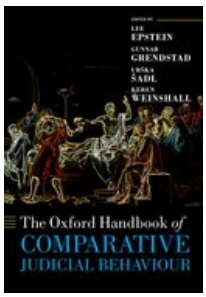

The Oxford Handbook of Comparative Judicial Behaviour

Lee Epstein (ed.) et al.

https://doi.org/10.1093/oxfordhb/9780192898579.001.0001

Published: 18 December 2023 **Available in print:** 12 November 2024 **Online ISBN:** 9780191924835

Print ISBN: 9780192898579

Search in this book

CHAPTER

8 Backgrounds, Attributes, and Identities

Santiago Basabe-Serrano, Lee Epstein, Keren Weinshall

https://doi.org/10.1093/oxfordhb/9780192898579.013.8 Pages 165–180

Published: 22 February 2024

Abstract

This chapter focuses on the effect of personal characteristics on judging. Early studies tended to draw connections between the judges' prior professional experience and their decisions; more contemporary work focuses on social identity. A summary of the existing literature shows that regardless of the category, many research results are consistent with in-group bias: judges, like most humans, tend to favour litigants of their own group over outsiders. Depending on one's perspective, this bias could be seen as offsetting years of 'exclusionary' judicial processes, or it could be seen as violating a guiding principle of most courts: to treat all parties equally. Either way, a mix of social identities is essential for ensuring socially diverse courts, which, in turn, may be crucial for developing innovative, high-quality solutions to the kinds of complex problems that confront contemporary courts. The chapter concludes with proposals for forward movement in the analysis of social identity and diversity.

Keywords: judicial in-group bias, social identity, gender, nationality, religion, race, ethnicity

Subject: Legal System and Practice, Comparative Law, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

1. Introduction

This chapter explores an important strand of the literature on judicial behaviour, variously described as the analysis of the judges' social backgrounds (Schmidhauser 1962; Ulmer 1973), personal attributes (George and Weaver 2017), biographies (Posner 1995), or identities (Epstein and Weinshall 2021). Whatever the descriptor, the basic idea is that personal characteristics affect judging.

Consideration of personal characteristics and their relation to judicial behaviour is both old and new. Early work traces to the 'legal realists'—a group of US law professors, policy-makers, and even judges. Writing at the

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

turn of the twentieth century, the realists speculated that the judges' biographies (especially their social class) influenced their decisions.

Not only does the realists' project continue into the twenty-first century, it has gained steam. Modern-day legal academics and social scientists worldwide are investigating how and why various personal attributes, especially social identities (including gender, religion, race, and nationality), affect judging.

This chapter begins, in section 2, with the realists and then moves to more contemporary studies in section 3. Section 4 discusses mechanisms that can help explain why the judges' personal characteristics influence their decisions. The chapter concludes with thoughts on future research programmes.

2. The Backstory

Linking judges' attributes to their behaviour traces to two intertwined events occurring in the United States in
p. 166 the early 1900s: (i) the rise of corporate influence and, ultimately, ↳ business's 'ascendancy in government', including in the courts (Schmidhauser 1959, 6); and (ii) the emergence of legal realism.

Because so much has been written on corporate influence from the perspective of judicial behaviour (see e.g. Epstein and Gulati 2022), suffice it to note here that at the turn of the twentieth century, economic regulation—such as maximum-hour work laws—was met with 'suspicion' from the nation's judges, especially Supreme Court justices (Chafee 1931, 338–39). That pro-business period, known as the 'Lochner era', [1] seemed to end in the 1910s only to return a decade later, when the Court issued a string of decisions favouring employers over unions and overturning laws disfavoured by business (e.g. minimum wage, child labour, and tax laws).

Neither the 'Lochner era' nor the later pro-business decisions went unnoticed by a group of scholars, policy-makers, and even some judges. Known as the legal realists, they tended to reject the 'mechanical theory' of judging, an approach postulating 'absolute legal principles, existing prior to and independent of all judicial decisions and merely discovered and applied by courts' (Haines 1922, 92; see also Morell, this volume). In its stead, the realists accepted the view, encapsulated in Holmes' (1881) famous line, that '[t]he life of the law has not been logic: it has been experience'. Under this view (though perhaps in an extreme version), judges were no different than other humans. Haines (1922, 104–05) explains it this way:

> Just as is the case with other opinions of individuals, judicial opinions necessarily represent in a measure the personal impulses of the judge, in relation to the situation before him, and these impulses are determined by the judge's lifelong series of previous experiences.

As applied to the Court's pro-business posture, the realists speculated that judges would naturally favour business over labour because they came from wealth and privileged 'social positions' (Haines 1922, 116).

Although the realists were interested in using data for policy-making purposes (e.g. improving the bankruptcy and criminal justice systems) (see Kritzer 2009), they conducted very few systematic studies of judicial behaviour. So they never put the posited relationship between social class and pro-business to the test.[2]

But soon enough, this test was applied. The realists' general speculation about the relationship between the judges' biographies and their decisions set the stage for data studies by social scientists, especially US political scientists (for a review of the early data studies, see Grossman 1966). Many of the initial projects focused on party identity (see Spill Solberg and Waltenburg, this volume; and Epstein, Martin, and Quinn, this volume; and e.g. Nagel 1961, Ulmer 1962; Vines 1964). Other work, though, zeroed in on various features of the judges' biographies, including the realists' interest in social class—though the results were mixed. Assuming that 'members of certain Protestant denominations' have a 'higher average income than that of members of other Protestant denominations', Nagel (1962, 337) compared the two types' treatment of criminal defendants. He

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

found no difference among US federal and state high court justices. In contrast, analysing a different outcome
p. 167 variable—the propensity to dissent—and using ↳ an alternative measure of social class, Schmidhauser (1962, 203) found that 'justices of humble background had a very strong propensity to dissent … while the justices of upper middle-class background tended almost equally strongly not to become "great" or frequent dissenters'.

