Interrogating Interdependence: Judging and Ascriptive Group Identity

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The literature on judicial independence has recently begun to be enriched by what might be described as its complement: a focus on judicial interdependence - that is, judicial connection or affiliation with identifiable groups in the larger population, members of whom will predictably appear before the courts. Though judges are, as a normative matter, assumed or exhorted to be independent, they also have, as a descriptive matter, connections to or affinities for different groups within their jurisdictions. Works arguing that these affinities shape the process or outcomes of adjudication date back to the legal realists; and they have recently served to challenge the norm of independence. But these works have tended to elide a set of more difficult questions: how precisely does judicial interdependence affect the operation of the judicial role? and is judicial connection with particular groups simply in tension with impartiality, or might the operations of more interdependent judicial roles be in some ways consistent with impartiality or help to refine our understanding of what impartiality on the part of situated decisionmakers might mean? In order to confront these questions more directly, I propose to examine judicial interdependence in the context of one kind of affinity: ascriptive group membership, or membership on the basis of unchosen characteristics such as gender or race.

This paper will begin by considering several related literatures that highlight judicial interdependence or connection with particular groups. Particularly prominent within this examination will be literatures that focus on judges' connections to those who share their ascriptive group membership. Works within these literatures are often premised on a tension between judicial action reflecting affinity and judicial objectivity or impartiality; and they focus primarily on justifying the departure from impartiality that interdependence seems to entail. This emphasis on largely theoretical justification has obviated, or even replaced, a more concrete examination of how ascriptive group affinities actually operate in the context of judicial decisionmaking. In this paper I undertake such an examination, looking at the characteristic of race. I focus first on empirical data concerning the way in which decisionmaking does or does not vary with the race (or in some cases, the gender) of the judge. My primary emphasis, however, is on a kind of analysis that tends to be lost in highly conceptual arguments about the effects of ascriptive group membership on judging: a phenomenological account of judging - that is, an analysis of the ways that individual judges experience their group membership as operating as they implement their role. In particular I discuss a series of more than a dozen extended narratives by African-American judges about how race shapes their approach to adjudication and other tasks connected with their judicial role. I conclude that these narratives provide concrete and sometimes unexpected ways of understanding the operation of racial group membership in judging, that serve more often to reinforce or reinterpret than they do to undermine the norm of judicial independence or objectivity.

Approaching Interdependence

The question of judicial interdependence with, or connection to, groups within the larger population has been approached from several perspectives. The issue is raised in a particularly blunt way by the election of some state judiciaries. Judges who must campaign for their positions, seek re-election, or face the prospect of recall cannot be wholly insulated from the views of their constituents, in the manner assumed by theorists of judicial independence. On the contrary, they develop and an acute awareness of both the issues facing their districts and the substantive preferences of those who elect them, that some judges have described as influencing their decisions. The elected judge's role as a "representative" -- responsive or accountable to, if not more directly influenced by, constituents -- has also been highlighted.
in cases holding judicial districts to be subject to the minority vote dilution protections of the Voting Rights Act. Finally, the necessity of judicial campaign finance has sharpened the question of constituent influence, as judges have developed not only diffuse electoral reliance on constituents who may have identifiable views, but more focused financial reliance on constituents who may have identifiable litigation-related interests. Despite the provocative facts surrounding this instance of judicial interdependence, the debate over the role of elected state court judges has generated more heat than light. Perhaps because the link that tethers judges to their constituents is so menacingly frank -- and the potential for departure from the norms of independence, understood not simply as impartiality but the practical freedom of a judge to decide for herself, is so great -- normative arguments are rarely made about the virtues of this form of connection between judges and their constituents. Moreover, with the exception of a few unseated judges who have been momentarily candid about the constraining effects of constituent opinion, judges themselves have not been forthcoming enough about the effects of electoral influence either to elaborate the effects of such connections on their work, or to commend such interdependence as the source of new judicial norms.

The remaining literatures in which the question of judicial interdependence has been raised are distinct, in that they *do* embody strong normative claims about the virtues of judicial connection with particular groups. In some of these literatures, moreover, the interdependence they explore arises not from electoral relations but from judges’ membership in ascriptive groups. Perhaps the most familiar, in this regard, is a feminist literature from the late 1980s and early 1990s that argued that adjudication could be improved by an approach that sought to foster more imaginative connection with the lives of litigants and more appreciation of the effects of adjudication on those lives. Scholars such as Judith Resnik, Martha Minow and Elizabeth V. Spelman argued that the venerated norm of objectivity, when understood as entailing abstraction or emotional distance from the life circumstances of litigants, could produce blindness to the effects of legal decisionmaking and judicial failure to take responsibility for the concrete, human consequences of decisions. A process of imaginative or empathic connection with the parties and their dilemmas, which seemed to challenge objectivity by encouraging too intimate an engagement with the parties, could actually be understood to promote sound and responsible decisionmaking.

