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SELF-GUARDING GUARDIANS? SUBSTANTIVE JUDICIAL ACCOUNTABILITY IN NEW ZEALAND

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Abstract

Although it is not for the reasons typically suggested, there is a substantive accountability deficit evident in Aotearoa's judiciary. While the existence of a judiciary that is not subject to direct democratic accountability is justified by the need for an independent check on the legislature, this justification is underpinned by a working assumption: that current substantive accountability mechanisms enable the judiciary to give effect to the values of the community. This paper argues that this working assumption is not upheld in practice. First, the discourse around judicial law-making is impoverished due to the continued influence of formalism. Consequently, external accountability mechanisms are not working as intended. And secondly, a lack of diversity in the judiciary means that the window of acceptable discourse within the judiciary is not a fair reflection of the values and experiences in wider society. Moves to diversify the judiciary are only likely to succeed if they confront the fiction of formalism.

Key words

Accountability;
The judiciary;
Democracy;
Formalism.

Contents

I Introduction

"The work which I propound", Francis Bacon wrote, "tend[s] to pruning and grafting the law, and not to ploughing up and planting it again".[1]

An age-old debate about the proper function of the judiciary continues to polarise commentators on judicial law-making. Concerns about judicial power are often accompanied with salvos directed against "philosopher-king", "hero" or "activist" judges, who are insulated from popular control, and who come from an elite, unrepresentative background.[2] The same concerns were echoed in the context of ending appeals to the Privy Council,[3] creating a supreme and written constitution,[4] and in the aftermath of cases where judges are perceived to have overstepped their judicial role, like *Ngāti Apa v Attorney General* (*Ngāti Apa*).[5] For Joseph, such concerns boil down to a reductive axiom: "Parliament is elected, judges are not".[6]

Yet despite Joseph's dismissiveness, the rhetorical power of branding judging as undemocratic is difficult to ignore. We expect for those wielding public power to be held accountable, not just internally, but also externally. As Mark Bovens observes, democracy is just a "paper procedure" if those in power cannot be held publicly accountable for their decisions.[7]

But before seeking to examine whether an accountability deficit exists, it is necessary to understand the nature of the judicial role itself. If judges are neither superhuman nor "legal

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[1] Cited in Tom Bingham "The Judge as Lawmaker: An English Perspective" in Tom Bingham (ed) *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000) at 32.

[2] See Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 787; and Bruce Harris "Judicial Activism and New Zealand's Appellate Courts" in Brice Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford, 2007) 273 at 277.

[3] Joseph, above n 2, at 787.

[4] Kerrin Eckersley "Parliament v The Judiciary: The curious case of judicial activism" (LLM Research Paper, Victoria University of Wellington, 2015) at 1.

[5] *Attorney General v Ngāti Apa* [2003] NZLR 643 (CA). See Eckersley, above n 4, at 7.

[6] Joseph, above n 2, at 787.

[7] Mark Bovens "Public Accountability" in Ewan Ferlie, Laurence E Lynn Jr. and Christopher Pollit (eds) *The Oxford Handbook of Public Management* (Oxford University Press, Oxford, 2007) 182 at 182.

pharmacist[s], dispensing the correct rule prescribed for the legal problem presented",[8] then it makes more sense to care about holding them to account. In Part II, I revisit the jurisprudential dichotomy which often dictates discourse around the role of the judiciary – between formalism and realism.[9] I argue that this dichotomy is false, and results from a fundamental, yet enduring misconception about the nature of judging. The misconception is evident in claims that, while Parliament has the democratic mandate to make law, judges should simply "ascertain the relevant facts and apply the applicable rule",[10] or that judges have no "freedom to make moral judgments".[11] I argue that inherently, the judiciary is a law-making body. The argument that the judiciary merely interprets the law, therefore, is no answer to calls that the judiciary should be subject to further accountability.

In Part III, after mapping the different accountability mechanisms the judiciary is subject to, I find that an accountability deficit exists on Bovens' theory of public accountability. The judiciary does not satisfy Bovens' "first and foremost function of public accountability", democratic control.[12] Judicial law-making does not end at the ballot box; citizens can only exert indirect, pseudo-democratic control over the judiciary. A more substantive and systemic theory of democracy, accordingly, is needed to justify the judiciary's place in our constitutional system. Democracy, like accountability, is a "weasel word", which must be given some meaning before it has any analytical utility.[13] Under an approach to democracy which recognises the important of democratic values as well as democratic procedure, I argue the judiciary's place can be theoretically justified. Importantly, underpinning this justification is a working assumption: at the current levels of accountability, the judiciary is nonetheless able to *give effect to community values* in a

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[8] William J Brennan Jr "Reason, Passion, and the 'Progress of the Law'" (1988) 10 Cardozo L Rev 3 at 4.

[9] See generally Brian Z Tamanaha *Beyond the Formalist-Realist Divide: the role of politics in judging* (Princeton University Press, Princeton, 2010).

[10] See for example John Smillie "Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand" (1996) NZ L Rev 254 at 255.

[11] See for example Martin Van Beynen "The Peter Ellis case and Māori customary law" (9 July 2020) Stuff News <www.stuff.co.nz>.

[12] Bovens, above n 7, at 192.

[13] PS Atiyah "Judges and Policy" (Lionel Cohen Lecture, Faculty of Law, Hebrew University of Jerusalem, 26 May 1980).

way that maintains its legitimacy. This working assumption is, in turn, predicated on the efficacy of the substantive judicial accountability mechanisms I outline.

In Part IV, I examine whether the above working assumption is upheld in practice. I outline two main concerns about the practical implementation of accountability, both internal and external to the judiciary. First, in Part IV(A), I argue that the continued appeal of the formalism-realism debate is insidious. The debate continues to shape popular understandings of the role of judges. This directs attention away from the values underpinning judicial decision-making – both in popular discourse, and in judgments themselves. The result, I argue, is a normatively impoverished discourse about judicial law-making in New Zealand, which means that the efficacy of community and academic opinion, as accountability mechanisms, is overstated.

Secondly, in Part IV(B), I argue that the claim that the need for judges to give reasons for their decisions, coupled with community and academic oversight, creates a window of acceptable discourse within the profession,[14] cannot be detached from broader concerns about judicial diversity. The window of acceptable discourse within the judiciary is shaped by its membership. Because judicial law-making is an inherently normative exercise, the judge's own sense of right – conscious and unconscious – cannot be ignored.[15] And because the judge's sense of right is inevitably shaped by their values and experiences in life, diversifying the judiciary strengthens its ability to give effect to community values, thereby improving accountability. If the working assumption which justifies the judiciary's constitutional position is to be upheld, the lack of judicial diversity needs to be addressed. The only way of doing so – while simultaneously addressing the formalist's retort that merit should be the only arbiter of judicial selection – is to recognise the inseparability of diversity and merit.

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[14] See generally EW Thomas "So-Called 'Judicial Activism' and the Ascendancy of Judicial Constraints" 21 NZULR 685.

[15] See Joseph Raz *Practical Reason and Norms* (Oxford University Press, Oxford, 1975) at 135–140; and Benjamin N Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) at 167–168.

II The Nature of Judgment

A Teleology and Accountability

The values or norms we choose to prioritise in the judiciary is a function of a teleological question about the judiciary itself. That is, depending on our conception of the proper role – or *telos* – of the judiciary, our expectations as to accountability and independence shift. As Webster explains when discussing the debate in the United States about judicial selection:[16]

> Although frequently not recogni[s]ed as such, the debate is [a] manifestation of a much more fundamental philosophical and political disagreement regarding *the role of judges* … Should judges be nothing more than interpreters of the law, searching some "corpus juris" for the most appropriate rule, then applying that rule to the particular controversy; or should judges perform the role of lawmakers and, if so, what are the legitimate limits of that role to be? The response … will, to a major extent, dictate the answer to whether judicial independence or judicial accountability is viewed as a relatively more desirable and important goal [and] determine one's position in the debate regarding alternative methods of judicial selection and retention.

If judges have no real discretion, and instead mechanically apply objectively determined rules, then accountability is less of a concern.[17] In such a system, the concern would instead be to ensure the selection of judges who are, as a matter of strict skill and intelligence, most capable of identifying the relevant rules, and applying them in a consistent manner.[18] Considerations as to ideology would be as irrelevant as they are for finding a good plumber, or mathematician. Conversely, if the exercise of judgement is in fact inherently political and indeterminate, based on "the personal or political proclivities of each individual judge", then direct, popular accountability appears crucial.[19]

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[16] Peter D Webster "Selection and Retention of Judges: Is There One "Best" Method?" (1995) 21 Fla St U L Rev 1 at 2 (emphasis added).

[17] At 5.

[18] At 5.

[19] At 6.

In sum, judicial accountability cannot be detached from a normative question of what purpose legal judgement ought to serve. As such, any discussion of judicial accountability must begin with a discussion about the nature of judicial decision-making itself.

B Formalism

The nature of judging is conventionally framed by a dichotomy between formalism and realism.[20] Formalism, also described as legalism, and which hails from the positivist tradition,[21] is said to have dominated common law jurisprudence for the past two centuries.[22] Its basic claim is that judges "engag[e] in pure mechanical deduction"[23] using "the strict analytical and conceptual techniques of formal legal argument" to arrive at an objective answer.[24] Under the conventional logic, judges do not make law, they only interpret it.[25] Law-making, the intuition goes, is the sole prerogative of the democratically accountable Parliament.

Formalism as an approach to, and understanding of, judicial decision-making is often attributed to the influence of 18th century jurist Sir William Blackstone. Blackstone's "declaratory" theory of law posited that judges "discovered" or "declared" the law in their judgments, rather than bringing it into existence.[26] Formalist judges looked to an "autonomous, comprehensive, logically ordered, and determinate" body of law to find a single correct answer to a legal issue.[27] Inconsistencies in the judicially-declared law were attributed to mistakes in interpretation, not ideological difference.[28]

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[20] See generally Tamanaha, above n 9.

[21] Tanya Josev *The Campaign Against the Courts: A History of the Judicial Activism Debate* (The Federation Press, Sydney, 2017) at 92.

[22] Michael Kirby and Edmund Thomas "An Interview with the Hon Michael Kirby AC CMG by the Rt Hon Sir Edmund Thomas on Judicial Activism" (2012) 18 Auckland UL Rev 1 at 6. But see Tamanaha, above n 9, for the view that formalism never really existed.

[23] Tamanaha, above n 9, at 2.

[24] Josev, above n 21, at 92.

[25] Kirby, above n 22, at 5.

[26] M McHugh "The Law-Making Function of the Judicial process – Part 1" (1988) 62 Australian Law Journal 15 at 24–25.

[27] Tamanaha, above n 9, at 1.

[28] William Blackstone *Commentaries on the Laws of England* (1765) (16th ed, Cadell & Butterworth, London, 1825) at 71, as cited in Joseph, above n 2, at 790.

Ronald Dworkin, although not formally considered a formalist, maintained a theory of law that had many of its trappings.[29] Dworkin suggested that judges only ever exercise discretion in the "weak sense" of applying law as adduced in rules and principles; they do not exercise discretion in the "strong sense" of making new law.[30] To illustrate this claim, Dworkin argued that Hercules J, a judge "of superhuman intellectual power and patience" and who accepted Dworkin's theory of law as integrity,[31] could distinguish "the best constructive interpretation of the political structure and legal doctrine of their community".[32] Hercules J could thereby arrive at a single correct solution, navigating a "seamless web" of complete and determinate law.[33] Correspondingly, if a mortal judge failed to reach the same answer as Hercules J, he contended, they did not make law, they simply made a mistake.[34]

A formalist approach obscures the existence of judicial law-making. This may be expressed more normatively: whenever tempted to change the status quo, judges should defer to this "noble lie",[35] in the belief that acknowledging their law-making role would depart from accepted political theory.[36] To do so would cause unnecessary upset to citizens who were "deemed to be reassured by thinking of judges as applicators not creators".[37] Without such obfuscation, Benjamin Cardozo suggested, judges believed that they risked exposing their human fallibility and losing "the grandeur of the conception that lifts them into the realm of pure reasoning".[38]

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[29] EW Thomas, for example, argues that Dworkin's theory, at its extreme "ultimately becomes a sophisticated version of the declaratory theory of law or a refined rendition of natural law imaginings". See EW Thomas The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles (Cambridge University Press, New York, 2005) at 189.