Schmidhauser's study excepted, early research connecting the judges' *prior professional experience* and their decisions proved more promising than the work on social class. Because the early 'careerist' studies are many in number and are summarized in Epstein, Martin, and Knight (2003), we list only few especially noteworthy findings:

- Vines (1964), in a study of federal trial court judges, found a positive relationship between holding state political office and taking a segregationist stance on race relations.
- Nagel (1962) demonstrated that both US and state justices with prosecutorial experience were harsher on criminal defendants.

Despite the variations in these and the many other studies reported in Epstein, Martin, and Knight (2003), the results are fairly uniform: whatever occupational path the authors explored and whether they sought to account for the vote, legal reasoning, or another feature of judicial behaviour, their studies generally unearthed some influence of career experience.

3. Modern-Day Analysis

As even this brief review of the early studies makes clear, systematic work on US courts and judges—mainly by political scientists—dominated the analysis of personal characteristics for much of the twentieth century. Towards the end of the century, political scientists from Canada joined in. While the attitudinal model (widely used in the US context; see Spill Solberg and Woltenburg, this volume) did not appear to travel well up north, Tate and Sittiwong (1989) demonstrated that prior career experience, gender, religion, and regionalism (particularly Quebec vs non-Quebec origins), had a significant impact on how Canadian Supreme Court justices reached their decisions (also see Songer and Johnson 2007).

The twenty-first century has witnessed remarkable growth in the diversity of scholarship work on the influence of judges' personal characteristics. Contemporary research is increasingly global in scope, covering judges serving on domestic and international courts. And these days work is just as likely to draw on economics, law, psychology, and sociology as it is on political science. Last but certainly not least, research on prior professional career experiences, to be sure, continues (see e.g. de Castro 2021, showing that former prosecutors remained tough on criminal defendants even after a change in the law). There is also, relatedly, thought-provoking contemporary work on the judges' academic backgrounds and training (see e.g. Basabe-
p. 168 Serrano 2014, 2019). But many ↳ modern-day studies tend to focus less on the judges' professional biographies than on the judges' (and, sometimes, the litigants') social identities (see generally Harris and Sen 2019), reflecting the (somewhat) growing diversity of courts worldwide.

The sections to follow focus on the identities of gender, religion, race, ethnicity, and nationality. These are, of course, distinct (though intersecting) categories but, as we shall see, the research on each has asked similar questions (chiefly, whether a particular identity affects the choices judges make) and has come to comparable conclusions (mostly but not always centring on in-group bias).

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

3.1 Gender

When the realists and political scientists began drawing links between judges' attributes and the choices they make, the systematic study of social identity (apart from partisanship) was difficult because courts in many countries were quite homogeneous. The judges' gender provides a, if not the, prime example. As Figure 8.1 shows, through the 1970s only about 12 per cent of the 155 countries represented in the data had selected a woman—their first woman—to sit on the country's highest court; in the 1980s, that percentage doubled, such that at least one women had served on about (12.3 + 12.9=) 25 per cent of the countries' courts. By the end of 2010s, only four countries had never appointed a woman to their highest court.

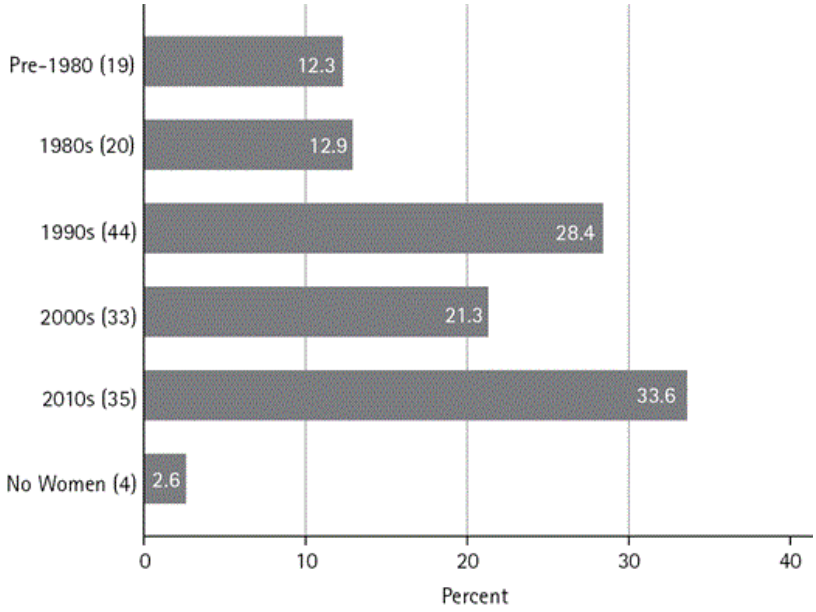

Figure 8.1 When the first woman was selected to serve on the highest court in 155 countries. The number in parentheses is the number of countries. For example, before 1980, in only nineteen of the 155 countries (12.3%) did the first woman serve; in the 1980s, twenty countries (12.9%) selected their first woman. Data are from Arrington et al. (2021).

p. 169 This is not to say that all high courts are now composed of substantial fractions of female judges. To the contrary: the fraction varies considerably. For international courts, Grossman et al .'s (2016) data, running from 1999 to 2015, show that women occupied 47 per cent of the seats on the International Court of Justice but only 14 per cent on the European Court of Justice. Valdini and Shortell's (2016) data for domestic high courts also shows considerable variation, from Latvia's 57 per cent female to under 10 per cent for eleven countries (including Italy, Panama, India, and the United Kingdom). Nonetheless, even low percentages can mask growth in gender diversity over time. In Latin America, for example, the number of female justices 'increased dramatically … from 3% of all justices in the region's high courts in 1980 to 19% in 2010'. (Arana Araya, Hughes, and Pérez-Liñán 2021, 373).

