THE MAN BEHIND THE CURTAIN: DISCOVERING JUSTICE CLARENCE THOMAS & THE ROLE OF JUDICIAL BIOGRAPHIES

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In his recent study of Supreme Court Justice Clarence Thomas, author Corey Robin declares that compared to Thomas, "few judges have made their biographies so central to their understanding of what it is they do as judges."[1]

Robin's book, *The Enigma of Clarence Thomas*, is an attempt to understand and find cohesion in the Justice's unique jurisprudence.[2] To this end, he finds it necessary to comb Thomas' biography to explain the Justice's extreme and seemingly contradictory opinions.[3] Robin concedes upfront, however, the discomfort this type of concession to personal history is likely to produce in the legal profession.[4] "[T]his is perilous ground,"[5] he asserts, as though acknowledging that judges are informed by their personal experiences could destabilize the entire American system of law and government. American law, drawn from its English antecedent, has long been conceptualized as above lived experience, as natural and preexistent, or otherwise "discovered" by disinterested judges.[6] In this system, the immense powers of our judiciary is only legitimate if judges—especially Supreme Court Justices—are imagined as the ultimate Wizards of Oz: disembodied legal minds, leaving personal feelings and experiences behind the curtain and off the bench.

Robin's assertion that Thomas, one of only three Justices of color to ever sit on the Court,[7] is among a mere handful of judges who have brought their personal experience to bear on their jurisprudence should give his readers pause. Though race figures centrally into the book's analysis, this flippant assertion is glaringly forgetful of the fact that until the appointment of Justice Thomas' predecessor, Justice Thurgood Marshall, in 1967, the Court was composed entirely of white men.[8] In the words of Sherrilyn Ifill, Robin measures the Justice by the anachronistic yardstick of an era "when white men were the only group permitted

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1 COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 12 (2019).

2 *See generally id.*

3 Though many know of Thomas' career in Republic government and of the historic allegations by Anita Hill, some may be surprised to learn that in college the Justice was a student of Malcolm X and an "activist" who marched against the Vietnam War. *Id.* at 13–15, 26–29. Equally formative to Justice Thomas' worldview, or so Robin argues, was his up bringing by his maternal grandfather—a "true figure of authority." *Id.* at 155.

4 *Id.* at 11.

5 *Id.*

6 *See generally* Charles S. Desmond, *Natural Law and the American Constitution*, 22 FORDHAM L. REV. 235 (1953).

7 Jessica Campisi & Brandon Griggs, *Of the 114 Supreme Court Justices in US History, All but 6 Have Been White Men*, CNN (Sept. 26, 2020, 5:29 PM), https://www.cnn.com/2020/09/25/politics/supreme-court-justice-minorities-history-trnd/index.html.

8 *See id.*

to offer and legitimate narratives in the legal process."[9] It is not that Thomas is an outlier for developing a judicial philosophy guided by personal experience. Instead, it is the substance of Thomas' lived experiences that make him an outlier on the Court.

Justice Thomas is not alone in drawing his biography into his opinions. The biographies of Justices tend to become visible in their jurisprudence when their backgrounds diverge from the expected narrative. Take for example, Justice Frankfurter's infamous draft opinion in *Schneiderman v. United States*, where the Court considered whether a naturalized Jewish immigrant could be stripped of his citizenship due to Communist affiliation.[10] Three years earlier, in *Minersville School District v. Gobitis*, Frankfurter's decision that religious minorities could be compelled to salute the flag provoked criticism that he had betrayed his Jewish identity.[11] When *Scheneiderman* touched on the same themes of Frankfurter's biography, he felt compelled to address the weight of his membership in the "the most vilified and persecuted minority in history."[12] That the opinion went on to disown this identity as a motivating factor in his decision—as he believed necessary to preserve his legitimacy—did not quell the horror of his fellow Justices at such a brazen invocation of personal experience.[13] Ironically, records of his discussion in chambers prove that his experience as a naturalized citizen and as a German Jew in America during World War II unavoidably shaped his judicial philosophy and his ultimate dissent in the case.[14]

The confirmation hearings of Justice Amy Coney Barrett are the most recent iteration of this treacherous formality. Justice Barrett was pressed on whether her experiences have shaped how she decides cases, and as is customary, she demurred.[15] However, her refusal to recognize her own vantage point should not inflate her fitness for the bench. In large part, we know already how Justice Barrett will rule on a number of issues, as guided by her religious views and