[30] Ronald Dworkin "The Model of Rules" (1967) 35 U Chi L Rev 14 at 32–33.

[31] Ronald Dworkin *Law's Empire* (Fontana Press, London, 1986) at 239.

[32] At 255.

[33] Thomas, above n 29, at 192.

[34] At 192.

[35] Lord Radcliffe *Not in Feather Beds* (Hamish Hamilton, London, 1968) at xvi.

[36] Michael Kirby *Judicial Activism* (Sweet & Maxwell, London, 2004) at 6.

[37] At 6.

[38] Cardozo, above n 15, at 168.

Today, formalism still has its adherents – although they make some important concessions to the arguments of legal realists. One such concession – but which is still grounded in formalism – is the oft-cited distinction between "easy" and "hard" cases.[39] New formalists reject the "right-answer thesis" – that every legal question has an objectively correct answer[40] – and accept that novel circumstances may in fact provide scope for judges to make law.[41] However, formalism remains the solution for cases which do not fit into these exceptions, the so-called easy cases. Rather, the resolution of easy cases is equated with "the mundane application of more-or-less well-established legal rules",[42] leaving a minority of hard cases, where "the legal problem has more than one legal answer".[43] For those of a positivist bent, only the latter-type cases involve discretion being exercised, which is in turn the foundation for judicial law-making.[44]

For example, Professor John Smillie, a prominent advocate for formalism in New Zealand, concedes that although formalism should be prioritised, "even the most committed formalist" realises that "not every dispute can be resolved by mechanical application of a rule".[45] In the case of statutory interpretation, Smillie argues, judges should give effect to the ordinary meaning, unless that would "derogate … from firmly established common law rights or settled expectations based on longstanding legislation".[46] But in the majority of cases, Smillie argues, the rules derived from legislation and judicial precedent are "of universal application and are couched in reasonably clear and specific terms", meaning the judge's job is simply "to ascertain the relevant facts and apply the applicable rule".[47]

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[39] Frank Carrigan "A Blast from the Past: the Resurgence of Legal Formalism" (2003) 27 MULR 163 at 183.

[40] For a proponent of this thesis, see generally Dworkin, above n 31.

[41] Owen Dixon "Concerning Judicial Method" in Woinarski (ed) *Jesting Pilate and Other Papers and Addresses* (Law Book Co, Sydney, 1965) 152 at 158. For a discussion of this concession, see Frank Carrigan "A Blast from the Past: the Resurgence of Legal Formalism" (2003) 27 MULR 163 at 166.

[42] Webster, above n 16, at 6

[43] Aharon Barak The Judge in a Democracy (Princeton University Press, Princeton, 2006) at xiii.

[44] At 306.

[45] Smillie, above n 10, at 255. See also John Smillie "Who Wants Juristocracy?" (2006) 11 Otago LR 183 at 190.

[46] Smillie, above n 45, at 190–191.

[47] Smillie, above n 10, at 255.

Textualism is the formalist's answer to the question of how objective legal rules come to exist.[48] On this view, "legal rules acquire perspicuous and compelling meanings through syntax and semantics".[49] That is, words are seen through the lens of ordinary meaning and the rules of grammar to arrive at an objective meaning, which exists independently from the author's intent.[50] A purposive approach to interpretation is seen as "a naked usurpation of the legislative function under the thin disguise of interpretation".[51]

Anathema to new age formalists are judges of Sir Robin Cooke's ilk, who refer to the "guiding philosophical touchstone" of "fairness grounded in shared social value and expectations".[52] For Smillie, such values and expectations are not necessarily derived from the common law,[53] or aligned with community values and expectations.[54] Rather, they reflect the individual judge's "personal and intuitive … moral convictions".[55] Similarly, Professor James Allan takes aim at Sir Ted Thomas' confidence that judges can ascertain a deeply embedded sense of justice which is "immanent in the community"[56] without being "slave[s] of the public mood".[57] Allan argues that perceptions of justice are subjective, which is why we need a "theory of authority … that gives a legal rule its compelling force,

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[48] See Michael Robertson "The Elegiac and Manichean Jurisprudence of John Smillie" in Shelly Griffiths and Mark Henaghan (eds) *The Search for Certainty: Essays in Honour of John Smillie* (Thomson Reuters, Wellington, 2016) 36 at 37; and Thomas, above n 29, at 57 (noting that formalism requires that the "literal mandate" of the "rule formulation" be preferred). But see Abbe R Gluck "Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up" (2017) 92 Notre Dame L Rev 2053, arguing that textualism is fundamentally incompatible with formalism.

[49] Robertson, above n 48, at 37.

[50] At 37.

[51] *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL) at 191 per Lord Simonds.

[52] Smillie, above n 10, at 259.

[53] At 258.

[54] At 259–260.

[55] At 261.

[56] EW Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 VUWLR Monograph No 5 at 56–57.

[57] At 56.

not the conscience and scruples of some judge who has life tenure".[58] Relying on Jeremy Waldron's writing,[59] Allan argues that "judicial supremacism",[60] reflected in judges who believe themselves "mystically endowed" to discover fairness and justice,[61] cuts against community participation in decision-making, and is therefore anti-democratic.[62]

C Realism

At the beginning of the 21st century, discourse started to shift. The legal realists of the 1920s, tutored by Oliver Wendell Holmes Jr, Roscoe Pound and Benjamin Cardozo, reportedly "devastated" the assumptions that "law was objective, unchanging, extrinsic to the social climate, and … different from and superior to politics".[63] In his extra-judicial writing, Holmes argued that the law primarily emerged and developed from justices' intuition and experience, as informed by prevailing social conditions, rather than via strict logic.[64] The 20th century United States jurists credited as being first to challenge Blackstone's declaratory thesis of law[65] were quickly followed by others in different common law jurisdictions. Soon, the law-making powers of the judiciary were accepted as orthodox; even Albert Venn Dicey described the common law as "judicial legislation".[66] Since these developments, formalism has been by and large decried as outright laughable by the legal academy. The concept is now variously derided as a "fictitious, even childish

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[58] James Allan "The Invisible Hand in Justice Thomas's Philosophy of Law" [1999] NZ Law Review 213 at 220. But see EW Thomas "The Invisible Hand Prompts a Response [1999] NZ Law Review 227.

[59] Jeremy Waldron *Law and Disagreement* (Oxford University Press, New York, 1999) at 156 and 232.

[60] James Allan "Interpreting Statutory Bills of Rights: The Deleterious Effects of 'Do the Right Thing Thinking' in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 285 at 288.

[61] Allan, above n 58, at 215.

[62] Allan, above n 60, at 288.

[63] William M Wiecek *Liberty under Law: The Supreme Court in American Life* (John Hopkins University Press, Baltimore, 1988) at 187.

[64] Josev, above n 21, at 23.

[65] See for example, Kirby, above n 36, at 15.

[66] AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, London, 1959) at 60.

approach",[67] a "grand fiction",[68] which is "imbued with the spirit of legal authoritarianism".[69]

Lord Reid, for example, famously stated:[70]

> There was a time when it was thought almost indecent to suggest that judges make law … Those with a taste for fairy[]tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy[]tales any more.

Increasingly, the realist movement acknowledges that law – and adjudication – is "inescapably political and non-objective".[71] The reality is that judges exercise authority that "propel[s] them into the realm of metaphysics".[72] Judges routinely grapple with issues, the answers to which involve a "broader search for life's meaning and purpose".[73] Taking this angle uncovers a deceptive tendency for the legal profession to transform moral and philosophical questions into legalistic ones.[74] Formal legal rhetoric can give a false impression of neutrality which masks the first-order assumptions which underlie it. Consequently, the "[l]aw's exile of moral, philosophical, and religious insight about the nature of its own meaning-making metaphysics sustains a dangerous lack of self-reflexivity".[75]

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[67] Barak, above n 43, at xiv.

[68] Joseph, above n 2, at 790

[69] Carrigan, above n 41, at 182.

[70] Lord Reid "The Judge as Lawmaker" (1972) 12 JSPTL 23 at 23.

[71] Allan C Hutchinson "Judges and Politics: An Essay from Canada" (2004) 24 LS 275 at 275. See also JAG Griffith *The Politics of the Judiciary* (5th ed, Fontana Press, London, 1997).

[72] John Burrows "Origin stories and the law: Treaty metaphysics in Canada and New Zealand" in Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, New York, 2019) 41 at 45.

[73] At 45.

[74] At 45.

[75] At 49.

Formalism's influence has also diminished in New Zealand jurisprudence. For instance, in 1956, BJ Cameron wrote that:[76]

> … the New Zealand bench and bar incline to a positivist Austinian concept of the function of the Courts … some in the legal profession would probably still regard Cardozo's 'The Nature of the Judicial Process' as akin to either indecent exposure or open heresy. New Zealand has never produced a Mansfield, a Wright, or a Denning; and, while the prevailing climate continues, is not likely to.

Conversely, at the beginning of the 21st century, Lord Cooke happily recorded:[77]

> … a refreshing and healthy move away by New Zealand courts from the more formalistic constraints once orthodox. The judges are accepting that they have a responsibility to do practical justice …

Today, scholars treat the courts' law-making function as largely considered self-evident.[78] For Lord Cooke, "[e]very judicial decision, to some extent makes law".[79] For Lord Steyn, the "root" of the development of the common law is "the struggle by fallible judges with imperfect insights for government under law and not under men and women".[80] Judges do not reason exclusively deductively, and they understand that there is significant indeterminacy inherent in the doctrine of precedent.[81]

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[76] BJ Cameron "Law Reform in New Zealand" [1956] NZLJ 72 at 73.

[77] Lord Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 284.

[78] Although some courts continue to support the declaratory theory, despite acknowledging that judges play a role in the development of the common law. See for example *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 18 (HL), as cited in Joseph, above n 2, at 790.

[79] Robin Cooke "Dynamics of the Common law" [1990] NZLJ 261 at 262.

[80] Lord Steyn "Democracy Through Law" (Robin Cooke Lecture, Wellington, 18 September 2002).

[81] Tamanaha, above n 9, at 28–32.

Formalism, in turn, is seen as a morally empty concept.[82] What makes something formalist is in the eye of the beholder.[83] Legal historians offer a range of explanations for the formalism of the past, whether it was for judges to avoid moral responsibility for deciding controversial questions,[84] to conceal political motivations,[85] or because they had some kind of formalist ideology.[86] For these reasons, Brian Tamanaha argues that the term should be dispensed with, saving much confusion.[87] Once this truth is realised, he argues, realism too, crumbles "beneath the label there was *nothing* distinctive – nothing unique or unifying – about the legal realists".[88] All judgment is an exercise in realism if formalism is just a "fairytale".[89] The charges of judicial activism and formalism both become empty epithets.[90]

Scholars also now regard indeterminacy and "leeways of choice" as corollaries of the evolutionary nature of judge-made law,[91] and the fact that words are, by themselves, rather "imprecise conveyors of meaning".[92] Consequently, although rules may be relatively settled, this can only be in the contingent sense that they are unlikely to be overturned by the courts.[93] Relatedly, Stanley Fish argues that textualism, like formalism, is an inherently empty and thus fundamentally incoherent position.[94] Legal meaning does not exist

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[82] At 161.

[83] At 57.

[84] See for example Robert M Cover *Justice Accused: Antislavery and the Judicial Progress* (Yale University Press, New Haven and London, 1986), arguing that judges used formalism to morally distance themselves from the uncomfortable reality of judicially condoning slavery.

[85] Tamanaha, above n 9, at 58–59.

[86] At 58.

[87] At 8.

[88] At 68.

[89] Reid, above n 70, at 23.

[90] Tamanaha, above n 9, at 161.

[91] Thomas, above n 29, at 31.

[92] Joseph, above n 2, at 792.

[93] Thomas, above n 29, at 31.