With increasing gender diversity has come scores of studies mostly aimed at the question typical in the study of personal characteristics: whether the category 'matters'—here, do female judges make different choices than male judges? Perhaps tracing to matters of data and/or methodology, the results of early studies were quite mixed (for a review see Boyd, Epstein, and Martin 2010). But more contemporary work has been rather uniform, with the results fitting comfortably with one of the most central and best documented manifestations of social group identity: in-group bias (or favouritism). More than five decades ago, social scientists noticed the tendency of individuals to favour members of their own group over outsiders (Tajfel 1970; Billig and Tajfel 1973; Tajfel and Turner 1979), and now there is a very substantial literature on the subject across law and the (social) sciences (for a general review, see Hewstone, Rubin, and Willis 2002; for a review with applications to judging,

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

see Epstein, Parker, and Segal 2018). The result is an impressive body of evidence showing that people tend to be more helpful, more willing to allocate resources, and more supportive of policies advocated by members of their own group (and vice versa for the out-group). Moreover, the greater the salience and relevance of the grouping to the task at hand, 'the stronger these intergroup divisions' (Iyengar et al. 2019, 130).

Evidence consistent with in-group bias in courts—'us-against-them' judging—abounds in the gender studies. Contemporary studies have converged on results showing that female judges are more favourable toward plaintiffs (mostly women) in cases of gender-based discrimination and sexual harassment. This holds for courts as diverse as the US intermediate appellate courts (Peresie 2005; Boyd, Epstein, and Martin 2010; Moyer and Tankersley 2012), the European Court of Human Rights (Voeten 2021), and the Supreme Court of Canada (Johnson and Songer 2009). Then there is evidence in the family law context of female judges tending to favour mothers over fathers, whereas male judges support fathers over mothers (Stribopoulos and Yahya 2007). Likewise, in criminal cases involving sex offences (again, with mostly male defendants), female judges favour the state at greater rates than males. Weinshall (2021), for example, finds that female judges on the Israeli Supreme Court, 'were significantly "tougher on crime" when sex offenses were involved, ruling for the state in 80.2% of their decisions, compared to 67.1% of the decisions by men'. Beyond these types of cases—*all salient to gender*—few (or weaker) differences emerge between male and female judges.

p. 170 But there are certainly exceptions to the in-group findings. Boyd's (2013) analysis of settlements is a prominent example. Analysing 18,000 civil rights and torts cases terminated in US district (trial) courts, she finds that 'the sex of a case's assigned judge matters, with female judges successfully fostering settlement in their cases more often and more quickly than their male colleagues' (193). Boyd attributes the results not to in-group bias but rather to the different management styles adopted by men and women (e.g. women tend to be more oriented toward consensus building).

3.2 Religion

Most studies on gender are relatively new, reflecting the dearth of women on the bench until the late-twentieth century. Religion, in contrast, sometimes figured into early research on social backgrounds and attributes. In comparing Catholic, Jewish, and Protestant US appellate judges, Goldman (1966, 381), for example, found that the Catholics (or, as he noted, 'perhaps [the] upper-class Catholics' who populated the federal bench) were less likely to rule in favour of the government in fiscal cases.

Work on religion continues, with more studies than ever and with many, yet again, reaching results consistent with in-group bias. Take Koev's (2019) study of religious freedom cases in the European Court of Human Rights, which also reports a form of us-against-them judging: the judges are less likely to rule in favour of Muslim applicants. Whether this result reflects bias against adherents of Islam is hard to know, as Koev acknowledges. Nonetheless, 'the strength of the empirical relationship, when paired with the salient and controversial role Muslims (especially Muslim migrants) play in Europe's contemporary political climate, suggests such a bias is plausible' (Koev 2019, 197).

Other studies run along similar lines, though they focus less on religious affiliation than on religious devoutness. Two papers, one on Israel (Weinshall 2021) and the other on the United States (Epstein and Posner 2022), provide examples.

In both countries, interestingly enough, 'devout' justices have increased in number. In 2010, as Figure 8.2 shows, religious Jewish justices (relative to secular Jewish and non-Jewish justices) cast fewer than 25 per cent of the votes in the Israeli Supreme Court; a decade later, the percentage jumped to 41. An increase in religiosity on the US Supreme Court is equally apparent (right panel). Between 2000 and 2020, the percentage of votes cast by Catholic justices, many of whom are devout, doubled, from about 33 to over 66.

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

To the extent that devoutness affects the judges' decisions, these increases are quite meaningful. Weinshall (2021) reports that religious Jewish justices on the Israeli Court are far less likely to overrule decisions of the rabbinical court than secular Jews, and Epstein and Posner (2022) show that highly devout US justices more frequently rule in favour of religious liberty than the less devout.

These findings square with other studies on judges' affiliation with the Catholic church. Blake (2012), for example, shows that Catholic justices on the US Supreme Court form a distinctive bloc, voting consistently with
p. 171 Catholic theological commitments. ↳ Wasserman and Hardy (2013) report that Catholic US justices favour religious organizations more than Protestant justices—by a factor of twelve. And work by Tate and Sittiwong (1989) and Songer and Johnson (2007) highlight distinct differences in the voting patterns of Catholic and Protestant judges on the Canadian Supreme Court.

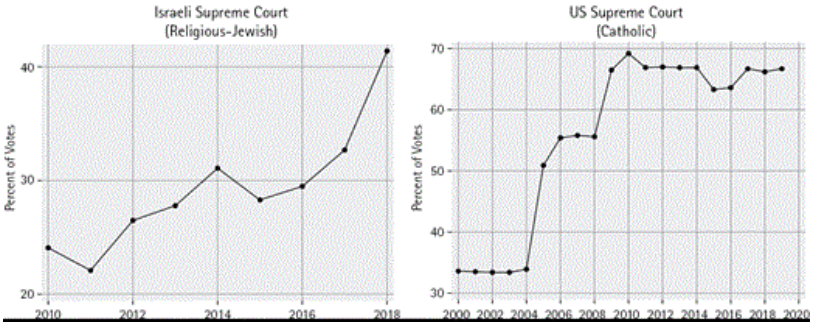

Figure 8.2 Percentage of votes cast by religious-Jewish justices on the Israeli Supreme Court (left panel) and by Catholic justices on the US Supreme Court (right panel). Data sources: Israel (Weinshall and Epstein 2020), United States (Epstein and Posner 2022).

