson and Caldeira explain that judicial "decisionmaking involves far more than 'applying' the law to the facts in a mechanical or

14. POSNER, *supra* note 12, at 41.

15. As described by Judge Kozinski: "We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts." Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 115, 119 (David M. O'Brien ed., 4th ed. 2013).

16. Brest and Krieger, for instance, explain how common cognitive biases are found in the legal context. PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 267–302 (2010). To illustrate, people in general tend to be influenced by externally-given reference points in their decision making, what social scientists call the "anchoring and adjustment bias." *Id.* at 267. In one study by Guthrie, Rachlinski, and Wistrich:

> [F]ederal judges [were given] the facts of a personal injury case, in which the plaintiff had been hospitalized for several months and was left paraplegic and confined to a wheelchair. One group was anchored by being informed that the defendant had moved for dismissal on the ground that the case did not meet the $75,000 jurisdictional minimum for a diversity case; the other group was given no such anchoring information. Though almost none of the judges granted the motion to dismiss, the average award in the anchored group was $882,000 compared to $1,249,000 in the unanchored group.

Id. at 269 (footnote omitted).

syllogistic fashion," and "inevitably involves and implicates judges' personal values."[17] At the same time, they observe:

> [T]his is a matter of degree—to reject mechanical jurisprudence is not necessarily to assume unfettered discretion but only to recognize that, within the context of the rule of law, judges have choices in their decisions and that their choices often if not typically reflect their own ideological predispositions. [18]

In practice, judges typically exercise discretion in a principled fashion, not in a strategic self-interested way, thereby protecting judicial legitimacy. They are not "merely politicians in robes."[19] Judge Kozinski further notes that judges exercise discretion, but that discretion is constrained by judges' own self-respect, colleagues' oversight, and the political process, including, in some jurisdictions, removal of judges by voters.[20]

B. Salience Theory

Salience theory, as studied by social scientists, is also consistent with the realists' perception of judicial decision making. Salience theory explains that when individuals are bombarded with lots of possible stimuli, for instance, myriad pieces of information, some stimuli stand out more.[21] These stimuli appear to garner the individual's attention and have heightened relevance. That is, these pieces are more salient than other pieces of information. For example, if you are thinking about buying a new car, you will start noticing different car models and colors more than under normal circumstances.

The concept of salience has been discussed in varied contexts. Nisbett, a cultural psychologist, for instance, found that in study after study East Asians and Americans responded in qualitatively different ways to the same situation.[22] In one experiment, Japanese and Americans viewed the same animated underwater scenes then reported what they had seen:

> The first statement by Americans usually referred to a large fish in the foreground . . . . They would say something like, "There was what looked like a trout swimming to the right." The first statement by Japanese usually referred to background elements: "There was a

17. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 201 (2011).

18. *Id.* at 214.

19. *Id.*

20. Kozinski, *supra* note 15, at 116−17.

21. *See generally* Duane M. Rumbaugh et al., *A Salience Theory of Learning and Behavior: With Perspectives on Neurobiology and Cognition*, 28 INT'L J. PRIMATOLOGY 973 (2007) (providing background information on salience theory).

22. RICHARD E. NISBETT, THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY (2003).

> lake or a pond." The Japanese made about 70 percent more statements than Americans about background aspects of the environment, and 100 percent more statements about relationships with inanimate aspects of the environment, for example, that a big fish swam past some gray seaweed.[23]

In other words, East Asians are more likely to attend to the whole, while Westerners are more likely to focus on a particular object within the whole.

Thus, we learn from Nisbett's work that our experiences and socialization shape our perceptions of the world. People from different backgrounds pay attention to different things; that is, among the array of pieces of information and stimuli that we could pay attention to, some things are more salient than others.

