

DIVERSITY ON THE BENCH—

ADMINISTERING JUSTICE FOR ALL THE PEOPLE

Nina Schuyler

The 2009 Supreme Court confirmation hearings of Justice Sonia Sotomayor placed center stage the issue of diversity on the bench. Nearly everyone agrees the bench should reflect the community it serves so that it preserves confidence in the courts.

But how else does diversity play a role in administering justice? Does one's personal experience enter into a judge's decision-making process? Does it matter if you grew up in housing projects as opposed to Cambridge? Or is it only your work experience that is relevant? If you agree that diversity on the bench is critical, what is the best way to increase the number of women and ethnic minority judges?

San Francisco's trial court bench is edging closer to reflecting the city's population demographics. According to 2008 U.S. Census data, San Francisco's population is 58.1 percent white, 6.8 percent African American, 31.3 percent Asian, and 14.1 percent Hispanic or Latino.

San Francisco's Superior Court bench has nearly equal numbers of female and male judges, 47.1 percent to 51 percent. In terms of ethnic diversity, 5.9 percent are African American, 17.6 percent are Asian, and 5.9 percent are Hispanic or Latino.

The California Court of Appeal for the First District,



however, still has a way to go. Of the twenty justices, only five are females; 10 percent are African American, 5 percent Hispanic or Latino, and there are no Asians.

In California as a whole, as of December 31, 2009, women represent 29.2 percent of the bench, according to the Administrative Office of the Courts. Native Americans make up .3 percent, Asians 5 percent, African Americans 5.2 percent, and Hispanic or Latino 7.5 percent.

According to Sharon Majors-Lewis, Governor Arnold Schwarzenegger's judicial appointments secretary, as of July 2010, 34.7 percent of appointees to the bench were ethnic minorities. "That's more than double the 2005 percentage, which was 15.5 percent," she says. "I think we're doing something right."

her position since 2007 and is the first African American and first woman to serve as the judicial appointments secretary.

The pipeline for a pool of ethnically diverse candidates is tied to diversity of the bar as a whole. And that's tied to diversity in law schools. At a minimum, a lawyer needs to have been a member of the California State Bar for ten years and in good standing.

"There's also a more esoteric reason for the small pool of ethnically diverse candidates," says Majors-Lewis. "There is oftentimes a belief that what happened before will hap-

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Sharon Majors-Lewis

President Barack Obama, too, is trying to increase diversity at the federal level. Since taking office, nearly half of the 73 candidates he has tapped for the bench have been women. In all, 25 percent have been African Americans, 10 percent Hispanics, and 11 percent Asian Americans. That means seven out of ten Obama court nominees are nontraditional, meaning they have not been white men. Yet few of these nominees have made it to the bench because of a deeply polarized confirmation process in the Senate. During Obama's first twenty-one months in office, his administration has been thwarted by unprecedented delays.

OBSTACLES TO ACHIEVING A DIVERSE BENCH

There are two ways to become a superior court judge: You can run for the position in a nonpartisan election for a six-year term. Or the governor can appoint you to fill a vacant position on the court. To become an appellate court justice, you must apply and the governor nominates you.

"The most significant obstacle to diversity is that many ethnically diverse lawyers don't bother applying for a judgeship," says Majors-Lewis, who has served in

pen again. If people felt they were marginalized and the system was stacked against them, they don't want to put themselves out there."

To counter that belief and increase the pool of candidates, Majors-Lewis spent most of 2007 traveling up and down the state, speaking with groups and individuals about the process of becoming a judge. "I wanted to make the process as transparent as possible," she says.

Diversity, in her view, is not limited to ethnicity. "We want diversity regarding political party affiliation, sexual orientation, religious affiliation," she says. "We want broad-based diversity."

Since Majors-Lewis's appointment, ethnic and racial appointments have increased. For instance, prior to her arrival, nine African Americans were appointed to the bench from November 2003 to January 2007. After her appointment, twenty-eight African Americans were appointed from February 2007 to April 2010.

Justice Maria Rivera, who sits on the First District, Division Four of the California Court of Appeals, and is the first Latina to serve on this court, says there are several



Maria Rivera

obstacles. “There’s a traditional bias in favor of appointing trial attorneys with court experience,” says Rivera, who was appointed in 2002. “We need to expand the notion of who will be a good judge to include areas of law that have traditionally been overlooked.”