Other studies reaching similar conclusions are easy enough to summons (see e.g. Songer and Tabrizi 1999). With few exceptions (e.g. Weinshall 2021), though, they are North American based; little is known about the linkage between religion and judging in other societies and regions. Expanding the targets of inquiry into Latin America, in particular, would seem quite important because the Catholic church remains the institution with the greatest credibility and public trust. Studies could compare areas in which the relationship between this sector and judicial choices might be especially salient (abortion, same-sex marriage, and euthanasia) and those where it may be less relevant.

At the same time, it is true that some work on religion, just as some research on gender, reaches results that must reflect explanations other than in-group bias. Take a study of Pakistan and India, showing that Ramadan fasting ritual increases 'Muslim judges' acquittal rates, lowers their appeal and reversal rates, and does not come at the cost of increased recidivism or heightened outgroup bias' (Mehmood, Seror, and Chen 2023, 874). The explanation, the authors suggest, may relate to the ritual itself: because Ramadan fasting is associated with greater reflection, it may prompt judges 'do the right thing' and make 'better' decisions, paying more attention to the facts of the case'.

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

3.3 Race and Ethnicity

When it comes to race, yet again the vast majority of studies are US based, and (mostly) focus on 'Black judges
p. 172 and how their voting differs from white judges' voting' (Harris ↳ and Sen 2019, 248).[3] And once again the findings tend to be consistent with various forms of in-group bias. To supply but a few examples: White judges are less likely than Black judges to hold for Black defendants claiming police misconduct (Scherer 2004); Black US federal appeals judges, relative to Whites, tend to support plaintiffs of colour in voting rights cases (Cox and Miles 2008); Black claimants in employment discrimination litigation (Morin 2014); and White judges are less supportive of affirmative action (diversity) programmes than Black judges (Kastellec 2013). Worthy of mention too is Sen's (2015) research showing a greater willingness on the part of (mostly White) US appellate judges to reverse the decisions of Black trial court judges. (For a comprehensive review of the US studies on the judges' race, see Harris and Sen 2019.)

Turning to ethnicity, studies outside the United States are more plentiful. Perhaps because it is such a salient characteristic in Israel, that country has been a testing ground for work on ethnicity (and religion). Shayo and Zussman's (2011) landmark paper of small claims courts in that country exemplifies both the kinds of questions scholars have asked and the answers their work has produced.

As with work on gender, Shayo and Zussman ask whether the identities of interest—here ethnicity/religion—influences judging. Not only do they demonstrate that these identities matter, the data also provides clear evidence of in-group bias: In small claims courts, Jewish judges systematically favour Jewish litigants, and Arab judges (encompassing both Muslims and Christians) favour Arab litigants (see also Gazal-Ayal and Sulitzeanu-Kenan 2010 reporting similar results in Israeli judges' decisions to detain suspects). Further, when the salience of these identities increases, say, in the aftermath of terrorist attacks, the bias strengthens.

Shayo and Zussman's work focused on a court of first instance. Choi, Harris, and Shen-Bayh (2022), in contrast, consider criminal appeals courts in Kenya but the findings are similar. Not only do the authors show that the judges are 'more likely to grant coethnic appeals than non-coethnic appeals' (1067) but Choi, Harris, and Shen-Bayh are able to trace the mechanism directly to in-group favouritism, demonstrating judges use more 'trust-related terms' when writing for co-ethnics.

3.4 Nationality

Although most early studies on the relation between the judges' backgrounds and their choices focused on US courts, with emphasis on the judges' prior professional careers, there were some notable exceptions. Hensley's (1968) analysis of the International Court of Justice stands out. He hypothesized and demonstrated empirically that the judges would show a 'disposition to favour their own countries' (568)—in other words, he provided evidence of in-group favouritism based on national identity.

Since then numerous empirical studies have confirmed Henley's basic finding, giving little reason to doubt 'that the nationality of the international adjudicator matters' (Titi 2020). Or as three international court judges once put it: 'Of all the influences to which men are subject, none is more powerful, more pervasive, or more
p. 173 subtle, than the tie ↳ of allegiance that binds them to the land of their homes and kindred' (quoted in Kuijer 1997, 49). To provide an (extreme) example, an Italian judge on the European Court of Human Rights dissented in 133 judgments concerning alleged Italian violations of the European Convention on Human Rights (Titi 2020).

More generally, in their classic empirical study of judges serving on the International Court of Justice, Posner and de Figueiredo (2005) explored whether the judges are biased toward their home countries, its allies, or even countries that resemble theirs. The researchers' findings are clear: not only do the judges favour their home country but also countries whose wealth level and political systems are like theirs.[4] But why the judges exhibit

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

these biases is unclear. As Posner and de Figueiredo note, it could be because the judges fear reprisal from their home government if they vote against its interests, or it could be a more emotional response: 'if judges identify with their countries, they may find it difficult to maintain impartiality' (608).

These explanations pertain to international courts. But even on domestic courts (ethno-) national affiliation can lead to in-group bias, as a study of the Constitutional Court of Bosnia-Herzegovina uncovered: 'the judges … divide predictably along ethno-national lines [and] these divisions cannot be reduced to a residual loyalty to their appointing political parties' (Schwartz and Murchison 2016).

Similarly, Songer and Johnson (2007) discovered that 'regionalism' emerges as one of the most significant factors influencing the decisions of justices on the Canadian Supreme Court. Notably, justices hailing from Quebec exhibit distinct voting patterns: more conservative on personal rights issues, while more liberal in economic matters compared to their counterparts from other regions. These patterns may reflect the unique ethnic subculture of Quebec, where Catholicism has influenced the predominantly French-speaking community, leading to the historical adoption of relatively conservative attitudes and values.