Research in medicine provides another example of salience, or in this case, the lack of it. Credentialed radiologists were asked to look at five lung CT scans, each which contained about ten nodules or abnormalities.[24] They were asked to click on anything strange on the scans.[25] On the final scan, a figure of a dancing gorilla about forty-eight times the size of an average nodule was placed in the upper right hand quadrant.[26] Twenty out of the twenty-four radiologists admitted they were unable to see the gorilla even though they scrolled past it an average of 4.3 times and twelve had looked directly at it.[27] After being asked if they were able to see the gorilla, the radiologists were shown the slide again and asked if they saw anything unusual.[28] They all were able to see the gorilla this time,[29] thus suggesting that individuals can be trained to find salient stimuli that would otherwise not be noticed.

Thus, we learn from this study that training someone to be an expert often means training them to pay particular attention to certain things. As a consequence, however, the training may also result in these experts ignoring other things, even when they are right before their eyes. This tendency has been called "inattentional blindness."[30]

23. *See The Geography of Thought: How Culture Colors the Way the Mind Works*, REGENTS U. MICH. (Feb. 27, 2003), http://www.ns.umich.edu/Releases/2003/Feb03/r022703a.html (internal quotation marks omitted) (describing Nisbett's research).

24. Trafton Drew et al., *The Invisible Gorilla Strikes Again: Sustained Inattentional Blindness in Expert Observers*, 24 PSYCHOL. SCI. 1848, 1849 (2013).

25. *Id.*

26. *Id.*

27. *Id.* at 1850.

28. *Id.*

29. *Id.*

30. *Id.* at 1848.

C. Empirical Research on Judges' Gender and Judges' Race

Substantial empirical research on judges' gender and race also indicates that different backgrounds can affect judicial decision making, and thus further supports the realism model of judicial decision making and salience theory.[31]

1. Judges' Gender

Consider this hypothetical: A judge hears a female employee's detailed complaint of her supervisor's sexual harassment. Consistent with applicable legal principles,[32] her lawyers argue: (1) the harassment was because of her sex; (2) the harassment was so "pervasive and severe" that it created a "hostile work environment"; and (3) therefore the defendant's actions were illegal. The judge then hears the supervisor and employer argue that the plaintiff-employee has not established the legal requirements for sexual harassment. Instead, they posit that (1) if there was harassment, it was not because of her sex but attributable to something else; (2) even if there was sexual harassment, it was not "severe or pervasive" enough to create a "hostile work environment"; and (3) therefore their conduct was not illegal.

How do judges analyze these arguments? Well-established case law directs judges to ask: What would a reasonable person conclude?[33] It turns out that if we attach a gender to the reasonable person, you get different conclusions about whether a set of facts is perceived as sexual harassment or not.[34] The reasonable man and the reasonable woman do not see eye to eye; they instead view what constitutes sexual harassment with very different lenses.[35] These findings suggest that the "reasonable person standard" is more variable than the formalist model would indicate, leaving the judge to essentially project his or her own beliefs onto what is supposed to be some objectively-defined reference point.

Given the differences among men and women in general, the realism model of judicial decision making would predict that female judges and male judges also would differ in their perceptions of sexual harassment and sexual discrimination. Indeed, the weight of empirical research

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31. *See, e.g.*, CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 107–22 (2d ed. 2009) (describing research on the effects of judges' race and gender on outcomes in criminal law cases).

32. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (clarifying the elements of a hostile environment claim); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (indicating that the harassment must be because of the protected status).

33. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); *see also* Ross v. Commc'ns Satellite Corp., 34 Fair Empl. Prac. Cas. (BNA) 260, 265 (D. Md. 1984), *rev'd on other grounds*, 759 F.2d 355 (4th Cir. 1985).

34. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35 (1998); Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES, no. 1, at 151, 154 (1995).

