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Judicial Diversity in France: The Unspoken and the Unspeakable.

Abstract:

Despite the critical importance of judicial diversity for litigants and the broader public, no previous study has examined this issue within the French judiciary. This Article begins to fill this gap by using original qualitative data that sheds light on judges’, prosecutors’, and other legal actors’ discourses on racial, ethnic, and sexual diversity. Its main contribution is to show that these legal professionals deploy three strategies—linguistic, conceptual, and geographic—to dodge or downplay the relevance of race, ethnicity, and sexual orientation to the judicial or prosecutorial work. The first, linguistic, form of avoidance lies in refusing to explicitly name and discuss race and ethnicity; the second, conceptual, in denying that the judiciary has a diversity problem or that the problem lies within its power; and the third, geographic, consists in relegating the issue of diversity to distant places—the United States and overseas France. The Article concludes by discussing key directions for future research.

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Introduction

At a trial court in the suburbs of Paris, I witnessed the following telephone exchange between a prosecutor and a police officer in the winter of 2016. The officer had just called to report a hit and run incident. After briefly summarizing the facts, he turned to the description of the suspect. The prosecutor listened, taking notes, until she interrupted, “the victim says that the driver was of European type. But he’s of African type, right?” Upon obtaining the requested clarification, she jotted down on her form, in the suspect’s box, the abbreviation “TA” for “African type” (type Africain).

During the same period, at another trial court, also located in the outskirts of Paris, I observed in-camera adoption hearings. During a break between two cases, the specialized family law prosecutor present in the room boasted to the three-judge panel that she had just created a new data processing tool including a “same-sex couple” category, allowing her to track the cases involving LGBTIQ parents. “Really? Well done!” cheered the giggling judges, before one of them asked, half-laughingly, “but won’t you run into trouble with the CNIL [the French data protection agency]?”

Based on these observations, it would be easy to assume that race and sexual orientation talk are routine in the French judiciary. Yet, when it comes to speaking about themselves and their corps, the magistrats (the official designation for both judges and prosecutors) are far less forthcoming. Asked if there were any racial and ethnic minorities among his 50-prosecutor office, a white senior prosecutor paused, ostensibly to reflect, retorting: “I am obliged to think to see if there are people of a particular origin. It wouldn’t even come to my mind.” Along the same lines, a straight appellate court chief judge responded to my inquiry as to whether she knew openly LGBT judges, evidently irritated: “It’s a non-subject. One does not even always know about it.”

A puzzling discrepancy exists between the magistrats’ patent reliance on litigants’ intersecting identities and their reluctance to openly discuss their own identities, creating a number of challenges for my research. How can one study and make sense of what appears to be largely unspoken and unspeakable? How should one understand the role of identities such as race, ethnicity, and sexual orientation in shaping the judiciary when the

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1. Diversity as a Socio-Economic Problem
2. Judicial Diversity as an Educational Problem
3. Geographic Dislocation
4. Introduction
5. Race in Overseas France
6. Conclusion

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1 A representative of the prosecutor’s office, supposed to defend the “general interest,” is present in all complex or “sensitive” adoption cases slotted for a hearing.
2 Interview with 2, Senior Prosecutor (2016).
3 Interview with 3, Appellate Court Chief Judge (2015).
majority of the research subjects refuse to see them as relevant to their work? My response consists in exploring the various forms of denial and avoidance I encountered during my study. Rather than addressing judicial diversity itself, its justifications, or its impact on litigants and substantive outcomes, I focus on what I call “judicial discourses of diversity,” that is, on how a group of court insiders talk about race, ethnicity, and sexual diversity in the judiciary. What rhetorical and conceptual mechanisms do they marshal to minimize or repudiate these forms of differences? My main contribution is to identify three forms of avoidance strategies in judicial discourses on diversity: linguistic, conceptual, and geographic. The first form of avoidance lies in refusing to explicitly name and discuss racial and ethnic diversity; the second, in denying that the judiciary has a diversity problem or that the problem lies within the power of the judiciary; and the third consists in relegating the issue of diversity to distant spaces—the United States and overseas France. These three strategies are not mutually exclusive. (The same respondent may reject race as a category of discourse while acknowledging that racial disparities exist in certain courts.)

This Article is the first to offer insights into judicial diversity in France. The data was generated by way of thirty-five interviews with judges, prosecutors, and legal professionals, as well as court observations in various regions of mainland France. Drawing on the insights of sociology, queer and critical race theory, discourse analysis is used to document the avoidance mechanisms put forth by research subjects to elide race, ethnicity and sexual orientation or minimize the relevance of these identity categories to the composition and mission of the judiciary. 4 I do not assume that these categories are unidimensional or that those who identify with one or more of them share any form of singularity or belong to a single community. It is the intersection and convergence between the ways in which research subjects discussed race, ethnicity, and sexual orientation that led me to examine them together. More often than not, the relevance of these identity categories were minimized, if not negated. I observed a gradation in the scope of denial, however. 5 Sexual orientation remained unspoken, in the sense that it was considered irrelevant and therefore not worth mentioning, while race and ethnicity were unspeakable in the sense that they were considered inexistential and therefore inappropriate to discuss.

