BEYOND A NUMBERS GAME: DEVELOPING A NUANCED APPROACH TO JUDICIAL DIVERSITY FOR AOTEAROA NEW ZEALAND

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This article develops a nuanced approach to judicial diversity suitable for a future Aotearoa New Zealand judiciary. The traditional account of judicial diversity has focused solely on increasing the overt diversity of the judiciary, such as increasing the number of Māori or female judges. This article contends that a sole emphasis on the traditional approach limits the promotion of judicial diversity by imposing a restrictive view of humanity in confining judges solely to their overt physical characteristics. In doing so, the approach fails to appreciate the true value of judicial diversity: the incorporation of diverse perspectives. Because the traditional approach focuses on overt manifestations, its practical implementation may be fraught with difficulty as it fights for consideration alongside merit. This article broadens the judicial diversity debate by including tacit diversity. Tacit diversity considers factors such as a judge's professional background, skill or expertise. Implementing this nuanced approach will result in a breadth of experiences being incorporated into the judiciary, moving Aotearoa New Zealand toward the types of judges needed for our changing society.

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I A TALE OF HUMANITY, JUDGING AND OF NEW ZEALAND DIVERSITY

> [O]nce one acknowledges that the law does not exist as a preformed set of rules which judges simply discover and apply to the facts at hand, and that on occasions the judge must form her or his own view as to what should happen, it follows that *who* the judge is matters.[1]

Judges matter. Although judges do not literally hold lives in their hands like doctors do, the impact of their work is arguably as great.[2] With a significant degree of power and influence, judges change lives and shape New Zealand society.[3] As Erica Rackley notes, judging is not a mechanistic process but instead vests the judge with discretion. In exercising this discretion, the inherent humanity of the judicial process comes to bear. Judges are not "superhuman", able to apply the law in an utterly detached and impartial way.[4] Instead, as human beings, they use their own experiences as reference points, giving effect to their broader worldview.[5] The identity of those who form the bench shapes the reasoning applied in legal decisions.[6] It is therefore a necessary corollary that because judges matter, it matters *who* our judges are.

New Zealand's judiciary continues to be dominated by older, heterosexual, Pākehā, cisgender men, drawn from the legal and social elite.[7] There exists a significant diversity deficit between the demographics of New Zealand's population and the composition of the judiciary.[8] Given both the inherent humanity and significant influence of judges, this is cause for concern. The legitimacy of the judiciary rests largely upon judges' ability to represent their community.[9] The continuing homogeneity

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1 Erika Rackley *Women, Judging and the Judiciary: From difference to diversity* (Routledge, Oxford, 2013) at 132.

2 Kate Malleson "Rethinking the Merit Principle in Judicial Selection" (2006) 33 J Law & Soc 126 at 132.

3 Ellen M Carroll, Tammi D Walker and Alyssa Croft "Diversifying the bench: Applying social cognitive theories to enhance judicial diversity" (2021) 15(2) Soc Personal Psychol Compass 1 at 2.

4 Emma Dellow-Perry "Myths of merit. Judicial diversity and the image of the superhero judge" (MJur Thesis, Durham University, 2008) at 17.

5 Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton, 2006) at 105.

6 Ngaire Naffine *Law and The Sexes: Explorations in feminist jurisprudence* (Allen & Unwin, Sydney, 1990) at 47.

7 See generally Rebecca Ellis "Change and Challenge: Diversity in the Senior Courts" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis NZ, Wellington, 2022) 343.

8 Brian Opeskin "Dismantling the Diversity Deficit: Towards a more inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Dynamics in Australia* (Cambridge University Press, Cambridge, 2021) 83 at 83.

9 Helen Winkelmann, Chief Justice of New Zealand "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (The Dame Silvia Cartwright Address, Auckland, 17 October 2019) at 2.

of the judiciary reinforces a pervasive view that judges represent an elite class in society.[10] This serves to undermine public confidence.[11] Further, because judges' life experiences naturally shape how they develop the law, the persistent homogeneity has meant the law has developed without meaningful reference to "outside" perspectives.[12] Given the significant impact the law has on all New Zealanders, it is crucial that it does not serve to simply reinforce the existing stratified social order.[13] Increasing judicial diversity is thus imperative to ensure the legitimacy of judicial decisions and of judges themselves. A society so enriched by the diversity it holds must be represented and ruled by a diverse range of individuals.[14]

The need for judicial diversity has been echoed in all corners of the legal community, including by those at the highest levels.[15] Yet, despite a widespread understanding of the need to increase diversity—and an apparent desire to do so—little has been done to develop an approach suited to New Zealand's social and legal landscape. Without an explicit articulation of the approach to be taken, the common working definition of diversity has simply been assumed. This traditional approach—labelled in this article as "overt diversity"—focuses on creating a judiciary that reflects the overt demographic characteristics of New Zealand's population. This is defined in terms of physical manifestations: for example, gender, age, race, ethnicity and sexual orientation.[16] The implicit adoption of this approach has seen New Zealand focus on a strategic "evening up" of numbers on the bench to ensure "numerical aestheticism",[17] largely focusing on increasing the number of Māori and female judges. In this sense, the approach thus far can be likened to a "numbers game".

It is concerning that this approach has been adopted without regard to whether this is right for New Zealand and the results it will produce. New Zealand must move forward with a clear approach in mind that fits the judges required for its distinct social and legal context. Approaches matter. Different approaches take us in different directions, leading to differing ideas of judicial diversity and

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10 Morné Olivier "Some Thoughts on Judicial Diversity in the New Supreme Court Era" (2008) 16 Wai L Rev 46 at 48.

11 Rachel J Cahill-O'Callaghan "Reframing the judicial diversity debate: personal values and tacit diversity" (2015) 35 LS 1 at 4.

12 Elizabeth Chan "Women Trailblazers in the Law: The New Zealand Women Judges Oral Histories Project" (2014) 45 VUWLR 407 at 415.

13 Naffine, above n 6, at 148.

14 United Kingdom Advisory Panel on Judicial Diversity *The Report of the Advisory Panel on Judicial Diversity 2010* (February 2010) at 15.

15 For example, the Chief Justice of New Zealand, the Rt Hon Dame Helen Winkelmann, expressed her concern in 2019. See Winkelmann, above n 9.

16 KO Meyers "Merit Selection and Diversity on the Bench" (2013) 46 Ind L Rev 43 at 43.

17 Erika Rackley "What a difference difference makes: gendered harms and judicial diversity" (2008) 15 IJLP 37 at 40.

differently constituted judiciaries.[18] This article recognises that the issues canvassed in the traditional diversity debate have exercised the minds of thoughtful scholars for years.[19] However, it respectfully rejects the traditional approach as the full account. This article contends that a sole emphasis on the traditional approach instead limits the promotion of judicial diversity by imposing a restrictive view of humanity in confining judges solely to their overt physical characteristics. In doing so, the approach fails to appreciate the true value of judicial diversity: the incorporation of diverse perspectives. Because of the traditional approach's hyper-fixation on overt manifestations, its practical implementation may be fraught with difficulty as it fights for consideration alongside merit.

This article moves the conversation forward by developing a normative approach suitable for practical implementation in New Zealand. Although the traditional approach remains integral, the article broadens the debate by introducing the nuanced approach to diversity. A perception of the judiciary as out of touch does not necessarily suggest the solution lies only in making them resemble society; the judiciary must also understand society.[20] The story is therefore far broader than the traditional boundaries that prior scholarship has demarcated.[21]

Diversity is a complex and multi-faceted concept, arising across various dimensions. To ensure richness of thought and experience, New Zealand's approach must incorporate a variety of these dimensions. As Lady Hale P, the only female President of the Supreme Court of the United Kingdom, noted:[22]

> You need a variety of dimensions of diversity, I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.

Herein lies the article's contribution to the field: advocating for the development of the nuanced approach that incorporates both overt and tacit diversity. Tacit diversity is defined as "things that we know but cannot tell",[23] and includes diversity in professional background, education, skills, values, socio-economic background and religion. In the appointment of influential people to this prestigious institution it makes no sense to limit the approach solely to diversity in overt characteristics. Instead,

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18 Erika Rackley and Charlie Webb "Three models of diversity" in Graham Gee and Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Routledge, Oxford, 2018) 283 at 298.

19 Opeskin, above n 8, at 85.

20 Dellow-Perry, above n 4, at 101.

21 Drew Noble Lanier and Mark S Hurwitz "Diversity by Other Means: Professional, Educational and Life Diversity of U.S. Appellate Judges" (paper presented to Annual Meeting of the Western Political Science Association, San Diego, 24–26 March 2016) at 1.

22 Evidence given by Lady Hale in response to oral questioning from the House of Lords' Select Committee on the Constitution. See Select Committee on the Constitution *Judicial Appointments* (HL 272, 28 March 2012) at [90].

23 Cahill-O'Callaghan, above n 11, at 5.

the breadth and depth of a person's experiences and what they can bring to the role is crucial.[24] The diversity New Zealand must aim for is that which adds richness of thought and experience to the development of the law.[25] This requires the nuanced approach.

In developing the nuanced approach, the article tells a story not only of the impacts of various types of diversity, but of the inherent humanity which exists within the judicial role. Judges are not fairy tale characters but instead human beings. They must be treated as such. The article begins in Part II by outlining the judicial role, dispelling any notions of the judge as an utterly impartial, mechanistic applier of the law. In Part III, the article synthesises key pieces of the traditional judicial diversity debate and places them in the New Zealand-specific context. It traverses the arguments for and against the traditional account before proposing an approach in Part IV which looks beyond this "numbers game". It explores the implications of this nuanced approach and suggests that it may be particularly suitable to the senior courts. The article ends in Part V by discussing how one might handle the practical implementation of judicial diversity in New Zealand, finding a way to reconcile diversity with merit.

II THE JUDICIAL ROLE: POWER AND SIGNIFICANCE

The need for judicial diversity is crucial as against the background of judges' immense power and influence. Indeed, very few roles provide for such a degree of authority over both individual citizens and society in general.[26] Judges influence the contours of New Zealand's laws and help shape citizens' freedoms and lives.[27] Their task is complex. Judges simultaneously take on the role of interpreter, fact-finder, policy-maker and decision-maker, and exercise considerable discretion while doing so.[28] Judges figuratively hold lives in their hands;[29] their daily decisions affect people's livelihoods, liberties, and reputations.[30] In a single day, a judge's decision in a sentencing case could see a person serve the rest of their life in prison; another judge's decision in an asylum case could result in a person having to leave the safety of New Zealand; while a third judge's decision in a family law case could mean someone loses care of their children. In all situations, three individuals' lives are dramatically

24 Dellow-Perry, above n 4, at 84.

25 Winkelmann, above n 9, at 6.

26 Carroll, Walker and Croft, above n 3, at 2.

27 Maggie Jo Buchanan "Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench" (13 August 2020) CAP <www.americanprogress.org>.