4. Mechanisms Explaining Why Personal Characteristics Affect Judging

Throughout this chapter, we have emphasized that the findings in many studies of personal characteristics are consistent with in-group bias. But not all. Songer and Johnson's (2007) study, as we just mentioned, demonstrates a clear ideological divide between justices from Quebec and those from other regions—a divide that appears unrelated to the origin of litigants or to other regional interests. Another example is Boyd's (2013) work on gender effects, showing that women are more likely to promote settlements than men, all else being equal. The suggestion from these and other studies is that in-group bias is not the only explanation linking identity and judging.

p. 174 For this reason, several papers explore and compare various explanations that seek to explain why personal characteristics affect judging (see generally Boyd, Epstein, and Martin 2010; Weinshall 2021), though the exact mechanism is not always clear, as acknowledged by Posner and de Figueiredo (2005).

One widely discussed mechanism, commonly known as the 'different voice' theory (Gilligan 1982; Sherry 1986), posits that individuals from diverse origins or backgrounds develop distinct world-views, leading them to hold different perspectives and perceptions concerning moral judgments. This premise suggests that the variations in moral views extend beyond issues directly related to one's own in-group and may manifest across a wide range of judicial decisions. This includes, for example, female judges' tendencies to favour a consensual approach to conflict resolution, as demonstrated in Boyd's 2013 study, or Muslim judges 'forgiving' approach during the month of Ramadan, as shown by Mehmood, Seror, and Chen (2023).

An alternative group of mechanisms falls under the category of 'representational' accounts, all positing that judges act as representatives of their gender, religion, race, ethnicity, class, minority, or other social groups (see e.g. Cook 1981). Accordingly, when deciding cases relevant to their in-group, judges tend to rule in favour of their group's interests.

The in-group bias mechanism can be understood as falling within this approach, or at least seen as having a similar impact on voting. The term 'bias', though, may imply that the behaviour is driven by an unaware or unconscious mechanism, whereas the representational accounts include rationally driven and incentivized decisions to serve one's in-group interests. Conversely, a similar voting pattern can also be explained by differences in information held by individuals belonging to various social categories, an explanation sometimes referred to as the 'informational' approach (see e.g. Gryski, Main, and Dixon 1986). In this context,

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

the ‘minority’ judge may possess knowledge and information unknown to out-group members, leading to a sincere divergence in their views of the legal conflict and its preferred resolution. In the latter case, the presence of a minority-group judge can influence not only her own vote but also the decisions of her colleagues (as discussed in the diversity studies covered in the next section).

When examining these mechanisms, it is essential to consider the possibility that judges’ identities may not significantly influence their decisions or that any effect is marginal. This could be ascribed to the neutral and objective manner in which judges approach their decisions (see Morell, this volume), or it could be linked to peer effects or the influence of court leadership, which may act as a constraint on any personal propensities (see Ostberg and Wetstein, this volume; and Bricker, Carrubba, and Gabel, this volume). Alternatively, the shared professional education and training of judges, along with the consequences of the selection process for appointing them to the bench, could contribute to minimizing the impact of their personal backgrounds. Indeed, the selection process may ultimately override differences in personal backgrounds and lead elite lawyers nominated as judges to adapt the dominant perspective. This perspective is sometimes referred to as
p. 175 the ‘organizational’ or ‘reflecting’ approach (e.g. ↳ Steffensmeier and Herbert 1999). Then again, the numerous studies cited in this chapter consistently challenge this viewpoint. The abundance of worldwide data showcasing correlations between personal attributes and judicial decisions underscore the influence of backgrounds, attributes and identities on the choices judges make.

5. What’s Next?

Undoubtedly, there is a need for more research that focuses on conceptualizing, identifying, and distinguishing among the possible mechanisms of influence we just discussed.[5] Nonetheless—and regardless of the specific mechanisms at play—scholarly attention should also be given to the normative implications and policy consequences of the attributes’ effects. Depending on your perspective, these effects could be seen as offsetting years of ‘exclusionary legal processes’ (Escobar-Lemmon et al. 2021) or they could be seen as violating a guiding principle of most courts: to treat all parties equally. Either way, a mix of social identities is essential for ensuring socially diverse courts (‘teams of judges’), which, in turn, may be crucial for developing innovative, high-quality solutions to the kinds of complex problems that confront contemporary courts. In other words, a ‘diversity bonus’ may follow for courts with a mix of social identities (Page 2017).[6]

Why? Diversity theorists posit several explanations. Most well suited to courts, we believe, are reasons that emphasize shared information and the requirement of reaching an agreement on a collective decision (for voting strategies of judges, see Epstein and Weinshall 2021).[7] Page, for example, argues that the key to building great teams lies in germane cognitive diversity, which amounts to ‘differences in information, knowledge, representations, mental models, and heuristics’ that team members bring to the tasks of ‘problem-solving, predicting, and innovating’ (Page 2017, 14–15). This account aligns closely with the ‘informational’ mechanism presented earlier, which suggests that minority judges possess information, experience, or expertise that is valuable to their colleagues. To the extent that social category diversity—differences in race, gender, ethnicity, religion, nationality—feeds into people’s ‘cognitive repertoire’, socially diverse groups will perform better.

Although research directly putting ideas about the value of diversity in the courtroom to the test is scant, a handful of results could be seen as consistent with them. Mostly these follow from the ‘Collegial Court’ studies —a line of inquiry that seeks to assess whether a case’s outcome (or a judge’s vote) would have been different had a single judge, and not a panel, decided the case. In other words, the key question is whether ‘collegial’ (or ‘panel’ or ‘peer’) effects exist (Kastellec 2007). Often the focus is on the social diversity of the panel, especially its racial (Cox and Miles 200), ethnic (Grossman et al. 2016), or gender (Boyd, Epstein, and Martin 2010) composition. Regardless, the results tend to show that ‘minority’ judges on a panel can affect the choices of their colleagues in pertinent areas of the law.