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[9] *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 441 (2000).
[10] 320 U.S. 118 (1943).
[11] Justice Frankfurter received vocal reprobation for applying a judicial restraint philosophy in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and thereby allowing schools to force Jehovah's Witness pupils to recite the pledge of allegiance. Some of his critics pointed out that this was antithetical to his identity as a religious minority. Noah Feldman, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 226–30 (2010).
[12] *Id.* Frankfurter's diary entries, that (rather unedited) became the draft opinion, and his notes from conference on the case are available at Joseph P. Lash, FROM THE DIARIES OF FELIX FRANKFURTER 208–17, 248–50, 251–59 (1915).
[13] *See* Feldman, *supra* note 11, at 229–30.
[14] At his confirmation hearing, Frankfurter was grilled by Senators who demanded to know how his identity as a non-native born American would affect his jurisprudence and his loyalty to American law. *See id.* Apparently, they too feared that his deviation from the law's foundational identity would likely seep into his interactions with it.
[15] Robin Givhan, *Amy Coney Barrett Faced the Questions. But Trump Hovered over her Confirmation Hearings*, WASH. POST (Oct. 13, 2020, 6:45 PM), https://www.washingtonpost.com/nation/2020/10/13/amy-coney-barrett-faced-questions-trump-hovered-over-her-confirmation-hearings/.

biography.[16] Repudiating implications that her judicial philosophy has been influenced by her background does not wipe away this impact. Justice Barrett's jurisprudence will be informed by her life experiences just as every Justice's before her.

No Justice has managed, or ever will, to be the Wizard of Oz. Instead, this feigned neutrality is instrumental to preservation of the cis-white-male norm. What Robin sees as the laudable model of "submersion of self in the impersonality of law"[17] is actually the abdication of diverse lived experiences to a body of law steeped in the default of the white male experience. We do injustice to our legal system and the lived experiences of a vast majority of Americans by refusing to acknowledge that judges' opinions are shaped by the bodies in which they navigate the world. By pretending anything less, we perpetuate the myth that American law as created and sustained is neutral to all experiences and just to all existences.

Contrary to what we have so long affirmed, decentering the white male experience will not destabilize the entire American legal project. More than half a century ago, acclaimed legal process scholar, Arthur Miller, dubbed the belief the that law existed "above men" a mere legal fiction, "the alternative [to which] is not despotism."[18] Quite to the contrary, only by "avowing that [they are] a human being" can a judge fully investigate and account for their biases.[19] Indeed, the careers of Justices Ruth Bader Ginsburg and Sonia Sotomayor illustrate that recognizing biography in our jurisprudence does not irreparably shake the law and can lead to compelling judicial philosophies and decisions. Justice Ginsburg made a career as an unabashed advocate for women's rights. Her continued vocal advocacy of these issues during her time on the Court made her a modern icon without diminishing respect for her legal prowess among conservative and progressive scholars alike.[20] Justice Sotomayor bluntly proclaimed that "our experiences as women and people of color affect our decisions," and that she hoped a Latina woman with her experiences would come to better decisions than

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[16] *See* Josh Gerstein, *How Amy Coney Barrett Might Rule*, POLITICO (Sept. 26, 2020, 7:12 PM), https://www.politico.com/news/2020/09/26/how-amy-coney-barrett-might-rule-422055 (predicting how Justice Barrett would rule on a number of hot-button issues including abortion and birth control based on her background and previous statements).

[17] ROBIN, *supra* note 1, at 12.

[18] *See* Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 695 (1960).

[19] *In re J.P. Linahan, Inc.*, 138 F.2d 650, 653 (2d Cir. 1943). Writing for a panel that included Judge Learned Hand, Judge Jerome Frank proclaimed, "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and…becomes a passionless thinking machine." *Id.* at 652–53. Scorning what today we might call implicit bias, Judge Frank argued that "[t]he concealment of the human element in the judicial process allows that element to operate in an exaggerated manner." *Id.* at 653.