28 Michael Nava "The Servant of All: Humility, Humanity and Judicial Diversity" (2008) 38 Golden Gate U L Rev 175 at 181.

29 Malleson, above n 2, at 132.

30 At 132.

altered by a judge's decision. As the Hon Matthew Palmer, Justice of the High Court, noted extrajudicially, this responsibility weighs on a judge.[31]

Judges' decisions can also impact society generally. As one commentator noted, judges have a hard job, as "[i]t's not just putting someone in jail or slapping someone on the wrist and giving them a punishment, but it's protecting society as a whole".[32] Judges are social artisans whose impact, although often more subtle than their political counterparts, is undeniable.[33] Decisions of potential precedential significance can have systemic effects.[34] The explanation and application of law in these judgments informs and shapes the standards and expectations applied in society.[35] Because judges' decisions are seen as the articulation of the community's conscience,[36] they serve as a normalising force in society by defining what is tolerable and permissible. The law thus informs and reflects society's culture, serving as an instrument of change.[37]

With such power, public confidence in judges is a constitutional imperative.[38] In fact, the legitimacy of the judiciary depends on it maintaining this public confidence.[39] Being an unelected body, its legitimacy rests largely on the credibility and confidence that its decisions and processes are fair.[40] As the Rt Hon Dame Sian Elias PC, Chief Justice of New Zealand, stated extrajudicially: "Full justification for the exercise of judicial power is necessary to ensure respect for human dignity."[41] However, many New Zealanders appear fundamentally suspicious of judges.[42] For instance, a Colmar Brunton study in 2016 revealed relatively low trust and confidence in judges, consistent with previous studies. Forty-eight per cent of respondents indicated they only had "some trust" in judges and the

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31 Matthew Palmer "Impressions of Life and Law on the High Court Bench" (2018) 49 VUWLR 297 at 305.

32 Rob Demovsky "No nicknames in court: Meet judicial intern (and Packers Pro Bowler) Ha'Sean Clinton-Dix" (24 August 2017) ESPN <www.espn.com>.

33 Allan C Hutchinson "Looking for the Good Judge: Merit and Ideology" in Nadia Verrelli (ed) *Democratic Dilemma: Reforming Canada's Supreme Court* (McGill-Queen's University Press, Montreal, 2013) 99 at 101.

34 Palmer, above n 31, at 305.

35 Winkelmann, above n 9, at 6.

36 At 6.

37 Melissa L Breger "Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial" (2019) 53 U Rich L Rev 1039 at 1053.

38 Jessica Kerr "Finding the New Zealand Judiciary" [2021] NZ L Rev 1 at 2.

39 Sophie Turenne "Fair Reflection of Society in Judicial Systems" in *Fair Reflection of Society in Judicial Systems - A Comparative Study* (Springer International Publishing, Switzerland, 2015) 1 at 4.

40 Human Rights Commission *Human Rights in New Zealand* (2010) at 101.

41 Sian Elias "Justice for One Half of the Human Race? Responding to Mary Wollstonecraft's Challenge" (2012) 24 CJWL 163.

42 John Priestley "Chipping Away at the Judicial Arm?" (2009) 17 Wai L Rev 1.

courts, while 17 per cent noted that had "little" or "no" trust.[43] A Ministry of Justice survey in 2019 echoed these concerning levels.[44] Citizens frequently express public dissatisfaction and distrust in our judges. Looking at social media comments on a single news article alone displays comments such as "[judges] fail us time and time again" and "our judges are so far removed from the real world that we all live in … the whole judicial system is failing its people and needs to be radically changed".[45]

These figures are concerning given the constitutional necessity of public confidence in our judges. These concerns underscore a need to transform the make-up of our judiciary. There is a widespread view that judges represent an elite value system which differs from that of "ordinary citizens". Judges are seen as the preserve of a limited elite class which disadvantages those disenfranchised from mainstream society, such as minority groups.[46] Judicial culture is perceived as one of indifference and superiority. Within the judicial system, this may increase participants' feelings of alienation and disempowerment and further reduce confidence that judges can effectively perform the role of neutral decision-maker.[47] Increasing judicial diversity is thus vital. The public needs to feel confident in those who hold such sway over individuals and society. Unless minorities feel that the legal system is their legal system, the estrangement of many from the law will continue.[48] A society so enriched by the diversity it holds should be represented and ruled by those who reflect this diversity.[49]

A Dispelling Fairy Tales: The Inherent Humanity of Judging

Against the power judges hold, it is necessary to remember *who* lies behind these judicial decisions: individual human beings. In the context of modern New Zealand judging, it is this essential humanity that further gives rise to the need for judicial diversity. Common law judging is no longer understood as a mechanical interpretation of the law.[50] Judges are not "robots or traffic cameras, inertly monitoring deviations from a fixed zone of the permissible".[51] Instead, judges are tasked with considerable discretion. In exercising this discretion, the nuanced mindsets of individual judges

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43 Institute for Governance and Policy Studies and Colmar Brunton *Who Do We Trust?* (March 2016).

44 Ministry of Justice "Part 1: Victims' trust and confidence in the criminal justice system (CJS) report - Frequently Asked Questions" (2019) <www.justice.govt.nz>.

45 Christine French "The role of the Judge in sentencing: From port-soaked reactionary to latte liberal" (2015) 14 Otago LR 33 at 46.

46 Ministry of Justice, above n 44.

47 Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (June 2019) at 37.

48 Olivier, above n 10, at 48.

49 United Kingdom Advisory Panel on Judicial Diversity, above n 14, at 15.

50 Anusha Bradley "90 percent of High Court, Court of Appeal judges Pākehā" (20 September 2021) RNZ <www.rnz.co.nz>; and Olivier, above n 10, at 48.

51 Eric Liu "Private: The Real Meaning of Balls and Strikes" (2 July 2010) American Constitution Society <www.acslaw.org>.

become relevant. When one realises that judges are using their own viewpoints to make decisions, homogeneity of the bench becomes dangerous. Once the viewpoint of the heterosexual, cisgender, Pākehā male becomes mistaken for neutrality, this narrow viewpoint becomes implemented as the objective norm.[52]

Recognising the impact of judges' inherent humanity requires one to dispel the notion of the impartial "superhuman" judge. Under a traditional interpretation of judging, judges are servants to the law and apply it in a completely impartial manner.[53] This impartiality is thought of as "an essential underpinning of western society"[54] and is made explicit by the judicial oath requiring judges to act "without fear or favour, affection, or ill will".[55] Lady Justice—the law's symbol—is blindfolded to represent her ability to balance the scales of justice and dispense her services with perfect impartiality.[56] The notion of the judge as an impartial applier of the law is interchangeable with the image of the "superhuman" judge—an enduring myth in law.[57] This "superhuman" judge is the incarnation of wisdom, experience and utter impartiality.[58] The judge brings a detached mind to the task of judging, setting aside their own perspectives, values and biases.[59] Arguments are heard and decided solely on their merits, detached from the identity of those making and hearing them.[60] Since justice is blind and the "superhuman" judge is utterly impartial, the identity of the individual judge behind the wig and robe has no bearing on their undertaking of the judicial role.[61]

This conventional notion places the judge as a fairy tale character, "superhuman in wisdom, propriety, decorum and humanity, able to apply to law in a neutral and detached way".[62] But, as Lord Reid stated, "we do not believe in fairy tales anymore".[63] As the name suggests, the notion of the

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52 Rosemary Hunter "More than Just a Different Face? Judicial Diversity and Decision-making" (2015) 68 CLP 119 at 124.

53 Lady Hale, President of the Supreme Court of the United Kingdom "100 Years of Women in the Law" (Girton's Visitor's Anniversary Lecture, Girton College, Cambridge, 2 May 2019).

54 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [31] (per Hammond J) as cited in Jasmin Moran "Courting Controversy: Judges and the Problems Caused by Extrajudicial Speech" (LLM Research Paper, Victoria University of Wellington, 2014) at 6, n 3.

55 Oaths and Declarations Act 1957, s 18.

56 Naffine, above n 6, at ix.

57 Dellow-Perry, above n 4, at 17.

58 At 18.

59 Jane Nelson "What Makes a Good Judge?" (1989) 9 J Nat'l A Admin L Judges 153 at 154.

60 Turenne, above n 39, at 2.

61 Lady Hale, above n 53.

62 Rackley, above n 17, at 41.

63 Dellow-Perry, above n 4, at 9.

"superhuman" judge is simply a myth. True impartiality in decision-making is, in fact, an aspirational fallacy.[64] While judges must aim for impartiality, they remain "inescapably human".[65] Like any mortal, judges do not operate in a vacuum but are instead a product of their experiences.[66] As one United States judge wrote extrajudicially:[67]

> Judges are real people with real-world experiences and backgrounds. We cannot expect them to erase their experiences and backgrounds from the mindset that informs their judicial decision-making.

Because judges are not "superhuman" but instead mere human beings like the rest of us, they are naturally unable to exert true impartiality. As much as judges try to see things objectively, they can never see them with any eyes except their own.[68]

Dispelling the notion of the "superhuman" judge demonstrates that the identity of the judge does, after all, matter. Under a legal realist conception, this innate humanity impacts the judicial task. Given the scope for choice that arises through the conferment of broad discretion given to judges,[69] subjectification of the process is inevitable.[70] Two judges deciding identical cases may come to opposing conclusions.[71] Indeed, a study of New Zealand Supreme Court decisions between 2004 and 2013 reveals that the justices decide unanimously only 56 per cent of the time.[72] In finely balanced decisions, the judge as an individual becomes central to the outcome. The influence of the individual's discretion will have a significant impact not only on the parties involved but on society as a whole.[73] As Lord Phillips acknowledged extrajudicially:[74]

> If you sit five out of twelve judges on a panel and reach a decision 3:2 it is fairly obvious if you have a different five you might reach a decision 2:3 the other way.

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64 Chan, above n 12, at 414.

65 Paul Heath "Hard Cases and Bad Law" (2008) 16 Wai L Rev 1 at [8].

66 Barak, above n 5, at 104; and Benjamin N Cardozo *The Nature of Judicial Process* (Yale University Press, New Haven, 1921) at 12.

67 John Marciano "A Conversation With Utah Supreme Court Justice Thomas Lee" (1 December 2014) Attorney at Law Magazine <attorneyatlawmagazine.com>.

