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Beyond a numbers game: developing a nuanced approach to judicial diversity for Aotearoa New Zealand

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Contents

Abstract

This paper develops a nuanced approach to judicial diversity, suitable for a future Aotearoa New Zealand judiciary. The traditional account of diversity focuses on increasing numbers of overtly minority judges, for instance, Māori or female judges. Due to the limitations of this approach, this paper broadens the debate by introducing diversity in a judge's tacit influences – for example, professional background, skill and expertise. The implementation of this approach will result in a breadth of experiences and move New Zealand towards the types of judges needed.

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Subjects and Topics

Judicial Diversity – New Zealand – tacit diversity

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 they do not, like doctors, literally hold lives in their hands, 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 Rackley notes, judging is not a mechanistic process, but vests the judge with incredible 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 cannot but 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 overwhelmingly comprised of ageing, 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

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[1] Erika Rackley *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge-Cavendish, Oxford, 2013) at 132.
[2] Kate Malleson "Rethinking the Merit Principle in Judicial Selection" (2006) 33 J Law Soc 126 at 132.
[3] Ellen Carroll, Tammi D. Walker and Alyssa Croft "Diversifying the bench: Applying social cognitive theories to enhance judicial diversity" (2020) 15 Soc Personal Psychol Compass 1 at 2.
[4] Emma Dellow-Perry "Myths of merit. Judicial Diversity and the image of the superhero judge" (LLM Thesis, Durham University, 2008) at 17.
[5] Aharon Barak *The Judge in a Democracy* (Princeton University Press, New Jersey, 2009) at 105.
[6] Ngaire Naffine *Law & The Sexes: Explorations in feminist jurisprudence* (Allen & Unwin, Sydney, 1990) at 47.
[7] Morne Olivier "Some thoughts on judicial diversity in the new Supreme Court era" (2008) 16 Wai L Rev 46 at 50.
[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.

influence of judging, this is cause for substantial concern. The legitimacy of the judiciary rests largely upon judges' ability to represent their community.[9] The continuing homogeneity 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, is it 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 those who reflect this.[14]

The need for judicial diversity has been echoed through all corners of the legal community, reaching 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 a approach suited to New Zealand. 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 paper as 'overt diversity' – focuses on securing a judiciary which 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 a

[9] Helen Winkelmann "What right do we have? Securing judicial legitimacy in changing times" (The Dame Silvia Cartwright Address, Auckland, 17 October 2019) at 1.
[10] Olivier, above n 7, 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: part 1" (2014) 45 VUWLR 407 at 415.
[13] Naffine, above n 6, at 148.
[14] UK Advisory Panel on Judicial Diversity "The Report of the Advisory Panel on Judicial Diversity 2010" (February 2010) at 15.
[15] For example, the highest judge of the land Dame Helen Winkelmann CJ 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.

"numerical aestheticism";[17] largely focusing on increasing Māori and women 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 what results this will produce. New Zealand must move forward with a clear approach in mind that fits our distinct social and legal context and the type of judges required for this. Approaches matter. In the end, they may take us in different directions, leading to different ideas of judicial diversity and differently constituted judiciaries.[18] Although the issues canvassed in the traditional diversity debate have exercised the minds of thoughtful scholars for years, this paper, respectfully, rejects the traditional approach as the full account.[19] Instead, the paper contends that a sole emphasis on the traditional approach limits the promotion of judicial diversity. It imposes a restrictive view of humanity, confining judges solely to their overt physical characteristics. In doing so, it fails to appreciate the true value of judicial diversity in the incorporation of diverse perspectives. Because of its hyper-fixation on overt manifestations, its practical implementation may be fraught with difficulty as it fights for consideration alongside merit.

This paper moves the conversation forward by developing a normative approach suitable for practical implementation in New Zealand. Although the traditional approach remains integral, the paper broadens the debate by introducing a 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, but rather, understand it.[20] The story is therefore far broader than the traditional boundaries that prior scholarship has demarcated.[21]

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[17] Erika Rackley "What a difference difference makes: gendered harms and judicial diversity" (2008) 15 International Journal of the Legal Profession 37 at 40.
[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* (Routeledge, Abingdon, 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.

Diversity is a complex and multi-faceted concept, arising in various dimensions. Unlike the traditional approach suggests, not all dimensions are protected characteristics under the Human Rights Act.[22] To ensure richness of thought and experience, New Zealand's approach must incorporate a variety of these dimensions. As Lady Hale P, the only appointed female justice of the United Kingdom (UK) Supreme Court, notes:[23]

> 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 paper's contribution to the field: the development of the nuanced approach which incorporates not only overt diversity but tacit diversity too. Defined as "things that we know but cannot tell",[24] tacit diversity includes diversity in professional background, education, skills, values, socio-economic background and religion. In the appointment of such influential people to a prestigious institution it makes no sense to limit the approach solely to diversity in overt characteristics. Instead, it is about the breadth and depth of a person's experiences and what they can bring to the role.[25] The diversity New Zealand must aim for is the one which results in a richness of thought and experience, able to contribute to the development of the law.[26] This is the nuanced approach.

In developing the nuanced approach, the paper 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. No paper on judicial diversity would be complete without background as to why the identity of the particular human behind the wig and robe matters. The paper begins by outlining the judicial role, dispelling any notions of the judge as an utterly impartial, mechanistic applier of the law. Next, it 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 which looks beyond this 'numbers game'. It explores the implications of this approach and

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[22] See, Human Rights Act 1993, s 21.
[23] Judicial Appointments – Constitution Committee "Chapter 3: Diversity" UK Parliament <https://publications.parliament.uk> per Lady Brenda Hale.
[24] Cahill-O'Callaghan, above n 11, at 5.
[25] Dellow-Perry, above n 4, at 84.
[26] Winkelmann, above n 9, at 6.

suggests it may be particularly suitable to the senior courts. The paper ends 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: utmost 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 citizens and society in general.[27] These individuals determine the contours of New Zealand's laws and shape citizen's freedoms and lives.[28] Their task is incredibly complex. Judges simultaneously take on the role of interpreter, fact-finder, policy-maker and decision-maker, exercising considerable discretion while doing so.[29] Judges figuratively hold lives in their hands;[30] their daily decisions fundamentally affect people's livelihoods, liberties, and reputations.[31] 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's decision in an asylum case could result in a person having to leave the safety of New Zealand; while another's decision in a family law case could mean someone loses care of their children. In all situations, there are three individual's lives dramatically altered through a judge's decision. As Matthew Palmer J noted, this responsibility weighs on you.[32]

Moreover, judges' decisions can impact society generally. As one commentator noted, judges have a hard job. "It'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".[33] Judges are social artisans of the highest order whose impact, although often more subtle than their political counterparts, is undeniable.[34] Decisions of potential precedential significance can

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[27] Carroll, Walker and Croft, above n 3, at 2.
[28] Maggie Jo Buchanan "Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench" (13 August 2020) Center for American Progress < www.americanprogress.org>.
[29] Michael Nava "The servant of all: Humility, humanity and judicial diversity" (2008) 38 Golden Gate U L Rev 175 at 181.
[30] Malleson, above n 2, at 132.
[31] At 132.
[32] Matthew Palmer "Impressions of life and law on the High Court bench" (2018) 49 VUWLR 297 at 305.
[33] Rob Demovsky "No nicknames in court: Meet judicial intern (and Packers Pro Bowler) Ha'Sean Clinton-Dix" (24 April 2017) < www.espn.com/>.
[34] Allan Hutchinson "Looking for the Good Judge: Merit and Ideology" (2011) *All Papers* Paper 12 at 2.

have systemic effects.[35] The explanation and application of law in judgments informs and shapes the standards and expectations which apply in society.[36] Because judges' decisions are seen as the articulation of the community's conscience,[37] they serve as a normalising force in society; defining what is tolerable and permissible. The law informs and reflects society's culture, thus serving as an instrument of change.[38]

With such considerable power, public confidence in judges is a constitutional imperative.[39] In fact, the legitimacy of the judiciary depends on its maintenance.[40] Being an unelected body, its legitimacy rests largely on the credibility and confidence that its decisions and processes are fair.[41] As Elias CJ stated, "full justification for the exercise of judicial power is necessary to ensure respect for human dignity."[42] However, New Zealanders appear fundamentally suspicious of judges.[43] For instance, a 2016 Colmar Brunton study revealed relatively low trust and confidence in judges, consistent with previous studies. 48 per cent of respondents indicated they only had "some trust" in judges and the courts, while 17 per cent noted that had "little" or "no" trust.[44] A 2019 Ministry of Justice survey echoed these concerning levels.[45] Citizens frequently express public dissatisfaction and distrust in our judges. Looking at social media comments on a single article alone displays comments such as "[judges] fail us time and time again" and "our judges are so far removed from the