[94] See generally Stanley Fish "There Is No Textualist Position" (2005) 42 San Diego L Rev 629; and Stanley Fish "Intention Is All There Is" (2008) 29 Cardozo L Rev 1109.

independently from authorial intent. And while shared legal meanings exist, which appear clear and compelling, they exist intersubjectively, rather than objectively. As Fish writes:[95]

> … when you come to the end of the anti-formalist road, what you will find waiting for you is formalism; that is, you will find meanings that are perspicuous for you, given your membership in what I have called an interpretive community, and so long as you inhabit that community (and if not that one, then in some other), those meanings will be immediately conveyed by public structures of language and image to which you and your peers can confidently point.

On Fish's analysis, when there is agreement within a legal "interpretative community" about the meaning of a rule, that is "the contingent product of the present shape of their shared background", as established by "rhetorical successes".[96] Legal meaning, in turn, becomes "ultimately the interpretations which judges, as individuals situated in time and place, bring to the law".[97]

For this reason, the claim that easy and hard cases are neatly separable – and whereas the formal rule of law applies in the first case, substantive justice determines the second – begins to falter. Indeed, there is "no epistemological break between the legal reasoning utilised" between the two.[98] There is simply no "autonomous juristic logic untouched by the broader social structure and its values".[99] Take for example, the assumption underlying the doctrine of precedent that "likes should be treated alike".[100] Such an assumption, requires moral content to be meaningful. As Peter Westen famously argued, equality – without more – is "empty", because the idea of treating likes alike necessitates making a moral judgment of likeness.[101] Because "categories of morally alike objects do not exist in

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[95] Stanley Fish *The Trouble with Principle* (Harvard University Press, Cambridge, 1999) at 294–295.

[96] Robertson, above n 48, at 58.

[97] Philip A Joseph "Public Law" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 196 at 201.

[98] Carrigan, above n 41, at 183.

[99] At 183.

[100] See for example Thomas, above n 29, at 207.

[101] See Peter Westen "The Empty Idea of Equality" (1982) 95 Harv L Rev 537.

nature; moral alikeness is established only when people define categories".[102] Considering whether the case before the court is relevantly alike to a precedent is therefore, properly understood, a moral question.

Similarly, Smillie's contention that rules are the province of apolitical and detached reasoning,[103] whereas principles like "fairness" are governed by the "personal and intuitive",[104] runs into what Lord Goff describes as the "dogmatic fallacy of being unable to see the principles for the rules".[105] If law is inherently indeterminate, then even the most simple of rules is contingent and morally-laden. To apply a rule uncritically, then, is simply to endorse the values or principles that underlie it, deferring to judicial discretion exercised in the past.[106] As even Dworkin acknowledged, political reasons inevitably underlie the claim "that interpretations must match the intentions of past judges".[107] For this reason, Michael Robertson describes formalist jurisprudence as "elegiac": it bemoans "misguided modern judges" deviating from the principles underpinning the 19th century civil law, as "constructed by wise judges of the past".[108]

Certainly, the truth of realism accords with the subjective experiences of many judges.[109] By the time a case reaches court, it often carries a "formidable baggage" of conflicting authorities and doctrines.[110] This is especially noteworthy at the appellate level, where the number of narrowly split decisions gives the lie to the idea that a case's outcome might be

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[102] At 545.

[103] Smillie, above n 10, at 255.

[104] Smillie, above n 10, at 261.

[105] Sian Elias "The Next Revisit: Judicial Independence 7 Years On" (2004) 10 Canta LR 217 at 222, quoting Robert Goff "The Search for Principle" in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, London, 2000) 313 at 318–320.

[106] Carrigan, above n 41, at 183. See also Thomas, above n 29, at 61.

[107] Dworkin, above n 31, at 259.

[108] Robertson, above n 48, at 43–44.

[109] Bingham, above n 1, at 28; Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Canta LR 171 at 171.

[110] Thomas, above n 29, at 32.

based on anything other than the happenstance of the bench's composition.[111] For Thomas and his colleagues sitting on the Court of Appeal, for example:[112]

> The question was never whether or not we should abide by the law but, rather, what was the law or, more particularly, which of two or more competing claims to be the law should be preferred.

Moreover, formalists – to the extent they still exist – appreciate the reality that judges have become far more willing to take ownership of their law-making role. The claim of the new formalist is no longer descriptive; it is normative. The law-making power of judges should be restricted – if it must exist at all – to the narrowest possible confines. Indeed, "unaccountability" has become the rallying cry for formalists, seeking to reign in wayward judicial realists like Cooke, Sian Elias or Thomas J. Joseph describes, for instance, a "clamour for accountability in the judicial role", which obscures the vulnerability of judicial independence in the face of "corrosive public attack".[113]

To summarise, judges have considerable discretion to shape development of the law, whether through statutory interpretation or the doctrine of precedent. Whatever one's precise view of the judicial role, if legal rule interpretation is intersubjective, there will be occasions where interpretative consensus runs out, or changes, and discretion must be exercised.[114] No human judges can hope to live up to the Dworkinian ideal of Hercules J, the superhuman judge blessed with omniscience of the law's "seamless web" and the ability to come to the single right answer, even in the hardest of cases.[115] Nor, then, can judges hope to detach themselves from the conscious or unconscious influence of their own

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[111] Carrigan, above n 41, at 183.

[112] Thomas, above n 29, at 58.

[113] Phillip A Joseph "Appointment, discipline and removal of judges in New Zealand" in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, New York, 2011) 66 at 95.

[114] Erika Rackley *Women, Judging and the Judiciary: From difference to diversity* (Routledge, Oxford, 2013) at 131.

[115] Dworkin, above n 31, at 239-240.

values and lived experiences. The "great tides and currents which engulf" normal people "do not turn aside in their course and pass the judges by".[116]

III What Accountability Exists?

If formalism is simply to be dismissed alongside Blackstone's declaratory theory – and the full extent of judicial law-making and discretion is recognised – there is a legitimate argument that courts should not be "a law unto themselves".[117] Claims that judges are "high priests" who decipher the "mystical aspects of the law",[118] and are ostensibly free to do so according to their personal moral convictions,[119] undercut the judiciary's claim to legitimacy. Indeed, the above-mentioned clamour for accountability appears vindicated if, as Smillie suggests, justice is done according to each judge's "personal and intuitive" sense of fairness.[120] Accordingly, it is necessary to inquire into the extent to which the judiciary is already accountable.

A Framing Accountability

Mark Bovens observes that, despite being "the hallmark of modern democratic governance" – indeed, a precondition for democratic legitimacy – public accountability is itself a rather "elusive" concept.[121] Accountability is "one of those golden concepts" loved by all, but which "can mean many different things to different people".[122] Certainly, it is in "in" word used to express concerns about growing judicial power.[123] But if

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[116] Cardozo, above n 15, at 168.

[117] Robin Cooke "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 CLB 1326 at 1331.

[118] Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 11 at 14.

[119] At 20.

[120] Smillie, above n 10, at 261.

[121] Bovens, above n 7, at 182.

[122] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 448.

[123] Cooke, above n 117, at 1327.

accountability is a mere "buzzword"[124], an "essentially contested and contestable concept" which is interchangeable with "good governance",[125] then any criticism of unaccountable, hero judges must be dismissed as empty rhetoric. How is one to take seriously the claim that the unaccountability of judges is problematic if accountability is no more than "a dustbin filled with good intentions"?[126] If it is to inform any meaningful discourse, accountability must be analytical, not just evaluative.[127] For this reason, Bovens' theory of public accountability is a helpful starting point for a discussion of judicial accountability.

At its simplest, Bovens writes, accountability is a "social relationship" where someone perceives an "obligation to explain and to justify" their conduct to an "accountability forum", some "significant other", whether that be a specific person, agency, or the general public.[128] *Public* accountability, then, involves account-giving in public.[129] For Bovens, public accountability occurs in three stages. First, the account-giver must act on a perceived obligation to explain and justify their conduct to the forum.[130] Secondly, the forum may respond to the account-giver by interrogating the adequacy of the explanation and justification.[131] Thirdly, the forum may "pass judg[e]ment on the conduct of the actor", whether by imposing sanctions or through public denunciation.[132]

Bovens also maintains that public accountability has three functions. The "first and foremost" is democratic control.[133] On this view, democracy constitutes a series of principal-agent relationships.[134] Citizens vest sovereignty in their elected representatives,

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[124] Mark Bovens, Thomas Schillemans and Robert E Goodin "Public Accountability" in Mark Bovens, Thomas Schillemans and Robert E Goodin (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2018) 1 at 1.
[125] Bovens, above n 122, at 449–450.
[126] At 449.
[127] Bovens, above n 122, at 450.
[128] At 184.
[129] At 183.
[130] At 184–184.
[131] At 185.
[132] At 185.
[133] At 192.
[134] Bovens, above n 122, at 463.

which, in turn, is partly transferred to the other branches of government.[135] Citizens sit at the end of the chain of accountability, waiting to "vot[e] the rascals out" based on the information provided through accountability processes.[136] The second function is integrity. A public relationship of account giving provides oversight which deters abuses of power, facilitating behaviour that befits good public governance.[137] The third function is one of learning. On this view, accountability can prevent as well as control.[138] The practice of account-giving means norms of conduct are "(re)produced, internali[s]ed, and, where necessary, adjusted".[139]

B Accountability, Independence or … Both?

Before unpacking the extent to which judicial accountability takes place in New Zealand, it is necessary to unpack the uneasy relationship between judicial independence and accountability. Both are normatively desirable and powerfully evocative concepts, yet there is a "perpetual tension" between them, "leading to frequent controversy and occasionally even constitutional crises".[140] This section argues that concepts are not, however, mutually exclusive. Some forms of accountability can be facilitated without compromising independence.

1 Judicial independence

There is no shortage of literature on the importance of judicial independence.[141] Judicial independence is seen as a prerequisite for Western liberal democracy itself. For Lord Steyn, "the judiciary can effectively fulfil its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently".[142] Fundamentally, independence is

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[135] At 463.

[136] Bovens, above n 7, at 193.

[137] At 193.

[138] At 193.

[139] Bovens, above n 7, at 193.

[140] Mads Andenas and Duncan Fairgrieve "Judicial Independence and Accountability: National Traditions and International Standards" in Guy Canivet, Mads Andena and Duncan Fairgrieve (eds) *Independence, Accountability, and the Judiciary* (British Institute of International and Comparative Law, London, 2006) 1 at 1.

[141] See Barak, above n 43, at 76.

[142] Lord Steyn "The Case for a Supreme Court" (2002) 118 LQR 382 at 388.

necessary to secure the rule of law, and thereby uphold the judiciary's legitimacy. As Helen Winkelmann writes:[143]

> A judiciary which serves only the interests of the government, or of a subsection of society, will soon lose its legitimacy as it will not be fulfilling its fundamental task of ensuring that all are equal before the law.

Independence is "a conduit for achieving fair and just decisions (or decisions perceived as fair and just) and is a necessary condition of impartiality".[144] Such is the importance of judicial independence that it is largely synonymous with the legal separation of powers in New Zealand.[145] Judicial independence is secured by a range of mechanisms in New Zealand's unwritten constitution, such as security of tenure and salary.[146] These formal mechanisms are supplemented by a range of constitutional conventions. By one convention, the Attorney-General apolitically when recommending judicial appointments to the Governor-General.[147] When the Attorney-General makes such recommendations, they act in their role as the First Law Officer of the Crown, rather than as a Cabinet minister.[148] The strength of this convention is highlighted in that "New Zealand is happily free of accusations that judicial appointments are made for personal or political reward".[149]

Another convention requires that public servants and ministers avoid criticising court decisions or judges.[150] If they are likely to be publicised, ministers should not express views that could reflect "adversely on the impartiality, personal views, or ability of any judge".[151] Similarly, ministers may not make comments which could be interpreted as

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[143] Helen Winkelmann, Chief Justice of New Zealand "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (The Dame Silvia Cartwright Address, 17 October 2019).
[144] Joseph, above n 2, at 798.
[145] Phillip A Joseph "Separation of Powers in New Zealand (2018) 5 JICL 485 at 487.
[146] At 488.
[147] Joseph, above n 2, at 822.
[148] EW Thomas "The Independence of the office of Attorney-General" [2009] NZLJ 213 at 213
[149] Joseph, above n 145, at 488–489. But see Cooke, above n 117, at 1331.
[150] Joseph, above n 145, at 492.
[151] Cabinet Office *Cabinet Manual 2017* at [4.13].

seeking to influence future court decisions.[152] Joseph notes that while this convention is not always followed, "[o]occasional irreverent outbursts are the exception, not the rule".[153] Joseph also points to an unwritten judicial code of conduct complementing this deference, requiring that judges themselves refrain from engaging publicly with politically contentious issues.[154]

2 Balancing independence and accountability

For Joseph, reconciling the tension between accountability and independence poses the single "greatest challenge" for modern-day jurists.[155] It is not the task of this paper, accordingly, to define exactly what mechanisms of accountability would create the ideal balance between independence and accountability. However, at least implicit in my argument below is that an absolute trade-off between accountability and independence is an inaccurate, and normatively impoverished understanding of the relationship between the two concepts. As I argue below, external accountability mechanisms are necessary to legitimise the judiciary's law-making power.