35. Gutek & O'Connor, *supra* note 34, at 155.

on judges' gender supports that prediction.[36] A review of fourteen studies found that female judges in federal appellate courts have decision-making patterns distinct from male judges in sexual discrimination cases.[37] Namely, female judges are more likely to hold for plaintiff employees, who are most likely women.[38] In Peresie's study of sex discrimination and sexual harassment cases in the federal courts, she found that female judges and male judges differed in their decision-making patterns.[39] Male judges held in favor of the plaintiffs 24% of the time; female judges held in favor of the plaintiffs 39% of the time.[40] Another study by Boyd, Epstein, and Martin also found that, when dealing with sex discrimination suits, female judges found in favor of plaintiffs more frequently than male judges.[41] In fact, they conclude that the likelihood of a plaintiff's success increases by about 10% if the judge is a woman.[42] Thus, it appears that female judges had different perceptions than male judges about what was salient; they saw things that male judges did not see. Conversely, male judges apparently saw things that made them rule more often in favor of the defendants.

2. Judges' Race

The realism model is also supported in empirical research on judges' race. Again, let me offer a hypothetical similar to the gender-based one above: A judge hears a black employee's detailed complaint of racial harassment. As required by the applicable legal principles,[43] his lawyers argue that (1) the harassment was because of his race; (2) the harassment was so "pervasive and severe" that it created a "hostile work environment"; and (3) therefore the defendants engaged in illegal conduct. The judge then hears the supervisor and employer argue that the plaintiff has not established the legal requirements for racial harassment. Instead, they argue that (1) if there was harassment, it was not because of his race but is attributable to a non-race-related reason; (2) even if there was racial harassment, it was not "severe or pervasive" enough to create a "hostile work environment"; and (3) therefore their actions were not illegal.

36. *See* Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359, 366 (2011).

37. *Id.* at 366; *see also* SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY *REALLY* MATTER 28 (2013) (reviewing research).

38. *See* Chew, *supra* note 36, at 366.

39. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

40. *Id.* at 1769.

41. Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–92 (2010).

42. *Id.* at 390.

43. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (clarifying the elements of a hostile environment claim); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (indicating the harassment must be because of the protected status).

The law again refers judges to the "reasonable person" in her or his filtering and interpreting process.[44] Yet if we attach a race to the reasonable person, different conclusions result about whether racial discrimination has occurred.[45] Thus, a reasonable African-American and a reasonable white American may well have different reasonableness perceptions.

And again, consistent with the realism model, empirical research establishes that judges' race makes a difference in legal conclusions in racial harassment cases.[46] In two studies of federal district court cases, Kelley and I found that judges of different races had distinct decision-making patterns: African American judges held for plaintiffs 46% of the time, Hispanic judges 19% of the time, and white judges 21% of the time.[47]

Contrary to what a "monolithic minority judge" model would suggest, African-American judges and Hispanic judges had significantly different decision-making patterns, with African-American judges much more likely to hold for plaintiffs than Hispanic judges (or judges of any other racial group).[48] In fact, when Hispanic judges are studied independently of other minority judges, their decision-making pattern is more similar to that of white judges.[49] Furthermore, judges of every race, including white judges, end up being more pro-plaintiff when the plaintiff is of the same race.[50] This finding suggests that judges of all races identify more readily with plaintiffs of the same racial background.

Thus, the empirical research indicates that there are cases where judges' gender and race make a difference. For judges' gender, it includes sex discrimination and sexual harassment disputes; for judges' race, it includes race discrimination and racial harassment disputes. An explanation for these results, consistent with the realism model and salience theory, is that individuals of different genders and of different races have different life experiences and these varied backgrounds affect how they determine if sex discrimination or race discrimination has occurred.

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44. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); *see also* Ross v. Commc'ns Satellite Corp., 34 Fair Empl. Prac. Cas. (BNA) 260, 265 (D. Md. 1984), *rev'd on other grounds*, 759 F.2d 355 (4th Cir. 1985).

45. *See, e.g.*, K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 1 (2002), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf (indicating that white workers are far more likely than minority workers to believe that everyone is treated fairly at work).