[35] Palmer, above n 32, at 305.
[36] Winkelmann, above n 9, at 6.
[37] At 6.
[38] Melissa L Breger "Making the Invisible Visible: Exploring implicit bias, judicial diversity, and the bench trial" (2019) 53 U Richmond L Rev 1039 at 1053.
[39] Jessica Kerr "Finding the New Zealand Judiciary" (2021) NZ L Rev 1 at 2.
[40] Sophie Turenne "Fair Reflection of Society in Judicial Systems" in Sophie Turenne (ed) *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Springer, Switzerland, 2015) 1 at 4.
[41] Human Rights Commission *Human Rights in New Zealand* (2010) at 101.
[42] Sian Elias "Justice for one half of the human race? Responding to Mary Wollstonecraft's challenge" (address to the Canadian Chapter of the International Association of Women Judges' Conference, Vancouver, 10 May 2011).
[43] JM Priestly "Chipping away at the judicial arm?" (Harkness Henry Lecture, University of Waikato, Hamilton, October 2009).
[44] Victoria University of Wellington Institute for Governance and Policy Studies and Colmar Brunton *Who Do We Trust?* (March 2016) at 5.
[45] Ministry of Justice "Part 1: Victims' trust and confidence in the criminal justice system (CJS) report – Frequently Asked Questions" (2019) <https://www.justice.govt.nz/>.

real world that we all live in… the whole judicial system is failing its people and needs to be radically changed."[46]

These figures are concerning given the constitutional necessity of public confidence. They 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 very limited elite class which disadvantages those disenfranchised from mainstream society, such as minority groups.[47] Judicial culture is perceived as one of indifference and superiority. This increases participants' feelings of alienation and disempowerment and reduces confidence that judges can effectively play the role of neutral decision-maker.[48] Increasing judicial diversity is thus vital. The public need to feel confident in those who hold such incredible sway over individual's lives and over society. Unless Māori and other minorities feel that the legal system is their legal system, the estrangement of many from the law will continue.[49] A society so enriched by the diversity it holds should be represented and ruled by those who reflect this.[50]

A Dispelling fairy tales: the inherent humanity of judging

Against this incredible authority, it is necessary to remember who lies behind these decisions: individual human beings. Behind the identical wig and robes lies a human face; just like you and me. In the context of modern New Zealand judging, it is this essential humanity which further gives rise to a need for judicial diversity. Common law judging is no longer understood as a mechanical interpretation of the law.[51] Judges are not "robots or traffic cameras, inertly monitoring deviations from a fixed zone of the permissible".[52]

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[46] Christine French "The role of the judge in sentencing: From port-soaked reactionary to latte liberal" (2015) 14 Otago LR 33 at 46.
[47] Ministry of Justice, above n 45.
[48] Safe and Effective Justice Advisory Group *He Waka Roimata Transforming Our Criminal Justice System* (Te Uepū Hāpai i te Ora Safe and Effective Justice, June 2019) at 37.
[49] Olivier, above n 7, at 48.
[50] UK Advisory Panel on Judicial Diversity, above n 14, at 15.
[51] Anusha Bradley "90 percent of High Court, Court of Appeal judges Pākehā" (20 September 2021) Radio New Zealand <www.rnz.co.nz>; and Olivier, above n 7, at 48.
[52] Eric Liu "Private: The Real Meaning of Balls and Strikes" (2 July 2010) American Constitution Society <www.acslaw.org/>.

Instead, judges are tasked with considerable discretion. In exercising this discretion, the nuances of the individual judge come to play. 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.[53]

Recognising the impact of this 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 who apply it in a completely impartial manner.[54] This impartiality is thought of as "the essential underpinning of western society"[55] and made explicit by the judicial oath requiring judges to act "without fear or favour, affection, or ill-will".[56] 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.[57] 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.[58] This 'superhuman' judge is the incarnation of wisdom and experience and is utterly impartial.[59] The judge brings a detached mind to the task of judgment, setting aside their own perspectives, values and biases.[60] Arguments are heard and decided solely on their merits, detached from the identity of those making and hearing them.[61] 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.[62]

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[53] Rosemary Hunter "More than just a different face? Judicial diversity and decision-making" (2015) 68 CLP 119 at 124.
[54] Lady Brenda Hale "100 Years of Women in the Law" (Girton's Visitor's Anniversary Lecture, Cambridge, 2 May 2019).
[55] Lili Barna and others *What Makes a Good Judge: Judicial Ethics and Professional Conduct* (European Judicial Training Network Thesis Competition, 2017) at 17; and Jasmin Moran "Courting Controversy: Judges and the Problems Caused by Extrajudicial Speech" (LLM Research Paper, Victoria University of Wellington, 2014) at 6.
[56] Oaths and Declarations Act 1957, s 18.
[57] Naffine, above n 6, at IX.
[58] Dellow-Perry, above n 4, at 17.
[59]At 18.
[60] Jane Nelson "What Makes a Good Judge?" (1989) 9 J Nat'l A Admin L Judges 153 at 154.
[61] Turenne, above n 40, at 2.
[62] Lady Hale, above n 54.

This conventional notion places the judge as a fairy tale character, one "superhuman in wisdom, propriety, decorum and humanity, able to apply to law in a neutral and detached way".[63] But, as Lord Reid stated, "we do not believe in fairy tales any more".[64] As the name suggests, the notion of the 'superhuman' judge is simply a myth. True impartiality in decision-making is, in fact, an aspirational fallacy.[65] While judges must aim for impartiality, they remain "inescapably human".[66] Like any other mortal, judges do not operate in a vacuum;[67] they are a product of their experiences.[68] As one United States (US) judge wrote, "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".[69] 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.[70] Even though the law may *prima facie* appear impartial, judges cannot but act on their own caprices.[71]

Dispelling the notion of the 'superhuman' judge portends 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 a broad conferment of discretion,[72] subjectification of the process is inevitable.[73] Two judges deciding identical cases may come to opposing conclusions.[74] Indeed, New Zealand's Supreme Court justices appear only to decide unanimously just over 50 per cent of the time.[75] In close call decisions, the

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[63] Rackley, above n 17, at 41.
[64] Dellow-Perry, above n 4, at 9.
[65] Chan, above n 12, at 414.
[66] Paul Heath "Hard Cases and Bad Law" (2008) 16 Wai L Rev 1 at [8].
[67] Barak, above n 5, at 104.
[68] Benjamin N Cardozo *The Nature of Judicial Process* (Yale University Press, New Haven, 1921) at 12.
[69] John Marciano "A Conversation With Utah Supreme Court Justice Thomas Lee" (1 December 2014) Attorney at Law Magazine <https://attorneyatlawmagazine.com>.
[70] Breger, above n 38, at 1052.
[71] Naffine, above n 6, at 40.
[72] Ellen France "Discretion, diversity, and other matters of judgment" (Ethel Benjamin Commemorative Address, Dunedin, 19 August 2011).
[73] Barak, above n 5, at 105.
[74] Petra Butler "The Assignment of Cases to Judges" (2003) 1 NZJPIL 83 at 83.
[75] For example, a study of Supreme Court decisions from 2004—2013 revealed unanimous decisions occurred in only 56 per cent of cases. See, Trevor J Shiels "Multiple judgments and the New Zealand Supreme Court" (2015) 14 Otago LR 11 at 23.

judge as an individual becomes central to the decision. The influence of the individual's discretion will have a significant impact not only on the parties invovled but on society as a whole.[76] As Lord Phillips acknowledged:[77]

> 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.