As noted, Lord Cooke posited a simple choice between accountability and independence. He faced a paradox: while public confidence requires an independent and accountable judiciary, holding the judiciary accountable to an external forum may threaten its independence and ability to deliver impartial decisions.[156] Indeed, for some, the very concept of an independent and an externally accountable judiciary is oxymoronic.[157]

However, impendence and accountability are not mutually exclusive. Cooke's claim that judicial accountability must be mainly a matter of "self-policing", and that otherwise the

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[152] At [4.14].

[153] Joseph, above n 2, at 821.

[154] Joseph, above n 2, at 493. But see Grant Hammond "Judges and free speech in New Zealand" in in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, New York, 2011) 195.

[155] Joseph, above n 2, at 827.

[156] Jane Keane "Independent Yet Accountable? The Judicial Conduct Commissioner and Judicial Conduct Panel" (LLB(Hons) Dissertation, Victoria University of Wellington, 2004) at 1.

[157] Palmer, above n 118, at 52.

impartial administration of justice required by the rule of law would be compromised,[158] is overbroad. First, the suggestion runs counter to experience. The increased involvement of Aotearoa's judges in a range of non-judicial policy work has not imperilled their independence.[159] Outside of their traditional role, judges are now routinely involved in a range of political activity, from sitting as members of both judicial and external committees,[160] chairing high policy commissions of inquiry,[161] to appearing before parliamentary select committees.[162] Indeed, for Geoffrey Palmer, such activities afford judges even more policy influence than their adjudicative role.[163] And yet for Palmer, these activities – including direct engagement with the executive on a wide range of policy issues – have not seemingly impacted the judiciary's ability to deliver independent legal judgement. Rather, they simply demonstrate the need to "make the best use possible of [Aotearoa's] restricted talent base".[164] For this reason, it is difficult to see why mandating further such engagement, such as requiring judges to account to a select committee for their judicial philosophies, would necessarily undermine independence.[165]

Equally, when it comes to proposals to increase judicial accountability by increasing judicial diversity,[166] it is worth recognising that the status quo is not of complete independence. Although Aotearoa might be free from accusations of politically motivated

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[158] Cooke, above n 117, at 1331.

[159] Geoffrey Palmer "Judges and the non-judicial function in New Zealand" in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, New York, 2011) 452 at 473.

[160] At 457–460.

[161] See for example O Woodhouse, HL Bockett and GA Parsons *Report of the Royal Commission of Inquiry: Compensation for Personal Injury in New Zealand* (Government Printer, December 1967); and John Hamilton Wallace and others *Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, December 1986).

[162] Palmer, above n 159, at 470.

[163] At 473.

[164] At 473.

[165] For a discussion of this suggestion see Vernon Bogdanor, Professor of Law at Gresham College "Parliament and the Judiciary: The Problem of Accountability" (Third Sunningdale Accountability Lecture, 9 February 2006). See also KD Ewing "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary" (2000) 38 Alta L Rev 708.

[166] See for example George Morrison "Judicial Appointments in New Zealand: An Incremental Approach To Reform" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017).

judicial appointments,[167] as Cooke himself acknowledged, "appointments by the executive are inevitably political to a greater or less degree".[168] No positive law exists to prevent an Attorney-General from appointing judges according to their political preference,[169] a concern which becomes especially insidious when the Attorney-General must choose between candidates of "roughly equal standing".[170] Moves to diversify the judiciary such as through legally mandating an independent judicial appointments commission,[171] therefore, do not necessarily compromise independence. Instead, such reform could arguably enhance the judiciary's independence and accountability, fettering the Attorney-General's discretion and providing statutory criteria to facilitate diversity.[172]

C Mapping Accountability in New Zealand: Procedural and Substantive

Overwhelmingly, academic concerns about judicial accountability, at least in New Zealand, have focussed on matters of judicial procedure.[173] Jane Keane writes, for example, that substantive judicial accountability – that is, accountability for the decisions that judges come to (and the law that they thereby make) – is largely uncontroversial. For Keane, such accountability is assured through public hearings, the practice of giving reasons for decisions, public scrutiny, and the supervision of appellate courts.[174] On the

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[167] Joseph, above n 145, at 488–489.

[168] Cooke, above n 117, at 1331.

[169] Bruce Harris *New Zealand Constitution: An Analysis In Terms of Principles* (Thomson Reuters, Wellington, 2018) at 244.

[170] Cooke, above n 117, at 1331.

[171] See for example Morrison, above n 166; BV Harris "A Judicial Commission for New Zealand: A Good Idea that Must Not Be Allowed to Go Away" [2014] NZ L Rev 383; and Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 21 and 63.

[172] Morrison, above n 166, at 30–31.

[173] See for example Jessica Braithwaite "Do As I Say, Not As I Do: Judicial Misconduct, Judicial Accountability and the Role of Direct Democracy in a Very Small Place" (LLB (Hons) Dissertation, Victoria University of Wellington, 2011); BV Harris "The Resignation of Wilson J: A Consequent Critique of the Operation of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004" [2011] NZ L Rev 625; BV Harris "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law Be Tidier" [2008] NZ L Rev 483; Tim Dare "Discipline and modernize: regulating New Zealand judges" in Richard Devlin and Adam Dodek (eds) *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar Publishing, Cheltenham, 2016); D Webb "Judicial Conduct in a Very Small Place" (2003) 6 Legal Ethics 106; and Keane, above n 156.

[174] Keane, above n 156, at 7–8.

other hand, "the extent to which judges should be accountable for their conduct is more contentious".[175] Commentators point to, for example, controversial instances of judicial misconduct, such as the cases of Wilson and Beattie JJ, to critique both the theory and implementation of procedural accountability.[176]

There are both internal and external mechanisms for ensuring *substantive* – as opposed to procedural – judicial accountability. The number and adequacy of such mechanisms, Thomas argues, reveals a skewed discourse around judicial law-making in New Zealand, where people "could be forgiven for thinking that judges operate as free-ranging, idiosyncratic spooks imposing their unfettered will on hapless litigants and an equally hapless community".[177] Judges are in theory subject to a range of substantive accountability mechanisms which constrain, and thereby legitimise their law-making power. The mechanisms have the combined effect of creating a window of acceptable discourse within which judicial decisions must fall, the borders of which are shaped by community input.

1 Internal accountability

Internal accountability mechanisms take place solely within the confines of the judiciary itself. Judges are first constrained by the existence of an appeal process. Lower court judges wish to avoid having their decisions reversed by higher courts in a way which reflects on their capacity to judge.[178] Even if a judge is not overly concerned about having their decision reversed in an individual case, if their view represents a "personal aberration", it is unlikely to be shared by an appeal court given the constraining effects of majority decision-making in higher courts.[179]

At the appellate level, the presence of other judges on a panel wards against idiosyncratic decision-making. Judges can correct their panel colleagues if they venture views which are

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[175] Keane, above n 156, at 8.

[176] See for example, Braithwaite, above n 173.

[177] Thomas, above n 14, at 685.

[178] At 704.

[179] Thomas, above n 29, at 243.

not shared by the majority. Judicial conferences and the common practice of circulating draft judgments prompt judges to engage with the ideas of their peers, and provides further opportunity to reign in wayward colleagues.[180]

The constraining effects of the appeal process are buttressed by the need for judges to give reasons for their decisions – a requirement which is arguably "inimical to arbitrary decision-making".[181] Reasons need to be framed so to appeal to others, which weeds out idiosyncrasies, ensuring that reasons fall within a zone of reasonableness.[182] The giving of reasons curbs "the exercise of personal power according to preference" by requiring judgments to be justified by valid and recognised legal rules or principles.[183]

Another internal mechanism of accountability is the process of legal development itself. Legal development is "path dependent", characterised by incremental, "punctuated evolution", which acts as a reference point for further change.[184] Judges are conditioned to frame their law-making against this backdrop of incremental evolution, meaning major changes to rules or principles are rare.[185] Although judges may revaluate precedent to determine whether it still meets modern needs, as beings situated in time and place, they retain the "imprint" of a "process that is indubitably larger than them".[186] Indeed, to be successful, judges need to integrate their opinion into a legal context that is acceptable to other members of the profession.[187] Even if the opinion itself is novel or radical, it must be framed against a common legal backdrop to be received as credible.[188]

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[180] Thomas, above n 14, at 705.
[181] At 705.
[182] At 705. See also Richard A Posner "The Role of the Judge in the Twenty-First Century" (2006) 86 BU L Rev 1049 at 1053.
[183] Elias, above n 105, at 227.
[184] Thomas, above n 14, at 705.
[185] Thomas, above n 29, at 244.
[186] At 245. See also Barak, above n 43, at 105.
[187] Thomas, above n 29, at 247.
[188] At 247.

Relatedly, judges exhibit a sense of "institutional propriety".[189] Judges are conditioned to commit to the judiciary as an institution, rather than to their subjective values. Accordingly, judges largely strive to adhere to institutional expectations to "coordinate or integrate" their legal reasoning with others who are similarly dedicated to the legal process and the judicial oath.[190] This effect is supported by a lifetime of legal education, which reportedly conditions judges not to step out of bounds of legitimate decision-making.[191]

The above internal accountability mechanisms have the combined effect of creating a window of acceptable discourse within the judiciary. Judgments must fall within this window to be acceptable to the profession as a whole, otherwise they risk being distinguished by lower courts or overturned on appeal.[192] The constraints are mutually reinforcing, ensuring that judgments largely stay within the parameters of "legitimate judicial differences".[193] They correspond with Richard Posner's "zone of reasonableness", within which "a decision either way can be defended persuasively, or at least plausibly".[194] Within this zone, particular decisions "cannot be label[l]ed 'right' or 'wrong'; truth just is not in the picture".[195]

The constraining effect of internal accountability mechanisms is also evident in practice. Philip Joseph, in his assessment of public law cases before the Supreme Court between 2004 and 2013, found no tendency toward conservative or liberal decision-making. Although "[d]istinctive preferences might attach to individual members of the Court", they do not attach to the Court itself.[196]

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[189] Thomas, above n 14, at 706.
[190] Thomas, above n 29, at 247.
[191] Thomas, above n 14, at 705.
[192] Thomas, above n 29, at 248.
[193] Thomas, above n 14, at 710.
[194] Posner, above n 182, at 1053.
[195] At 1053.
[196] Joseph, above n 97, at 226.