68 Breger, above n 37, at 1052.

69 Ellen France, Justice of the Court of Appeal of New Zealand "Discretion, diversity, and other matters of judgment" (Ethel Benjamin Commemorative Address, Dunedin, 19 August 2011).

70 Barak, above n 5, at 105.

71 Petra Butler "The Assignment of Cases to Judges" (2003) 1 NZJPIL 83 at 83.

72 See Trevor J Shiels "Multiple Judgments and the New Zealand Supreme Court" (2015) 14 Otago LR at 27.

73 Rachel Cahill-O'Callaghan "The Influence of Personal Values on Legal Judgments" (PhD Thesis, Cardiff University, 2015) at 329.

74 Lord Phillips "The Highest Court in the Land: Justice Maker" (27 January 2011) BBC <www.bbc.co.uk>.

As a result, the outcomes of key judgments have been dictated by who happened to be on the bench at the time.[75]

The reason behind differing conclusions may well be influenced by the identity of the individual judge. As Felix Frankfurter, former Associate Justice of the Supreme Court of the United States, stated extrajudicially: "[A] person brings his whole experience, his training, his outlook, his social, intellectual and moral environment with him when he takes a seat on the Supreme Court bench."[76] In exercising discretion, judges use their own experiences as reference points, giving effect to the worldview that, in their eyes, seems proper and basic.[77] As human beings, even judges who pride themselves on strict neutrality are unable to detach themselves from their own backgrounds, experiences and biases when undertaking apparently objective assessments.[78] Claims seen in judgments such as "experience has shown us", "as far as I am aware" and "from what I have observed" are statements intended to present some sort of universal truth. In fact, often such claims merely reflect the background, life experience and worldview of that particular judge.[79] The objective "reasonable person" standard does nothing more than perpetuate the viewpoints and biases of the judges applying that standard.[80] The identity of those who form the bench therefore matters. The identity of judges shapes the legal reasoning applied in decisions by colouring the way they read the problem before them.[81]

Revealing the inherent humanity of judging highlights why judicial diversity matters. Once one realises judges are using their own viewpoints and experiences to make decisions, homogeneity of the bench becomes problematic. Implicit bias is omnipresent, and research shows that judges harbour the same kind of implicit biases as anybody else.[82] Mixing with other "insiders" who share the same

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75 Peter Spiller "Realism reflected in the Court of Appeal: the value of the oral tradition" (1998) 2 YBNZ Juris 31 at 36.

76 Philip Elman (ed) *Of Law and Men: Papers and Addresses of Felix Frankfurter* (Harcourt, Brace and Co, New York, 1956) at 41–42 as quoted in Lady Hale, Deputy President of the Supreme Court of the United Kingdom "Appointments to the Supreme Court" (address at conference to mark the tenth anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015) at 1, n 3.

77 Barak, above n 5, at 105.

78 Carroll, Walker and Croft, above n 3, at 2.

79 Rosemary Hunter and others "Introducing the Feminist and Mana Wahine Judgments" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 25 at 38.

80 Mai Chen *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (Superdiversity Institute for Law, Policy and Business, November 2019) at 172.

81 Naffine, above n 6, at 47.

82 Breger, above n 37, at 1054.

thoughts and experiences makes it difficult to suppress any unconscious prejudices.[83] This is concerning. If these biases are mistaken for neutrality, they may become preserved within the law. The existence of unconscious bias carries a potentially powerful impact in legal proceedings, where the public places its trust in judges to reach a fair result.[84] As the Hon Helen Winkelmann, Justice of the Court of Appeal of New Zealand, stated extrajudicially: "The effect of unconscious prejudice is particularly acute for judges because of the nature and importance for society of the work we do."[85]

Rejecting complete impartiality as an unattainable fairy tale does not require us to embrace complete subjectivity. The importance and centrality of judicial objectivity must be maintained, while also appreciating it cannot be fully achieved.[86] Yet, the inherent humanity of judging needs to be recognised and celebrated. Each judge is a distinct world unto themselves. They are not faceless automatons, but personalities with different characteristics, backgrounds, strengths, and attitudes.[87] The sin lies not in accepting this humanity, but in trying to hide it.[88] The judiciary's humanity is one of its greatest assets. Cases reflecting the infinite variability of human beings call for sensitive and acute human understanding.[89] Objectivity should not rid a judge of their experiences and values, but rather make use of personal characteristics to reflect the fundamental values of society as faithfully as possible.[90] Neutrality is not gained through detachment but through understanding the concerns of parties.[91] Dispelling the notion of judges as "superhuman" and instead appreciating their inherent humanity opens important space on the bench for judges who are different. Judges are complex and diverse human beings, and the composition of the bench should reflect this.

III "NUMERICAL AESTHETICISM": TRADITIONAL ACCOUNT OF JUDICIAL DIVERSITY

Given judges' significant authority, it is crucial to have judges able to reflect the diversity of the community. There has been growing recognition of the necessity of judicial diversity within the New Zealand legal community and broader society. However, little work has been done to develop a normative framework for what this diversity should look like. In its absence, the traditional approach

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83 Elias, above n 41.

84 Breger, above n 37, at 1053.

85 Letter from Helen Winkelmann (Justice of the Court of Appeal of New Zealand) to the Law Foundation regarding her support for the Feminist Judgments Project Aotearoa (26 August 2015) as cited in Hunter and others, above n 79, at 39, n 89.

86 Cahill-O'Callaghan, above n 73, at 20.

87 Spiller, above n 75, at 33.

88 Hutchinson, above n 33, at 1.

89 Spiller, above n 75, at 43.

90 Barak, above n 5, at 104.

91 Dellow-Perry, above n 4, at 105.

to diversity—labelled in this article as "overt" diversity—has been implicitly assumed. Given the traditional dominance and partial implementation of this approach, it will always be an important part of our diversity story. As discussed below, this approach brings exclusive benefits. However, as this section will reveal, the limitations of this approach mean that it cannot be the sole archetype as it serves to limit the promotion of true diversity, thus necessitating a broader method.

The traditional notion of judicial diversity has largely focused on overt diversity: that is, diversity in overt characteristics which are easily codified and reflect how the judiciary is seen.[92] Proponents of this traditional account would define judicial diversity as being the presence of diverse physical indicators, such as gender, race, age, and sexuality.[93] Arguments for its promotion have centred on the importance of having a bench which physically reflects the population it serves. This emerges from the proposition that there is inherent value in having courts which "look like New Zealand".[94] The way forward has focused on a strategic evening up of numbers on the bench to ensure "numerical aestheticism".[95]

Increasing the overt diversity of judges is thought to challenge the complacency and normative superiority of the status quo.[96] The appearance of a diverse group of judges improves descriptive representation: the idea that as an important public institution which represents the state, the judiciary ought to resemble the people of that state.[97] As the overt approach focuses on increasing the number of judges with diverse overt characteristics, it can be described as a "numbers game". Under this approach, New Zealand's judiciary is currently inadequately diverse compared to an increasingly diverse society. Compositional population data is as shown in Table 1.

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92 Cahill-O'Callaghan, above n 73, at 281.

93 Rachel Cahill-O'Callaghan and Heather Roberts "Hidden depths: diversity, difference and the High Court of Australia" (2021) 17 Int JLC 494 at 496.

94 Opeskin, above n 8, at 91.

95 Rackley, above n 17, at 40.

96 Erika Rackley "Judicial diversity, the woman judge and fairy tale endings" (2007) 27 LS 74 at 87.

97 Anna Dziedzic "Foreign judges on Pacific Courts: Implications for a Reflective Judiciary" (2018) 5 federalismi.it 63 at 70.

TABLE 1: DEMOGRAPHICS OF NEW ZEALAND POPULATION, 2018[98]

Demographic	Percentage of population (4.9 million)
Born overseas	27
Female	50.8
Pākehā	70
Māori	17
Asian	15
Pasifika	8
LGBTQI+	3.5

As of October 2021, there were approximately 310 judges across the levels of New Zealand's judicial hierarchy.[99] Although data on the identity of judges is limited, the known demographic breakdown is shown in Table 2.

TABLE 2: DEMOGRAPHICS OF NEW ZEALAND JUDICIARY, 2020–2021[100]

Demographic	All Courts	District Court	High Court	Court of Appeal	Supreme Court
Female	40 %	41 %	41 %	20 %	50 %
Pākehā	79 %	76 %	91 %	90 %	67 %
Māori	15 %	18 %	4%	10 %	17 %
Pasifika	3 %	4 %	0 %	0 %	0 %
LGBTQI+	3.5 %	No data	No data	No data	No data
Have a disability	12 %	No data	No data	No data	No data

98 See Statistics New Zealand "New Zealand as a village of 100 people: Our population" (23 September 2019) <www.stats.govt.nz>; and Statistics New Zealand "New sexual identity wellbeing data reflects diversity of New Zealanders" (26 June 2019) <www.stats.govt.nz>.

99 Chief Justice of New Zealand *Annual Report: For the period 1 January 2020 to 31 December 2021* (Office of the Chief Justice, March 2022) at 14.

100 At 15; and Bradley, above n 50. Note that these percentages take into account judges for whom demographic information is not held.

Comparing the compositional data of the New Zealand population and its judiciary reveals a clear diversity deficit under the traditional account. Although the data does not cover all dimensions of overt diversity, anyone with a passing familiarity of the judiciary would recognise it falls short in these regards too. It is encouraging to see that overt diversity is increasing in the District Court, as this may filter through to the senior echelons over time.[101] However, as it stands, the typical New Zealand judge continues to be a middle-aged, heterosexual, Pākehā male.[102] Although New Zealand's judges are at the coalface of the population's changing demographic make-up, the judiciary's efforts to diversify have been insufficient to match this.

A The Case for Increased Overt Diversity

As an important part of any New Zealand approach, it is necessary to outline the significant and wide-ranging implications of an overt diversity deficit. In combatting these issues, overt diversity provides unique benefits. Beneficial consequences relate not only to representativeness, but may impact equality, the rule of law, and the quality of judicial decision-making. The first and potentially strongest case for diversity of this kind is that its deficit can lead to decreased public confidence.[103] As canvassed earlier, a lack of public confidence in New Zealand's judiciary can be partially attributed to its unrepresentative nature.[104] If judges are seen to favour one sector of society over another, the integrity and legitimacy of the judiciary will be compromised.[105] Large-scale studies from the United States have demonstrated that increased overt diversity can have a powerful symbolic value in increasing public confidence.[106] Thus, promoting overt diversity is essential given the constitutional imperative to maintain judicial confidence and legitimacy.