This means that key judgments have been dictated by who happened to be on the bench at the time.[78]

The reason behind differing conclusions may well be influenced by the identity of the individual judge. As Frankfurter J of the US Supreme Court stated, "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".[79] In exercising discretion, judges use their own experiences as reference points, giving effect to the worldview that, in their eyes, seems proper and basic.[80] 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 "objective" assessments.[81] 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 the particular judge.[82] The objective reasonable person standard does nothing more than perpetuate the viewpoints and biases of judges applying that standard.[83] The identity of

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[76] Rachel Cahill-O'Callaghan "The Influence of Personal Values on Legal Judgments" (PhD Thesis, Cardiff University, 2015) at 329.
[77] At 329.
[78] Peter Spiller "Realism reflected in the Court of Appeal: the value of the oral tradition" (1998) 3 Yearbook of New Zealand Jurisprudence 31 at 36.
[79] Lady Brenda Hale "Appointments to the Supreme Court" (address at conference to mark the tenth anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015).
[80] Barak, above n 5, at 105.
[81] Carroll, Walker and Croft, above n 3, at 2.
[82] Rosemary Hunter and others "Introducing the feminist and mana wahine judgments" in mcdonald and others (eds) *Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope* (Oxford and Portland, Oregon, 2017) 25 at 38.
[83] 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.

those who form the bench therefore matters. It shapes the legal reasoning applied in decisions by colouring the reading of the problem before them.[84]

Revealing the inherent humanity of judging in this sense highlights why judicial diversity matters. Once one realises judges are using their own viewpoints and experiences to make decisions, homogeneity of the bench becomes dangerous. Implicit bias is omnipresent; research shows that judges harbour the same kind of implicit biases as anybody else.[85] Mixing with other 'insiders' who think and experience the same makes it difficult to suppress any unconscious prejudices.[86] 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.[87] As Winkelmann CJ states, "the effect of unconscious prejudice is particularly acute for judges because of the nature and importance for society of the work we do".[88]

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 consciously appreciating it cannot be fully achieved.[89] 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 in wigs and robes, but personalities with different characteristics, backgrounds, strengths, and attitudes.[90] The sin lies not in accepting this humanity, but instead in trying to hide it.[91] 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.[92] Objectivity should not rid a judge of their experiences and values, but instead make use of personal characteristics to

[84] Naffine, above n 6, at 47.
[85] Breger, above n 38, at 1054.
[86] Elias, above n 42.
[87] Breger, above n 38, at 1053.
[88] Hunter and others, above n 82, at 39.
[89] Cahill-O'Callaghan, above n 76, at 20.
[90] Spiller, above n 78, at 33.
[91] Hutchinson, above n 34, at 1.
[92] Spiller, above n 78, at 43.

reflect the fundamental values of society as faithfully as possible.[93] Neutrality is not gained through detachment but through understanding of the concerns of parties.[94] 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, like any of us, are complex and diverse human beings. The make-up of the judicial bench should reflect this.

III 'Numerical aestheticism': traditional account of judicial diversity

The need for judicial diversity becomes clear once one dispels the fairy tale notion of the 'superhuman' judge. Appreciating the judge as a human being allows us to see the influence of the individual on the judicial task. If all judges are of similar identities, this can serve to diminish outside voices and perpetuate biases, alienating those who do not fit within the 'elite' value system. If judges are seen as ruling upon the community without representing it, this can also seek to undermine public confidence in, and legitimacy of, the judiciary as an institution. Given judges' significant authority, it is crucial to have judges able to reflect the diversity of the community.

There has been recognition of this necessity within the New Zealand legal community and broader society thus far. However, little work has been done to develop a normative framework for what this diversity should look like. In its absence, the traditional approach to diversity – labelled in this paper as 'overt' diversity – has been implicitly assumed. Given the approach's traditional dominance and partial implementation, it will always be an important part of our diversity story. In fact, this approach brings exclusive benefits. However, as this section will reveal, the limitations of this approach mean that it cannot be the sole archetype. A sole reliance actually 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

[93] Barak, above n 5, at 104.
[94] Dellow-Perry, above n 4, at 105.

seen.[95] Proponents of this traditional account would define judicial diversity as being the presence of diverse physical indicators – such as, gender, race, age, and sexuality.[96] 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'.[97] The way forward has focused on a strategic evening up of numbers on the bench to ensure a "numerical aestheticism".[98] This has largely involved ensuring there is a strategic assortment of women and Māori judges on the bench to reflect a statistical mirror image of society.

Increasing the number of judges with overt diversity is thought to challenge the complacency and normative superiority of the status quo.[99] 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.[100] As the approach focuses on increasing the number of judges with diverse overt characteristics, it can be described as somewhat of a 'numbers game'. Under this account, New Zealand's judiciary is currently inadequately diverse. New Zealand is an increasingly diverse society. Compositional population data is as shown in Table 1.

Table 1: Demographics of New Zealand Population[101]

Demographic	Percentage of population (4.9 million)
New Zealanders born overseas	27%
Identify as female	50.8%
Identify as Pākehā	70%

[95] Cahill-O'Callaghan, above n 76, at 281.
[96] Rachel Cahill-O'Callaghan and Heather Roberts "Hidden depths: diversity, difference and the High Court of Australia" (2021) 17 Int JLC 1 at 3.
[97] Opeskin, above n 8, at 91.
[98] Rackley, above n 17, at 40.
[99] Erika Rackley "Judicial diversity, the woman judge and fairy tale endings" (2007) 27 LS 74 at 87.
[100] Anna Dziedzic "Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary" (2017) 5 Federalismi at 9.
[101] See, Statistics New Zealand "New Zealand as a village of 100 people: Our population" (23 September 2019) <https://www.stats.govt.nz/>; and Statistics New Zealand "New sexual identity wellbeing data reflects diversity of New Zealanders" (26 June 2019) <https://www.stats.govt.nz/>.

Identify as Māori	17%
Identify as Asian	15%
Identify as Pasifika	8%
Identify as LGBTQI+	3.5%

As of September 2021, there are approximately 241 full-time judges across the four levels of New Zealand's judicial hierarchy.[102] Although data on the identity of judges is limited, the known demographic breakdown is as shown in Table 2.

Table 2: Demographics of New Zealand Judiciary[103]

Demographic	All Judges	District Court	High Court	Court of Appeal	Supreme Court
Identify as female	40%	41%	41%	20%	50%
Identify as Pākehā	79%	76%	91%	90%	67%
Identify as Māori	15%	18%	4%	10%	17%
Identify as Pasifika	3%	4%	0%	0%	0%

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

[102] Bradley, above n 51.
[103] Bradley, above n 51.

overtime.[104] However, as it stands, the typical New Zealand judge continues to be a middle-aged, heterosexual, Pākehā, male.[105] Although New Zealand's judges are at the coalface of the population's changing demographic make-up, the composition of the judicial branch has failed to keep pace.[106]

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. 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.[107] As canvassed earlier, a lack of public confidence in New Zealand's judiciary can be partially attributed to its unrepresentative nature.[108] If judges are seen to favour one sector of society over another, the integrity and legitimacy of the judiciary will be compromised.[109] Large scale US studies have demonstrated that increased overt diversity can have a powerful symbolic value in increasing this public confidence.[110] Thus, its promotion is essential considering the constitutional imperative to maintain 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.[111] Because these decisions change lives and shape society, it is critical they are of the highest quality. Diversity secures more than a democratic ideal. It can improve the quality of substantive law by improving the judicial

[104] Bradley, above n 51. 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 c"ent of those aged between 50 and 55 are not Pāhekā.
[105] Human Rights Commission, above n 41, at 102.
[106] Chen, above n 83, at 7.
[107] 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.
[108] Winkelmann, above n 9, at 9; and Jan-Marie Doogue "Diversity central to public confidence in the court" (December 2018) 924 Lawtalk 78 at 78.
[109] Winkelmann, above n 9, at 3; and Human Rights Commission, above n 41, at 102.
[110] Thomas, above n 107, at 56.
[111] Breger, above n 38, at 1073.

method and adding richness to its content.[112] 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.[113] The law, despite proclaiming itself as coherent and neutral, has played a vital role in reinforcing the existing stratified social order.[114]

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 desirable place for women and other 'outsiders'.[115] In its purported neutrality, the law can quietly assist in reproducing conditions which subordinate 'outside' groups.[116] Outwardly neutral laws have been interpreted by 'inside' judges in ways which favour the privileged status of their group.[117] The supposedly impartial notion of the "reasonable person" instead presupposes a very particular type of individual; one who resembles that of the decision-maker.[118] As the law has been conceived through this specific eye, it represents one specific perspective. This has ensured the 'inside' group remained dominant.[119] 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 "the good life".[120] Although all judges are 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.[121] Space must instead be created for alternative experiences and understandings from those who do not conform to these traditional assumptions.[122]