46. *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117 (2009) [hereinafter Chew & Kelley, *Myth of the Color-Blind Judge*]; Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 91 (2012) [hereinafter Chew & Kelley, *The Realism of Race*].

47. Chew & Kelley, *Myth of the Color-Blind Judge*, *supra* note 46, at 1143; *see also* Chew & Kelley, *The Realism of Race*, *supra* note 46, at 103–07.

48. Chew & Kelley, *The Realism of Race*, *supra* note 46, at 104.

49. *Id.* at 100.

50. *Id.* at 110.

Note, however, that the judges' sex and race does not appear to make a difference in all cases. For example, Kelley and I found that female and male judges did not have distinct decision-making patterns in racial harassment cases.[51] Boyd and her colleagues found no gender-related differences in twelve subject areas.[52]

II. QUESTIONING THE FEAR OF BIAS

Recalling the conservative critique of the wise Latina quote, it appears that the first part of the critique is correct: that is, that Justice Sotomayor and other judges' gender and racial backgrounds affect their decision making. As described in Part I of this Essay, the realism model of judicial-decision-making, salience theory, and empirical research on judges' gender and race all support that conclusion.

But now I want to shift gears and focus on the second part of the conservative critique's logic, that is, the fear that Justice Sotomayor's gender and racial background will lead to judicial bias, prejudice, and unfair results. I think this second part of the conservative critique is problematic. If indeed bias exists in the judiciary, why would we be more suspicious of a Latina judge than any other judge? Why not the male judge? Why not the white judge? Indeed, why should we presumptively accuse any of these judges of bias because of their gender or race? Would this not be a form of gender or racial profiling? I know of no empirical evidence that judges of a particular gender or race are more likely than any other gender or race to ignore legal principles and instead substitute their own political or personal preferences.[53]

Let's try a "thought experiment." Judges have all kinds of backgrounds and experiences. Here are some miscellaneous details from the biographies of current and former judges:

> Judge 1's background: Father was a plant manager with Bethlehem Steel; has adopted children; has had recurring seizures.[54]
>
> Judge 2's background: Has diabetes; former partner in a commercial litigation law firm in Manhattan specializing in litigation against alleged counterfeiters of Fendi goods.[55]

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51. Chew & Kelley, *Myth of the Color-Blind Judge*, *supra* note 46, at 1143 (showing that plaintiffs are successful 26% of the time before female judges and 21% of the time before male judges).

52. Boyd, Epstein & Martin, *supra* note 41, at 390.

53. Unfortunately, there are judicial abuses of professional duties. We can all recall, for instance, cases of judicial corruption, but the perpetrators are not disproportionately white or minority, male or female. As noted earlier, judges as a group are subject to cognitive biases, but again, there is no evidence that these biases are more prevalent in one gender or race than in others. *See supra* text accompanying note 16.

54. Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES, July 21, 2005, at A1; Michael D. Shear, *Chief Justice Suffers Seizure Roberts Is Fine, Spokeswoman Says*, WASH. POST, July 31, 2007, at A01.

55. Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1.

> Judge 3's background: Served in naval intelligence as a code breaker; started his own law firm specializing in antitrust law.[56]
>
> Judge 4's background: Grew up on a cattle ranch in Arizona; pre-college education in a private all-girls school in El Paso, Texas; spouse suffered from Alzheimer's for many years.[57]

My question to you: Will these judges' experiences affect their decisions in cases where those experiences are relevant? For examples, might Judges 1 and 2 draw from their own health care experiences when analyzing a health care case? Or would Judge 3's experience in naval intelligence affect his thinking in a case dealing with national security? Or in a case dealing with property rights, might Judge 4 draw on her background growing up in a ranching family?