Secondly, it is not just the perception of unfairness that suffers when overt diversity is lacking, but the actual quality of justice.[107] Because judicial decisions change lives and shape society, it is critical they are of the highest quality. Diversity secures more than a democratic ideal—it improves

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101 Bradley, above n 50. This could be largely due to this being where younger judges are appointed. For example, 75 per cent of judges aged between 45 and 49 in the District Court are not Pākehā, and 40 per cent of those aged between 50 and 55 are not Pākehā.

102 Human Rights Commission, above n 40, at 102.

103 Cheryl Thomas *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (The Commission for Judicial Appointments, November 2005) at 55.

104 Winkelmann, above n 9, at 9; and Jan-Marie Doogue "Diversity central to public confidence in the court" *Lawtalk* (Issue 294, Wellington, December 2010) at 78.

105 Winkelmann, above n 9, at 3; and Human Rights Commission, above n 40, at 102.

106 Thomas, above n 103, at 56.

107 Breger, above n 37, at 1073.

the quality of substantive law by "improv[ing] judicial method and add[ing] richness to its content".[108] As judges' life experiences shape their development of the law, the pervasive judicial homogeneity has meant the law has developed without meaningful reference to "outside" perspectives.[109] The law, despite proclaiming itself coherent and neutral, has played a vital role in reinforcing the existing stratified social order.[110]

Within the law, one can discern a dominant tendency to endorse a particular worldview which provides a more privileged place for the middle-class, Pākehā, heterosexual man, and another less privileged place for women and other "outsiders".[111] In its purported neutrality, the law can quietly assist in reproducing conditions which subordinate "outside" groups.[112] Outwardly neutral laws have been interpreted by "inside" judges in ways which favour the privileged status of their group.[113] The supposedly impartial notion of the "reasonable person" instead presupposes a very particular type of individual: one who resembles the decision-maker.[114] As the law has been conceived through this specific eye, it represents one specific perspective. This has ensured the "inside" group has remained dominant.[115] It is not to say these judges are bent on their own interests. Instead, the law can be traced to an impersonal, but nevertheless patriarchal and colonial, vision of what represents a life which is lived in accordance with narrow colonial and patriarchal values.[116] Although all judges should be motivated by the communal good, even the most conscientious judge will have difficulty imagining the thoughts and feelings of "outsiders" if they have no experience of what it is like to be in one of those groups.[117] Space must instead be created for alternative experiences and understandings from those who do not conform to traditional assumptions.[118]

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108 Helen Winkelmann "Women as agents of change – Can a diverse judiciary ensure it is independent?" (paper presented to Commonwealth Magistrates' and Judges' Association Conference, Kuala Lumpur, 18–21 July 2011) as cited in France, above n 69, at 25, n 82.

109 Chan, above n 12, at 415.

110 Naffine, above n 6, at 148.

111 At 148.

112 At 3.

113 Susan Glazebrook, Justice of the Supreme Court of New Zealand "Women Delivering Justice: A Call for Diverse Thinking" (speech to the International Development Law Organization side-event "Women Delivering Justice", Commission on the Status of Women, 63rd session, New York, 15 March 2019).

114 Naffine, above n 6, at ix.

115 At 7.

116 At xxi.

117 Nava, above n 28, at 182.

118 Dellow-Perry, above n 4, at 1.

The most prominent groups given a subordinate place in New Zealand's law are women and Māori. The edited volume *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* provides a particularly compelling account of the absence of women's perspectives in judicial reasoning.[119] The 25 judgments, rewritten as if a feminist judge had sat on the bench, reveal important differences. For example, the feminist judgments include a strong anti-subordination theme, an increased presence of the ethic of care, and changes to the judgements which allowed women's experiences to shine through. A reimagined reasonable person standard which considered female perspectives alters the nature of many cases.[120] The project demonstrates the impact of a paucity of female judges on substantive law-making and highlights a need to include these different voices.

The absence of Māori judges has also contributed to their subordination under the law. Since 1840, tikanga Māori has received adverse treatment from an almost entirely Pākehā judiciary. A pervasive line of argument which permeated legal reasoning for decades went so far to deny the existence of Māori customary law.[121] Even today, the largely-Pākehā judiciary faces critical difficulties in "being called upon to assess the mores of a society still largely foreign to them".[122] The enforcement, interpretation and application of Māori customs by Pākehā decision-makers has left open the possibility of misinterpretation and application of the judges own worldview to the interpretative task.[123] There is also the potential this absence has contributed to the overrepresentation of Māori in the criminal justice system. It is a troubling reality that an overwhelmingly Pākehā judiciary deals with predominately Māori defendants.[124] Although the judiciary must deal with defendants in an impartial manner, it is questionable how the life experience of the typical Pākehā judge enables them to appreciate the circumstances of Māori offenders. This is especially relevant given the limited use of s 27 cultural reports.[125] A modern New Zealand judiciary must attempt to understand not just the law, but the society it serves. This includes reflecting on and recognising the effects of colonisation

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119 Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017).

120 Hunter and others, above n 79, at 40.

121 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); and Natalie Rāmarihia Coates "Me Mau Ngā Ringa Māori i Ngā Rākau a te Pākehā? Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago, 2009) at 13.

122 Paul Heath "'One law for all' – Problems in Applying Māori Custom Law in a Unitary State" (2010 & 2011) 13 & 14 YBNZ Juris 194 at 204.

123 Coates, above n 121, at 23.

124 Winkelmann, above n 9, at 5.

125 See Sentencing Act 2002, s 27; and Gregory Burt "What about the Wāhine? Can an Alternative Sentencing Practice Reduce the Rate that Māori Women Fill our Prisons? An Argument for the Implementation of Indigenous Sentencing Courts in New Zealand" (2011) 19 Wai L Rev 206 at 213.

on indigenous populations.[126] Arguably, this is made easier by the introduction of more Māori judges, hence supporting the promotion of overt diversity.

In addition to the specific cases of women and Māori, there is value in the representation of all minority groups. As former United States President Barack Obama said in relation to the promotion of minority judges: "For them to be able to see folks in robes that look like them is going to be important."[127] Judicial homogeneity may mean that "different" judges feel unwelcome.[128] Minorities who achieve judicial appointment thus act as role models and confirm that they are persons who can hold public authority.[129] As Judge Doogue noted extrajudicially, minority judges "can inspire law students and practitioners alike to see judicial office as an achievable goal, and not one exclusive to a particular section of society".[130] A lack of overt diversity may deter potential candidates.[131] Given legal talent is not confined to a specific identity, there may be very able judges who do not view themselves as judge-worthy but whose talents should be recognised and put to good use.[132] Overt diversity can provide inspiration for those who would otherwise limit their horizons and aspirations.[133] Equality of opportunity benefits not only the individuals concerned, but all of society. It ensures we do not waste talents which are available to us.[134]

The incorporation of overt diversity on the bench may thus improve the ultimate judicial product.[135] The lived experience of women and other minority judges brings a unique perspective. It

126 Glazebrook, above n 113.

127 Jeffrey Toobin "How Obama Transformed the Courts" *The New Yorker* (online ed, New York City, 20 October 2014) as quoted in Danyelle Solomon and Michele L Jawando "The Need for a Reflective Judiciary Demands a Return to Normal Order" (15 July 2016) CAP <www.americanprogress.org>.

128 Dellow-Perry, above n 4, at 21.

129 Susan Kiefel and Cheryl Saunders "Concepts of Representation in Their Application to the Judiciary in Australia" in Sophie Turenne (ed) *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Springer, Switzerland, 2015) 41 at 60.

130 Doogue, above n 104, at 79.

131 Cahill-O'Callaghan, above n 11, at 4.

132 Lady Hale, Deputy President of the Supreme Court of the United Kingdom "Judges, Power and Accountability: Constitutional Implications of Judicial Selection" (speech to the Constitutional Law Summer School, Belfast, 11 August 2017).

133 Breger, above n 37, at 1075.

134 Lady Hale, above n 61.

135 Rackley, above n 17, at 49.

adds an additional lens through which arguments and rationales are filtered to create a more nuanced accurate image of reality.[136] As Lady Hale P opined extrajudicially:[137]

> … the interaction between our own internal sense of being a woman and the outside world's perception of us as women leads to a different set of everyday and lifetime experiences. The same is true for other visible minorities. It is just as important that these different experiences should play their part in shaping and administering the law as the experiences of a certain class of men have played for centuries. They will not always make a difference but sometimes they will and should.

A diverse bench therefore provides decision-making power to formerly disenfranchised populations and infuses the law with traditionally excluded perspectives.[138] As Dame Sian Elias noted extrajudicially, different perspectives cannot but impact substantive outcomes.[139] This is not to imply that women and minorities collectively have a superior approach and offer a better "female version" of the law, for instance. Rather, as "outsiders", they are able to observe the non-inclusive nature of a legal system which purports to offer a universal, all-embracing service.[140] Indeed, recent studies from the United States have shown that cases decided by overtly diverse benches were more likely to debate a wider range of considerations.[141] It is this impact on substantial decision-making which furthers the case for increased judicial diversity of this kind.

Diverse courts are essential, not only to the perception of an equitable justice system but also to the rule of law.[142] The representative nature of overt diversity may thus also benefit the guiding principles of our legal system. Under the rule of law, the law serves all New Zealanders and not simply a narrow elite.[143] All members must feel confident the law is for them and they will receive a fair hearing before the courts.[144] This necessitates a judiciary which reflects the society it serves.[145] In a democratic New Zealand society where all members are valued, equality is a necessary requisite for

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136 Sian Elias, Chief Justice of New Zealand "Changing our World" (speech at the International Association of Women Judges' Conference, Sydney, 4 May 2006).

137 Lady Hale "A Minority Opinion?" (2008) 154 Proceedings of the British Academy 319 at 331 (footnote omitted). This article is a published version of a speech by Lady Hale at the Maccabaean Lecture in Jurisprudence held at the British Academy on 13 November 2007.

138 Breger, above n 37, at 1072.

139 Elias, above n 136.

140 Naffine, above n 6, at 152.

141 Thomas, above n 103, at 10.

142 Glazebrook, above n 113.

143 Lady Hale, Justice of the Supreme Court of the United Kingdom "It's a Man's World: Redressing the Balance" (Norfolk Law Lecture 2012, University of East Anglia, Norwich, 16 February 2012).