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[112] Helen Winkelmann “Women as agents of change – Can a diverse judiciary ensure it is independent?” (Commonwealth Magistrates’ and Judges’ Association conference Kuala Lumpur, 18—21 July 2011).
[113] Chan, above n 12, at 415.
[114] Naffine, above n 6, at 148.
[115] At 148.
[116] At 3.
[117] Susan Glazebrook "Women Delivering Justice: A Call for Diverse Thinking" (Commission on the Status of Women, 63rd session, New York, 2019).
[118] Naffine, above n 6, at ix.
[119] At 7.
[120] At xxi.
[121] Nava, above n 29, at 182.
[122] 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 *Feminist Judgments Project of Aotearoa New Zealand– Te Rino: A Two-Stranded Rope* provides a particularly compelling account of the absence of women. The 25 judgments, rewritten as if a feminist judge had sat on the bench, reveal important differences. For example, rewritten judgments include a strong anti-subordination theme, an increased presence of the ethic of care, and changes which allowed women's experiences to become legal truths. A reimagined reasonable person standard which considered female perspectives altered the nature of many cases.[123] The project demonstrates the impact of an absence 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, Māori customary law has received adverse treatment from an almost entirely-Pākehā judiciary. A pervasive line of argument which permeated legal reasoning for decades went as far to deny the existence of Māori customary law.[124] Even today, the largely-Pākehā judiciary faces critical difficulties through "being called upon to assess the mores of a society still largely foreign to them".[125] 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.[126] There is also the potential this absence has contributed to the over-representation of Māori within the criminal justice system. It is a troubling reality that an overwhelmingly Pākehā judiciary deals with a predominately Māori cohort.[127] 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

[123] Hunter and others, above n 82, at 40.
[124] Most infamously seen in Prendergast CJ's *Wi Parata* judgment. See, 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.
[125] Paul Heath "'One law for all" – problems in applying Māori custom law in a unitary state" (2011) 13-14 Yearbook of New Zealand Jurisprudence 194 at 204.
[126] Coates, above n 124, at 23.
[127] Winkelmann, above n 9, at 5.

is especially revelant given the limited use of s 27 cultural reports.[128] A modern New Zealand judiciary must attempt to understand not just the law, but the societies they serve. This includes reflecting on and recognising the effects of colonisation on indigenous populations.[129] Arguably, this is made easier by the introduction of more Māori judges, hence supporting the promotion of overt diversity.

The incorporation of overt difference on the bench may thus improve the ultimate judicial product.[130] The lived experience of women and other minority judges brings a unique perception. It adds an additional lens through which arguments and rationales are filtered to create an accurate image of reality.[131] As Lady Hale P opined:[132]

> …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.[133] As Elias CJ noted, different perspectives cannot but impact substantive outcomes.[134] It is not to imply that minorities collectively have a superior approach and offer a better "female version" of the law, for instance. But, more modestly, that as 'outsiders', they are able to observe the non-inclusive nature of a legal system which purports to offer a universal all-embracing service.[135] Indeed, recent US studies have shown that cases decided by overtly diverse benches were more likely to debate a wider range of considerations and move the decision

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[128] 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.
[129] Glazebrook, above n 117.
[130] Rackley, above n 17, at 49.
[131] Sian Elias "Changing our World" (address at International Association of Women Judges' Conference, Sydney, 4 May 2006).
[132] Lady Brenda Hale "A Minority Opinion?" (the Maccabaen Lecture in Jurisprudence, British Academy, 4 May 2006).
[133] Breger, above n 38, at 1072.
[134] Elias, above n 131.
[135] Naffine, above n 6, at 152.

in the direction of which the law requires.[136] It is this impact on substantial decision-making which furthers the case for increased judicial diversity of this kind.

Diverse courts are essential both to the perception of an equitable justice system and to the rule of law.[137] The representative nature of overt diversity may thus also benefit these guiding principles of our legal system. Under the rule of law, the law serves all New Zealanders. Courts do not simply serve a narrow elite.[138] All members must feel confident the law is for them and they will receive a fair hearing before the courts.[139] This necessitates a judiciary which reflects the society it serves.[140] In the democratic New Zealand society in which all members are valued, equality is a necessary requisite for the judiciary's legitimacy.[141] The denial of women, Māori and other minorities from the bench can be seen as a denial of equality.[142] 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.[143] Because all members must feel the law is their law, increasing overt diversity symbolically demonstrates a commitment to these principles.[144]

For minority groups, there is further representative value in the visibility of minority judges. As President Barack Obama said surrounding the promotion of minority judges, "for them to be able to see folks in robes that look like them is going to be important".[145] Judicial homogeneity may mean that 'different' judges feel unwelcome, believing that 'they wouldn't want someone like me'.[146] Minorities who achieve judicial appointment thus act

[136] Thomas, above n 107, at 10.
[137] Glazebrook, above n 117.
[138] Lady Brenda Hale "It's a man's world: Redressing the balance" (Norfolk Law Lecture 2012, University of East Anglia, Norwich, 16 February 2012).
[139] Lady Hale, above n 62.
[140] Lady Hale, above n 62.
[141] Elias, above n 131.
[142] Elias, above n 131.
[143] Lady Hale, above n 138.
[144] Glazebrook, above n 117.
[145] Danyelle Solomon and Michele L Jawando "The Need for a Reflective Judiciary Demands a Return to Normal Order" (15 July 2016) Center for American Progress <www.americanprogress.org>.
[146] Dellow-Perry, above n 4, at 21.

as role models and confirm that they are persons who can hold public authority.[147] As Judge Doogue noted, 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".[148] A lack of overt diversity may deter potential candidates.[149] 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 who's talents should be recognised and put to good use.[150] Overt diversity can provide inspiration for those who would otherwise limit their horizons and aspirations.[151] Equality of opportunity benefits not only the individuals concerned, but all of society. It ensures we don't waste talents which are available to us.[152]

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 that the appearance of judges who look like New Zealand society brings results in a necessary incorporation of this traditional approach moving forward.

B A limited approach

In saying this, there are significant limitations to this traditional notion of diversity. For example, the approach is fatally narrow and could potentially overstate the representative

[147] 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.
[148] Doogue, above n 108, at 79.
[149] Cahill-O'Callaghan, above n 11, at 4.
[150] Lady Brenda Hale "Judges, Power and Accountability: Constitutional Implications of Judicial Selection" (Constitutional Law Summer School, Belfast, 11 August 2017).
[151] Breger, above n 38, at 1075.
[152] Lady Hale, above n 62.

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 mean that a sole reliance on this approach may serve to limit the true promotion of diversity and mean that diversity is incompatible with the type of judges needed for New Zealand. These limits are what necessitate a broadening of approach through incorporating tacit diversity within the paper's nuanced approach. The recognition of these limitations and the development of the nuanced approach does not disregard the importance of explicit overt diversity. As explained, the arguments surrounding legitimacy, public perception and equality likely require an increase in overt diversity to garner these benefits.

Firstly, the approach's narrowness is unfavourable. As established through dispelling the notion of the judge as 'superhuman', judges are complex human beings who bring their entire identity, worldview and experience to the judicial task. The traditional approach fails to recognise the complexity of human beings and instead places judges into watertight compartments; losing sight of the judge as an individual.[153] 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 facet of themselves that minority judges bring.[154] The traditional approach therefore simply corrects how the judiciary is perceived, rather than directly challenging the myth of judges as utterly impartial 'superhumans'.[155] In treating minorities as homogenous groups, the approach assumes certain overt characteristics affect different judges in the same way.[156] It denies the possibility of difference in thought, perpetuating the myth that all judges think alike.[157] 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, they are separated by ethnic backgrounds, political views and

[153] Olivier, above n 7, at 52.
[154] Cahill-O'Callaghan, above n 11, at 19.
[155] Dellow-Perry, above n 4, at 18.
[156] Cahill-O'Callaghan, above n 11, at 29.
[157] Dellow-Perry, above n 4, at 29.

upbringings; resulting in very different approaches to the law.[158] Judges are influenced by much more than membership to certain societal groups. Being a minority is not uniformly applicable and enduring, but may be a qualified, partial and fleeting experience.[159]