2 External accountability

No matter how small the window of acceptable discourse, however, an accountability link between the judiciary and wider community is needed to legitimise the judiciary's law-making ability. If judges are not accountable to the external world, the window is unlikely to reflect the interests and values of the community at large. A solely internally accountable judiciary is likely to contribute to the sense that judges are a homogenous, unelected group of elites who have free reign to subvert the intentions of a democratically elected legislature.[197] Public confidence – the foundation of the courts' legitimacy – is best facilitated if the courts are, in both perception and reality, accountable to the community.[198] Alone, self-policing conflicts with Bovens' requirement of an accountability forum, where public accountability is defined by its "openness".[199] "By definition, 'self-guarding guardians' belong in an oligarchy not in a democracy in which authority is derived directly (and exclusively) from the body politic".[200]

Theoretically, judges in New Zealand are externally accountable. First, Parliament enjoys the right to override judge-made law, its final say reflecting the fact democracy gives it "a legitimacy which judges cannot claim".[201] Where Parliament disagrees with a decision, it may be prompted to intervene and reverse its effect. For example, s 8(3)(b) of the Defamation Act 1992, which provides that the defence of truth shall succeed if "the publication taken as a whole was in substance true", effectively overturned the previous "pick and choose" rule followed in *Templeton v Jones*.[202] Similarly, Parliament overrode the decision in *Daniels v Thompson*,[203] legislating for the availability of exemplary

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[197] Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 586.

[198] Bruce Harris "The Law-making of the Judiciary" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 265 at 277.

[199] Bovens, above n 7, at 183.

[200] Alan Paterson and Chris Paterson *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (CentreForum, 2012) at 23.

[201] David Baragwanath, Judge of the Court of Appeal of New Zealand "Magna Carta and the New Zealand Constitution" (speech to the English Speaking Union, Wellington, 29 June 2008).

[202] *Templeton v Jones* [1984] 1 NZLR 448 (CA). For further discussion of this, see Emily Buist-Catherwood "*Simunovich* and the Defence of Truth" (2011) 42 VUWLR 485 at 489–490.

[203] *Daniels v Thompson* [1998] NZLR 22 (CA).

damages for personal injury even where criminal prosecution results in acquittal, or is yet to take place.[204] For some, such examples demonstrate the ability for Parliament "to provide a quick and decisive democratic check on judicial creativity".[205]

Further, the need to provide reasons for decisions coupled with hearing cases in public enables community engagement with judicial decisions. As Helen Winkelmann suggests:[206]

> The requirements that judges work in public and that they provide reasons for their decisions provides the best means of accountability. Their decisions can be, and are, the subject of public comment and criticism.

Decisions are inevitably criticised by the community, whether by academics, practitioners or in the media. As Cardozo wrote, if a decision conflicts with a community's set of values, it is unlikely to stand for long.[207] The same goes for the New Zealand context, writes Sir Ivor Richardson:[208]

> Lawyers who want to change the world should go into politics. The healthy reality is that the sands of time quickly wash over the great majority of appellate judgments – and that is how it should be.

D Applying Bovens' Theory of Public Accountability

In theory, although the substantive judicial accountability mechanisms identified above appear to satisfy both the integrity and learning functions of public accountability, they do not satisfy the democratic control function. However, this deficit in terms of Bovens' theory is justified by the need to ensure a balance between independence and accountability which enables the judiciary to check democratic excesses.

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[204] See Accident Insurance Act 1998, s 396(2), now Accident Compensation Act 2001, s 319(2).

[205] Harris, above n 2, at 309.

[206] David Fisher "Judges respond to critics" *The New Zealand Herald* (online ed, Auckland, 27 October 2012).

[207] Cardozo, above n 15, at 178.

[208] Ivor Richardson "Closing Remarks" (2004) 2 NZJPL 115 at 119.

In terms of integrity, the appeal process necessarily safeguards against abuses of power by providing a review mechanism against individual lower court decisions. Moreover, by creating a window of acceptable discourse, the internal mechanisms as a whole create the deterrence effect Bovens contemplates as necessary to correct abuses of power.[209] Where judges step outside the window such as by arbitrarily creating a new rule or principle to justify their decision, not only do they risk their decision being appealed or distinguished, Thomas writes, they also "end up looking like an idiot".[210] Because judges are conditioned to care about their professional reputations, they are incentivised to stick within the window to avoid others calling into question their ability to judge.[211]

Similarly, the accountability mechanisms foster learning, Bovens' third function of public accountability.[212] First, the appeal process sets up an accountability relationship whereby lower courts are held accountable to appeal courts. Normally implicit in a decision being overturned on appeal is that the overturned judgment fell short of an expected procedural or normative standard. This may also be made explicit in the language of the appellate judgment.[213] Similarly, criticism by the community – whether lawyers, academics, or members of the public – "can have a chastening effect and undoubtedly sets broad boundaries which no judge will wilfully cross".[214] In this way, both internal and external accountability mechanisms contribute to norms of conduct being "(re)produced, internali[s]ed, and, where necessary, adjusted".[215]

Democratic control is notably absent from the substantive judicial accountability mechanisms. The constraining impact of community engagement with the judiciary does

[209] Bovens, above n 122, at 466.
[210] Thomas, above n 14, at 707–708.
[211] Thomas, above n 14, at 704.
[212] Bovens, above n 122, at 463.
[213] Thomas, above n 14, at 704.
[214] At 706.
[215] Bovens, above n 7, at 193.

not satisfy the democratic control function because the judiciary, unlike the executive, is not connected to the community through a series of principal-agent relationships.[216]

The only democratic chain of accountability that enables citizens to control the behaviour of judges is the possibility of Parliament overriding judge-made law. However, the efficacy of such control is questionable. The decisions of lower courts can have a "cumulative accretive impact".[217] As Sir Geoffrey Palmer observes, this "convenient theory" overlooks the difficulty of raising the political capital needed "to consult the political branches on a judicial outcome … [i]nertial forces are a great factor in selecting the public policy issues which gain attention".[218]

Granted, Parliament expressly contemplates judicial law-making in some of its legislation. For example, Parliament left it to the courts to deduce the "principles of the Treaty of Waitangi" by leaving them undefined in legislation.[219] Equally, enacting the Bill of Rights Act 1990 "deliberately leaves a comparatively open-ended creative law-making role to the courts".[220] However, if every common law decision represents, to some extent, judicial law-making,[221] then it is plainly unrealistic to expect Parliament to comprehensively police the judiciary in all instances of its law-making. The constitutional role of courts reflects the view that the "legislature cannot be relied upon to facilitate the development of all law, particularly in areas such as human rights".[222] Are we to simply accept that the theoretical ability for Parliament to override the common law constitutes accountability that is commensurate with the law-making power of judges?

On Bovens' theory of public accountability, an accountability deficit is evident. The judicial law-making function is – at least partially – insulated from democratic control, a

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[216] Bovens, above n 122, at 463.
[217] Tamanaha, above n 9, at 191.
[218] Palmer, above n 118, at 54.
[219] Cooke, above n 117, at 1328.
[220] Harris, above n 2, at 276.
[221] Cooke, above n 79, at 262.
[222] Harris, above n 2, at 276.

key function of public accountability.[223] However, such a conclusion need not inspire rallies to inject direct democracy into the system. Such a straightforward application of Bovens' theory, this paper contends, would miss important nuance. Direct democratic accountability is just one virtue of public administration which must, in the context of the judiciary, be balanced against others.

E Justifying the Absence of Democratic Control

Although the judiciary largely fails to meet Bovens' democratic function of public accountability, its existence is not undemocratic by all accounts. Bovens' democratic control theory is necessarily individualised and formal, focusing as it does on the "democratic chain of delegation".[224] However, the law-making power of an unelected judiciary can be justified by reference to a more systemic, substantive conception of democracy. As Supreme Court of Israel President Aharon Barak (as he was then) put it in his book *The Judge in a Democracy*, "the question is not whether every organ of the state is accountable as the legislature is … [but] 'whether the system as a whole fits our concept of democracy.'"[225] For President Barak, democracy has its own "internal morality" which requires a delicate balance between two "levels": first, "the most profound values of society in its progress through history"; and secondly, "passing vogues".[226] Their independence from the electorate is exactly what makes the judiciary best-placed to choose between these two levels.[227] At minimum, the judiciary needs to be insulated from direct democratic accountability to check the very excesses of majority rule that direct democratic accountability facilitates.

Fundamentally, the substantive democracy justification for the law-making power of unelected judges is comparative. It compares unfettered majority rule with majority rule fettered by respect for democratic values and minority rights, as enforced by an unelected judiciary. In line with this justification, Waldron argues that critics of judicial law-making

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[223] Bovens, above n 7, at 192.

[224] Bovens, above n 122, at 465.

[225] Barak, above n 43, at 95.

[226] At 95.

[227] At 96.

in New Zealand must ask: "compared to what?"[228] For Waldron, justifying judicial law-making is inseparable from the counterfactual of "a situation in which statutes would be left unchallenged after being enacted by the New Zealand Parliament".[229] On this view, the unaccountability of judges to an electorate is their strength relative to Parliament. Public hearings and lucid reasoning occur in marked contrast to a messy legislative process, where "whips exert more influence than the arguments, and where division bells summon to vote those MPs (generally the majority) who have not even attended the debate".[230]

Waldron also points to the fact that New Zealand's Parliament is internally majoritarian, legislation can be enacted without adequate scrutiny and parliamentary proceedings are dominated by the executive.[231] Such pressures can render the legislature overly responsive to popular views. Politicians are often unduly-reactive to constituency pressures (for example, to be "tough on crime") at the expense of rights. This problem is exacerbated around election time, where retention of power requires re-election. An unelected judiciary, is, on the other hand, naturally insulated from majoritarian electoral pressures.[232]

Likewise, political participation is rife with inequities. Purely representative democracy, then, "creates a systemic risk that those who fail to mobilise political support or whose interests are not represented by a member of parliament, will be effectively disenfranchised".[233] Participation in the courts system provides an added channel of political participation for those who might otherwise be disenfranchised. While the courts are themselves costly, as Aileen Kavanagh notes, "some of those who may have little or no chance of achieving any level of support or recognition [through majoritarian

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[228] See generally Jeremy Waldron "Compared to what? Judicial activism and New Zealand's Parliament" [2005] NZLJ 441.

[229] At 442.

[230] Lord Brown "The Unaccountability of Judges: surely their Strength not their Weakness" in Christopher Forsyth and others (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010) 208 at 213.

[231] Waldron, above n 228, at 443.

[232] Aileen Kavanagh "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 Law and Philosophy 451 at 471–472.

[233] At 480.

parliamentary processes], may have greater chances when bringing a case to the Supreme Court".[234]

Further, the legislature can simply overlook issues which are brought to the fore in judicial proceedings.[235] Rights violations may be an unforeseen product of legislation, meaning that "even if we assume that legislators will always strive to protect rights in every case, and never succumb to pressures to do otherwise, the possibility of rights-violations still exists".[236]

The argument that the law-making power of the judiciary is justified by a more substantive conception of democracy does not mean the judiciary should not be externally accountable. Accepting that the need for formal democratic control is ousted by the need for an independent body to check democratic excesses is predicated on the efficacy of the substantive accountability mechanisms identified above. In other words, the substantive democracy justification for the judiciary's constitutional position relies on a working assumption: at the current levels of accountability, the judiciary is nonetheless able to *give effect to community values* in a way that maintains its legitimacy. According to Cooke, judges must take a long-term view, weighing majority opinion up against society's "enduring values".[237] For Thomas, equally, judges must channel their decisions into a form consistent with the community's values.[238] Or, in Barak's words, judges must "bridg[e] the gap between law and society", acting as "senior partner" to the legislature in the development of common law, and as "junior partner" in interpreting enacted law.[239] Judges are expected to give effect to the "deep, underlying beliefs of society" rather than their individual values.[240] It is on this basis, Harris notes, that the system ensures:[241]

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[234] At 484.
[235] Harris, above n 2, at 276.
[236] Kavanagh, above n 232, at 478.
[237] Cooke, above n 117, at 1331.
[238] Thomas, above n 29, at 242.
[239] Barak, above n 43, xvii–xviii.
[240] At 95.
[241] Harris, above n 198, at 276.

> … accountability to all persons within the community … the Courts are able to attempt to protect minorities from possible tyranny of the majority, or perhaps an equally threatening danger, the apathy of the majority.

Importantly, this is not the sort of direct democratic accountability that Bovens contemplates. Judges are in no way connected to a chain of accountability that ultimately ends at the ballot box. Rather, the assumption that judges are responsive to community views is a kind of pseudo-democratic accountability, which is substituted for its conventional, electoral, form. The question therefore becomes: to what extent is this working assumption upheld?