144 Lady Hale, above n 53.

145 Lady Hale, above n 53.

the judiciary's legitimacy.[146] The denial of women, Māori and other minorities from the bench can be seen as a denial of equality.[147] If judicial appointment is not seen as fair to all sections of society, it is difficult for the courts to visibly embody justice, fairness and equality.[148] Because all members must feel the law is their law, increasing overt diversity symbolically demonstrates a commitment to these principles.[149]

The traditional account of diversity provides many compelling reasons for increasing diversity of this kind. A lack of overt diversity has had significant implications not only through endangering public confidence, but on the substantive development of the law. The law's development without meaningful reference to "outside" groups has resulted in a subordination of women, Māori and other minorities. An absence of overt diversity may also impact the essential notions of the rule of law, equality and fairness. As many of these rationales relate exclusively to the visible representation of overt diversity on the bench, no New Zealand approach to diversity could proceed without it. The significant value of the appearance of judges who reflect New Zealand society results in a necessary incorporation of this traditional approach moving forward.

B A Limited Approach

There are, however, significant limitations to this traditional notion of diversity. For example, a purely overt approach is fatally narrow and could potentially overstate the representative nature of the judicial role. The focus on overt characteristics alone fails to tell the whole story of judges as complex human beings. These limits are what necessitate a broadening of approach through incorporating tacit diversity into efforts to increase judicial diversity. The recognition of these limitations and the development of a new approach does not disregard the importance of overt diversity. As explained, the arguments about legitimacy, public perception and equality likely require an increase in overt diversity to garner these benefits.

The first major limitation of the traditional approach is that it treats minority groups as homogenous and neglects the importance of diverse worldviews. As established through dispelling the notion of the judge as "superhuman", it emerges that judges are complex human beings who bring their identity, worldview and experience to the judicial task. The traditional approach fails to recognise the complexity of human beings and instead places judges into compartments, losing sight of the judge as an individual.[150] Overt characteristics such as gender or race cannot be used as a proxy for the many life experiences that influence a judge's decision-making. Gender or race are but one

146 Elias, above n 136.

147 Elias, above n 136.

148 Lady Hale, above n 143.

149 Glazebrook, above n 113.

150 Olivier, above n 10, at 52.

facet of themselves that minority judges bring.[151] The traditional approach therefore simply corrects how the judiciary is perceived, rather than directly challenging the myth of judges as utterly impartial "superhumans".[152] In treating minorities as homogenous groups, the traditional approach assumes certain overt characteristics affect different judges in the same way.[153] It denies the possibility of difference in thought, perpetuating the myth that all judges think alike.[154] However, as complex individual beings, judges from minority groups do not necessarily take homogenous approaches to how they interpret and apply the law. A comparison of two lesbian South African judges demonstrates this well. One judge noted that simply being lesbians was not enough to cement the experience of being in common. Although both identified as lesbians, the judges were separated by ethnic backgrounds, political views and upbringings, resulting in very different approaches to the law.[155] Judges are influenced by much more than membership to certain societal groups. Being a minority is not uniformly applicable, but may be a qualified and partial experience.[156]

The second major limitation of the traditional account is that it adopts a simplistic view of representation and neglects the importance of judicial neutrality. Representational theory suggests minority judges serve as representatives, working to advance their group's interests.[157] However, while increased numerical representation may result in increased statistical representation, it does not necessarily result in sufficient representation for these minority groups. Not all female judges are going to be pro-choice or feminist, in the same way that not all Māori judges will necessarily advocate for Māori interests. As a parallel example, one prominent New Zealand politician who has Māori whakapapa is commonly described as advocating against Māori interests, such as campaigning for the abolishment of Māori seats.[158] This demonstrates that statistical representation does not necessarily mean sufficient representation. Further, even judges who do wish to advance minority interests are confined by the law. As Lady Hale stated extrajudicially: "Our loyalty is to the law and not to our race or gender."[159] Although true impartiality is a myth, judges must still apply the impartiality

151 Cahill-O'Callaghan, above n 11, at 19.

152 Dellow-Perry, above n 4, at 18.

153 Cahill-O'Callaghan, above n 11, at 29.

154 Dellow-Perry, above n 4, at 29.

155 Leslie Moran "Judicial Diversity and the Challenge of Sexuality" (2006) 28 Syd LR 565 at 575.

156 At 575.

157 Dziedzic, above n 97, at 11.

158 Lachy Paterson "It's about how best to represent Maori interests" *Otago Daily Times* (online ed, 20 August 2018).

159 Dermot Feenan "Women Judges: Gendering Judging, Justifying Diversity" (2008) 35 JL & Soc 490 at 505.

requirements of the judicial oath.[160] Thus, to understand judges solely as representatives of their social group is inappropriate and conflicts with the core judicial function of neutrality.[161]

The third major limitation of the traditional account is that the traditional common law judicial ideology may hinder the representative ability of a minority judge. A judge's background or beliefs may be trumped by an acculturated set of decision-making norms and traditions.[162] These norms include deference to the separation of powers, adherence to precedent, and upholding the fundamental principles of the common law.[163] In addition, the ideology may include a resentfulness against difference: a notion that exhibiting difference of any kind is contrary to the judicial role.[164] Because the principles and values of the law have been defined by reference to colonial and patriarchal structures, minority judges must therefore conform to this ideal.[165] "Different" judges can only be admitted to the judiciary on the condition they conform to the prevailing ethos.[166] Any hint of failure to conform may result in their ability being questioned.[167] Because these values have been shaped by cisgender, heterosexual Pākehā men, the minority judge is induced to sell their voice for acceptance—a phenomenon coined "the Little Mermaid syndrome".[168] In this silence, difference is lost.[169] Because the minority judge must ascribe to the ideals of the incumbent judiciary, this may undermine any representative value of overt diversity. Several studies reveal an unwillingness of minority judges to step out of line.[170] If judicial authority is seen to be properly vested only in a quintessentially Pākehā, heterosexual male collection of virtues,[171] judges may feel the need to distance themselves from any notion of difference.[172] Therefore, even a minority judge who wishes to take a more robust approach

160 France, above n 69.

161 Dziedzic, above n 97, at 8.

162 Hunter, above n 52, at 126.

163 At 126.

164 At 126.

165 Dellow-Perry, above n 4, at 2.

166 At 3.

167 Erika Rackley "Representation of the (women) judge: Hercules, the little mermaid, and the vain and naked Emperor" (2002) 22 LS 602 at 620.

168 At 602.

169 At 603.

170 Hunter, above n 52, at 127.

171 Dellow-Perry, above n 4, at 12.

172 Hunter, above n 52, at 127.

to the issue of difference may find it impossible to insert a different perspective because of the institution's conformity to established legal and social norms.[173]

A final limitation is that a sole focus on representativeness may distract from the true benefits of diversity. Representation is not the be all to end all; some divergences from true judicial representation are beneficial.[174] Society can be divided in endless ways, referencing an infinite list of overt characteristics. But for many of these societal groups, there is simply no legitimate argument for their judicial representation.[175] There is no legitimacy, for example, in the representation of those born on a Sunday, or those who have Scorpio as their star sign. An empirical under-representation of certain groups does not result in a normative case for their equal presence. Descriptive representatives must only be implemented when distinctive marginalised groups reasonably feel that the judiciary does not represent them.[176] Which groups meet these criteria will vary across times and across communities.[177] In addition, there may be contexts where no group member can be a judicial representative, thus providing justification for a lack of representation. For example, severely intellectually disabled people cannot be appointed as judges, meaning that their voices must be given expression by people who are not themselves members of the group.[178]

Therefore, despite its potential benefits through impacting substantive law-making, increasing public confidence and enhancing the perception of equality, the traditional approach alone is insufficient. Its various limitations, including a hyperfocus on statistical representation, may detract from the true benefits of a diverse bench. There needs to be a shift in focus from simple representation to how best to capitalise on the true benefits of diversity. The nuanced approach aims to do this.

IV BEYOND A NUMBERS GAME: A NUANCED APPROACH TO JUDICIAL DIVERSITY

A different take on the diversity issue is to look beyond overt manifestation of a judge's identity and include tacit influences, described as "things that we know but cannot tell".[179] In the judicial diversity context these include differences in professional background, education, skills, values, and socio-economic background. The arguments for promoting overt diversity remain. Arguments centred

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173 At 128.

174 Rackley and Webb, above n 18, at 290.

175 At 290.

176 At 293.

177 At 293.

178 Wendy Salkin "Judicial Representation: Speaking for Others from the Bench" in I Glenn Cohen and others (eds) *Disability, Health, Law, and Bioethics* (Cambridge University Press, Cambridge, 2020) 211 at 214.

179 Cahill-O'Callaghan, above n 11, at 5.

around legitimacy and public confidence necessarily rely on how the judiciary is perceived.[180] However, incorporating tacit diversity into this approach recognises the importance of inherent characteristics and better appreciates the value of a judge as an individual.[181] Attempts to create a diverse judiciary should no longer be focused solely along the reductive lines of gender, race and other visible characteristics. Judges are multi-dimensional people with a variety of reasons for their different views.[182] Overt characteristics, such as gender or race, cannot alone be used as a proxy for the many life experiences that influence a particular judge's decision-making.[183] Every judge brings something unique to the task of judging.[184]

While diversity impacts how the judiciary is seen, the true benefit lies not in the physical manifestations of overt differences, but instead in the diverse insights and contributions the judicial process gains. The advantage of true diversity is not in an individual judge's social identity or status as a minority *per se*,[185] but rather in the perspective and experiences they can bring to the role.[186] Value lies in the ability for minority judges' distinct viewpoints to help shape the law, in the same way the experience of leading men has done for centuries.[187] Diversity in the judiciary utilises knowledge of the lives of people, and their values and their challenges, in a way that might not otherwise be available.[188] This enables judges from traditional backgrounds to confront diverse perspectives and opinions.[189] The value of judicial diversity lies in the inclusion of voices usually rendered inaudible.[190] Diversity offers more than a simple evening up of numbers at the table. Adjudication in New Zealand's diverse society necessitates that a range of identities are both represented and understood.[191]

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180 Cahill-O'Callaghan, above n 73, at 281.

181 At 30.

182 Harry T Edwards "The Effects of Collegiality on Judicial Decision Making" (2003) 151 U Pa L Rev 1639 at 1668.

183 Cahill-O'Callaghan, above n 11, at 29.

184 Lady Hale, above n 143.

185 Rackley, above n 17, at 41.

186 Dellow-Perry, above n 4, at 31.

187 Rackley, above n 17, at 41.

188 Winkelmann, above n 9, at 6.

189 Olivier, above n 10, at 52.

190 Naffine, above n 6, at 151.

191 Dellow-Perry, above n 4, at 31.

As the true value of diversity lies in incorporating a rich range of information and perspectives, there is no reason this rationale cannot be applied to judges who do not display overt diversity.[192] A judge who does not belong to a minority group can still provide diverse insights gained through their tacit influences, such as their professional background, skills, upbringing or values. Those with tacit diversity may also take a different approach to the law, an approach which prevents the values and concerns of one group becoming dominant.[193] The story is therefore far broader than the boundaries traditional scholarship has demarcated.[194] The greater the diversity of participation by judges of different backgrounds and experiences, the greater the range of ideas and information contributing to the institutional process.[195] Through incorporating tacit diversity, the nuanced approach broadens the field by including all salient influences on judicial decision-making. New Zealand's approach must not limit itself, but instead aim for the utmost richness of thought and experience able to contribute to the development of the law.[196] Moving beyond a numbers game and weaving tacit and overt diversity together in the nuanced approach ensures New Zealand is best placed to do so.