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

p. 176 Such results are consistent with the social diversity literature. But truth be told, researchers have barely scratched the surface when it comes to using data to suss out diversity 'bonuses' on collegial courts. For this reason, we propose new research programs that explore the possible benefits of diversity on courts—including equity, legitimacy, quality, innovation, and creativity.

Taking equity as an example, one question might be: are the decisions of collegial courts more impartial than those of individual judges? Existing studies tend to answer in the affirmative, suggesting that socially diverse courts may mitigate in-group bias. Recall, for example, the study showing that in family law disputes male judges tend to favour fathers and female judges favour mothers (Stribopoulos and Yahya 2007) The same study, though, reports that 'these effects are dampened on panels that include judges of both genders' (319). Likewise, research on sentencing in the United States finds 'that as the proportion of Black judges increases, white and Black judges are less likely to render incarceration sentences in cases with Black defendants and white judges are more likely to render incarceration sentences in cases with white defendants' (Harris 2023). Both studies, in other words, imply that social diversity can redress inequities caused by in-group bias. But far more work is needed, especially on courts outside the United States.

Equity is but one example. We can imagine equally interesting studies exploring, say, whether diverse courts produce higher-quality decisions or rulings that society is more likely to respect.[8] For, despite its long pedigree, the study of links between the judges' decisions and their biographies, attributes, and identities is still evolving —and evolving in more interesting ways than ever.

Acknowledgements

Thanks to Jack Knight for his valuable insights.

Notes

1. This era was named for a 1905 US Supreme Court decision, *Lochner v New York*, in which the majority struck down a law that prohibited employees of bakeries from working more than ten hours per day and sixty hours per week. The Court claimed that such laws reflected nothing more than government paternalism; they were 'mere meddlesome interferences' with the liberty of contract. In 1937, the Court repudiated this approach.

2. But their conjecture about the justices' backgrounds was later confirmed in a landmark data study by Schmidhauser in 1959 (9): 'Throughout the entire history of the Supreme Court, only a handful of its members were of essentially humble origin . … [They] but were chosen overwhelmingly from the socially-prestigeful and politically influential gentry class or the professionalized upper middle-class.'

3. A far fewer number of studies focus on US Latinx judges. Exceptions include Morin (2014) and Haire and Moyer (2015). For a review, see Harris and Sen (2019).

4. Voeten's (2008, 417) findings are similar: European Court of Human Rights judges tend to favour their home country when
p. 177 it is a party to a dispute. But, in a twist, Voeten shows ↳ that judges 'from former socialist countries are more likely to find violations against their own government and against other former socialist governments, suggesting that they are motivated by rectifying a particular set of injustices'.

5. A unique challenge faced by researchers studying certain European and international courts pertains to acquiring information concerning the judges' personal attributes, such as religion or ethnicity. These details are regarded as private information, and even if researchers manage to acquire them, disseminating the database remains unfeasible.

6. Almost needless to write, many justifications exist for diversity, inclusion, and equity. In the context of courts, see e.g. Grossman (2011) and Haire and Moyer (2015).

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

7. Two other explanations for the possible influence of minority judges on the decisions of their colleagues are the (i) the voting strategies of judges, and (ii) the very presence of minority judges, which can increase the salience of the minority group (see Grossman et al. 2016; Kastellec 2013).

8. For other ideas running along these lines, see Epstein and Knight (2022).

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

References

Arana Araya, Ignacio, Melanie M. Hughes, and Aníbal Pérez-Liñán. 2021. 'Judicial Reshuffles and Women Justices in Latin America'. *American Journal of Political Science* 65: 373–88.
Google Scholar WorldCat

Arrington, Nancy, Leeann Bass, Adam Glynn, Jeffrey K. Staton, Brian Delgado and Staffan I. Lindberg. 2021. 'Constitutional Reform and the Gender Diversification of Peak Courts'. *American Political Science Review* 115: 851–68.
Google Scholar WorldCat

Basabe-Serrano, Santiago. 2019. 'Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin America'. *Justice System Journal* 40: 110–25.
Google Scholar WorldCat

Basabe-Serrano, Santiago. 2014. 'Determinants of the Quality of Justice in Latin America: Comparative Analysis of the Ecuadorian Case from a Sub-national Perspective'. *Justice System Journal* 35: 104–20.
Google Scholar WorldCat

Billig, Michael, and Henri Tajfel. 1973. 'Social Categorization and Similarity in Intergroup Behaviour'. *European Journal of Social Psychology* 3:27–52.
Google Scholar WorldCat

Blake, William. 2012. 'God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences'. *Political Research Quarterly* 65: 814–26.
Google Scholar WorldCat

Boyd, Christina L. 2013. 'She'll Settle It?' *Journal of Law and* Courts 1: 193–219.
WorldCat

Boyd, Christina L., Lee Epstein, and Andrew D. Martin. 2010. 'Untangling the Causal Effects of Sex on Judging'. *American Journal of Political Science* 54: 389–411.
Google Scholar WorldCat

Chafee, Zechariah Jr. 1931. 'Liberal Trends in the Supreme Court'. *Current History* 35: 338–44.
Google Scholar WorldCat

Choi, Donghyun Danny, J. Andrew Harris, and Fiona Shen-Bayh. 2022. 'Ethnic Bias in Judicial Decision Making: Evidence from Criminal Appeals in Kenya'. *American Political Science Review* 116: 1067–80.
Google Scholar WorldCat

Cook, Beverly B. 1981. 'Will Women Judges Make a Difference in Women's Legal Rights?' In *Women, Power, and Political Systems*, edited by Margherita Rendel, 216–39. London: Croom Helm.
Google Scholar Google Preview WorldCat COPAC

Cox, Adam B., and Thomas J. Miles. 2008. 'Judging the Voting Rights Act'. *Columbia Law Review* 108: 1–54.
Google Scholar WorldCat

de Castro, Samy Alexander. 2021. 'Judicial Attitudes Under Shifting Jurisprudence. Evidence´s from Brazil new drug law of 2006'. *International Review of Law and Economics* 68: 1–15.
Google Scholar WorldCat