This literature was not straightforwardly about ascriptive group membership: the process of imaginative connection was recommended to all judges, in connection with all groups of litigants. However, in another sense, ascriptive group membership - membership in the group women - was implicated in this normative position. The posture of imaginative or empathic connection corresponds to the modes of cognition or decisionmaking some theorists have associated with women, or with epistemological claims (i.e., for experiential forms of knowledge and concrete, situated reasoning) advanced by feminists and associated with women. Some of this scholarship even sought to derive this approach from the work of women judges. Perhaps more importantly, while some judges discussed in this literature - Justices Brennan and Blackmun primary among them - could engage in strong empathic connection with claimants whose lives were completely unfamiliar to them, this posture is easier to assume for claimants whose lives most strongly resemble one's own, a situation approaching the effects of ascriptive group membership. As it emerged during this period, this scholarship on imaginative connection to sought primarily to problematize a particular account of objectivity - objectivity as a posture of intentional distance from the lives of litigants - and to introduce, in broad terms, a possible alternative. It did less to elaborate what the stance of empathic engagement meant for judges in their decisionmaking: Was such thinking particularly applicable to sanctions or remedies (the phase of adjudication in which lives were actually disrupted), or did it also play into decisions about liability? Was empathic identification a natural process that had simply been derailed by the conventional injunction to maintain distance from the parties, or did it have to be exercised like a muscle? Did such identification emerge more readily
toward some parties than toward others, and if so, how did a judge respond to such disparities? Because of these failures of elaboration, this literature does not make clear whether this new mode of decisionmaking simply disrupts or potentially refines prevalent notions of objectivity. What we see is more a juxatposition of prototypes than a fully fleshed-out account of interdependent decisionmaking.

The final body of scholarship to address questions of interdependence and ascriptive group membership is a small but growing literature on the normative contributions of a racially diverse bench -- that is, a judiciary that includes increasing numbers of judges of color. Scholars seeking to advocate the racial diversification of the bench have asked whether diversity can be defended in terms that are substantive as well as symbolic. The effort to mount a substantive defense of the contributions of judges of color has entailed an interesting tension: the more these judges are thought to embody or bring to adjudication an identifiable perspective, the more this account of their approach to adjudication seems to conflict with the longstanding mandate of judicial objectivity or impartiality. The most common way of resolving this tension has been to look at the judiciary as a group and employ the metaphor of cross-sectionality. This conceptualization comes, of course, from work on the jury, and has been brought to the discussion of the bench by scholars such as Sherrilyn Ifill[9] and Martha Minow.[10] If one considers the judiciary, as a whole, as analogies to the jury, it becomes structurally impartial - or broadly reflective of the range of views that could arise in adjudication - only if it embodies many different, as opposed to one dominant, perspective. Racial diversity understood as contributing a set of substantively distinct perspectives could therefore be understood not only as salutary but as necessary for the achievement of structural impartiality.[11]

This analogy might be criticized for begging a variety of questions: Do we actually expect the same characteristics of decisionmaking from judges as from a jury? And how can we talk about cross-sectionality in the judiciary, in the aggregate, when most judges decide alone, rather than in collegial groups? My reservation about the analogy, for purposes of this paper, is different. The cross-sectional account fails to address the dynamics produced by ascriptive group membership decisionmaking by individual judges. In its move to the aggregate, it assumes a kind of direct, representational relation between individual judges of color and members of their ascriptive group -- a relation that is not only potentially reductive of a more complex connection, but posits an apparently inevitable tension between ascriptive group membership and impartiality. We need an account of the effects of ascriptive group membership -- in this case, racial group membership -- that tries to answer these questions about individual decisionmaking, rather than assuming them for the purposes of talking about judges in the aggregate.

One scholar, Sherrilyn Ifill, has recognized this problem, and in a recent article, she has attempted to ask what racial group representation that has substantive, as well as symbolic, dimensions means for the decisionmaking and the impartiality of individual judges.[12] Her answer is that one can identify, across broad population groups, differences in perspective between Blacks and whites on many issues that come before the courts, particularly at the state level. But individual judges do not straightforwardly act on these differences; they more often simply bring them to the table - in both collegial deliberations and in the ongoing choice among interpretive possibilities that constitutes decisionmaking for the individual judge. This reconciliation permits judges to reflect particularized group perspectives and to reflect the impartiality that academics and the public have traditionally demanded from judges.