A Looking behind Physical Manifestations

There is no limitation to the various tacit influences that may have potentially shaped judges. However, since this article is developing an approach to be implemented into practice, five key factors are identified: professional background, skills, education, values, and socio-economic background.

Professional experience is an important dimension of a diverse bench.[197] Both a judge's legal experience and the type of clients they have represented can inform their perspectives and thus contribute to the development of the law.[198] Knowledge and skills developed through this work—for example, particular commercial acumen, or knowledge of tikanga or the criminal justice system—can further influence their approach to the law. Diversity of professional expertise and experience likely results in an improved jurisprudence that better recognises a variety of people and lived experiences.[199] The broader the range of work undertaken, the broader the potential engagement with

192 Edwards, above n 182, at 1667.

193 Dellow-Perry, above n 4, at 82.

194 Lanier and Hurwitz, above n 21, at 1.

195 Cahill-O'Callaghan, above n 11, at 5.

196 Winkelmann, above n 9, at 6.

197 As recently as September 2021, the Chief Justice recognised this as being an important dimension needing improvement. See Bradley, above n 50.

198 Janna Adelstein and Alicia Bannon "State Supreme Court Diversity — April 2021 Update" (20 April 2021) Brennan Center for Justice <www.brennancenter.org>.

199 Maggie Jo Buchanan "The Startling Lack of Professional Diversity Among Federal Judges" (17 June 2020) CAP <www.americanprogress.org>.

society.[200] For example, those who spend their careers advancing minority interests bring this unique perspective and understanding to the task. As noted about Thurgood Marshall, former Associate Justice of the Supreme Court of the United States, who spent his career at the National Association for the Advancement of Colored People:[201]

> His was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to heal them. His was the ear of a counsellor who understood the vulnerabilities of the accused and established safeguards for their protection.

It matters that judges have represented parties other than corporate clients.[202] As the Rt Hon Dame Helen Winkelmann, now Chief Justice of New Zealand, noted extrajudicially, lawyers who work solely for corporate interests will have experience only of the justice, needs and concerns of those clients.[203] At every level of the judiciary there should be a mix of legal professional backgrounds to ensure judges have experience not only of advocacy but of litigating, representing minority interests, transactional lawyering, teaching, research, and more.[204]

There is much to be improved in this area. Within the three highest courts, more than 70 per cent of judges were either working in corporate law, civil law or for the Crown immediately prior to appointment.[205] Between 75 and 80 per cent of current judges in the senior courts were once a partner in a law firm.[206] Accordingly, the majority of judges have gained their legal expertise predominately through advancing business interests.[207] Ten per cent of judges were Crown solicitors or prosecutors immediately before appointment, compared to just three per cent working for criminal defence.[208] In the High Court—where judges often undertake serious and complex criminal trials—it is believed that there are only three judges who have done defence work.[209] This is an issue that may affect a

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200 Winkelmann, above n 9, at 8.

201 Buchanan, above n 199.

202 Lanier and Hurwitz, above n 21, at 1.

203 Winkelmann, above n 9, at 8.

204 Lady Hale, above n 143.

205 Anusha Bradley "Judges can be appointed without ever attending an interview" (21 September 2021) RNZ <www.rnz.co.nz>.

206 Ellis, above n 7, at 353.

207 Buchanan, above n 199.

208 Bradley, above n 50.

209 Bradley, above n 50.

judge's understanding of matters such as admissibility of evidence and challenges facing the defendant.[210]

There is an urgent need to increase the number of judges who have represented underprivileged populations and worked to improve the lives of marginalised communities.[211] Identifying this as an issue is not a condemnation of corporate lawyers; the need for judges with commercial and corporate experience will always exist.[212] Rather, it is a recognition that judges from various professional backgrounds will bring diverse expertise and skills to the bench, thus helping to improve the quality of our judiciary and legal jurisprudence.[213] Traditional assumptions as to which professional backgrounds are best suited for the judicial role must be abandoned. Less traditional pathways, such as academia and in-house counsel roles, in addition to the criminal bar, must be considered. The best judges, no matter where they are found, should be appointed to the bench. Further, increasing this tacit diversity may, in fact, have corresponding benefits for overt diversity. Since women and minorities are less likely to hold the positions that are currently stepping stones to the bench, the norm of prior judicial experience currently limits both overt and tacit diversity. Looking outside the conventional trajectory may increase the appointment of minority judges.[214]

Diversity in personal values is another interesting aspect of tacit diversity. A personal value is defined as "an enduring belief that a specific mode of conduct or end-state is personally or socially preferable to an opposite or converse mode of conduct or end-state existence".[215] These values serve as the basis from which attitudes and behaviours are created.[216] As they are inextricably linked to personhood and identity, these values provide insight into the individual beyond overt characteristics.[217] Given true impartiality is a myth, and therefore judicial decision-making is influenced by the personal judge's views, personal values inherently influence this task. In deciding cases, judges will support one or more values over others.[218]

Although objectivity should not rid a judge of their personal values, there needs to be confidence that the values expressed in their judgments reflect the fundamental values of society as faithfully as

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210 Bradley, above n 50.

211 Buchanan, above n 199.

212 Buchanan, above n 27; and Winkelmann, above n 9, at 8.

213 Buchanan, above n 199.

214 Lee Epstein, Jack Knight and Andrew D Martin "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court" (2003) 91 CLR 903 at 905.

215 Milton Rokeach *The Nature of Human Values* (Free Press, New York, 1973) at 5 as cited in Cahill-O'Callaghan and Roberts, above n 93, at 504.

216 At 25.

217 Cahill-O'Callaghan, above n 11, at 10.

218 At 10.

possible.[219] There is a two-way stream of traffic: the law is not only a repository of community values, but values espoused in judgments shape community expectations. By continually weighing values in their judgments, judges remind society of the existence of values and their importance.[220] Overseas research shows that diversity in personal values on the bench already exists, even in the absence of overt diversity. Both Australian and British studies highlighted variety in personal values of judges, despite their apparent overt homogeneity.[221] This is encouraging. Because personal values encompass more than simple demographic difference, this dimension of tacit diversity highlights the broad nature of diversity. Diversity of personal values provides a promising lens through which to develop a richer and more nuanced understanding.[222]

Other potential tacit influences to include in this approach to diversity are socio-economic background and education. Although the salary of a judge places them in a certain socio-economic group, their financial position during their upbringing and education are other potential influences which go beyond overt characteristics. The decile system rates schools according to their overall socio-economic index: decile 1 schools being the 10 per cent of schools with the highest proportion of students from low socio-economic communities, and decile 10 schools being the 10% of schools with the lowest proposition of students from these communities. Although far from perfect, the decile rating system is the most obvious assessment tool to assess the diversity of the judiciary's socio-economic background.[223] In the 2021 cohort of senior court judges, 63 per cent attended decile 8, 9 or 10 schools; 22 per cent attended decile 4, 5, 6 or 7 schools; and 15 per cent attended decile 1, 2 or 3 schools.[224] On the other hand, a common denominator of defendants who appear before the courts is poverty.[225] Judges have a duty to secure fair hearings, and thus knowledge of the circumstances of those who come from low socio-economic backgrounds may be critical. It may provide important and mitigating context for offending.[226] A judge with insight into the financial burdens of poverty—gained either through lived or professional experience—may have an increased awareness of how these economic burdens impact the defendant and their whānau. This increased awareness may help ensure the defendant is afforded the dignity of a fair hearing.[227] Although there is modest socio-economic diversity in the judiciary, this may reflect the fact many judges attended law school when

219 Barak, above n 5, at 104.

220 Winkelmann, above n 9, at 6.

221 See Cahill-O'Callaghan, above n 73; and Cahill-O'Callaghan and Roberts, above n 93.

222 Cahill-O'Callaghan and Roberts, above n 93, at 508.

223 Ellis, above n 7, at 351.

224 At 351.

225 Winkelmann, above n 9, at 7.

226 At 7.

227 At 7.

socio-economic barriers were less formidable.[228] Moving forward, an active approach to appointing judges from low socio-economic backgrounds is essential to ensure the future judiciary is not dominated by those from affluent backgrounds.[229]

Shifting the focus beyond a numbers game does not necessarily hinder the promotion of judges from minority groups. The nuanced approach does not completely reject overt diversity, and tacit diversity does not exclude overt diversity.[230] The two types of diversity work together. As judges who display tacit diversity are also often members of minority groups, intersectionality means the promotion of tacit diversity may simultaneously increase overt diversity. For example, lawyers from lower socio-economic backgrounds are statistically less likely to be Pākehā, and lawyers working outside the traditional career trajectory to the bench are more likely to be female.[231]

In addition, a shift in emphasis to the nuanced approach to diversity may still lead to increased substantial representation of minority interests regardless of the effect on overt diversity.[232] Although members of minority groups are obviously best placed to promote substantive representation, membership is not necessarily a pre-requisite for advancing a group's interests. Members of other backgrounds may be capable of understanding the values and needs of those from a different group.[233] For instance, a male judge could equally approach their task in a manner which is alive to potential gender issues in the same way a female judge could.[234] While insights are best achieved by first-person experience, it is not to say that all insights are only arrived in that way.[235] Judges with tacit diversity may have a sufficient understanding of members of minority groups to have meaningful insights.[236] For example, a Pākehā upper-class judge who has committed their career to representing underprivileged Māori defendants may have sufficient insight into the inner workings of this group. There is a need for judges to be empathetic and resonate with people of different backgrounds regardless of the social groups to which they belong. This can be achieved not only through the promotion of overt diversity, but tacit diversity too.

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228 For example, during the 1970s and 1980s: see at 7.

229 At 7.

230 Dellow-Perry, above n 4, at 110.

231 For instance, in 2015, just under half the children living in poverty and hardship were Māori and Pasifika. See also Claire Dale *Whakapono: End child poverty in Māori whānau: A preliminary report* (Child Poverty Action Group, November 2017) at 4.

232 Danielle Root, Jake Faleschini and Grace Oyenubi "Building a More Inclusive Federal Judiciary" (3 October 2019) CAP <www.americanprogress.org>.