Focusing upon the denial, and sometimes erasure, of racial, ethnic, and sexual identity categories, the argument builds upon Didier Fassin and Éric Fassin’s pioneering work on racial and sexual politics in France 6 as well as the scholarship of other French

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4 In this sense, this study differs from diversity talk research, which aims at revealing some form of closeted racism or homophobia. See, e.g., Teun A. Van Dijk, Discourse and the Denial of Racism, 3 DISCOURSE & SOCIETY 87 (1992); Eduardo Bonilla-Silva, Racism Without Racists (2d ed. 2006).

5 See Didier Fassin, Du Déni à la dénégation. Psychologie politique de la représentation des discriminations, in DE LA QUESTION SOCIALE À LA QUESTION RACIALE? 131 (Didier Fassin & Éric Fassin, eds., 2006) (applying the Freudian concept of defense mechanism such as denial and abnegation to understand the common French denial of race and racial discrimination).

6 See generally Didier Fassin & Éric Fassin (eds), DE LA QUESTION SOCIALE À LA QUESTION RACIALE? (2006) (offering a research agenda to study the intersection of race and class in French society).
social scientists working in the field, in particular François Bonnet, Véronique Hélenon, Pap Ndiaye, Sarah Mazouz, Daniel Sabbagh, Emmanuelle Saada, Patrick Simon, and Louis-Georges Tin. I also rely on theories and concepts developed by American queer, post-colonial, and critical race theorists such as Lauren Berlant and Michael Warner, Devon Carbado and Mitu Gulati, Joe Feagin, Barbara Flagg, Eve Sedgwick, Ann Laura Stoler, and Kenji Yoshino to understand the French case study.

The Article proceeds in five Parts. Part I describes the research design. Part II provides background information on the French judiciary and its attendant ideologies. The next three Parts analyze respondents’ avoidance strategies when it comes to discussing judicial diversity. Part III focuses on speech circumvention devices through which race in particular is erased from judicial discourses. Part IV identifies a conceptual avoidance strategy by which respondents deny that race, ethnicity, and sexual orientation are relevant categories of analysis to understand the judiciary. Finally, Part V considers a strategy of geographic dislocation, by which I mean that respondents tend to relegate the issue of diversity to distant places—the United States and overseas France.

I. Research Design

A. Data and Methods

The heart of the data for this study consist of court observations and semi-

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8 See Véronique Hélenon, “Tis distance lends enchantment to the view”—Distance as a Mode of Domination: Legal Elements of the Slave and Colonial Periods, 32 J. CONTEMPORARY THOUGHT 91 (2010).
14 See Louis-Georges Tin, Who is Afraid of Blacks in France?: The Black Question: The Name Taboo, the Number Taboo, 26 FRENCH POLITICS, CULTURE & SOCIETY 32 (2008).
structured interviews with *magistrats* and other professionals gravitating around the judiciary, primarily collected from September 2015 to June 2016. I conducted both courtroom observations during public hearings and behind the scenes court observations. The courtroom observational data spans over 40 hearings held in four courtrooms located in the Paris region and in the South of France. I observed a variety of hearings, including small claims, criminal trials, and adoption hearings. I assumed the *magistrats’* spatial perspective, sitting behind the bench next to the judge or the prosecutor I was shadowing. I transcribed major portions of each hearing verbatim (as much as possible) during and immediately after the hearings. Courtroom observations provided me with basic insights about judges-litigants dynamics, which informed my interview questions and the interpretation presented below. I also spent two days at a South of France trial court and four days at a Paris region trial court observing behind the scene interactions between judges, prosecutors, and between judges and prosecutors. I sat in internal meetings, pre-conferencing gatherings, and in open space offices where judges, prosecutors, and their staff were going about their business.

In addition to these observations, I conducted 26 interviews with *magistrats* and 9 with other legal actors working in law enforcement, as attorneys, teachers, or applying to the judiciary. The interviews took place either face-to-face or over the phone depending on subject’s availability and the proximity of their place of residence or of work, lasting from 45 minutes to two hours. Interviews typically covered a wide variety of topics, including the participants’ backgrounds and career development, the process by which they were recruited in the judiciary, their work routine, their relationships among colleagues, and their views of judicial diversity. Analysis of early interviews led to deeper exploration of preliminary categories in future interviews. Some of the interviews were recorded and transcribed verbatim. Others were not recorded, but I took detailed notes to memorialize them, both during the interview and immediately afterwards. The understanding is that I may quote directly from participants, but without attribution to any individual.