[20] *See* Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html (recounting appearances of Justice Ginsburg's feminist jurisprudence from the bench and citing praise for the legal brilliance of her opinions).

a white male without them.[21] Yet, her opinions receive praise both when her background is central and when it is seemingly irrelevant.[22] Nor has Justice Thomas' continual reference to race as a basis for his opinions invalidated his place on the Court.[23]

Some scholars counter that diverse representation in the judiciary is not a relevant consideration, as it interferes with the legitimacy of the courts and conflates their role with the elected branches of government.[24] In other words: composition is not a problem for the judiciary because judges are not bound by the same bodily considerations. Instead, judges should be able to do their job without looking like or coming from the backgrounds of The People. Judges do not represent them; they represent The Law.

That "The Law" can be represented by five white men, two white women, and only two people of color admits the bias inherent in our law from the founding.

Allowing the assertion of more personal experiences on the Court—in concert with increasing the diversity of experiences brought to the bench—does not have to be about the Court reaching more "right" decisions. Though, there are certainly those that believe more diversity on the Court would do just that.[25] Instead, the

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[21] Peter Baker & Jeff Zeleny, *Obama Hails Judge as 'Inspiring'*, N.Y. TIMES (May 26, 2009), https://www.nytimes.com/2009/05/27/us/politics/27court.html?_r=1&hp.

[22] *See, e.g.*, Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525 (2013–2014) (arguing that Justice Sotomayor's jurisprudence concerned with the public legitimacy of the court is well supported by social science); David L. Hudson Jr., *Justice Sotomayor Expresses Concern Over Court's True Threat Jurisprudence*, FREEDOM FORUM INST. (Mar. 7, 2017), https://www.freedomforuminstitute.org/2017/03/07/justice-sotomayor-expresses-concern-over-courts-true-threat-jurisprudence/ (praising the Justice for a concurring opinion in which she cautioned the Court about its muddled line of free speech reasoning leading to draconian effects). *See also* David Fontana, *Justice Sotomayor is Showing Her Liberal Peers on SCOTUS How to Be a Potent Minority Voice*, VOX (July 7, 2018, 10:01 AM), https://www.vox.com/the-big-idea/2018/7/6/17538362/sotomayor-kennedy-retirement-liberal-wing-dissent-travel-ban-rbg (citing a body of cases in which Justice Sotomayor staked a more liberal defense of minorities than any Justice on the Court).

[23] *See* ROBIN, *supra* note 1, at 1 (citing acclaim that "Thomas's views are now being followed by a majority of the Court in case after case"). It is worth noting as well that Justice Marshall joined the bench as a heralded civil rights advocate. His peers on the bench wrote that Marshall shared his experiences with the Court in deliberation and strengthened their thought processes on issues that related to his personal experience. *See* Ifill, *supra* note 9, at 410 n.9.

[24] *See* Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 159 (2004) ("In general, two related criticisms have been lodged against efforts to apply the concept of representation to the judiciary: (1) judges are not representatives in the same sense that legislators are, and therefore, they are not politically accountable to special interest groups; and (2) judicial independence would be threatened if a representative judiciary were pursued as a matter of public policy."). *See also* Nancy Scherer, *Diversifying the Federal Branch: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 628–30 (2011) (summarizing conservative arguments that efforts to increase diversity on federal courts decreases their legitimacy); Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary*, 62 JUDICATURE 488, 494 (1979) (posing the argument that affirmative action within the judiciary is "inappropriate").

[25] *See, e.g.*, Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206 (2006); Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15

collective acknowledgement that our personal experiences unavoidably inform our philosophies as judges, lawyers, and policy makers better prepares us as a society for serious inquiry into the legal frameworks we uphold. More fundamentally, having a Court comprised of Justices that resemble the American people—and recognizing the personal experiences of all Justices on the Court—is an important step in de-centering the experiences of cis, white, able-bodied men as the default of our law.

Justice Thomas does not write the type of opinions that the typical proponents of diversity savor; Justice Barret will likely fail to write these decisions as well. For that matter, in both of the aforementioned opinions in which Justice Frankfurter felt the weight of his Jewish identity, he reached the illiberal conclusion.[26] But, their mere presence on the Court, and the extent to which they draw on personal experiences outside of what our system is accustomed to, presents an opportunity to seriously engage in uprooting the foundation of our legal system from solely the experiences of white men. To do so requires recognition of what Robin overlooked: that these men have been importing their lived experience into the law since our country's inception. As we diversify the bench, it is not the importation of personal experience that needs to be scorned. Rather, it is the insistence that an increasingly diverse bench continue to uphold the same dangerous norms that deserves our critique.

AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/.

[26] *See* Feldman, *supra* note 11.