Ifill's work reflects a deft theoretical reconciliation - and far more awareness of the pitfalls of neglecting individual adjudication than many others who write in this area. However, it leaves important issues unresolved. How do judges who are as thoroughly socialized to a group-based perspective as Ifill describes them to be satisfy themselves simply by "bringing it to the table"? Isn't it difficult to abstract from, or make choices against, the explanatory "narratives" conferred by their group-based experience,
given that these narratives shape so many, almost sub-conscious, quotidian responses? If earlier accounts posit too much distance between group-based perspectives and the conventional demands of impartiality, Ifill's accounts seems to tie them too neatly together. It might be easier to imagine this act of transcendence if Ifill had supplied more concrete details about how judges move from a particular group-based reaction or assumption to the decision about how it should bear on a particular instance of adjudication.

In the end we need, once again, a better picture of how group-based perspectives operate, in order to answer the question of exactly how such perspectives shape our understanding of judicial objectivity. In the remainder of this paper, I will attempt to provide a more detailed picture by drawing on two distinct bodies of work. First, I will ask what we can say about the ultimate, decisional effects of group-based perspectives, and I will draw on an empirical literature about the effects of race, gender and other similar characteristics on judicial decisionmaking. Second, I will ask what we can say about how these effects operate in the numerous different tasks that constitute the judicial role, and how they affect, or transform, our understanding of the impartiality that judges are able to achieve. To answer this second question, I will draw on a group of first-person narratives - virtually all by African-American judges - about how their race-derived understandings and experiences have affected their approaches to judging.

Ascriptive Group Membership and Decisional Effects

One way of assessing of the impact of ascriptive group membership on judicial role is to consider decisional effects. This section of the paper will survey the findings of four major empirical studies, completed between 1983 and 1995, that sought to measure the effects of race on judicial decisionmaking. These studies most frequently analyzed the decisions of judges who were Carter appointees, comparing white judges to Black judges among Carter appointees, or comparing Carter appointees as a group to less diverse groups of federal judges. But some also looked at the decisions of larger groups of federal or state courts and sought to isolate the effects of race within those groups.

The most noteworthy feature of these studies is that they find no consistent and very few significant differences in decisionmaking that can be ascribed to the race of the judge. None of these studies finds any significant difference in decisionmaking among Black and white judges in areas including economic regulation, sex discrimination, and (surprisingly, to some observers) civil rights. The only area in which some studies (two of the four surveyed here) found race-related differences in decisionmaking was criminal law. In Gottschall's 1983 study of Carter appointees to the courts of appeals, the author found that in a comparison of decisions by white male and Black male judges, Black judges found in favor of claims of the accused/prisoners at a rate of 79%, whereas white judges found in favor of claims of the accused/prisoners at a rate of 53%. In a second study by Welch et al, which looked at sentencing decisions by state court judges in an unidentified urban metropolitan area, the authors found that, in the initial decision to incarcerate, Black judges tended to be more even-handed toward Black and white defendants, whereas white judges tended to be more severe with Black defendants. As to the length of sentences, however, Black judges tended to give lighter sentences when all sentences were aggregated, but tended to be more severe than white judges when defendants were white, and more lenient than white judges when defendants were Black.

These findings seem to be consistent with my earlier intuition that a cross-sectional notion -- that judges from different racial backgrounds bring to collective decisionmaking distinctive decisional inclinations derived from their group-based experience - may be an insufficiently nuanced tool for explaining how racial group membership and affinity affects the judge's role. Black judges, for example, might be expected to have a range of perceptions about civil rights or economic regulation that are distinct from those of white judges; but these differences in perception or assumptions do not seem consistently or
even perceptibly to translate into different decisional outcomes. This suggests that there may be a more complicated story about the way that premises, assumptions, and racially-grounded explanatory "narratives" operate for judges as they perform their official role. Thus, first-person accounts that explore precisely these questions may help us to fill in the details of that more complicated picture.

Interrogating Interdependence

To begin this task, I analyzed a series of first-person narratives by judges: the first group, which I discuss in this section, are narratives by judges of color; in a later section, I will contrast these narratives with a series of experiential reflections offered by white judges. This first group of narratives is drawn from a series of autobiographical accounts by African-American jurists, and, in particular, from a fascinating collection entitled Black Judges on Justice, in which 14 African-American state and federal judges reflect on the ways that race bears on their decisionmaking, as well as on other aspects of their judicial role and on the possibilities for justice in the legal system more generally. All of these judges consider themselves to be African-American, but beyond that, they are a fairly heterogeneous group. Two have biracial heritage; three are women. They span a range of ages, geographical areas, educational backgrounds, prior professional experience and years on the bench. Most are Democrats, although three or four (depending on one's definition) are Republicans. They are fairly equally divided between the federal and state benches.