Will these judges' backgrounds affect their decisions in cases where their experiences are salient? Of course. So Judges 1 and 2, Justices Roberts and Sotomayor respectively, would likely draw from their health care experiences when analyzing a health care case. And Judge 3, former Justice Stevens's experience in naval intelligence would inform his thinking in a case dealing with national security. And Judge 4, former Justice O'Connor, also might draw from her ranching experience in a dispute over property rights. Thus, consistent with the first part of the conservative critique, a judge's background may well play a role in her or his decision making.

But here is a second question: Did these background details prompt you to question the judges' commitment to following the law? Did you fear that Justice Roberts or Justice Sotomayor, in deciding a case dealing with health care laws, would act on their personal or political preferences rather than adhere to established legal rules and precedents? Did you fear that that Justice O'Connor would be biased in a case dealing with a ranching-related dispute; or that Justice Stevens would be biased when analyzing a case dealing with naval intelligence?

My guess is that you did not have those fears. As you considered their backgrounds and their qualifications to be judges, I am guessing that you viewed this information about their backgrounds neutrally. Or perhaps you even associated their backgrounds and their judicial decision making positively. Your reasoning would be that their backgrounds might provide useful insights and particular attentiveness to cases where their knowledge of the health care system, ranching, or military intelli-

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56. Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES, Sept. 23, 2007, at 650.

57. *Sandra Day O'Connor*, THE OYEZ PROJECT, http://www.oyez.org/justices/sandra_day_oconnor (last visited Mar. 7, 2014); Adam Bernstein, *John J. O'Connor III, 79; Husband of Supreme Court Justice*, WASH. POST, Nov. 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111119571.html.

gence would be salient. While their perceptions may vary from individuals without these particular experiences, you might plausibly assume that their varied perceptions could enhance rather than corrupt the judicial process; that they would be able to offer insights about the facts and legal principles that others would be unable to offer, drawing from their background for more nuanced, better-informed, and fairer judicial decisions.

So if our reaction to this broad array of backgrounds is neutral, or even positive, why not also think positively about individuals' gender and racial backgrounds and perspectives? Why not similarly anticipate that individuals of varied gender and racial backgrounds would offer insights about the facts and legal principles in cases where their background is salient; that they can draw from their experiences so that there are more nuanced, better-informed, fairer judicial decisions.

Based on my own experience in interactions with hundreds of judges,[58] I think judges themselves illustrate a contrary impulse—an impulse to view the worldviews of judges of other races as somehow biased or faulty.

When presented with our empirical findings that judges of different races have different decision-making patterns, judges sometimes have both speculative and defensive reactions.

For example, some judges, who are often but not always white, are on the defense. They argue that minority judges' legal conclusions must be incorrect, while white judges' legal conclusions are correct.[59] Their implicit assumption is that white judges in racial harassment cases set the standard; it is their interpretation of the law that should be the norm. They presume that minority judges favor minority plaintiffs in unfair ways or that minority judges' legal analysis is otherwise lacking. Perhaps they are thinking that minority judges are affirmative action law students who are presumptively not as skilled or intelligent as non-minority students. Thus, that same inferior skill and intelligence makes them less skilled and intelligent as judges.

A second group of judges, who are often but not always minority, are also defensive. They argue that it is the white judges who are incor-

58. Among other events, I led workshops and was a featured speaker at the following: (1) National Workshops for Federal Magistrate Judges, Federal Judiciary Center, Denver and Miami (2012); (2) Annual Meeting of the National Consortium on Racial and Ethnic Fairness in the Court (May 2009); (3) ABA Midyear Presentation, Judicial Division and over twenty other sponsors (2010). Also, I received dozens of comments from judges and others on articles describing my research. *E.g.*, Mike Green, *Report: Race Matters in Judicial Decision-Making*, HUFFINGTON POST (Feb. 13, 2010, 5:40 PM), http://www.huffingtonpost.com/mike-green/report-race-matters-in-ju_b_461526.html; Edward A. Adams, *Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find*, A.B.A. J. (Feb. 6, 2010, 19:20 CDT), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba/.