IV The Accountability Deficit

Even accepting the theoretical adequacy of current substantive accountability mechanisms, there are two reasons why a substantive judicial accountability deficit still exists in New Zealand. First, the working assumption that pseudo-democratic accountability renders the judiciary appropriately responsive to community values is compromised by the continued influence of formalism, reflected in both popular and legal discourse on judicial law-making. And secondly, the internal window of acceptable discourse within the judiciary is currently defined by a lack of judicial diversity, meaning that community members have differentiated levels of influence over the values and experiences embodied in judicial decisions.

A The Pernicious Influence of Formalism

Formalism "been killed again and again, but has always refused to stay dead".[242] Formalism continues to influence both popular and judicial discourse. In both instances, the result is the same: instead of focussing on the values which in reality underpin decision-making, untoward attention is given to the mere fact of judicial creativity – that is, any form of law-making being exercised. The ensuing breakdown in constructive dialogue between the judiciary and community compromises the pseudo-democratic accountability which is said to justify the judiciary's law-making power.

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[242] Ernest J Weinrib "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale LJ 949 at 951.

1 In Popular Discourse

Regardless of the actual validity (or indeed accuracy) of the formalist-realist antithesis,[243] its influence on popular discourse is undeniable. While the debate continues, however, the language has changed. For example, some argue that Richard Nixon's presidential campaign was run "against the Warren Court as much as his actual opponents".[244] He announced that he wanted "men [sic] on the Supreme Court who are strict constructionists, men that interpret the law and don't try to make the law".[245] His concern was with the "activism" of the court, a term he equated with the use of any form of moral judgment in constitutional cases.[246] On the other end of the spectrum, back in New Zealand, Dame Sian Elias laments that law schools are "too analytical, too positivist and [they] often neglect … the human and social needs to which law responds".[247]

Summing up his concerns about this polarised discourse, Michael Kirby writes of the emergence of a "Counter-Reformation".[248] Formalism is back once again, equipped with a new slogan. "Judicial activism" is the new pejorative used to decry cases where courts are perceived to have overstepped their mark, straying into the territory of moral judgment.[249] Use of the term is now ubiquitous.[250] As Randy Barnett notes, the "gravamen of the complaint of judicial activism is that (unelected and unaccountable) judges are somehow interfering with (elected and accountable) legislatures".[251] As just one illustration, an article in *The Australian*, opines:[252]

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[243] See generally Tamanaha, above n 9.

[244] Thomas M Keck *The Most Activist Supreme Court in History* (University of Chicago Press, Chicago, 2004) at 101.

[245] At 112.

[246] See Ronald Dworkin "The Jurisprudence of Richard Nixon" (4 May 1972) New York Review of Books <www.nybooks.com>.

[247] Sian Elias "Teaching Law Today" (2017) 48 VUWLR 217 at 218.

[248] See generally Kirby, above n 36.

[249] Harris, above n 2, at 273.

[250] Josev, above n 21, at 1.

[251] Randy E Barnett "Constitutional Clichés" (2007) 36 Cap U L Rev 493 at 496.

[252] Janet Albrechtsen "Death to Democracy" *The Australian* (Sydney) 26 June 2002, as cited in Josev, above n 21, at 175.

> A war on democracy is taking hold across the West. It's being launched by activist judges trying to overturn the will of the people … At bottom, these activist judges think governments, politicians and the people who elect them cannot be trusted. The logical end point is elite rule. It might be a seemingly benign, well-educated, intelligent elite, but it's elite rule all the same. To date we've eschewed it as a poor alternative to democracy.

Yet just like the formalism that wielders of the language of activism tacitly endorse, judicial activism is also notoriously difficult to define. Ruth Bader Ginsburg described the term as one "too often pressed into service by critics of court results rather than the legitimacy of court decisions".[253] Similarly, Dame Sian Elias described the term as "abusive", representing an "attack on the observance of the judicial oath".[254] In the United States, the term is all but clichéd – the common thread of its invocation being:[255]

> … the apparent desire by commentators to avoid substantive constitutional argument in favor of a process-based analysis that can be easily leveled in the absence of any expertise on the issues raised by a particular case … [it] enable[s] commentators to criticize the Court or particular decisions without actually having to know much about the Constitution itself.

Frank Carrigan describes rallies against activism in Australia (and a call for a return to the formalism of the past) as the work of conservatives "bolstering the structure of power that ensure[s] the containment of popular control over policy and politics" and which preferences an ideology that "reinforces the ideological domination of the power elite".[256] Formalism becomes an "article of faith" for political conservatives which belies certainty, consistency and predictability, but which really is a "fairy tale that cloaks the conservative values of the legal system".[257]

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[253] As quoted in DH Zeigler "The New Activist Court" (1996) 45 Am U L Rev 1367 at 1367–1368.
[254] Elias, above n 105, at 226.
[255] Barnett, above n 251, at 493.
[256] Carrigan, above n 41, at 163.
[257] At 171.

The critique that formalists are merely political conservatives in disguise suggests that activism is necessarily a liberal pursuit. On one view, for example, judicial law-making through an activist lens is seen to reflect a "partisan set of liberal-feminist commitments".[258] However, as Bruce Harris writes, this is a "trap" since activism can also be levelled against judges on the political right.[259] For example, under the leadership of Justice Rehnquist, who was "extremely conservative",[260] the Supreme Court of the United States continually reversed, modified and reinterpreted the law that had developed under its more liberal Warren era.[261] This, according to Ted Thomas, earned (or should have earned) the Court "the sobriquet of being the most activist court in the history of the common law world".[262]

It is the manipulability and normative emptiness of the term judicial activism which is a concern from an accountability perspective. The cry of activism becomes the knee-jerk reaction to judges who, conscious of the "fiction" of declaratory or formalist theory,[263] seek to justify their decisions "by reference to principle and policy, not just the words of past legal authority".[264] However, engaging with matters of principle and policy is precisely what enables the community to have a constraining impact on the judiciary. If academics and the wider community express widespread and *reasoned* disagreement with the values underlying a judicial decision, then that not only suggests the decision does not uphold the community's values, but sets a reference point for change. Judges can synthesise and respond to the community's arguments in future judgments. Conversely, if epithets of judicial activism are all that meet a particular decision, such constructive dialogue between the community and judiciary breaks down.

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[258] Allan C Hutchinson "Judges and Politics: An Essay from Canada" (2004) 24 LS 275 at 278.

[259] Harris, above n 2, at 285.

[260] Jeffrey A Segal and Harold J Spaeth *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, New York, 2002) at 64.

[261] Thomas, above n 29, at 99

[262] At 100.

[263] Joseph, above n 2, at 790.

[264] Kirby, above n 36, at 53.

In New Zealand, complaints about judicial activism have also filtered into popular discourse. To take just one recent example, the prospect of further judicial recognition of tikanga Māori in *Ellis v R*[265] was quickly met by concerns about licensing "our judges to decide cases on how they feel and not according law".[266] For critics, because tikanga is unwritten, it is readily manipulated. It confers on judges the moral justification to act as "priests".[267] It would amount to "judges, the elite of the intelligentsia" usurping Parliament's law-making prerogative, disregarding a history where judges denied themselves the freedom to cast moral judgments.[268] Consequently, greater recognition of tikanga poses a direct threat to democracy and the rule of law, undermining predictability, certainty and stability.[269]

Another example of this tendency to defer to labels rather than the substance of decisions can be seen in the aftermath of the Court of Appeal's decision in *Ngāti Apa*.[270] Although the reasoning of the Court was, Thomas writes, clearly "within the bounds of conventional judicial methodology",[271] the case attracted considerable controversy, including charges of judicial activism. Stephen Franks MP wrote that the case was wrongly decided because it went beyond merely "applying existing law", instead prompting concerns of bias and a hidden judicial political agenda.[272] Similarly, writing subsequently, the Minister of Justice, Hon Michael Cullen MP (as he was then) mounted a strong defence of parliamentary supremacy, noting his concern about judges undermining the law-making prerogative of Parliament in "recent decisions":[273]

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[265] *Ellis v R* [2020] NZSC 89.

[266] Van Beynen, above n 11.

[267] Van Beynen, above n 11.

[268] Van Beynen, above n 11.

[269] Van Beynen, above n 11.

[270] *Attorney General v Ngāti Apa*, above n 5.

[271] Thomas, above n 14, at 695.

[272] Stephen Franks MP "Political criticism of Judges" [2004] NZLJ 11 at 13.

[273] Hon Michael Cullen MP "Address to Otago District Law Society" (Address to Otago District Law Society, The Savoy, Dunedin, 7 April 2004). See also Hon Michael Cullen MP "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1; and Hon Michael Cullen MP "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243.

> In our tradition the [c]ourts are not free to make new law. It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to them for their decisions. MPs are accountable. Judges are not; they are in fact independent, and that is essential to their role in society … but if they begin to express views on what the law should say they enter dangerous territory. It is dangerous not only for the case at hand, but also because it means the public begin to perceive the judiciary as politicized.

Even today, some commentators remain disgruntled about the decision, citing the case as an example of "unprecedented judicial activism" which embodies a "devil-may-care attitude" to any ensuing consequences.[274]

Such arguments demonstrate a continued allegiance to formalism. They ignore the reality that judges make law routinely, whether by interpreting legislation or developing the common law. There is thus no metaphysical division between applying and making law. Indeed, as Lord Bingham observes, had Lord Buckmaster's views carried the day in *Donoghue v Stevenson*,[275] the decision would still have made law, even if "one would incline to see it as a bad decision".[276] The decision would still have "placed a highly authoritative roadblock in the path of a plaintiff and so would have made law".[277]

Similarly, had the judges in *Ngāti Apa* uncritically applied *Re the Ninety-Mile Beach*,[278] they would have tacitly endorsed the earlier ruling in *Wi Parata*,[279] to the effect that the assumption of sovereignty in New Zealand effectively extinguished Māori customary title.[280] As Thomas writes, the Court very properly considered the precedent in terms of the "force and standard of its reasoning, … its reception at the time and over time, … other

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[274] See Muriel Newman "Judicial Activism" (19 February 2020) the BFD <www.thebfd.co.nz>. See also Muriel Newman "The Dangers of Judicial Activism" (14 October 2018) NZCPR <www.nzcpr.com>.
[275] *Donoghue v Stevenson* [1932] AC 562 (HL).
[276] Bingham, above n 1, at 29.
[277] At 29.
[278] *Re the Ninety-Mile Beach* [1963] NZLR 461.
[279] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).
[280] Thomas, above n 14, at 696.

developments in the law, and … the changing mores of the society", and found it wanting on all counts.[281]

The influence of formalism on discourse inhibits the external accountability link between the community and the judiciary. Again, if the popular discourse in the aftermath of controversial judgments centres around the mere fact of judicial law-making – as implicit in the claim that a decision is "activist" – then the judiciary cannot receive accurate feedback on the values underpinning its decisions. Instead, the conversation which maintains the pseudo-democratic accountability link referred to above becomes reductive and binary: a decision is either "good", because it ostensibly stays within the bounds of formalist reasoning, such as by blindly following a strict doctrine of precedent;[282] or a decision is "activist" because it departs from the commentator's individual conception of legitimate judicial decision-making.

A renewed commitment to examining the values which underpin the decisions of judges is therefore needed. But this cannot occur if, for example, the only arbiter of good judicial reasoning is whether past precedent is upheld. Once it is realised that legal judgement is a morally-laden exercise, and setting aside the ultimate "incorrigible indeterminacy" of the law,[283] certainty becomes just one value to balance against the need to develop the law to changing circumstances and social mores.[284] Although there will be law which is relatively well settled within a particular interpretative community, an approach which turns only on the strict application of the doctrine of precedent ignores the reality that, especially at the appellate level, cases "do not turn on the simple question of the applicability of a rule", but rather a contestable and indeterminate rule, or multiple competing rules.[285]

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[281] At 696.

[282] Thomas, above n 29, at 63.

[283] Roberto Mangabeira Unger "The Critical Legal Studies Movement" (1983) 96 Harv L Rev 561 at 578–579.