She also says the meaning of the “best” person for the position must be reconsidered. “I always hear the argument, ‘we only want the best,’” says Rivera. “But how do you define best? If it’s always the smartest one in law school, from the best law school, the most prestigious law firm, the most experienced district attorney, you are pulling from a narrow subset of people. What if we expand our definition to include people who will be humble, empathetic, who will treat folks with dignity and respect?”

Judge Brenda Harbin-Forte, Superior Court judge in Alameda County and chair of the State Bar of California Council on Access and Fairness’s Judicial Committee, says the entire process of appointing judges should be made more transparent. The governor consults with private screening committees, of which the membership and the evaluation criteria used are not public. Yet these committees hold a lot of power: they recommend whether your

name should be submitted to the Judicial Nominee Evaluation (JNE) Commission. “When we looked at the issue of diversity, or the lack thereof, we found the governor’s informal groups that vet candidates are not very diverse,” says Harbin-Forte. “We need a paradigm shift in the way the applications are handled and how applicants are evaluated.” Harbin-Forte’s JNE Commission has put together a checklist of practical suggestions to help someone complete the governor’s application form.

To help increase the pool of applicants, Rivera is involved with two formal mentoring programs: the Judicial Mentorship Program, launched by The Bar Association of San Francisco this spring, and the Judicial Mentorship Project, with the Alameda County Bar Association. She also informally mentors University of San Francisco School of Law students who are interested in becoming a judge.

DIVERSITY AND ITS EFFECT ON THE JUDICIAL COMMUNITY

While diversity provides the perception of fairness, it also injects fairness into the substantive decision-making process, but not in a way you might think.



Brenda Harbin-Forte

Trial court judges talk. To each other. In fact, they spend a lot of time together since the California Code of Judicial Ethics requires judges to minimize the risk of conflict with judicial obligations.



Garrett Wong

“What people don’t realize is that judges exchange thoughts and ideas,” says San Francisco Superior Court Judge Garrett Wong, who was appointed in 2005 and currently presides over criminal trials at the Hall of Justice. “It’s very collegial. The other day, we met our colleagues from the civil court at a restaurant. A dozen or more of us sat and exchanged views on issues and topics. I think diversity is important, especially for this kind of exchange.”

Judge Lillian Sing, who was elected to the Municipal Court in 1981, often has non-Chinese judges consult with her about her background and culture. “They might have a case involving Chinese litigants,” she says. “They ask questions so they are more sensitive to my culture.” This was not always the case, she says. “When I first



Lillian Sing

started as a judge, there was no such forum. It was very isolating and I often felt unwelcome.”

In addition to informal exchanges, the San Francisco bench holds monthly meetings. The judges also serve on subcommittees designed to improve the courts.

“One of the wonderful things I’ve encountered is that any one of my colleagues will get off the bench if I have a question,” says Judge Monica Wiley, who was appointed by the governor in September 2009 and is the second African American female judge to sit on San Francisco’s Superior Court bench. “I feel free to call anyone here.”

At the California Court of Appeals for the First District, cooperation is built into the process of administering justice. Justices sit on panels of three. “We naturally collaborate on our decision making,” says Justice Rivera.

THE ROLE OF PERSONAL EXPERIENCE

During the confirmation hearings, Justice Sonia Sotomayor, who became the first Hispanic Supreme Court



Monica Wiley

justice, came under fire for remarks made during a lecture at the University of California at Berkeley when she said, “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.”

In the debate that ensued, the issue of diversity on the bench quickly led to a discussion about the role of personal experience in decision making. As one might guess, the San Francisco bench holds diverse views on the topic.

When Judge Julie Tang presided over small claims court, her background came into play in a very concrete way. She handled several cases in which both parties spoke only Chinese. “With their consent, we conducted the proceedings in Chinese,” she says.

She also assisted another judge who had a matter in small claims involving a document that was written in Chinese. “I read it and laughed,” says Tang. “The contract involved illegal activity, the sale of a gambling house. And

the parties had brought the dispute to small claims. I told the parties there was no remedy in court because it was not a legal contract.”

Beyond language abilities, there is a wide range of views on whether one’s background affects decision making.

“Just because I’m an African American woman doesn’t mean I’m going to read the cases differently or apply the law differently,” says Judge Teri Jackson, who has been on the bench since 2002 and was the first African American female judge appointed to San Francisco Superior Court. In June, Jackson was appointed to the Judicial Council of California, which sets policy for the entire state court



Julie Tang

system. “We have an obligation to treat everyone fairly and base our decisions upon the law.”