233 Sonia Sotomayor "A Latina Judge's Voice" (2002) 13 La Raza LJ 87 at 92.

234 Hunter and others, above n 79, at 29.

235 Salkin, above n 178, at 218.

236 At 271.

B Suitability to Senior Court Decision-Making

The promotion of judges from a wide range of backgrounds and life experiences through the nuanced approach to diversity ensures varying perspectives are brought to bear on critical legal issues.[237] The nuanced approach brings a richness to the discussion not seen through the traditional account of diversity. The introduction of diverse perspectives is particularly relevant to the two senior courts—the Court of Appeal and Supreme Court—which hold considerable scope for judicial discretion and where judgments frequently consider public interests.[238] Due to the significance of their judgments and the nature of collective decision-making, the approach toward judicial diversity in these courts must be one that produces the highest quality decision-making. A sole focus on overt diversity will not produce this desirable mix of minds.[239] Because most New Zealanders do not directly interact with judges on these courts but may be impacted by their decisions, increasing diversity of thought must be emphasised. While an increase in overt diversity is welcome, this should be an ancillary concern to achieving a bench which is better balanced in its understanding of the law and its approach to the law's social and cultural effects.[240] In contrast, the approach taken in the lower courts may not require such a dramatic reframing from the traditional account. Although diversity of thought is beneficial, its impact is lessened when there is only one judge deciding a case. New Zealanders are more likely to directly interact with judges of these lower courts, and so improving overt diversity in these courts could have a powerful visible symbolic meaning to those who appear in court.[241]

As appellate courts, the Court of Appeal and Supreme Court have two functions: error correction and the development of the law.[242] Their decisions are extremely impactful in developing the law. Not only will principles be relied upon and applied in lower courts, but judgments may have wide-ranging societal influence.[243] This is especially true for decisions of the Supreme Court,[244] which decides cases of the greatest public and constitutional importance.[245] Given their reach and

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237 United Kingdom Advisory Panel on Judicial Diversity, above n 14, at 26.

238 At 26.

239 Dellow-Perry, above n 4, at 82.

240 At 86.

241 Breger, above n 37, at 1072.

242 Heath, above n 65, at [64].

243 At [65].

244 Rod Vaughan "Supreme Court ponders blending tikanga into the law" (31 July 2020) ADLS <adls.org.nz>.

245 Section 13(2) of the Supreme Court Act 2003 provides that leave to appeal may only be granted in three circumstances, two of which involving either matters of "general or public importance" or "general commercial significance".

significance, it is critical that the decision-making process is completed with the best minds available to it.

The collective decision-making process would particularly benefit from the introduction of diverse perspectives through the nuanced approach. Through this process, individual judges work together in pursuit of a collective judgment by sharing their knowledge and abilities.[246] As the Māori whakataukī goes: "*Ehara taku toa i te toa takitahi, engari he toa takitini*"—"my strength is not that of a single warrior but that of many".[247] The strength of these judgments relies upon the strength of the combined group of minds. The process provides individual judges with opportunities to test the merits of their own ideas and beliefs as well as those of others.[248] While this can result in a collective understanding superior to that held by an individual, its effectiveness depends on the richness of inputs. Having all judges approach the problem from the same point of view will not lead to the best result.[249] Instead, the presence of diverse perspectives at the table will broaden and enhance the base upon which experimentation, inquiry and testing occurs.[250] By simply engaging with and hearing stories told by others, judges gain a richer understanding. It is through a multiplicity of narratives that a complete and complex picture emerges.[251]

In the senior courts, every dimension added to the collective mix makes it easier to have genuine debates.[252] Diversity in both overt and tacit influences helps produce meaningful dialogue among judges, which can assist in grasping the reality of situations far removed from their own experiences.[253] There is a developing body of research which shows that diverse collective bodies make better decisions than homogenous ones.[254] Diversity may reduce implicit biases by sharing unique perceptions, developing new understandings and challenging preconceptions.[255] This can result in more thoughtful, innovative and well-rounded decision-making compared to that of homogenous groups.[256] Given the scope and importance of these courts' decisions, the ability of the

246 Epstein, Knight and Martin, above n 214, at 942.

247 "Ngā pēpeha a ngā tīpuna" (29 June 2022) Educational Leaders <www.educationalleaders.govt.nz>.

248 Epstein, Knight and Martin, above n 214, at 944.

249 Dziedzic, above n 97, at 17.

250 Epstein, Knight and Martin, above n 214, at 944.

251 At 82.

252 Lady Hale, above n 22.

253 Barry Sullivan "The Power of Imagination: Diversity and the Education of Lawyers and Judges" (2018) 51 UC Davis L Rev 1105 at 1144.

254 Lady Hale, above n 132.

255 Breger, above n 37, at 1072; and France, above n 69.

256 Root, Faleschini and Oyenubi, above n 232.

nuanced approach to improve the legitimacy of the deliberation process and the resulting judgments is critical.[257]

V NUANCED DIVERSITY IN PRACTICE

This article has aimed to broaden the judicial diversity debate beyond the traditional numbers game and instead to develop a normative framework suitable for a future New Zealand judiciary. However, the nuanced approach would be limited if it were unable to be applied in practice, or if its implementation was to be consistently overlooked in favour of other considerations. Diversity is not the sole consideration in appointing judges. Although diversity is a necessary goal, the principal and pre-eminent criterion for appointment will always be merit.[258] As a judge of the Australian High Court wrote extrajudicially:[259]

> Although it is right that it is good to have balance on the Bench in terms of ensuring minorities are represented, I think it is dangerous to carry that argument too far … what one has to be looking for is good judges, rather than trying to select people because they just happen to fit a category that you are looking for because there is a lack of it on the bench at any given time.

The intersection between diversity and the idea of merit as the essential touchstone of judicial appointment must be addressed if the nuanced approach is to achieve success in practice.

Given the constitutional importance of the judiciary, the merit of those appointed as judges is important. It is undeniable that those in this influential position must possess the technical and professional capabilities of a competent judge.[260] Yet, as seen above, this has led to a pervasive view that merit considerations will always rank above diversity. Historically, diversity has been considered "merit's servant or foot soldier".[261] For many, the two principles are antithetical and should be kept apart as individual considerations.[262] This view is explicit in New Zealand, with the Judicial Appointment Protocol (the Protocol), which states that the appointment process shows: "[a] commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection".[263] This wording separates diversity from, and qualifies it by, the principle of merit selection, and thus implies that merit and diversity represent two separate and perhaps incompatible

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257 Olivier, above n 10, at 52.

258 At 53.

259 Moran, above n 155, at 589.

260 Hutchinson, above n 33, at 1.

261 George Morrison "Judicial Appointments in New Zealand: An Incremental Approach to Reform" (LLB (Hons) Dissertation, Victoria University of Wellington, 2017) at 21.

262 Hutchinson, above n 33, at 1.

263 Ministry of Justice "Judicial Appointments Protocol 2019" (2019) <www.justice.govt.nz>.

normative ideals.[264] By separating the concepts, the promotion of judicial diversity is undermined. It serves to reiterate the notion that "diversity cannot interfere with the fundamental principle that we have to choose the best man for the job".[265]

This article suggests that diversity and merit are not necessarily mutually exclusive principles. It is possible to increase judicial diversity without sacrificing merit,[266] but this requires challenging the traditional assumptions of both principles and flexibility in approach.[267] The tension between merit and diversity relies upon implicit assumptions about both concepts. The Protocol does not define "merit" nor "diversity". However, it does state that the commitment to promoting diversity in the judiciary takes into account "all appropriate attributes".[268] Without defining what the "merit" or "diversity" attributes comprise, one could infer that they both lean toward narrow traditional interpretations. In looking solely at technical competencies, the traditional definition of merit serves a very narrow purpose. The definition should instead be derived from the judicial function to be fulfilled.[269] As established throughout this article, once one dispels the myth of the "superhuman" judge and instead appreciates the inherent humanity of judging, a good judge needs to be more than just technically competent. A good judge can no longer judge without awareness of social context, but must be able to understand the communities they serve.[270] While the good judge should have technical skills, thus meeting the traditional conception of merit, they must also possess a socio-political vision within and on behalf of which they can deploy those technical skills.[271] Further, as the Protocol refers to "diversity" and a judge's "range of experience and expertise" separately, its conception of diversity could be limited to the traditional approach.[272] However, if diversity instead meant the nuanced approach, this may resolve the conflict between the principles.[273] Tacit diversity is better insulated from suggestions it conflicts with merit, because its principal concern is to encourage a diverse collection of minds on the bench.[274] As a judge with a diverse range of insights can indeed improve the judicial product, diversity in this sense is intrinsically linked to their ability to effectively undertake the role. Thus, once assumptions as to the definitions of both merit and

264 Dellow-Perry, above n 4, at 33.

265 Malleson, above n 2, at 126.

266 Morrison, above n 261, at 21.

267 Olivier, above n 10, at 52.

268 Ministry of Justice, above n 263, at 3.

269 Dellow-Perry, above n 4, at 102.

270 At 84.

271 Hutchinson, above n 33, at 3.

272 Ministry of Justice, above n 263, at 8.

273 Dellow-Perry, above n 4, at 30.

274 At 33.

diversity are challenged, it allows diversity to be seen as an element of merit, rather than a subordinate consideration.[275]

This article further argues that the nuanced interpretation of diversity will, in fact, be an essential quality of a New Zealand judge moving forward. If the role of the judiciary is to expand into the socio-political sphere of New Zealand's diverse society, then an ability to understand and address the concerns of others must be taken into consideration when evaluating judicial merit.[276] Judges who bring a range of experience, expertise and diverse insights to their decisions will be an essential criterion in making up the composition of New Zealand's future judiciary.[277] The concept of a meritorious judge will ultimately be shaped by New Zealand's distinct social and legal context, which may result in value being placed on different characteristics for judges in New Zealand than in overseas jurisdictions.

How, then, might the notion of diversity be reconciled with our idea of a meritorious judge? The most obvious link between the two concepts is that increased tacit and overt diversity lead to higher quality decision-making. As canvassed in this article, the incorporation of different perspectives improves the judicial product by giving effect to a broader worldview and adding richness to its content.[278] As High Court judge Ellis J notes, a breadth of life experiences and perspectives increases the collective competence of the judiciary, as good judging requires perspectives to be broad and difference understood.[279] As the identity of the individual judge impacts their decision-making, incorporating diversity can infuse the law with traditionally excluded perspectives.[280] Especially in the senior courts, a diverse judiciary is better equipped to make decisions in New Zealand's increasingly complex legal system and increasingly diverse society.[281] In this sense, increased diversity can be directly linked to judicial merit. A judiciary composed of varying backgrounds produces a diverse range of approaches to legal questions, improving the product in return.[282]

A further connection is that New Zealand's judges will need to have an awareness and understanding of the diversity of the communities they serve.[283] Some type of community knowledge

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275 At 109.