Before turning in detail to these accounts, let me acknowledge the methodological limitations of my investigation. First, and most obviously, I will be analyzing the narratives of less than twenty judges: a very small group, although the total number of African-American judges in this country at the present time - 1000 out of 30,000 as of 1995 - is not itself particularly large. So I will make no claims of statistical significance about the conclusions I reach. In fact, even within this group, by observations will be almost entirely qualitative. I may comment on the frequency of a certain kind of response, but the point is not to make any claims or predictions about the incidence of that view in the larger population of African-American judges or judges of color more generally. It is simply to indicate that within this group a particular view was not entirely isolated, or to suggest that a particular view seemed, in this group, to emerge more frequently among state court judges that among federal judges. Mostly my observations highlight qualitative themes, rather than focusing on questions of incidence. This thematic treatment is intended to shed light on the different ways that identification with an ascriptive group might bear on the judicial role, and, in particular how the kind of understandings and actions that are animated by it might bear on our understandings of judicial impartiality.

Second, one doesn't have to be a social science methodologist (which, of course, I am not) to know that there are problems with the self-reporting that forms the basis of my analysis here, particularly among a group of professionals who are widely expected to enact or embody certain norms, including the very norms at issue in this analysis, objectivity or impartiality. Judges may feel, consciously or subconsciously, that they would compromise themselves, or compromise members of their racial group, by describing the effects of race on their judicial functioning in a way that deviated too sharply from these norms. Thus we expect to see subtle, or not so subtle, efforts by judges to describe their group-based affinities in terms that are more or less consistent with broader judicial norms. This is a possibility that must be taken into account, although, as we will see, some of the judges whose accounts I will analyze reveal a willingness to depart from or reinterpret those norms that is surprising and bracing.

How do the African-American judges whose statements are analyzed here express, or act on, or experience their connections with their affective communities, in the context of their judicial roles? It may be useful to ask, first, whether there are judges in this group who do not articulate a specific connection with members of their affective group. The answer is there are few if any, although this
should be placed in context, because judges who had no sense of themselves as members of their ascriptive group would be unlikely to want to be interviewed for a book like Black Judges on Justice, to write a book like Bruce Wright's, Black Robes, White Justice, or, for that matter, to see their lives as district court judges, for example, as worthy of book-length focus. (21) There are, however, judges whose connection with their ascriptive communities appears to be minimal, or who regard the consequences of their ascriptive group membership as primarily symbolic. There is one judge who talks primarily about the responsibility to be an "exemplar of Black excellence," (22) a role that entails some awareness of group-based history and tradition, but that depends primarily on integrity, relentless work and analytic skill. One or two other judges talk about the effects of their role as making things "fairer," or making the legal system more legitimate in the eyes of racial minority groups. (23) These roles reflect no particularized perspective that might bear on decisional outcomes, or challenge the norm of objectivity.

Most judges in this group, however, combine these more symbolic understandings with actions, decisions or analytic postures that, more substantively, reflect their ascriptive group membership. Ten of fourteen of the judges interviewed for Black Judges on Justice describe Black judges as having a race-related obligation to effect certain goals or undertake certain actions that are not incumbent on white judges. (24) Not all of these mandates have specific decisional consequences. They vary from speaking up against the subtle effects of racism, (25) to "acting like a 'real' black and trying to solve the problems of the community" (26) to "being part of the leadership that is saying things that people don't want to hear." (27) But they are indicative of a range of potential ways in which the judicial role of these African-American judges might look different from that of their white counterparts. Let us now think about how these perceived obligations play out in practice. Many judges reflected a commitment to their ascriptive group that is expressed through judicial actions outside the adjudicative process, or even through actions that are not distinctively judicial. Members of this group who were state court judges, in particular, committed themselves to a variety of activities in their local communities, many of which addressed members of their ascriptive group in particular, or addressed substantive issues of particular interest to this group. Several mentioned making presentations to schoolchildren, particularly at schools with substantial poor or minority populations, or hosting schoolchildren during their visits to the courthouse. (28) These visits were described by some of these judges in explicitly group-based terms, as "giving hope" to children of color, or contributing to their view of the justice system as one that insured equality for all. (29) One or two also volunteered in their communities at activities like tutoring, or working with youth of color, usually from poorer areas. (30) Of the judges who chose to become involved in their communities in ways that exceeded their formal judicial duties, most showed a particular interest in addressing problems of crime, an issue they described as bearing in particular on young African-American men. (31) Some of these judges expressed a feeling of responsibility for bringing local leaders together to address problems of crime and criminal justice; one state court judge described himself as a playing the role of a "village chieftain." (32) Others highlighted their responsibility, exercised through speeches and commission work, for helping policymakers to see the larger social problems that bear on the incidence of crime in urban areas, or condition the responses of the criminal justice system. (33)