[284] Thomas, above n 29, at 247.

[285] At 61.

Indeed, on the other side of the *Ellis v R* case go arguments that tikanga Māori is already "integrated and mainstream" within New Zealand's general body of law. Further recognition thus simply reflects the logical progression of the common law developing to "reflect the values of Aotearoa".[286] The recognition and revival of indigenous legal traditions is a means of giving effect to self-determination,[287] and can offer a way of challenging the problematic influence of colonial law.[288] On this view, the judiciary needs to "up its game" in terms of its understanding and application of tikanga principles.[289]

Correspondingly, if popular discourse continues to reflect the idea that judges should only interpret and apply the law, but their role does not extend to developing and making law,[290] then an accountability deficit exists. For judges to, as Barak suggests, effectively bridge the gap between law and society, then society must play its role too by engaging in constructive dialogue with the judiciary. Likewise, for Sir Ivor Richardson, the value-judgements underpinning judicial decision-making gain their legitimacy from the fact that "the values underlying particular legal principles need to be continually reassessed, modified, and in some cases replaced, to reflect contemporary thinking".[291]

However, the judiciary cannot be responsive to changing values in society if society holds fast to a misconception about the nature of legal judgement. Indeed, if both academic and political debates continue to use judicial activism "as a convenient shorthand for judicial decisions they do not like",[292] while failing to articulate the values which lie behind their

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[286] Van Beynen, above n 11.

[287] Gordon Christie "Culture, Self-determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 Indigenous LJ 14 at 25.

[288] Hadley Friedland and Val Napoleon "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1 Lakehead LJ 16 at 42.

[289] Joseph Williams "Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev 1 at 33.

[290] Various governmental webpages also emphasise the function of judges as being to interpret or apply law, rather than to make it. See for example The District Court of New Zealand "How District Court Judges Make Decisions" <www.districtcourts.govt.nz>; and Ministry of Justice "The role of New Zealand's courts" (11 March 2020) <www.justice.govt.nz>.

[291] Ivor Richardson "Changing Needs for Judicial Decision-Making" (1991) 1 JJA 61 at 64.

[292] Earnest A Young "Judicial Activism and Conservative Politics" (2002) 73 U Colo L Rev 1139 at 1141.

distaste for such decisions, then it is difficult to see how judges can be "accountab[le] to all persons within the community".[293] That is, it is difficult for judges to understand what the "contemporary thinking" is, aside from in the narrow sense that a particular decision is disagreed with. In this context, Carrigan's cynical conclusion is, unfortunately, accurate:[294]

> … in reality the courtroom and legal rule will never give a true reflection of … social relations, values or conflict between interest groups … In a court, the rights and duties of legal individuals are abstracted from the web of social relations that is the crucible of human consciousness and values.

2 In Judicial Decision-making

The impoverished discourse about judicial law-making which takes place in the community has its effects reinforced by the continued influence of formalism in judicial decision-making. This further undermines the pseudo-democratic accountability link said to justify judicial law-making in Aotearoa.

For Thomas, formalism in judicial reasoning is a "creed", the remnants of which constitute "the main barrier to the adoption of a contemporary legal methodology in which fairness and relevance command the allegiance of the judicial process".[295] The continued influence of formalism stands against an approach where judicial differences are regarded as part of the "rich tapestry of a divided society constantly undergoing social and economic change".[296]

Unfortunately, according to Thomas, formalism's "curse" continues to haunt modern jurisprudence: "although accepting that the declaratory theory of law is a fairy tale, many judges continue to behave and reason as if the theory still held sway".[297] For Thomas, this is most clearly evidenced by rules being seen as "prescriptive" and precedents "tangibly

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[293] Harris, above n 198, at 276.
[294] Carrigan, above n 41, at 179.
[295] Thomas, above n 29, at 73.
[296] Carrigan, above n 41, 184.
[297] Thomas, above n 29, at 14.

coercive".[298] The danger evident in such an approach is that the level of judicial discretion – and the extent to which judges must contend with political questions – is obscured.[299]

Thomas strongly criticises a "rigid version of positive theory" as being a new "methodological refuge" for formalist theory.[300] He argues especially against Frederick Schauer's theory of "presumptive positivism", whereby rules are conceived of as presumptively binding unless they are unreasonable in the context of the wider normative universe.[301] Thomas contends that presumptively applying rules amounts to a dereliction of judicial reasoning, and is liable to "frustrate the clear intention of the legislature".[302] Because the rule applies "subject to defeasibility", it becomes the "haven for the formalistic judge".[303] Moreover, a presumption of positivism only defers to moral judgement exercised earlier in time,[304] ignoring the fact that moral judgement is required when determining whether a presumptive rule applies.[305]

Thomas notes that any number of cases could be used to illustrate the continued influence of formalism.[306] Instead of delving into New Zealand jurisprudence that demonstrates a formalist bent, he sketches a "portrait" of the formalist judge. For Thomas, the new-age formalist judge exhibits "to a greater or lesser extent" the tendencies to: "make the facts fit the law";[307] "accept form over substance";[308] dodge judicial discretion through reliance on "absolute or near absolute rules";[309] blindly "[v]enerat[e] certainty";[310] assume the

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[298] At 14.
[299] At 73.
[300] At 56.
[301] See generally Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, Oxford, 1991).
[302] Thomas, above n 29, at 60.
[303] At 60.
[304] At 61.
[305] At 62.
[306] At 66.
[307] At 63.
[308] At 63.
[309] At 63.
[310] At 63.

internal rationality of law and apply a rigid doctrine of precedent;[311] draw incomprehensible distinctions;[312] leave change to Parliament even if the "law is widely condemned and the change could be readily accomplished by the courts";[313] evade deciding anything beyond the issue before the court;[314] avoid accommodating insights from non-legal disciplines such as psychology and economics into the law;[315] refuse to "reassess the justification … for the rule" in light of changing social mores;[316] and shun concepts like "fairness" as legitimately informing judicial reasoning.[317]

However, a formalist approach is not confined to the characteristics of particular judges. Rather, I argue that legal doctrines themselves can predispose judicial decision-making to formalism. One example of this phenomenon, which I have discussed elsewhere,[318] is the structure of discrimination law in New Zealand. To briefly summarise, the two limbs of the test required to assess whether an act or omission is discriminatory, adopted by the Court of Appeal in *Ministry of Health v Atkinson*,[319] require that the claimant experiences:[320]

(1) differential treatment on a prohibited ground with respect to a person or group in comparable circumstances; and
(2) consequent "material disadvantage".

The difficulty with the test is that it does not front up to the fact that assessing discrimination, being underpinned by the principle of equality, is an inherently normative exercise. Given the test itself provides little normative guidance to the reviewing court, it

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[311] At 63.
[312] At 64.
[313] At 64.
[314] At 65.
[315] At 65.
[316] At 65.
[317] At 66.
[318] See generally Charlie Cox "The Majestic Equality of Disenfranchisement: The Right to Freedom from Discrimination in Light of the *Ngaronoa* Litigation" (2019) 51 VUWLR 27.
[319] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] NZLR 456.
[320] At [55].

permits largely uninterrogated and ad hoc moral determinations, which masquerade under a formalistic fact-based and common-sense façade. Again, the values animating judicial reasoning are actively obscured.

Formalistic judicial reasoning only bolsters the impact of formalism on popular discourse. In terms of accountability, the effects are mutually-reinforcing. Intuitively, if judicial reasoning exhibits formalistic tendencies, the view that judges have no law-making role is likely to become further entrenched in public consciousness. Conversely, judges who openly articulate the values underpinning their decisions and honestly confront their law-making function, are more likely to be branded as activists. The breakdown in dialogue thus creates somewhat of a catch-22 for judges: deviations from formalistic rhetoric risk public backlash, whereas the accountability link between judiciary and community – which legitimises the judiciary's law-making ability – is effectively severed if the community is unable to interrogate and respond to judicial value-judgements. As Carrigan observes, the public would "be empowered if there were a variety of judicial methodologies openly acknowledged".[321] In the alternative:[322]

> In the case of all brands of formalism, the stumbling block is its professed apolitical nature. The price of glossing over the forces that guide legal development is paid by the further decline of democracy.

For the sake of completeness, it is worth addressing the argument that obscuring the values underlying judicial decisions is justified under a "do good by stealth" type approach.[323] Perhaps, the logic goes, judges should conceal their law-making power to enhance the wider community's respect for the law.[324] The community and Parliament only accept the judiciary's law-making capabilities because it exercises them discreetly.[325] Patrick Atiyah ventures, for example, that most English judges would rather "shelter behind the

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[321] Carrigan, above n 41, at 184–185.

[322] At 185.

[323] Bingham, above n 1, at 30.

[324] See for example Lord Radcliffe *Not in Feather Beds* (Hamish Hamilton, London, 1968) at 216.

[325] Atiyah, above n 13, at 365.

declaratory theory of the judicial function in public, and to confine discussion of the nature and use of the creative judicial function amongst the *cognoscenti*".[326] This argument, however, fails to align with the pseudo-democratic accountability justification for the judiciary's law-making power. To say that only judges and their elite counterparts should be able to engage with the values underpinning judicial decision-making is, fundamentally, paternalistic. It restricts the pseudo-democratic accountability link to only those elite members of the community who are aware of the creativity inherent in judicial law-making. But there is no reason to expect that such elites will have the best grasp on the values of the community as a whole. Accountability to an elite few is a far cry from the accountability to "all persons within the community" said to justify judicial law-making.[327]

B The Lack of Diversity

The working assumption that the judiciary can adequately give effect to community values is also compromised by a lack of judicial diversity. In particular, the lack of judicial diversity impacts the window of acceptable discourse created by the internal substantive accountability mechanisms mentioned above. Consequently, the values and experiences reflected in judicial reasoning are limited by its current membership. Work to diversify the judiciary, I argue, can only proceed by acknowledging the fiction of formalism, and, accordingly, the inseparability of diversity and merit.

1 How formalism justifies non-diversity

As Barak observes, the truth, once the remains of formalism are lifted away, is that "[i]deological pluralism … is the hallmark of judges in democratic legal systems. Diverse judges reflect – but do not represent – the different opinions that exist in their societies".[328] This view, however, has not always been accepted. Indeed, the ideology of formalism traditionally justified selecting judges from a narrow, elite background. As Richard Posner notes, the single "most important constraint on English judges … was that the judges were picked from a tiny, homogenous social and professional sliver of the nation".[329] Mirroring

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[326] At 360.

[327] Harris, above n 198, at 276.

[328] Barak, above n 43, at xv.

[329] Richard A Posner *How Judges Think* (Harvard University Press, Cambridge, 2008) at 155.

this finding, between 1946 and 1972 nearly 50 per cent of appointments to New Zealand's Supreme Court (as it was then) came from the same four schools: Auckland Grammar, Wanganui Collegiate, Wellington College, and Otago Boys High School.[330] The template judge appointed during this period was:[331]

> … a middle-aged Caucasian male … well-educated … a successful and prominent member of the legal profession and, as such, … almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.

The logic behind such uniformity, as Posner observes, was that judges who came from the same professional and social background were likely to have shared premises to ground their decision-making processes, leading to shared and "objectively verifiably conclusions".[332] For Alexander Hamilton, only a small, independent elite group of men could adhere to a strict doctrine of precedent, creating consistency in decision-making.[333] Similarly, Alexis de Tocqueville wrote that lawyers were naturally inclined to "order and formalities"; lawyers "belong to the people by birth and interest, and to the aristocracy by habit and taste".[334]

With such precedent in mind, it is hard to avoid Iris Marion Young's conclusion that:[335]

> As ruling institutions … [courts] have been elitist and exclusive, and these exclusions mark their very conceptions of reason and deliberation, both in the institutions and in the rhetorical styles they represent. Since their Enlightenment beginnings they have been male-dominated institutions, and in class- and race-differentiated societies they have been white- and upper class-dominated. Despite the claim of deliberative forms

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[330] Jack Hodder "Judicial Appointments in New Zealand" [1974] NZLJ 80 at 84.

[331] At 85.