59. This is based on my experiences, described *supra* note 58.

rect and the minority judges that are correct. They presume that white judges are biased, perhaps unconsciously, against minority plaintiffs. They assume that even in a post-Obama world, whites are still naive about how discrimination occurs and how pervasive and impactful stereotyping continues to be. They believe that white judges, for instance, do not see the subtle bias that pervades the workplace, and thus are less likely to call harassment racially based or sufficiently serious to result in a hostile workplace. Meanwhile, from their vantage point, minority judges see and experience ongoing subtle bias and, therefore, find minority plaintiffs' claims of it persuasive.

III. MOVING FORWARD

The challenge is how do we move forward from the conservative critique and defensive positions that are not constructive? How do we take advantage of the varied perspectives of all judges, of all genders, of all races?

How do we move from Senator Sessions's fear that Justice Sotomayor's Latina background will result in judicial bias, prejudice, and unfair results to an alternative attitude? This alternative mindset is anticipation that her Latina background (and all the other details of her and other judges' background) will result in judicial insight, more nuanced understanding of facts and law, and therefore fairer results.

A. Deep Analysis

Drawing from anthropologists Avruch and Black's work on intercultural conflicts, an approach they call "thick"[60] and I call "deep analysis," appears particularly apt—at least as a starting point.

1. Acknowledge Opaqueness

"Acknowledging opaqueness" is the first of two steps in the deep analysis process. Judges and others can begin by recognizing that there is a range of legitimate perspectives distinct from their own. These alternative perspectives may not be immediately understandable or familiar. Avruch and Black would describe these as "opaque" perspectives because, on their face, they do not seem comprehensible or correct.[61] In contrast, one's own perspective and those of individuals who share your perspective are "transparent"; that is, they are readily understandable, naturally sensible, and familiar to you. This transparency is particularly reinforced if your perspective is also the norm.

60. *See* Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, *in* THE CONFLICT AND CULTURE READER 7, 10 (Pat K. Chew ed., 2001) (internal quotation mark omitted).

61. *Id.* at 9.

Thus, for example, if you are a male judge who shares the reasonable man's view of what constitutes sexual harassment, then you will naturally interpret the facts in a sexual harassment claim in a way that is sensible and familiar to you. In contrast, the view of a female judge who shares the reasonable woman's view of sexual harassment will not make much sense to you. It will be an unfamiliar and less comprehensible interpretation of the facts; it will be opaque to you. As a male judge, your own interpretation will be transparent and because it is also the norm, it will be easy to be confident that your view is correct. Avruch and Black, however, recommend that male judges begin by acknowledging there is an alternative perspective and that it is opaque to them.[62]

2. Pause and Empathically Assess

Once one recognizes that there is an alternative perspective, Avruch and Black suggest our first impulse is to dismiss these alternative views because they are inconsistent with our worldview.[63] Our inclination is to reconcile differences in our worldview by comparing them to our set of norms, values, and beliefs. If they do not match up, our tendency is to dismiss or criticize them. Instead, Avruch and Black suggest you pause and suspend any judgments.[64] As Judge Kozinski suggests in describing judicial decision making generally: allow yourself to doubt and question your own impulses.[65]

Instead of assuming that others holding alternative views are biased, consider instead how novel perspectives may hold particularly valuable insight to the issues at hand. Ask how these alternative worldviews might expand your thinking and deepen your understanding of what is occurring. In other words, think "deeply" about these alternative perspectives. Try to understand the underlying assumptions and premises of the alternative view and how they might differ from your underlying assumptions.

Thus, male judges in sexual harassment cases should resist the impulse to discount an alternative view offered by a "reasonable woman" judge. Avoid or at least suspend a presumption of her prejudiced bias in favor of one party in a way that is unfair and unmerited. Instead, they should query what are the underlying assumptions of the alternative view. What does the female judge find most salient and why does that factor seem so relevant to her? If she is inclined toward a different legal conclusion, empathically try to understand why. What insights can you gain? That is, how does her perspective help you gain a more accurate and meaningful understanding of the laws and of the facts? (Of course,

62. *Id.* at 10.
63. *Id.* at 11.
64. *Id.* at 10.
65. Kozinski, *supra* note 15, at 119.

female judges would do the same exercise when listening to their male colleagues.)