Both federal and state judges in this group demonstrated strong commitment to increasing the numbers of judges of color on the bench. Although some focused specifically on African-Americans, a substantial number spoke of racial minorities more generally and some also spoke about women. (34) This commitment seemed to be an important means of expressing a connection with other members of their ascriptive group, which judges acted on in a number of different ways. Most (including a Republican appointed by President Bush) (35) vocally criticized public officials for their failure to appoint African-American or other minority judges. (36) Several worked in their local or state legal communities to
promote African-American candidates for the bench, including one state court judge who conducted lectures for minority lawyers on strategies for enhancing their attractiveness as potential judicial candidates. Several more served on state bar commissions on racial equity, examining both judicial appointments and the treatment of minority clients, lawyers and court personnel in state legal systems.

If the above are the non-decisional (and even non-judicial) means by which black judges act on their connection with members of their racial group, these connections also seem to be vindicated through forms of substantive decisionmaking. Perhaps the most conspicuous is the interest reflected among these judges in experimentation with innovative criminal sanctions. Four of the fourteen judges, all working at the state court level, spoke of work they had done developing non-traditional solutions to the problem of crime. These ranged from the sanctioning of "reverse theft" - the victim was authorized to enter the home of the convicted defendant and take a specified number of items of his choice - to the requirement that convicted pimps establish scholarship funds for prostitutes, to the requirement that convicted felons pursue literacy programs, Graduate Equivalency Degrees or read the works of black theorists such as WEB DuBois or Malcolm X. The judges who experimented with these innovative sanctions - along with several of their more conventional black colleagues - decried the high numbers of young African-American men in prison, and the use of mandatory sentencing guidelines. They expressed doubt that such "containment" strategies reflected promise in combating urban crime. Some of them also stressed the power that the sentencing judge has over the conduct of a convicted criminal, and advocated that that power be used to improve the lives of both victims and perpetrators of crime, rather than simply to remove convicted criminals from the streets.

Others expressed views about the operation of the criminal justice system that one could imagine bearing on decisions in the area of criminal law, particularly those relating to sentencing. Many of these views tend to situate the criminal responsibility of African-American offenders in the context of larger social problems and governmental decisions. Some judges were fairly explicit about the likely effects of these understandings on their adjudicative decisionmaking. One state court judge said specifically that his perspective as an African-American had led him to consider lack of education and job security in criminal dispositions. A federal judge volunteered that he had come to have a different view of what convicted criminals were most subject to rehabilitative efforts than that evinced by most white judges. He said that an African-American perpetrator who had spent his youth in circumstances of poverty and pervasive crime and had resisted their influence until nearly the age of maturity showed far more potential for future self-discipline than a white youth who had been given every advantage of economic comfort and skin privilege and had nonetheless succumbed to the temptations of crime.

Other judges offered accounts of complex social responsibility for crime that might or might not bear on matters such as sentencing decisions. Six judges, at both federal and state levels, said that the crime problems of urban areas required systematic government approaches to poverty and unemployment that were not currently being undertaken. Two federal judges stated, in connection with the drug problems prevalent in many urban areas, that black males were being targeted in enforcement efforts, but were neither the original source of the problem, nor the largest financial beneficiaries of the drug traffic. Three judges also stated that the intense veneration of wealth and diminished respect for life that characterized many criminal defendants reflected values that poor African-American shared with, and often learned from, highly privileged whites. While many of these contextualizing responses pointed the finger at powerful persons or institutions apart from the black community, some placed responsibility with members of that community itself - and the effect of such understandings on actual decisionmaking seems even less clear than with the assumptions above. Three judges cited the breakdown of the family as a source of the increase in crime, with two judges citing the negative
influence of single mothers in raising young black men.\(^{(46)}\) One federal judge talked about the need for "containment" and the imperative for black leaders to "get tough" on members of the black community engaged in crime.\(^{(47)}\)