[332] Posner, above n 329, at 155.

[333] Martin Loughlin "Judicial Independence and Judicial Review in Constitutional Democracies: A Note on Hamilton and Tocqueville" in Christopher Forsyth and others (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010) 9 at 16.

[334] At 16.

[335] Iris Marion Young *Dilemmas of Gender, Political Philosophy, and Policy* (Princeton University Press, Princeton, 1997) at 63.

> of orderly meetings to express pure universal reason, the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people.

Today, people are less likely to advocate so explicitly for a homogenous and elitist judiciary. However, the logic of formalism continues to indirectly militate against moves to diversify the judiciary. Formalism is mobilised through the concept of "merit", insofar as merit is able to trump diversity in the diversification debate. An argument which expressly confronts the fiction of formalism, therefore, is best-placed to resolve the "difficult interaction" between diversity and merit.[336]

2 The arguments for further diversity

Loosely, the arguments for diversifying the judiciary fall into three camps: legitimacy, equity and difference. While each of these arguments has its own normative appeal, it is only the argument about difference which directly confronts the fiction of formalism – and the ensuing democratic accountability deficit – and thus is able to resolve the tension between diversity and merit which has slowed judicial diversification in New Zealand.

Starting from the perspective of legitimacy, it is crucial to the judiciary's legitimacy that it is seen to representative of the community at large.[337] An institution which exercises law-making power should be representative of those on whose behalf the power is exercised.[338] This in turn supports public confidence in the judiciary.[339] As Winkelmann writes, if "judges are seen to be drawn from one part of society only, they may be thought to serve only that group's interests".[340] In this sense, a representative judiciary connects to the perception that the judiciary is both independent and impartial. The argument for legitimacy connects to the democratic ideal. For proponents of this view, it is just as

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[336] Paterson and Paterson, above n 200, at 44.

[337] Winkelmann, above n 143, at 4.

[338] Ewing, above n 165, at 716.

[339] See for example Cheryl Thomas *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (The Commission for Judicial Appointments, 2005) at 108.

[340] Winkelmann, above n 143, at 4.

democratically unacceptable for the judiciary to be unreflective of society as it is for Parliament.[341] In the words of Lady Hale:[342]

> [Diversity] matters because democracy matters … We are the instrument by which the will of Parliament and government is enforced upon the people … it does matter that judges should be no less representative than the politicians and civil servants who govern us.

Importantly, this set of arguments can be distinguished from the concerns (explored below) about equity. Fundamentally, the concerns are perceptual. The claim is not that a homogenous judiciary is necessarily biased against particular groups or individuals.[343] Rather, it is that public confidence is undermined if the public do not see themselves represented in decision-making. It contributes to a sense that judges are "out of touch", and, at base, are "not like us".[344] Importantly, the notion of a representative judiciary need not entail a direct reflection of society, only that the judiciary contains "a wide variety of backgrounds, cultures, opinions, styles, perspectives, values and beliefs".[345] Indeed, arguably "the notion that any judicial officer should represent the interests of their gender (or class or race) is objectionable" because the judiciary should not be responsive to political pressure.[346]

The second camp of arguments is grounded in equity. Such arguments hone in on the relative opportunities for individuals to becomes judges.[347] As a matter of desert, people should all have a "fair crack of the whip" when it comes to entering the ranks of the

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[341] See for example Sean O'Grady "A Government of straight, white, privately educated men" (7 August 2010) The Independent <www.independent.co.uk>.

[342] Brenda Hale "Equality and the Judiciary: Why Should We Want More Women Judges?" (2001) 3 PL 489 at 503.

[343] Rackley, above n 114, at 25.

[344] At 25.

[345] Department for Constitutional Affairs *Increasing Diversity in the Judiciary* (CP25/04, 2004) at 57.

[346] Kcasey McLoughlin "The Politics of Gender Diversity on the High Court of Australia" (2015) 40 Alt LJ 166 at 167.

[347] Rackley, above n 114, at 26.

judiciary.[348] Everyone who is sufficiently qualified should have the same prospects for judicial appointment, if they so desire. All the more so since, as Beverly McLachlin observes, "in a world where one of the primary functions of the judiciary is to promote equality and fairness, it would be anomalous if the very instrument charged with that goal should itself exclude women from its ranks".[349]

The difficulty, however, with these first two sets of arguments, is that they do not confront the fiction of formalism. As such, both are subject to the inevitable and well-traversed claim that a judge's background has no bearing on their ability to adjudicate decisions. For instance, as Lord Judge observed:[350]

> I suggest to you it is perfectly obvious that background, ethnicity, religion, sexuality and gender are utterly irrelevant to the ability of an individual to be a good judge, and therefore they are utterly irrelevant to the selection and appointment of any judge. The single most important consideration is always whether the individual in question has the quality, the aptitude and ability to take on and perform the individual office to which he or she is aspiring.

This view accords with the idea that diversity should be "merit's servant or foot-soldier".[351]

3 The need to link diversity and merit

Implicit in the claim of Lord Judge and his ilk is that values do not matter to merit. However, once accepted that judicial law-making is a fundamentally normative exercise, no longer makes sense to select the best judges in the same way as one might select the best plumbers, or mathematicians. Values matter to how a judge exercises their discretion, and accordingly, they matter to defining a good judge.

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[348] Hale, above n 342, at 490.

[349] As quoted in Lady Hale "Making a Difference? Why We Need a More Diverse Judiciary" (2005) 56 NILQ 281 at 286.

[350] Lord Judge, Lord Chief Justice of England and Wales (as he was then) "Equality in Justice Day" (Royal Courts of Justice, London, 24 October 2008).

[351] Rackley, above n 114, at 194.

Relatedly, Erika Rackley argues that treating merit as an objective and narrow concept has insidious consequences. Despite being an ultimately subjective and variable concept, a particular "understanding of what constitutes individualised merit has come to be treated as a somehow objective and tangible absolute that must effectively trump everything".[352] In the United Kingdom its result is the emergence of a "default understanding of the judge", a "white, probably public school, man", deviations from which are seen to threaten not only the judiciary's homogeneity, but also its "objectivity, impartiality, [and] authority".[353]

As Allan Hutchinson notes, the "shared assumption that 'merit' and 'diversity' are somehow independent and unrelated categories – that an increase in diversity will threaten to undermine merit and a reliance on merit will preclude diversity" – is "entirely wrong-headed".[354] Most problematically, in implying that judging is a purely mechanical exercise, this assumption tacitly endorses formalism. If judging was a purely mechanical exercise, then it would make sense pick the most highly skilled legal mechanic. However because legal judgement is a normative exercise, selecting for skill is fundamentally incoherent.

What is needed is an approach which recognises the inseparability of merit and diversity. Arguments stemming from difference accomplish this goal, positing that diversification will improve the nature and quality of judicial reasoning. On this view, "the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process".[355] Importantly, this approach accounts for the corollary of the fact that judges have considerable discretion to make law: that their personalities, prior experiences and worldviews influence their

[352] Paterson and Paterson, above n 200, at 44–45.

[353] Rackley, above n 114, at 130.

[354] Hutchinson, above n 71, at 288.

[355] L Epstein, J Knight and A Martin "The norm of prior judicial experience and its consequences for career diversity on the US Supreme Court" (2003) 91 Cal L Rev 903 at 944.

reasoning and accordingly "*who* the judge is matters".[356] In reality, the "path that judges have walked through life shapes how they will and can develop the law".[357]

The truth of this conclusion is explicitly confronted in the feminist judgments movement. If a feminist judge, while being subject to all of the same constraints as the original judges:[358]

> … can produce a legally plausible judgment which uses different reasoning and/or reaches a different result, that is both a powerful demonstration that the original decision was not inevitable, and a powerful illustration of the difference a feminist consciousness might make to judging.

Similarly, for Lady Hale:[359]

> You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. 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.

The hypothesis that judicial diversity will improve judicial reasoning has also been empirically substantiated. In the United States, a range of studies have found that judicial panels featuring a more heterogenous range of backgrounds were more likely to discuss a wider range of considerations in reaching their conclusions.[360] Their conclusion supports

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[356] Rackley, above n 114, at 132.

[357] Winkelmann, above n 143, at 5.

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

[359] Select Committee on the Constitution: Judicial Appointments (House of Lords, HL Paper 272, 28 March 2012) at [90].

[360] Thomas, above n 29, at 57–58.

the validity of "tacit diversity": that "judicial decision[-]making is subject to tacit influences that are associated with overt demographic differences".[361]

It is unfortunate, therefore, that Aotearoa's current Judicial Appointments Protocol wrongly distinguishes between merit and diversity. The two concepts are treated as competing, rather than complementary and interrelated. The Protocol states there should be a "commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection".[362]

This false dichotomy also influences political discourse about diversifying the judiciary. The parliamentary debate about a Supplementary Order Paper which sought to effect the Law Commission's recommendation for legislative appointment criteria requiring diversity is illustrative.[363] Justifying the National Party's rejection of the Paper, Amy Adams MP challenged whether there was a "demonstrable problem" in the diversity of appointments (or lack thereof).[364] Her view was that sufficient female judges were appointed *on the basis of merit* without need for statutory criteria.[365]

Recognising the inseparability of diversity and merit would have salutary effects for accountability. Arguments that ideological pluralism – difference – should be facilitated within the judiciary neatly intersect with fulfilling the working assumption mentioned above: that current levels of accountability enable the judiciary to give effect to community values. If judicial decision-making is inevitably influenced by individuals' deeply embedded values and experiences, then the judiciary must be a fair reflection of the community as a whole, in order to give effect to the full range of experiences and values within the community. Conversely, a homogenous judiciary cannot be expected to reach decisions giving effect to the values and experiences in the community, because its

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[361] Rachel Cahill-O'Callaghan "Reframing the judicial diversity debate: personal values and tacit diversity" (2015) 35(1) LS 1 at 5.

[362] Crown Law *Judicial Appointments Protocol* (2019) at 1.

[363] Supplementary Order Paper 2016 (217) Judicature Modernisation Bill 2013 (178-2).

[364] (14 September 2016) 717 NZPD 13723.

[365] At 13724.

membership only represents a certain segment of the community. The above-mentioned window of acceptable discourse created by accountability mechanisms internal to the judiciary is, accordingly, framed by the judiciary's membership. Diversifying the judiciary will change the window of acceptable discourse. Doing so is necessary to uphold the working assumption underlying the judiciary's law-making power.

V Conclusion

Undoubtedly, the precise limits of acceptable judicial law-making will continue to divide commentators. This is not only to be expected; it is positive. Judicial law-making is a normative enterprise: it involves "matters of justice, of moral or social principle, on which, as a matter of practical inevitability, different individuals will differ".[366] Correspondingly, it is incumbent on the community to interrogate the values underpinning judicial decisions, so the decisions, in turn, better reflect the community's values.

That judicial law-making is a normative project entails a necessary focus on accountability. Given that reasonable disagreement exists about what legal norms should be prioritised in society, it is only fair that those deciding upon and applying such norms are held to account. Bearing this in mind, it is perhaps surprising that the judiciary fails to meet Bovens' "first and foremost function of public accountability", democratic control.[367] However, the democratic accountability deficit on Bovens' metric can be justified under a different metric. Only by taking a more systemic, substantive conception of democracy, is it possible to understand the judiciary's current constitutional position. Underpinning this justification is a working assumption as to the efficacy of existing internal and external judicial accountability mechanisms for enabling the judiciary to give effect to community values.

Currently, the working assumption is not being upheld. First, the concept of formalism continues to detract from an accurate understanding of the judicial role, which impacts both popular discourse and judicial reasoning. The resulting discourse fails to adequately engage with the norms reflected in judicial reasoning, meaning the external accountability created

[366] Rackley, above n 114, at 132.

[367] Bovens, above n 7, at 192.

by community criticism of judicial decisions is oversold. And secondly, a lack of diversity in the judiciary means that the window of acceptable discourse within the judiciary is not a fair reflection of the values and experiences in wider society. Moves to diversify the judiciary are only likely to succeed if they confront the fiction of formalism.

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Word Count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 13,428 words.