276 Dellow-Perry, above n 4, at 97.

277 Select Committee on the Constitution, above n 22, at 31–32.

278 Winkelmann, above n 108.

279 Ellis, above n 7, at 357.

280 Breger, above n 37, at 1072.

281 Dellow-Perry, above n 4, at 30.

282 At 110.

283 United Kingdom Advisory Panel on Judicial Diversity, above n 14, at 31.

and understanding will be necessary to perform the judicial function.[284] The law is permeated with tests informed by what the community expects or regards as reasonable. Modern judges are consistently required to draw upon their knowledge of society, making community knowledge and understanding of social phenomena indispensable.[285] Although this is valuable in all jurisdictions, it is particularly necessary given New Zealand's small size. Judges are likely to be known personally by advocates and there is a greater readiness for community members to engage members of the judiciary on equal terms in social situations than might be the case elsewhere.[286] A New Zealand judge does not withdraw from the community, but is an integral part of it.[287] In many small towns, a District Court judge may be the most powerful resident as the only senior official from a branch of government. This imposes a unique obligation whereby judges are simultaneously leaders, servants and members of their community. They are leaders by reason of their occupying positions of power, but are nonetheless appointed to carry out a servant function to a community of which they are also a member.[288] Community engagement for New Zealand judges is not merely a right, but a core obligation.[289]

Considering the changing nature of judging, the necessity of this community understanding is only going to become more pronounced. In contrast to the "aloof and rarified days focused narrowly on the letter of the law and observing so-called gentlemen's hours",[290] there has been a realisation that modern New Zealand judging requires building connections between the courts and the community.[291] New initiatives such as the Rangatahi Courts under the Youth Court jurisdiction seek to intertwine the courts and community.[292] The impending implementation of the Te Ao Mārama model within the District Courts will only exacerbate this need. This model seeks greater connection between the community and the courts and shifts to solution-focused judging. Instead of acting as a neutral arbiter, dispassionately determining the facts and applying the law, the judge will instead need to understand the offender and their situation.[293]

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284 Winkelmann, above n 9, at 5.

285 Lady Hale, above n 143; and Turenne, above n 39, at 19.

286 Duncan Webb "Judicial Conduct in a Very Small Place: Some Contextual Questions" (2003) 6 Legal Ethics 106.

287 Sam Bookman "Judges and community engagement: an institutional obligation" (2016) 26 JJA 3 at 11.

288 At 21.

289 At 6.

290 Doogue, above n 104, at 79.

291 Winkelmann, above n 9, at 10.

292 At 10.

293 Heemi Taumaunu, Chief District Court Judge "Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture, University of Waikato, Hamilton, 11 November 2020).

The changing nature of the judicial role underscores a need for a bench which is understanding of and responsive to the community.[294] Understanding of social phenomena and community knowledge is therefore an attribute that should be sought in all judges.[295] As Ellis J notes:[296]

> … today, I would suggest it is *impossible* to be a competent judge without understanding of — and insight into — a victim's perspective in a rape case or of the relationship between colonial history, cultural deprivation and Māori imprisonment rates. That is what collective competence is all about.

It appears that the Protocol already appreciates this. In articulating key personal characteristics that a successful candidate should embody, an awareness of and sensitivity to the diversity of modern New Zealand society as well as New Zealand's life, customs and values is listed beside legal ability, qualities of character and personal technical skills.[297] This article goes further to argue that no judge should be considered meritorious if they do not have some knowledge of the community they live in.[298] Because this is gained either through lived or professional experience, this intrinsically links both types of diversity to merit. The diversity experience—either overt or tacit—gives a person a different and heightened sensitivity and understanding of the community.[299] Because this necessary quality is so closely tied with both types, the nuanced approach to diversity will be a necessary part of the qualities and characteristics that distinguish a good judge. Understanding the essentiality of this knowledge serves to reconcile merit and diversity.[300]

A meritorious New Zealand judge will also be one with an understanding of different interpretations of law, which both overt and tacit diversity achieve. The New Zealand legal system is transitioning into "the third law of Aotearoa", which sees a fusion of the common law and tikanga Māori.[301] The Hon Joe Williams, then-Justice of the High Court, writing extrajudicially about the current place of tikanga in the law, said it was "no longer seen as an independent source of law but rather as a flavour in the common law of either stronger or weaker effect, depending on the subject matter and context".[302] There is also recognition that tikanga applies widely, not only to Māori parties,

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294 Doogue, above n 104, at 79.

295 Lady Hale, above n 143.

296 Ellis, above n 7, at 358.

297 Ministry of Justice, above n 263.

298 Turenne, above n 39, at 2.

299 Moran, above n 155, at 589.

300 At 589.

301 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 12.

302 At 16.

but Pākehā litigants too.[303] This weaving of legal systems will become more entrenched overtime, coupled with a decolonisation of the criminal justice system and the law as a whole.[304] These alterations will significantly change the judicial context, and thus will require a different approach to the skills required of judges. Judges will need to be comfortable grappling between the two worlds. The judges who are more likely to have sufficient understandings of this fused law are those from diverse backgrounds.

Not only will meritorious judges need to understand tikanga, but possibly foreign law also. This is especially true for judges appointed to the senior courts. Despite the move towards the third phase of New Zealand law, our legal system is still largely a product of its colonial heritage.[305] The judiciary continues to place large emphasis on transnational values. Although New Zealand courts are under no obligation to consider overseas authorities, integration of legal systems is rife.[306] For example, in the first 631 decisions of the Supreme Court, 258 of these decisions—or 41 per cent—contained the use of comparative jurisprudence.[307] The frequent recourse to international sources signifies the importance the New Zealand judiciary places on comparative analysis.[308] This may thus impose a unique requirement for good New Zealand judges to possess knowledge or experience of overseas legal systems. Because this requirement is likely fulfilled through the appointment of judges with diverse experiences, such as working overseas, it further links merit and diversity together.

A broader approach to diversity and merit reveals that these are compatible, not competing, concepts. Analysing the practical requirement of merit within the New Zealand context demonstrates that the promotion of nuanced diversity is directly linked to the qualities desired in a meritorious judge. For example, a contribution to quality decision-making, an understanding of the community, and knowledge of tikanga and international legal systems are necessary skills for a New Zealand judge which are all likely to be fulfilled by diverse judges. As fulfilling these requirements involves searching beyond the classical interpretation of the New Zealand judge, it seeks to promote judicial diversity. For instance, appointing Māori judges may fulfil the requirement of comprehensive knowledge of tikanga while promoting both overt and tacit diversity too. Indeed, not all judges can

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303 See for example Martin van Beynen "The Peter Ellis case and Māori customary law" (9 July 2020) Stuff <www.stuff.co.nz>.

304 See for example *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai – The Independent Working Group on Constitutional Transformation* (January 2016).

305 Olivier, above n 10, at 47.

306 Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago LR 475 at 17.

307 The Supreme Court issued 631 decisions between 30 June 2004 and 10 June 2010. The most common comparative jurisdictions were similar commonwealth countries—Australia, Canada and the United Kingdom—although citing non-Commonwealth courts was frequent too. See Petra Butler "The Use of Foreign Jurisprudence in New Zealand Courts" in Andrea Büchler and Markus Müller-Chen (eds) *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli Verlag AG, Bern, 2011) 305 at 307.

308 At 315.

possess all these qualities. We must remember that judges are human beings, who cannot be all things to all people.[309] There cannot be one set of fixed criteria constructed to suit all levels of judges.[310] However, this is not necessarily a bad thing. The beauty of diversity is that judges are distinct worlds unto themselves who bring a combination of skills, understandings and experiences that are like no other. Increasing diversity results in individual judges bringing their own unique piece to create the puzzle of judges that New Zealand needs.

Although this article has only canvassed merit to the extent it applies to diversity, I suggest the Protocol criteria should read as follows to ensure the two principles are reconciled in practice:[311]

(a) the person to be appointed a judge must be selected by the Attorney-General on merit, having regard to that person's—

(i) personal qualities, including integrity and sound judgment;
(ii) legal abilities, including relevant expertise and experience, appropriate knowledge of New Zealand, and international law and its underlying principles;
(iii) social awareness of and sensitivities to tikanga Māori and its application to law;
(iv) social awareness of and sensitivities to the diverse communities of New Zealand; and
(v) ability to contribute to a diverse judiciary, considering the range of backgrounds, perspectives and experiences on the bench.

VI CONCLUSION

This article has sought to broaden the judicial diversity debate by developing a nuanced approach to diversity suitable for modern New Zealand society. It has suggested that the story is far more complex than traditional scholarship has demarcated. In developing this nuanced approach, the article has challenged assumptions of judges as fairy tale characters, of traditional confinements of diversity, and of detrimental tensions between merit and diversity. In doing so, it has created a future-focused approach to pragmatically increase and enrich the diversity of those given immense power to represent and rule upon the community. At present, it is problematic that the traditional approach has been implicitly assumed without reference to the best interests of New Zealand society.

The nuanced approach—incorporating diversity in both overt and tacit characteristics—aims to shift the focus from physical manifestations to how best to capitalise on the true benefits of diversity. As the true value of diversity lies in incorporating a rich range of information and perspectives, the article holds that there is no reason this rationale cannot be applied to judges who do not display overt diversity.[312] The article discusses five potential tacit characteristics: professional background, skills,

309 Olivier, above n 10, at 52.

310 Dellow-Perry, above n 4, at 95.

311 Morrison, above n 261, at 37.

312 Edwards, above n 182, at 1667.

education, values and socio-economic background. As the added richness of perspectives leads to better decision-making, this approach is particularly useful in the appellate courts. Because two types of diversity are weaved together under the nuanced approach, the shift in focus beyond a numbers game does not necessarily hinder the promotion of judges from minority groups or representation of these interests.

As one scholar wrote: "Judging is a very human endeavour, reflecting all the variation in experience, perspective, humanity, common sense, and understanding of the law of the judges themselves."[313] Moving beyond a numbers game towards the nuanced approach to judicial diversity serves to recognise the inherent variability in our judges. Judges are complex human beings with a multitude of influences. They are not confined to their membership of any particular social group. Any approach to judicial diversity must reflect this. In this sense, the article has told a tale of judging, of humanity, and of New Zealand's diversity. It is hoped the argument expressed in this article has challenged conceptions and will be used in developing a diverse judiciary suitable for the complexities and differences of New Zealand society moving forward.

313 Butler, above n 71, at 83.