Secondly, the traditional account tends to overstate its representative nature. Representational theory suggests minority judges serve as representatives, working to advance their group's interests.[160] 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 not all Māori judges will necessarily advocate for Māori interests. As a parallel example, one prominent New Zealand politician who has Māori whakapapa is in fact known to advocate against Māori interests, such as through campaigning for the abolishment of Māori seats.[161] Although no judge may go this far, it demonstrates that statistical representation does not necessarily mean sufficient representation. Further, even for judges who do wish to advance minority interests, they are confined by the law. As Lady Hale P stated, "our loyalty is to the law and not to our race or gender".[162] Although true impartiality is a myth, judges must still apply the judicial oath's requirements for impartiality.[163] Thus, to understand judges as representatives is inappropriate and conflicts this core judicial function.[164]

Thirdly, the traditional common law judicial ideology may supress any representative ability of a minority judge. Under this ideology, a judge's background or beliefs are trumped by a deeply acculturated set of norms and traditions of judicial decision-making which all judges adhere to.[165] These norms include deference to the separation of powers, adherence to precedent and upholding the fundamental principles of the common law. [166]

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[158] Leslie Moran "Judicial Diversity and the Challenge of Sexuality" (2006) 28 Syd LR 565 at 575.
[159] At 575.
[160] Dziedzic, above n 100, at 11.
[161] Lachy Paterson "It's about how best to represent Māori interests" (20 August 2018) Otago Daily Times <www.odt.co.nz>.
[162] Dermot Feenan "Women Judges: Gendering judging, justifying diversity" (2008) 35 JL & Soc 490 at 505.
[163] France, above n 72.
[164] Dziedzic, above n 100, at 8.
[165] Hunter, above n 53, at 126.
[166] At 126.

In addition, the ideology may include a resentfulness against difference; a notion that exhibiting difference of any kind is contrary to the judicial role.[167] 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.[168] 'Different' judges can only be 'let into' the judiciary on the condition of their conformity to the prevailing ethos.[169] Any hint of failure to conform may result in their ability being questioned.[170] Because these values have been shaped by cisgender, heterosexual Pākehā men, for like men, the minority judge is thus induced to sell their voice; a phenomenon coined "the Little Mermaid syndrome".[171] In this silence, difference is lost.[172] Because the diverse 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.[173] If judicial authority is seen to be properly vested only in a quintessentially Pākehā, heterosexual male collection of virtues,[174] they may feel the need to distance themselves from any notion of difference.[175] Therefore, even a minority judge who wishes to take a more robust approach to the issue of difference may find it impossible to insert a different perspective because of the institution's conformity to established legal norms.[176]

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 positively beneficial.[177] Society can be divided in endless ways, referencing an infinite list of overt characteristics. But, for many if not most of these groups, there is simply no legitimate argument for their judicial representation.[178] There is no legitimacy to the representation of those born on a Sunday, or those who are a Scorpio.

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[167] At 126.
[168] Dellow-Perry, above n 4, at 2.
[169] At 3.
[170] Erika Rackley "Representation of the (women) judge: Hercules, the little mermaid, and the vain and naked Emperor" (2018) 22 LS 602 at 620.
[171] At 602.
[172] At 603.
[173] Hunter, above n 53, at 127.
[174] Dellow-Perry, above n 4, at 12.
[175] Hunter, above n 53, at 127.
[176] At 128.
[177] Rackley and Webb, above n 18, at 290.
[178] At 290.

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.[179] Which groups meet these criteria will vary across times and across communities.[180] In addition, there may be contexts where no group member can be a judicial representative, thus providing reasons for a diversion from representation. For example, the severely intellectually disabled cannot be appointed as judges, meaning that their voices must be given expression by people who are not themselves members of the group.[181]

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 hyper-focus on statistical representation, may actually 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

These clear limits of the traditional approach necessitate a rethink to how we approach judicial diversity moving forward. A sole emphasis on numerical aestheticism may distract from developments towards the type of judges New Zealand requires. By linking diversity solely to overt characteristics, it denies the possibility of difference in thought, perpetuating the myth that all judges think alike. Structuring diversity along social constructs inhibits development of a truly diverse judiciary by prescribing an intellectual norm shared by individuals of similar backgrounds.[182] Difference is negatively defined. Under the traditional approach, it is not who judges are that makes them valuable, but who they are not: namely, a heterosexual, Pākehā, cisgender man.[183] This fails to appreciate the inherent

[179] At 293.
[180] At 293.
[181] 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.
[182] Dellow-Perry, above n 4, at 29.
[183] At 29.

humanity of judging. As complex human beings, influences on individual judges are not confined to their membership of social groups, but instead attributed to their whole being. The required New Zealand approach must look beyond a numbers game. A perception of the judiciary as out of touch does not necessarily suggest the solution lies only in making them resemble society, but rather, understand it.[184] This new focus is of key importance in the upper echelons of the judiciary.

Diversity comes in various dimensions. Unlike the traditional approach suggests, not all of them are protected characteristics under the Human Rights Act.[185] Diversity is not defined simply by the colour of a person's skin or their gender but is much broader and complex. Instead, it is about the breadth and depth of a person's experiences and what they can bring to the role.[186] In the appointment of such influential people to a prestigious institution it makes no sense to limit the approach solely to diversity in overt characteristics. Instead, New Zealand's judicial diversity approach must incorporate a variety of these dimensions. Herein lies the paper's contribution to the field: the development of the nuanced approach. The nuanced approach seeks to broaden the diversity debate by arguing for the incorporation of a new kind of diversity: tacit 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".[187] In the judicial diversity context these may include, but are not limited to, diversity in professional background, education, skills, values, socio-economic background and religion. The arguments for the promotion of overt diversity remain. Arguments centred around legitimacy and public confidence necessarily rely on how the judiciary is perceived.[188] However, the incorporation of tacit diversity into this approach recognises the importance of inherent characteristics and better appreciates the value of a judge as an individual.[189] Attempts to create a diverse judiciary should no longer be focused solely

[184] At 101.
[185] See, Human Rights Act 1993, s 21.
[186] Dellow-Perry, above n 4, at 84.
[187] Cahill-O'Callaghan, above n 11, at 5.
[188] Cahill-O'Callaghan, above n 76, at 281.
[189] At 30.

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.[190] Overt characteristics, such as gender or race alone, cannot be used as a proxy for the many life experiences that influence a particular judge's decision-making.[191] Every judge brings something unique to the task of judging.[192]

The benefits of this nuanced approach become clear once one deconstructs the value of a overtly diverse bench behind its façade. While diversity impacts how the judiciary is seen, the true benefit lies not in the physical manifestations of overt differences, but instead within the diverse insights and contributions the judicial process gains. True diversity does not draw on any advantage of the minority judge per se.[193] Importance lies not in the social identity of the individual but rather within the intellectual tools they can bring to the role.[194] Value lies within the understanding that minority judges' distinct perspectives and experiences should help shape the law, in the same way the experience of leading men has done so for centuries.[195] Diversity brings to the law knowledge of the lives of people, their values and their challenges in a way which might not otherwise be available.[196] It allows judges to interact and work with others who are different from themselves and thus likely to have different life experiences. This enables judges from traditional backgrounds to confront diverse perspectives and opinions.[197] The value of judicial diversity thus lies in the inclusion of voices usually rendered inaudible.[198] Diversity offers more than a simple evening up of numbers at the table. Value lies in the incorporation of the chorus of 'voices from below'.[199] Adjudication in New Zealand's diverse society necessitates that a range of identities are both represented and understood.[200]

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[190] Harry T Edwards "The Effects of Collegiality on Judicial Decision Making" (2003) 151 U Pa L Rev 1639 at 1668.
[191] Cahill-O'Callaghan, above n 11, at 29.
[192] Lady Hale, above n 150.
[193] Rackley, above n 17, at 41.
[194] Dellow-Perry, above n 4, at 31.
[195] Rackley, above n 17, at 41.
[196] Winkelmann, above n 9, at 6.
[197] Olivier, above n 7, at 52.
[198] Naffine, above n 6, at 151.
[199] At 151.
[200] Dellow-Perry, above n 4, at 31.

As the true value of diversity lies in the incorporation of a rich range of information and perspectives, there is no reason this rationale cannot be applied to judges who do not display overt diversity.[201] A judge who does not belong to a minority group can still provide diverse insights gained through their tacit influences; for example, through their professional background, skills, upbringing or values. Those with tacit diversity may also result in a different approach to the law, an approach with prevents the values and concerns of one group becoming dominant.[202] The story is therefore far broader than traditional boundaries of scholarship have demarcated.[203] New Zealand's approach can no longer be limited simply to questions of race and gender. The greater the diversity of participation by judges of all different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process.[204] 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.[205] Moving beyond a numbers game and weaving tacit and overt diversity together in the nuanced approach ensures we are 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 paper is developing an approach to be implemented into practice, six key factors are identified: professional background; skills; education; values; socio-economic background and religion.