In another group-based commitment with potential decisional implications, many judges stressed that they felt an obligation, as people of color in a position of relative power, to speak out when they saw instances of racial injustice. Four judges expressed this as an obligation to highlight subtle effects of racism that might go unappreciated by many whites.\(^{(48)}\) While this obligation could, for some, be vindicated by public statements, others saw it as extending to actions on the bench. One judge detailed numerous contexts in which he had spoken out about racism among members of the bench and bar.\(^{(49)}\) Two spoke of times they had intervened to highlight and stop racist statements by witnesses, attorneys or court personnel in their own courtroom.\(^{(50)}\) Some were, finally, specific about the way that this mandate had affected their decisionmaking in specific cases. One state criminal judge gave examples of contexts in which he had rejected prosecutorial requests to deny bail to large groups of suspects, when he believed that the requests reflected a strategy of containment against accused parties who were African-American.\(^{(51)}\) Two other federal court judges described cases in which they had denied motions for their recusal which they saw as predicated on the unjust and unjustified assumption that race (or gender) eroded the objectivity of minority and female decisionmakers in a way that it did not in the case of white male jurists.\(^{(52)}\)

Finally, a majority of these judges stated that their experience as persons of color had helped create in them a different posture toward the parties before them, and a critical vantage point on some of the arguments that were made in their courts. Many stated that their experience had helped to remove some of the barriers that frequently existed between courts and certain parties, particularly criminal defendants.\(^{(53)}\) It was a recurrent theme in these narratives that there is a universe of difference between the narrow, highly privileged background that many white judges come from and the extremely harsh lives of many criminal defendants. These judges believed that many white judges simply knew nothing of the circumstances or lives of those whose cases they adjudicated. This made it more likely that they would resort to stereotypes in thinking about those before them. As one federal judge, who had had previous experience as a state criminal judge said, "when you see a young black guy charged with a crime, there's a prejudice about what's going on in urban communities." He added that while some of this was based in fact, "this particular kid may not be a part of it."\(^{(54)}\) Many of these judges argued that their own experience growing up in poorer neighborhoods, or being closely acquainted with people who had grown up in such neighborhoods, gave them a perspective on the experience of those before them that made it difficult simply to resort to stereotypes. As one state court judge said, "I'm from South Central L.A.; I know what it's like to get jacked up on the wall by police."\(^{(55)}\) One state court judge said that her group-based experience made it possible for her to see blacks who were accused even of the most serious crimes in human terms.\(^{(56)}\) Two others stated that their familiarity with the circumstances of black offenders meant that they were able to "speak their language." Interestingly, this experiential proximity did not always translate into a posture of greater empathy or leniency. Two judges remarked, for example, that this familiarity made it easier for them to see when they were being given what one of them referred to as a "lame line" by a Black defendant.\(^{(57)}\)

Several judges noted that their own experiences of being discriminated against in public accommodations, educational institutions or courtrooms made it easier for them to see subtle discrimination in action. These were among the most poignant sections of these narratives, where judges related being shown to a portion of a restaurant where other Black families "just happened to be" seated, or having a conference hotel call the police because management believed that a bar association party of Black lawyers and
judges were becoming 'unruly.' The judges noted that these experiences gave them a critical eye, and helped them to see how perspective shapes decisionmaking and, in particular, how it can produce blindness and insensitivity on certain kinds of issues. Although this critical frame of reference was frequently brought to bear on actions taken by white people, it was also capable of inspiring self-scrutiny. One judge remarked that once she saw this problem in other people, it became easier to see it in herself as well. Finally, several judges stated that their experiences of victims of prejudice had given them a deep commitment to the articulated goals of equal justice under law. As one state court judge said, "persons of color understand the importance of being fair to other persons because we don't want other persons to have the negative experiences we've had." His experience as a person of color, this judge concluded, "makes me more sensitive, more aware of the need for treating all persons as decent human beings."(60)

Interdependence, Partiality and Objectivity

Even in a sample this small, the enormous complexity of response quickly undermines the notion that there is a predictable set of decisional leanings associated with ascriptive group membership, or that such membership produces on the part of judges a straightforward affinity with the ascriptive community that is in tension with the demands of objectivity or impartiality. In as much as it is possible to draw conclusions based on so small a sample, I would offer the following.

First, the ways in which African-American judges seemed to respond most directly to the perceived needs of their ascriptive communities were extra-decisional or even external to the formal judicial role. The state judges interviewed, in particular, seemed to feel that their positions both empowered them and made it incumbent upon them to take a role in the community that helped address such problems as poor education, limited economic opportunity or crime. The federal judges, in general held themselves at a greater remove from the political system. But they joined with their state counterparts in serving on race equity commissions and acting in a variety of ways to recruit more people of color to the bench. The view that there should be greater racial diversity on the bench was shared by every judge in the group, including registered Republicans, judges professedly "tough on crime" and judges who considered Justice Clarence Thomas among their professional heroes.