Epstein, Lee, and Mitu Gulati. 2022. 'Essay: A Century of Business in the Supreme Court, 1920–2020'. *Minnesota Law Review Headnotes* 107: 49–74.
Google Scholar WorldCat

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

Epstein, Lee, and Jack Knight. 2022. 'How Social Identity and Social Diversity Affect Judging'. *Leiden Journal of International Law*, 35: 897–911.
Google Scholar WorldCat

Epstein, Lee, and Eric Posner. 2022. 'The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait'. *Supreme Court Review* 2021: 315–47.
Google Scholar WorldCat

Epstein, Lee, and Keren Weinshall. 2021. *The Strategic Analysis of Judicial Behavior: A Comparative Perspective*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Epstein, Lee, Andrew D. Martin, and Jack Knight. 2003. 'The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court'. *California Law Review* 91: 903–66.
Google Scholar WorldCat

Epstein, Lee, Christopher M. Parker, and Jeffrey Segal. 2018. 'Do Justices Defend the Speech They Hate? An Analysis of In-Group Bias on the US Supreme Court'. *Journal of Law and Courts* 6: 237–62.
Google Scholar WorldCat

Escobar-Lemmon, Valerie J. Hoekstra, Alice J. Kang, and Miki Caul Kittilson. 2021. 'Breaking the Judicial Glass Ceiling: The Appointment of Women to High Courts Worldwide'. *Journal of Politics* 83: 662–74.
Google Scholar WorldCat

Gazal-Ayal, Oren, and Kenan-Raanan Sulitzeanu. 2010. 'Let My People Go: Ethnic in-Group Bias in Judicial Decisions-Evidence from a Randomized Natural Experiment'. *Journal of Empirical Legal Studies* 7: 403–28.
Google Scholar WorldCat

George, Tracey E., and Taylor Weaver. 2017. 'The Role of Personal Attributes and Social Backgrounds on Judging'. In *The Oxford Handbook of U.S. Judicial Behavior*, edited by Lee Epstein and Stephane Lindquist, 286–302. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Gilligan, Carol. 1982. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.
Google Scholar Google Preview WorldCat COPAC

Goldman, Sheldon. 1966. 'Voting Behavior on the United States Courts of Appeals, 1961–1964'. *American Political Science Review* 60: 374–83.
Google Scholar WorldCat

Grossman, Guy, Oren Gazal-Ayal, Samuel D. Pimental, and Jeremy M. Weinstein. 2016. 'Descriptive Representation and Judicial Outcomes in Multiethnic Societies'. *American Journal of Political Science* 60: 44–69.
Google Scholar WorldCat

Grossman, Joel B. 1966. 'Social Backgrounds and Judicial Decision-Making'. *Harvard Law Review* 79: 1551–64.
Google Scholar WorldCat

Gryski, Gerard, Eleanor C. Main, and William J. Dixon. 1986. 'Models of State High Court Decision Making in Sex Discrimination Cases'. *Journal of Politics* 48: 143–55.
Google Scholar WorldCat

Grossman, Nienke. 2011. 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts'. *Chicago Journal of International Law* 12: 647–84.
Google Scholar WorldCat

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

Haines, Charles Grove. 1922. 'General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges'. *Illinois Law Review* 17: 96–116.
Google Scholar WorldCat

Haire, Susan B., and Laura P. Moyer. 2015. *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals*. University of Virginia Press.
Google Scholar Google Preview WorldCat COPAC

Harris, Allison P., and Maya Sen. 2019. 'Bias and Judging'. *Annual Review of Political Science* 22: 241–59.
Google Scholar WorldCat

Harris, Allison. 2023. 'Can Racial Diversity among Judges Affect Sentencing Outcomes?' *American Political Science Review* 117: 1–16.
Google Scholar WorldCat

Hensley, Thomas. 1968. 'National Bias and the International Court of Justice'. *Midwest Journal of Political Science* 12: 568–86.
Google Scholar WorldCat

Hewstone, Miles, Mark Rubin, and Hazel Willis. 2002. 'Intergroup Bias'. *Annual Review of Psychology* 53: 575–604.
Google Scholar WorldCat

Holmes, Oliver Wendell, Jr. 1881. *The Common Law*. Available at: https://www.gutenberg.org/files/2449/2449-h/2449-h.htm
WorldCat

Iyengar, Shanto, Yphtach, Lechkes, Matthew Levendusky, Neil Molhotra, and Sean J. Westwood. 2019. 'The Origins and Consequences of Affective Polarization in the United States'. *Annual Review of Political Science* 22: 129–46.
Google Scholar WorldCat

Johnson, Susan W., and Donald R. Songer. 2009. 'Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts'. *Justice System Journal* 30: 265–79.
Google Scholar WorldCat

Kastellec, Jonathan P. 2007. 'Panel Composition and Judicial Compliance on the U.S. Courts of Appeals'. *Journal of Law, Economics and Organization* 23: 421–41.
Google Scholar WorldCat

Kastellec, Jonathan P. 2013. 'Racial Diversity and Judicial Influence on Appellate Courts'. *American Journal of Political Science* 57: 167–183.
Google Scholar WorldCat

Koev, Dan. 2019. 'Not Taking It on Faith: State and Religious Influences on European Court of Human Rights Judges in Freedom of Religion Cases'. *Journal of Human Rights* 18: 184–200.
Google Scholar WorldCat

Kritzer, Herbert M. 2009. 'The (Nearly) Forgotten Early Empirical Legal Research'. In *The Oxford Handbook of Empirical Legal Research*, edited by Peter Cane and Herbert M. Kritzer, 875–900. New York: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Kuijer, Martin. 1997. 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice'. *Leiden Journal of International Law* 10: 49–67.
Google Scholar WorldCat

Lochner v New York. 1905. 198 U.S. 45.