While the above examples of deep analysis deal with male and female judges in sexual harassment cases, the same process could be applied to judges of different races in racial harassment cases. Thus, a white judge can begin by acknowledging the legitimate alternative perspectives of black or Hispanic judges. Rather than immediately assuming that their perspective is correct, white judges should pause to do a deep analysis of the minority judge's worldview, empathically understanding these alternative assumptions and saliences. Instead of framing the alternative worldview as bias, consider it as judicial insight. (Again, minority judges should do the same.)[66]

B. Evidence of Deep Analysis

This analysis of gender-related and race-related judicial saliences may not be as abstract and impractical as one might think at first glance. In fact, while they do not label the process as deep analysis, there is inferential evidence that judges already engage in some version of this collaborative and introspective process. In particular, the research on the effect of mixed-gender and mixed-race judicial panels is telling.

Boyd and her colleagues found in their study of sex discrimination cases that a male judge on an appellate panel was more likely to rule in favor of a plaintiff if at least one female judge sat on the appellate panel.[67] The difference between all-male versus mixed-gender panels had measurable consequences for litigants.

> [The probability of an all-male panel] supporting the plaintiff in a sex discrimination dispute never exceeds 0.20—not even for the most liberal of male judges. But for mixed sex panels the probability never falls below 0.20 for even the most conservative males. For males at relatively average levels of ideology, the likelihood of a liberal, pro-plaintiff vote increases by almost 85 percent when sitting with a female judge.[68]

Another example is Cox and Miles's study of voting rights cases.[69] They investigated whether the presence of an African-American judge on a judicial panel affects the votes of his or her colleagues.[70] They found that it made a significant difference, with white judges more likely to

66. To take it a step further, even though white and Hispanic judges hold for the plaintiff with similar frequency (21% and 19% respectively), white judges should not assume that Hispanic judges reached their decision in a similar fashion (and vice versa). *See supra* note 47 and accompanying text. Different facts or legal interpretations may have been salient to each group.

67. Boyd, Epstein & Martin, *supra* note 41, at 406.

68. Chew, *supra* note 36, at 367.

69. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

70. *Id.* at 34.

vote in favor of liability when they sit with an African-American colleague.[71] The researchers theorized that white judges' view of the merits of the case might change when they deliberate with African-American colleagues who share their different experiences and information relating to discriminatory practices.[72]

Thus, one explanation of these research findings is that when judicial panels are confronted with facts and issues on which women or minorities have particular insight, the panels pause to more deeply analyze what is occurring. It would appear that male judges listen and are willing to learn from the alternative perspectives of female judges, while white judges are willing to learn from the alternative perspectives of black judges. Moreover, it appears that jurists might decide a case differently than they would have without this deep analysis of their varied perspectives.

CONCLUSION

Conservative critics interpreted Justice Sotomayor's wise Latina quote to mean two things: first, that her gender and racial background would affect her judicial decision making; and second, that her background would affect her decision making negatively, namely that it would lead to bias, prejudice, and unfair results. This Essay agrees with the first part of the conservative critique and discusses it more broadly, ultimately finding substantial support that judges' gender and racial backgrounds do indeed affect their decision making in certain cases. However, this Essay finds the second part of the conservative critique problematic. It argues that we should anticipate that information about a judge's gender and racial background should prompt a positive association with judicial decision making, rather than a fear of bias and prejudice. Finally, the Essay suggests that judges engage in a deep analysis when they encounter alternative perspectives from judges of other genders and races, thus anticipating constructive insights for the judicial decision-making process.

71. *Id.*
72. *Id.*