Second, these judges manifested a few perspectives explicitly traceable to race, that that had the potential to bear on substantive decisionmaking. The perceived obligation on the part of many of these judges to speak up about both blatant and subtle instances of racial injustice seemed likely to influence matters from courtroom exchanges to decisions on the merits. The belief that it is necessary for judges and policymakers to contextualize the high incidence of crime among African-American males in urban areas, and that it is necessary to critique and develop alternatives to incarceration-dominated, "containment" strategies appears to have affected decisional outcomes, in at least some cases, for four to six of these judges, particularly in the area of sentencing. For slightly more, a wide range of views about the complex causes of urban crime seem less clear in their decisional implications.

Third, among the most consistent consequences of group-based experience and affinity for these judges were a set of postures or frames of references that judges developed toward cases or parties before them. An ability to see past familiar race-based stereotypes, or humanize even those accused of serious crimes is one example of such a frame of reference. The ability to glimpse the blind spots produced by unreflective perspectivity - in both oneself and others - is a more general formulation of the same insight or posture. A familiarity with the circumstances of certain parties, that permits both more effective communication and an enhanced capacity to assess credibility constitutes a third kind of postural benefit. What is most interesting about these intellectual or perceptual postures is that, rather than moving judges in the direction of greater partiality toward members of their ascriptive group, they seem
principally to remove the barriers - whether they be stereotyped understandings, blind spots of which one was unaware, or communication-scrambling distance - that have prevented some judges from addressing these group members fairly when they come before the court. Something similar is true about the stated commitment of some of these judges to treating all parties more fairly, specifically because of their experience with discrimination: it tends less in the direction of partisanship and more in the direction of impartiality. An increase in objectivity - where objectivity is defined quite traditionally as an ability to look without prejudice or preconceived notions at the parties before the court - could be described as a consequence of group-based membership for many of these judges. These judges also suggest the need to expand conventional notions of objectivity, to include a definition familiar to feminists and other critical legal theorists: awareness of the inevitable partiality of all perspectives, and the willingness to test a range of affinities and commitments for their blind spots and limitations.

White Judges and Ascriptive Group Membership

If my point in this exploration has been to suggest that the consequences of interdependence or group-based membership for the judicial role are more complex and varied, and less threatening to what we have considered objectivity in judicial decisionmaking, than has previously been anticipated, it may also be useful to examine the role of race in the work of white judges. White judges, after all, have a race just as minority judges do. To neglect this would be to partake of the same error that led parties to seek the recusal of Judges Leon Higginbotham and Constance Baker Motley, on the ground that their race, but not the race of white judges, would make it impossible for them to view a race discrimination claim objectively. Yet it would be naive to assume that racial group membership functions in the same ways for white judges as it does for judges of color. To begin with, group-based affinity with a numerically predominant and socially privileged group might well produce different kind of effects than interdependence with a systematically disadvantaged group. Second, and relatedly, for most white people, and many white judges, their race is "transparent"; they scarcely notice that they have one let alone reflect on what their construction by that race means for their approach to legal decisionmaking. This means either that it will be necessary to abandon the approach of assessing these effects phenomenologically (ie., by considering first-person reflections on the issue by judges themselves) or it will be necessary to identify contexts in which the possibility of race-based differentiation in perspective become apparent even to substantial numbers of white people (or white judges), and perhaps both.

[To address these distinctive features of the racial identification of white judges, I have decided to focus my research on three groups of white judges: 1) those who seem to have some explicit affinity with the white claimants before them - ie., white judges who resisted the elimination of de jure segregation in the South; 2) those for whom their race may generally be transparent but who have been systematically or repeatedly involved in kinds of cases that would tend to make them more aware of race and its effects on perception - criminal cases, school desegregation or affirmative action cases; 3) those for whom race is not transparent and who have sought to resist an identification with members of their (white) ascriptive racial group. Although this research is still ongoing, I would be happy to talk about my strategy and some of the preliminary things that I have found.]

1. The form of "independence" that is most frequently at issue in this particular debate is independence from the perspectives of the parties before the court, or from any specific vantage point on a controversy. This quality is also described as objectivity or impartiality.

2. These arguments were of course made in the 19th and early 20th centuries, when the election of judges was first being implemented. For a discussion of these arguments, see ...
however, analysts more frequently characterize elected state judiciaries as an inevitable feature of the institutional landscape, and direct their energies toward mitigating the most problematic effects of this feature. See e.g., ...


6. Cite Gilligan or whomever else these scholars cite

7. Cite Kate Bartlett, Feminist Legal Methods, and Susan Williams piece on feminist challenges to cartesian epistemology.

8. See Resnik, On the Bias, supra note [], at 1928-29 (discussing work of Shirley Abrahamson).


10. Martha Minow, Stripped Down Like a Runner or Enriched by Experience? __ Wm. & Mary L. Rev. __ (1993)

11. See Ifill, Judging the Judges, supra note [] (argued that structural impartiality of this sort can be viewed as constitutionally required).