Mehmood, Sultan, Avner Seror, and Daniel L. Chen. 2023. 'Ramadan Fasting Increases Leniency in judges from Pakistan and

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

India'. *Nature Human Behaviour* 7: 874–80.
Google Scholar WorldCat

Morin, Jason L. 2014. 'The Voting Behavior of Minority Judges in the US Courts of Appeals: Does the Race of the Claimant Matter?' *American Politics Research* 43: 34–64.
Google Scholar WorldCat

Moyer, Laura P., and Holley Tankersley. 2012. 'Judicial Innovation and Sexual Harassment Doctrine in the US Courts of Appeals'. *Political Research Quarterly* 65: 784–98.
Google Scholar WorldCat

Nagel, Stuart S. 1961. 'Political Party Affiliation and Judges' Decisions'. *American Political Science Review* 55: 843–50.
Google Scholar WorldCat

Nagel, Stuart S. 1962. 'Judicial Backgrounds and Criminal Cases'. *Journal of Criminal Law and Police Science* 53: 333–39.
Google Scholar WorldCat

Page, Scott E. 2017. *The Diversity Bonus*. Princeton: Princeton University Press.
Google Scholar Google Preview WorldCat COPAC

Peresie, Jennifer L. 2005. 'Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts'. *Yale Law Journal* 114: 1759–1790.
Google Scholar WorldCat

Posner, Eric A., and Miguel F. P. de Figueiredo. 2005. 'Is the International Court of Justice Biased?' *The Journal of Legal Studies* 34: 599–630.
Google Scholar WorldCat

Posner, Richard A. 1995. 'Judicial Biography'. *NYU Law Review* 70: 502–23.
Google Scholar WorldCat

Scherer, Nancy. 2004. 'Blacks on the Bench'. *Political Science Quarterly* 119: 655–75.
Google Scholar WorldCat

Schmidhauser, John R. 1962. 'Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States'. *University of Toronto Law Journal* 14: 194–212.
Google Scholar WorldCat

Schmidhauser, John R. 1959. 'The Justices of the Supreme Court: A Collective Portrait'. *Midwest Journal of Political Science* 3: 1–57.
Google Scholar WorldCat

Schwartz, Alex, and Melanie Murchison. 2016. 'Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina'. *Law & Society Review* 50 (4): 822–55.
Google Scholar WorldCat

Sen, Maya. 2015. 'Is Justice Really Blind? Race and Reversal in US Courts'. *Journal of Legal Studies* 44: 187–229.
Google Scholar WorldCat

Shayo, Moses, and Asaf Zussman. 2011. 'Judicial Ingroup Bias in the Shadow of Terrorism'. *Quarterly Journal of Economics* 126: 1447–84.
Google Scholar WorldCat

Sherry, Suzanna. 1986. 'Civic Virtue and the Feminine Voice in Constitutional Adjudication'. *Virginia Law Review* 72: 543–616.
Google Scholar WorldCat

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

Songer, Donald R., and Susan W. Johnson. 2007. 'Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model'. *Canadian Journal of Political Science* 40: 911–34.
Google Scholar WorldCat

Songer, Donald R., and Susan J. Tabrizi. 1999. 'The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts'. *Journal of Politics* 61: 507–26.
Google Scholar WorldCat

Steffensmeier, Darrell, and Chris Herbert. 1999. 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?' *Social Forces* 77: 1163–96.
Google Scholar WorldCat

Stribopoulos, James, and Moin A. Yahya. 2007. 'Does a Judge's Party of Appointment or Gender Matter to Case Outcomes: An Empirical Study of the Court of Appeal for Ontario'. *Osgoode Hall Law Journal* 45: 315–63.
Google Scholar WorldCat

Tajfel, Henri and John Turner. 1979. 'An Integrative Theory of Intergroup Conflict'. In *The Social Psychology of Intergroup Relations*, edited by W. G. Austin and S. Worchel, 94–109. Monterey: Brooks/Cole.
Google Scholar Google Preview WorldCat COPAC

Tajfel, Henri. 1970. 'Experiments in Intergroup Discrimination'. *Scientific American* 223: 96–102.
Google Scholar WorldCat

Tate, C. Neal, and Panu Sittiwong. 1989. 'Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations'. *Journal of Politics* 51: 900–16.
Google Scholar WorldCat

Titi, Catharine. 2020. 'Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy Options for the Multilateral Investment Court'.
https://doi.org/10.2139/ssrn.3519863.
WorldCat

Ulmer, S. Sidney. 1962. 'The Political Party Variable in the Michigan Supreme Court'. *Journal of Public Law* 11: 352–62.
Google Scholar WorldCat

Valdini, Melody, and Christopher Shortell. 2016. 'Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices'. *Political Research Quarterly* 69: 865–76.
Google Scholar WorldCat

Vines, Kenneth N. 1964. 'Federal District Judges and Race Relations Cases in the South'. *Journal of Politics* 26: 337–57.
Google Scholar WorldCat

Voeten, Erik. 2008. 'The Impartiality of International Judges: Evidence from the European Court of Human Rights'. *American Political Science Review* 102: 417–33.
Google Scholar WorldCat

Voeten, Erik. 2021. 'Gender and Judging: Evidence from the European Court of Human Rights'. *Journal of European Public Policy* 28: 1453–73.
Google Scholar WorldCat

Wasserman, Lewis M., and James C. Hardy. 2013. 'U.S. Supreme Court Justices' Religious and Party Affiliation'. *British Journal of America Legal Studies* 2: 111–62.
Google Scholar WorldCat

Weinshall, Keren, and Lee Epstein. 2020. 'Developing High-Quality Data Infrastructure for Legal Analytics: Introducing the Israeli

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026

Supreme Court Database'. *Journal of Empirical Legal Studies* 17: 416–34.
Google Scholar WorldCat

Weinshall, Keren. 2021. 'Courts and Diversity: Normative Justifications and Their Empirical Implications'. *Law and Ethics of Human Rights* 15: 187–220.
Google Scholar WorldCat

Downloaded from academic.oup.com/edited-volume/55208/chapter/440426061 by University of Bergen Library user on 29 October 2026