Diversity in professional experience is an important dimension of a diverse bench.[206] Both a judge's legal experience and the type of clients served can inform their perspectives and

[201] Edwards, above n 190, at 1667.
[202] Dellow-Perry, above n 4, at 82.
[203] Lanier and Hurwitz, above n 21, at 1.
[204] Cahill-O'Callaghan, above n 11, at 5.
[205] Winkelmann, above n 9, at 6.
[206] As recently as September 2021, the Chief Justice recognised this as being an important dimension needing improvement. See, Bradley, above n 51.

thus contribute to the development of the law.[207] Knowledge and skills developed through this work – for example, particular commercial acumen, knowledge of tikanga, or knowledge of inner workings of 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.[208] The broader the range of work undertaken, the broader the potential engagement with society.[209] For example, those who spend their careers advancing minority interests bring this unique perspective and understanding to the task. As noted about Justice Marshall of the US Supreme Court who spent his career at the NAACP,[210] he brought a special touch:[211]

> 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 someone has represented those other than corporate clients.[212] As Winkelman CJ noted, those who work solely for corporate interests will have experience only of the justice needs and concerns of those clients.[213] At every level 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.[214]

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.[215] Accordingly, the majority of judges have gained their legal expertise predominately through the lens of advancing business interests.[216] Ten per

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[207] Janna Adelstein and Alicia Bannon "State Supreme Court Diversity – April 2021 Update" (20 April 2021) Brennan Center for Justice <www.brennancenter.org>.
[208] Maggie Jo Buchanan "The Startling Lack of Professional Diversity Among Federal Judges" (17 June 2020) Center for American Progress < www.americanprogress.org>.
[209] Winkelmann, above n 9, at 8.
[210] The National Association for the Advancement of Colored People.
[211] Buchanan, above n 208.
[212] Lanier and Hurwitz, above n 21, at 1.
[213] Winkelmann, above n 9, at 8.
[214] Lady Hale, above n 150.
[215] Anusha Bradley "Judges can be appointed without ever attending an interview" (21 September 2021) Radio New Zealand <www.rnz.co.nz>.
[216] Buchanan, above n 208.

cent were Crown solicitors or prosecutors immediately before appointment, compared to just three per cent working for criminal defence.[217] In the High Court – who's judges often undertake serious and complex criminal trials – it is believed there are only three judges who have ever done any defence work.[218] This is an issue. It may give a skewed starting point to matters such as admissibility of evidence and challenges facing the defendant.[219]

There is an urgent need to increase the number of judges who have represented under-deserved populations and worked to improve the lives of marginalised communities.[220] Identifying this as an issue is not a condemnation of corporate lawyers; the recruitment of judges with commercial and corporate experience will always be important.[221] 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 legal jurisprudence and institution.[222] Traditional assumptions of which backgrounds are more 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 looked at. The best judges, no matter where they are found, should be appointed to the bench. 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 works to limit both overt and tacit diversity. Looking outside the conventional trajectory may increase the appointment of minority judges.[223]

Diversity in personal values is another interesting notion of tacit diversity. Personal values are defined as enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct.[224] These values serve as the basis

[217] Bradley, above n 51.
[218] Bradley, above n 51.
[219] Bradley, above n 51.
[220] Buchanan, above n 208.
[221] Buchanan, above n 28; and Winkelmann, above n 9, at 8.
[222] Buchanan, above n 208.
[223] Lee Epstein, Jack Knight and Andrew Martin "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court" (2003) 91 CLR 903 at 905.
[224] Cahill-O'Callagan and Roberts, above n 96, at 25.

from which attitudes and behaviours are created.[225] As they are inextricably linked to personhood and identity, they provide insight into the individual beyond overt characteristics.[226] Knowing that 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.[227]

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 possible.[228] There is a two-way stream of traffic. The law is not only a repository of community values, but values exposed in judgments shape community expectations. By continually weighing values in their judgments, judges remind society of them and their importance.[229] This results in a need to ensure a diversity in judicial personal values to reflect that of the community. Overseas research shows this is likely to already exist, even in the absence of overt diversity. Both Australian and UK studies highlighted variety in personal values of judges, despite their apparent overt homogeneity.[230] This is encouraging. Because personal values encompass more than simple demographic difference, it highlights the broader facets of diversity. This provides a promising lens through which to explore a richer and more nuanced understanding.[231]

Other potential tacit influences to include in this approach are diversity in 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 their education received are other potential influences which go beyond overt characteristics. A common denominator of defendants who appear before the courts is poverty.[232] Because judges have a duty to secure fair hearings, knowledge of life for those who exist at the margins may be

[225] At 25.
[226] Cahill-O'Callaghan, above n 11, at 10.
[227] At 10.
[228] Barak, above n 5, at 104.
[229] Winkelmann, above n 9, at 6.
[230] See, Cahill-O'Callaghan, above n 76; and Cahill-O'Callagan and Roberts, above n 96.
[231] Cahill-O'Callagan and Roberts, above n 96, at 34.
[232] Winkelmann, above n 9, at 7.

critical. It may provide important and mitigating context for offending.[233] A judge with insight into these financial burdens – gained either through lived or professional experience – may have an increased awareness of how these economic burdens impact the defendant and their whānau. It may help ensure the defendant is afforded the dignity of a fair hearing.[234] Although there is thought to be a modest amount of socio-economic diversity within our judiciary, this may reflect the fact a large portion attended law school during times where socio-economic barriers were less formidable.[235] Moving forward, an active approach is essential to ensure the future judiciary is not comprised solely of those from affluent backgrounds.[236]

Shifting the focus beyond a numbers game does not necessarily hinder the promotion of judges from minority groups. Although the nuanced approach does not completely reject overt diversity, tacit diversity in of itself does not exclude overt diversity.[237] The two types work together. As judges who display tacit diversity are also often members of minority groups, intersectionality means its promotion may simultaneously increase overt diversity. For example, those from lower socio-economic backgrounds are statistically less likely to be Pākehā, and those from outside the traditional career trajectory are more likely to be female.[238]

In addition, a shift in emphasis to the nuanced approach – while it may result in less descriptive representation than the traditional approach – may still lead to increased substantial representation of minority interests.[239] Although members of minority groups will obviously be best placed to promote substantive representation, membership is not necessarily a pre-requisite for advancing a group's interests. Members of other backgrounds

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[233] At 7.
[234] At 7.
[235] For example, during the 1970s and 1980s; At 7.
[236] At 7.
[237] Dellow-Perry, above n 4, at 110.
[238] For instance, in 2015, just under half the children living in poverty and hardship were Māori and Pasifika. See, Claire Dale *Whakapono: End child poverty in Māori whānau* (Child Poverty Action Group, 2017) at 4.
[239] Danielle Root, Jake Faleschini and Grace Oyenubi "Building a More Inclusive Federal Judiciary" (3 October 2019) Center for American Progress < www.americanprogress.org>.

may be capable of understanding the values and needs of those from a different group.[240] 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.[241] While insights are best achieved through first-person experience, it is not to say that all insights are only arrived in that way.[242] Those with tacit diversity may have a sufficient understanding of members of minority groups to do so.[243] For example, a Pākehā upper-class judge who has committed their career to representing under-privileged 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 no matter what social groups they belong to. This can be achieved not only through the promotion of overt diversity, but tacit diversity too.

B Suitability to senior court decision-making

The promotion of judges from a wide range of backgrounds and life experiences through the nuanced approach ensures varying perspectives are bought to bear on critical legal issues.[244] It brings a richness to the discussion not seen through the traditional account. 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 public interest considerations are prevalent.[245] Due to the incredible significance of their judgments and the nature of collective decision-making, the approach toward judicial diversity in these courts must be that which produces the highest quality decision-making. A sole focus on overt diversity will not produce this desirable mix of minds.[246] Instead, this requires the nuanced approach. Because everyday 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

[240] Sonia Sotomayer "Supreme Court Nominee Sonia Sotomayor's Speech at Berkeley Law in 2001" (26 May 2009) Berkley Law <www.law.berkeley.edu/>.
[241] Hunter and others, above n 82, at 29.
[242] Salkin, above n 181, at 218.
[243] At 271.
[244] UK Advisory Panel on Judicial Diversity, above n 14, at 26.
[245] At 26.
[246] Dellow-Perry, above n 4, at 82.