Having said that, Jackson says there is a role for personal

experience in developing a rapport with jurors and litigants. “I was born and raised in the Bay Area,” she says. “I know the interests of the jurors. They like the idea that here is someone, a judge, who can remember when Stonestown had an Emporium-Capwell. They have a judge who understands and appreciates the community.”

In Wiley’s opinion, it’s her work experience that is invaluable. “Prior to becoming a judge, I worked for ten years at the city attorney’s office on the trial team and tried twenty-seven cases to verdict,” she says. She currently presides over civil matters. “I think one prerequisite to this job is having an intimate knowledge of litigation and trying a case before a judge.”

For San Francisco Superior Court Judge Ronald Albers, named to the post in 2009 as the first openly gay judge to be appointed by Governor Arnold Schwarzenegger, personal experience plays a role in deepening a judge’s understanding. “In my mind, each judge regardless of background strives to determine the facts and apply them appropriately to laws of our country,” he says. “That’s our job, our sworn duty. And having said that, we all bring an array of personal experiences and perspectives. As I am making decisions, my personal experience enables me to understand issues that may be subtle or invisible.”

“What diversity does is bring to the table rich and varied experience,” says Wong. “If you grew up in the Mission District, you have a different experience than someone who grew up in Chinatown. That background is part of the makeup of a person, as is whether your prior legal work has been in the civil arena or the criminal.”

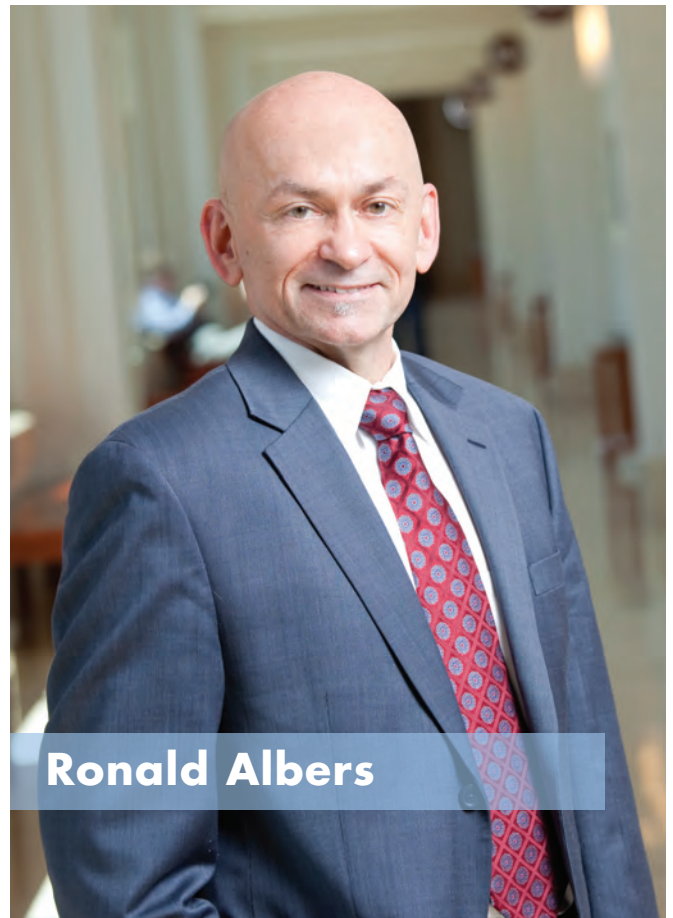
Justice Rivera says personal experience is critical. “If you grew up in foster homes, imagine how much better you’ll be as a juvenile court judge.”

THE FUTURE

At the time of the writing of this article, thirty vacancies on the bench were waiting to be filled by the governor. “I’m 100 percent committed to diversifying the bench and finding the individuals who are the best and brightest,” says Majors-Lewis. “Each individual will be evalu-

ated based on his or her uniqueness, skills, intelligence, and involvement with his or her community.”

Harbin-Forte, whose life passion is increasing diversity on the bench, says there is still much work to be done. “It’s a huge issue for our state,” she says. “It’s about fairness in the court system. Citizens have a right to come into court and receive justice without regard to gender or race. We ought be able to present to them a judiciary that reflects the population.”



Ronald Albers

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