13. See Ifill, Racial Diversity on the Bench, supra note [], at 439-49 (describing race-based "narratives").


15. precise cite

16. same

17. same

18. See e.g., Bruce Wright, Black Robes, White Justice (1987);

19. See Linn Washington, ed., Black Judges on Justice (199-).
20. Get cite for this - Washington intro?

21. In his empirical study of Black judges, Race v. Robe, Michael David Smith notes that some judges to whom he sent a written survey instrument responded angrily that they did not think of themselves as Black judges and did not wish to participate in a study that hypothesized for them that kind of identity. See Michael D. Smith, Race v. Robe: The Dilemma of Black Judges (1983) [cite from introduction].

22. See Washington, Black Judges on Justice, supra note [], at 226 et seq (interview with Judge Timothy Lewis).

23. See Washington, Black Judges on Justice, supra note [], at ...

24. Note which judges are included in this number.

25. See Washington, Black Judges on Justice, supra note [] (judges who made this point); also cite autobiographical works by Wright and Higginbotham on this point.

26. See Washington, Black Judges on Justice, supra note [], at .

27. See Washington, Black Judges on Justice, supra note [], at .

28. See Washington, Black Judges on Justice, supra note [], at

29. See Washington, Black Judges on Justice, supra note [], at ..

30. See Washington, Black Judges on Justice, supra note [] at 46 et seq., 91 et seq, 211 et seq. (Joseph Brown, Reggie Walton, Abigail Rogers).

31. See Washington, Black Judges on Justice, supra note [], at (list those who focus on criminal justice issues).

32. See Washington, Black Judges on Justice, supra note [], at 46 (Joseph Brown).

33. See Washington, Black Judges on Justice, supra note [], at (list judges who opt for more prof'l/organizational rather than community based approach to these issues)

34. See Washington, Black Judges on Justice, supra note [], at . Also note writings by Higginbotham, Motley.

35. See Washington, Black Judges on Justice, supra note [] at 230 (Timothy Lewis)

36. See Washington, Black Judges on Justice, supra note [], at (those who stress this point).

37. See Washington, Black Judges on Justice, supra note [], at .

38. See Washington, Black Judges on Justice, supra note [], at 27 et seq., 145 et seq., 186 et seq. (Veronica McBeth, George Crockett, Jr., Charles Z. Smith).

39. See Washington, Black Judges on Justice, supra note [], at 27 et seq. (Veronica McBeth), 46 et seq (Joseph Brown), 65 et seq. (Theodore McKee), 186 et seq (Charles Z. Smith).
40. See Washington, Black Judges on Justice, supra note [], at (critiques of mandatory sentencing, McKee, Walton, etc.)

41. See Washington, Black Judges on Justice, supra note [], at 188 (Charles Z. Smith).

42. See Washington, Black Judges on Justice, supra note [], at 73 (Theodore McKee).

43. See Washington, Black Judges on Justice, supra note [], at .

44. See Washington, Black Judges on Justice, supra note [], at .

45. See Washington, Black Judges on Justice, supra note [], at .

46. See Washington, Black Judges on Justice, supra note [], at (Joseph Brown, Reggie Walton)

47. See Washington, Black Judges on Justice, supra note [], at 171 et seq (Henry Bramwell).

48. See Washington, Black Judges on Justice, supra note [], at (list these).

49. See Washington, Black Judges on Justice, supra note [], at 247 et seq (Bruce Wright). See also Wright, Black Robes, White Justice, supra note [].

50. See Washington, Black Judges on Justice, supra note [], at

51. See Washington, Black Judges on Justice, supra note [], at 165-70 (George Crockett, Jr.).

52. See Washington, Black Judges on Justice, supra note [], at 3 et seq. (Leon Higginbotham), 127 et seq (Constance Baker Motley).

53. See Washington, Black Judges on Justice, supra note [], at .

54. See Washington, Black Judges on Justice, supra note [], at (Theodore McKee).

55. See Washington, Black Judges on Justice, supra note [] at (Joseph Brown).

56. See Washington, Black Judges on Justice, supra note [], at .

57. Washington, Black Judges on Justice, supra note [], at (Joseph Brown)

58. Washington, Black Judges on Justice, supra note [], at

59. See Washington, Black Judges on Justice, supra note [], at

60. Washington, Black Judges on Justice, supra note [], at

61. For a thoughtful discussion of these and other recusal cases involving Black judges, see Sherrilyn Ifill, Judging the Judges, supra note [], at .

62. Cite Barbara Flagg, "Was Blind But Now I See ..."