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.[247] 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. Everyday New Zealanders are more likely to directly interact with judges of these courts. Thus, improvement of overt diversity could have a powerfully visible symbolic meaning to those who interact with these judges.[248]

As appellate courts, the Court of Appeal and Supreme Court have two functions; error correction and the development of the law.[249] In developing the law, their decisions are extremely impactful. Not only will principles be relied upon and applied in lower courts, but judgments may have wide-ranging societal influence.[250] This is especially true for decisions of the Supreme Court. [251] Cases which reach this court are of the greatest public and constitutional importance.[252] Given their reach and 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.[253] 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"*. The strength of these judgments relies upon the strength of the combined group of minds. The process provides individual judges opportunities to test the merits of their own ideas and beliefs as well as those of others.[254] While this can result in a collective understanding superior to

[247] At 86.
[248] Breger, above n 38, at 1072.
[249] Heath, above n 66, at [64].
[250] At [65].
[251] Rod Vaughan "Supreme Court ponders blending tikanga into the law" (31 July 2020) ADLS <https://adls.org.nz>.
[252] The Supreme Court Act, s 13 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".
[253] Epstein, Knight and Martin, above n 223, at 942.
[254] At 944.

that held by an individual, its effectiveness depends on the richness of inputs. Having all judges come at the problem from the same point of view will not lead to the best result. [255] Instead, the presence of diverse perspectives at the table will broaden and enhance the base upon which experimentation, inquiry and testing occurs.[256] The eccentricities of judges balance one another and prevent the dominance of one particular mode of thought.[257] Simply by 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.[258]

In these courts, every dimension added to the collective mix makes it easier to have genuine debates.[259] 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.[260] Research indicates diverse collective bodies make better decisions than homogenous ones.[261] Diversity may reduce implicit biases by sharing unique perceptions, developing new understandings and challenging other's preconceptions.[262] This can result in more thoughtful, innovative and well-rounded decision-making compared to that of homogenous groups.[263] Given the scope and importance of these courts' decisions, the nuanced approach's ability to improve the legitimacy of the deliberation process and the resulting judgments is critical.[264]

V Nuanced diversity in practice

The paper has aimed to provide value by broadening the judicial diversity debate beyond the traditional numbers game and instead developing a normative framework suitable for a future New Zealand judiciary. In developing its nuanced approach, the paper has

[255] Dziedzic, above n 100, at 17.
[256] Epstein, Knight and Martin, above n 223, at 944.
[257] Dellow-Perry, above n 4, at 82.
[258] At 82.
[259] Lady Hale, above n 23.
[260] Barry Sullivan "The Power of Imagination: Diversity and the Education of Lawyers and Judges" (2018) 51 UC Davis L Rev 1105 at 1144.
[261] Lady Hale, above n 150.
[262] Breger, above n 38, at 1072; France, above n 72.
[263] Root, Faleschini and Oyenubi, above n 239.
[264] Olivier, above n 7, at 52.

challenged assumptions around the inherent humanity of judging and of the influences on judicial decision making. Because judges are not defined by their membership to societal groups, broadening the approach can result in a diversity of thought not previously seen under the traditional account. This is of particular use to the senior courts. However, the approach would be subject to serious limitations if unable to be applied in practice, or if its implementation was to be consistently overlooked in favour of other considerations. One must remember that 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.[265] As a judge of the Australian High Court wrote:[266]

> Although it is right that it is good to have balance on the Bench in terms of ensuring minorities are represented, 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 judicial position, it is imperative that judges are of utmost merit. It is undeniable that those in this influential position must possess the technical and professional capabilities of a competent judge.[267] 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".[268] For many, the two principles are mutually exclusive antithetical notions, designed to be kept apart as individual considerations.[269] This view is explicit in New Zealand, with the Judicial Appointment Protocol (the Protocol) stating the appointment process shows, "A commitment to actively promoting diversity in the judiciary without compromising the

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[265] Olivier, above n 7, at 53.
[266] Moran, above n 158, at 589.
[267] Hutchinson, above n 34, at 1.
[268] George Morrison "Judicial Appointments in New Zealand: An incremental approach to reform" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017) at 21.
[269] Hutchinson, above n 34, at 1.

principle of merit selection".[270] The use of separation and qualification reinforces the notion that merit and diversity represent two separate and incompatible normative ideals.[271] By segregating 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".[272]

This paper suggests that diversity and merit are not necessarily mutually exclusive and opposing principles. It is indeed possible to increase judicial diversity without sacrificing merit.[273] It simply requires challenging the traditional assumptions of both principles and a flexibility in approach.[274] The tension relies upon implicit assumptions of both merit and diversity. As the Protocol does not define neither "merit" nor "diversity" it can be assumed that they both adopt traditionally narrow conceptions. These must be questioned. 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.[275] As established throughout this paper, 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 blindly and without awareness of social context, but must be able to understand the communities they serve.[276] While the good judge should have technical skills (i.e. the traditional merit conception), they also need to possess a socio-political vision within which and on behalf of which they can deploy those technical skills.[277] Further, as the Protocol refers to "diversity" and judge's "range of experience and expertise" separately, its conception of diversity must be limited to the traditional approach.[278] However, if diversity was instead taken to mean this paper's nuanced account, this may resolve the conflict between the principles.[279] Tacit diversity is much more insulated from such charges of conflict because

[270] Crown Law Office "Judicial Appointments Protocol" (21 May 2014) < https://www.crownlaw.govt.nz/>.
[271] Dellow-Perry, above n 4, at 33.
[272] Malleson, above n 2, at 126.
[273] Morrison, above n 268, at 21.
[274] Olivier, above n 7, at 52.
[275] Dellow-Perry, above n 4, at 102.
[276] At 84.
[277] Hutchinson, above n 34, at 3.
[278] Crown Law Office, above n 270.
[279] Dellow-Perry, above n 4, at 30.

its principal concern is to encourage a diverse collection of minds on the bench.[280] 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 these assumptions are challenged, it creates space for diversity to be seen as an element of merit, rather than a subordinate consideration.[281] No matter how much people wish that it were so, in modern New Zealand judging, merit and diversity "walk down much the same street".[282]

A Reconciling diversity and merit

This paper goes further to argue 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, or has already, expanded into the socio-political sphere of our diverse society, then an ability to understand and address the concerns of others must be taken into consideration when evaluating judicial merit.[283] 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 our future judiciary.[284] Any idea of a meritorious judge will ultimately be shaped by New Zealand's distinct social and legal context. This may result in value being placed on different characteristics for New Zealand judges than those in overseas jurisdictions.

How then might the notion of diversity be reconciled into our idea of a meritorious judge? The most obvious link between the two principles is that increased nuanced diversity leads to higher quality decision-making. As canvassed in this paper, the incorporation of different judges improves the judicial product by giving effect to a broader worldview and adding richness to its content.[285] As the identity of the individual judge does impact their decision-making, incorporating diversity can infuse the law with traditionally excluded perspectives.[286] Especially in the senior courts, a diverse judiciary is better equipped to

[280] At 33.
[281] At 109.
[282] Hutchinson, above n 34, at 1.
[283] Dellow-Perry, above n 4, at 97.
[284] Judicial Appointments – Constitution Committee, above n 23.
[285] Winkelman, above n 112.
[286] Breger, above n 38, at 1072.

make decisions in New Zealand's increasingly complex legal system and increasingly diverse society.[287] 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.[288]

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.[289] Some type of community knowledge and understanding will be necessary to discharge the judicial function.[290] The law is permeated with tests informed by what the community expects or regards as reasonable. As modern judges are consistently required to draw upon their knowledge of society, community knowledge and understanding of social phenomena is indispensable.[291] Although this is valuable in all jurisdictions, its necessity is particularly emphasised given the judge's position within New Zealand's small community. The result of New Zealand's social and geographic factors means there is a greater connection between the judiciary and the public. Judges are likely to be personally known 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.[292] A New Zealand judge does not withdraw from the community, but instead is an integral part of it.[293] In many small towns, a District Court judge may be the most powerful resident as the only senior official of a national branch of Government. This imposes a unique obligation whereby judges are simultaneously leaders of the community, servants of their community, and normal members of their community. They may occupy positions of power but are nonetheless appointed to carrying out a servant function to a community which they are also member of.[294] Community engagement for New Zealand judges is not merely a right, but a core obligation.[295]

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[287] Dellow-Perry, above n 4, at 30.
[288] At 110.
[289] UK Advisory Panel on Judicial Diversity, above n 14, at 31.
[290] Winkelmann, above n 9, at 5.
[291] Lady Hale, above n 138; and Turenne, above n 40, at 19.
[292] Duncan Webb "Judicial Conduct in a Very Small Place: Some Contextual Questions" (2003) 6 Legal Ethics 106.
[293] Sam Bookman "Judges and Community Engagement: An Institutional Obligation" (2016) 26 JJA 3 at 11.
[294] At 21.
[295] At 6.

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",[296] there has been a realisation that modern New Zealand judging requires a building of connections between the courts and the community.[297] New initiatives such as the Rangatahi Courts under the Youth Court jurisdiction seek to intertwine the courts and community.[298] The impending implementation of the 'Te Ao Mārama' model within the District Courts will only exacerbate this need. Seeking greater connection between the community and the courts, the model 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 situations, clearly changing the nature of judging.[299]

The changing nature of the judicial role underscores a need for a bench which is understanding of and responsive to the community.[300] Understanding of social phenomena and community knowledge is therefore an attribute that should be looked for and desired in all judges.[301] 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.[302] This paper goes further to argue that no judge should be considered meritorious if they do not have some knowledge of the community they live in.[303] 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

[296] Doogue, above n 108, at 79.
[297] Winkelmann, above n 9, at 10.
[298] At 10.
[299] Heemi Taumaunu "Calls for transformative change and the District Court response" (Norris Ward Mckinnon Annual Lecture, University of Waikato, Hamilton, 11 November 2020).
[300] Doogue, above n 108, at 79.
[301] Lady Hale, above n 138.
[302] Morrison, above n 268, at 12.
[303] Turenne, above n 40, at 2.

a different and heightened sensitivity and understanding of the community.[304] Because this necessary quality is so closely tied with both types, the nuanced approach to diversity will therefore be a necessary part of the qualities and characteristics which distinguish a good judge. Understanding the essentiality of this knowledge serves to reconcile merit and diversity.[305]

A meritorious New Zealand judge will also be one with understanding of different interpretations of law, something achieved through both overt and tacit diversity. The New Zealand legal system is transitioning into "the third law of Aotearoa"; one which sees a fusion of the common law and Māori customary law.[306] Tikanga is no longer an independent source of law, but rather a flavour in the common law of either stronger or weaker effect.[307] There is recognition that tikanga applies widely, not only to Māori parties, but Pākehā litigants too.[308] This weaving of legal systems will only become more entrenched overtime, coupled with a decolonisation of the criminal justice system and the law as a whole.[309] As these changes will entirely change the context the courts sit in, it 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 to have sufficient understandings of this new law are likely to be 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.[310] The judiciary continues to place large emphasis on transnational values. Although New Zealand courts are under no obligation consider overseas authorities,

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[304] Moran, above n 158, at 589.
[305] At 589.
[306] 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.
[307] At 16.
[308] For example, see Martin Van Beynen "The Peter Ellis case and Māori customary law" (9 July 2020) Stuff NZ <www.stuff.co.nz/>.
[309] For example, see the work of *He Whakaaro Here Whakaumu Mō Aotearoa*: *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Report, 2016).
[310] Olivier, above n 7, at 47.

integration of legal systems is rife.[311] 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. The court rarely restricted itself to a single jurisdiction.[312] The frequent recourse to international sources signifies the importance the New Zealand judiciary places on comparative analysis.[313] 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, it further links merit and diversity together.

Therefore, once one takes a broader approach to the principles of diversity and merit, it is revealed that these are not competing notions but instead work together. Analysing the practical requirement of merit within the New Zealand specific 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 likely 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 possess all these qualities. We must remember that judges are human beings; they cannot be all things to all people.[314] There cannot be one set of fixed criteria constructed to suit all levels of judges.[315] However, this is not necessarily a bad thing. The beauty of diversity is that judges are distinct world unto themselves who bring a combination of skills, understanding, 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.

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[311] Sian Elias "Transition, Stability and the New Zealand Legal System" 10 Otago LR 475.
[312] 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 UK– although citation of non-Commonwealth courts was frequent too. See, Petra Butler "The Use of Foreign Jurisprudence in New Zealand Courts" (2014) 4 VUWLRP 123 at 127.
[313] At 129.
[314] Olivier, above n 7, at 52.
[315] Dellow-Perry, above n 4, at 95.

Although this paper has only canvassed merit to the extent it applies to diversity, to ensure the two principles are reconciled in practice, I suggest the statutory criteria should read similar to as follows:[316]

> (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, sound judgment, and objectivity);
>
> (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 paper has sought to broaden the debate surrounding judicial diversity through developing a nuanced approach of suit for modern New Zealand society. It has suggested that the story is indeed more complex than traditional scholarship has demarcated. In developing this approach, the paper has challenged assumptions of conventional perspectives 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 an approach to be taken forward which can 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 paper first provided context as to why the identity of the individual judge behind the wig and robe matters. With a degree of power and influence enjoyed by so few, it contends that because judges matter, it is a necessary corollary that it matters *who* the judges are. As public confidence in judges and their decisions is a constitutional imperative, increased diversity is necessary to ensure the community feel as though the judges are there to serve

[316] Morrison, above n 268, at 37.

them; not simply a narrow elite class. In addition, because modern New Zealand judging vests the judge with considerable discretion, the essential humanity within this exercise gives rise to a further need for diversity. Once one realises that judges are using their own viewpoints to make decisions, homogeneity of the bench becomes dangerous. The law must operate with meaningful reference to all groups it serves.

Next, the paper canvassed the traditional approach to judicial diversity – the method which, to date, has been implicitly assumed as New Zealand's approach. Given the approach's traditional dominance and partial implementation, it will always be an important part of our diversity story. Increasing judicial diversity of this kind brings considerable benefits; it may improve substantive law-making, public confidence and a perception of equality. In fact, the arguments centred public confidence and equality necessarily rely on the public perception of the judiciary and how the judiciary is seen.[317] However, the limitations of this approach mean that it cannot be the sole archetype. As explored, an emphasis on 'numerical aestheticism' may inhibit development of a truly diverse judiciary by prescribing an intellectual norm shared by individuals of similar backgrounds.[318] It denies the possibility of difference in thought and fails to recognise judging as an inherently human endeavour. As complex human beings, influences on individual judges are not confined to membership of social groups, but instead attributed to their whole being.

These limitations necessitate a reformulation of New Zealand's approach moving forward. 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 the incorporation of a rich range of information and perspectives, the paper holds that there is no reason this rationale cannot be applied to judges who do not display overt diversity.[319] Six potential tacit factors are identified: skills; education; values; socio-economic background and religion. As the added richness of perspectives leads to better decision-making, this approach is of particular use

[317] Cahill-O'Callaghan, above n 76, at 281.
[318] Dellow-Perry, above n 4, at 29.
[319] Edwards, above n 190, at 1667.

to the appellate courts. Because two types of diversity are weaved together under this 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.

To end, the paper explores challenges surrounding the implementation of the nuanced approach in practice. The approach would be subject to serious limitations if unable to be applied in practice, or if its implementation was to be consistently overlooked in favour of merit. It was thus necessary to challenge assumptions surrounding the tension between the two principles. Once broader notions of both principles are adopted, this creates space for diversity to be seen as an inherent element of merit rather than a subordinate consideration. Indeed, the paper suggests that a notion of nuanced diversity will be an essential quality of a New Zealand judge moving forward. It has identified distinct ways in which merit and diversity are reconciled in the specific New Zealand context. For example, a judge's ability to contribute to quality decision-making, understanding of the community, and knowledge of both tikanga and international law will be essential components of a meritorious judiciary which are inherently linked to diverse judges.

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".[320] Moving beyond a numbers game towards a 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 must reflect this. In this sense, the paper has told a tale of judging, of humanity, and of New Zealand diversity. It is hoped the argument expressed in this paper has challenged conceptions and will be used in developing a diverse judiciary suitable for the complexities and differences of New Zealand society moving forward.

[320] Butler, above n 74, at 83.

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