Due to the difficulty of reaching the very private and elite world of the *magistrats*, I did not select a sample that is representative of the French judiciary in terms of demography, assignment, or position in the hierarchy. Among the 26 *magistrats* interviewed, 14 had served as judges for their entire career, 6 as prosecutors, 5 as both judges and prosecutors, and one was still a trainee-*magistrat* wishing to embark on the prosecutorial track. Fourteen were male and twelve, female. The vast majority of

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22 Twenty-three of the *magistrats* I interviewed were in office, two were retired, and one was trainee-*magistrat*.

23 I used the interview protocol I developed as a roadmap, though I made no effort to ask every participant exactly the same questions in the same order. I preferred to follow the flow of their reasoning and steer them with questions from the protocol to areas that we thought might yield useful insights. Interviews were conducted in French and I translated the quotations provided in this Article.

24 To protect participants’ confidentiality, I have removed any details that might identify them. I provide neither their exact current and past judicial assignments, nor the precise location of the courts I visited, nor the exact dates when the interviews or my observations took place. Whenever possible I indicate demographic characteristics such as age, race, gender, and sexual orientation, using terms participants approved, even if I occasionally alter them to avoid any risk of identification.
participants were white and straight: only four *magistrats* identified as belonging to a racial or ethnic minority and one openly identified as gay.\(^{25}\) From a couple initial contacts, I used the snowballing method to recruit more participants, interviewing those judges, prosecutors, and other legal actors who were referred to me and made themselves available to talk.\(^{26}\) After a few months, I oriented my sampling strategies based on the emerging analysis. Given that my initial contacts were straight, white, and quite senior *magistrats* who tended to refer me to colleagues of similar backgrounds and experiences, I actively sought to meet with minority, sexually diverse, and female subjects. The resulting group of 35 participants is a small, unrepresentative sample, which allows no claim to generality. This limitation does not diminish the study’s contribution, however, as my goal is not to provide an estimate of judicial diversity itself, but an analysis of legal actors’, in particular judges and prosecutors, beliefs about how race, ethnicity, and sexual orientation structures their organization.

B. Identity Interplay

There has been much discussion about the interplay between the social identities of the researchers and that of the people they study.\(^{27}\) My own French, white, straight, middle class privilege undoubtedly influenced the study’s research design, data, and the interactions I had with those I interviewed and spent time with during my field work. As sociologist François Bonnet has emphasized, “it is the interaction between respondents and me which constitutes the data.”\(^{28}\) Similarly, I examine respondents’ race, ethnicity, and sexual orientation avoidance talk in reaction to the white and straight researcher I embody. It is likely that my white and straight privilege was rewarded with some of the surprisingly candid responses I discuss below. This is both a strength and weakness. It is possible that the participation of other investigators in the data collection, particularly LGBTIQ and/or researchers of color would have provided corroborative triangulation—or not.

At the same time, perhaps because the research pertained to diversity, my own social identity proved ambivalent, or at least unstable, in the eyes of some study participants. On the one hand, because of my first and last name, my physical appearance

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\(^{25}\) Among the 9 legal professionals I interviewed, all identified as straight. Seven were male, two female. Two identified as Magrebi, while the other seven implicitly identified as white.


\(^{27}\) See, e.g., Eleanor Singer, Martin R. Frankel & Marc B. Glassman, *The Effect of Interviewer Characteristics and Expectations on Response*, 47 PUB. OPINION Q. 68 (1983) (examining the effect of interviewers’ characteristics and expectations on responses obtained via a telephone survey); Richard Sherman, *The Subjective Experience of Race and Gender in Qualitative Research*, 45 AM. BEHAVIORAL SCIENTIST 1247 (2002) (showing that researchers’ race and ethnicity are rarely neutral, interacting with participants’ and the data collected). See also Louisa Allen, *Queer(y)ing the Straight Researcher: The Relationship(?) between Researcher Identity and Anti-Normative Knowledge*, 20 FEMINISM & PSYCHOLOGY 147 (2010) (asking whether straight identified researchers can produce anti-normative knowledge relevant to queer theory and research); James McDonald, *Coming Out in the Field: A Queer Reflexive Account of Shifting Researcher Identity*, 44 MANAGEMENT LEARNING 127 (2013) (discussing how researchers’ sexual identities impact fieldwork from the perspective of “queer reflexivity”).

\(^{28}\) See Bonnet, *supra* note 7, at 1281.
(my skin is white and I wore the standard uniform of conventional professional femininity during the field work—conservative pant suits occasionally enlivened by necklaces and flowy scarves), and because I introduced myself as working under the auspices of established French and American research institutions, I personified the dominant heteronormative\textsuperscript{29} white racial frame.\textsuperscript{30} On the other hand, when I raised the issues of racial oppression and discrimination as well as homophobia and heteronormativity, I provoked more than once defensiveness and charges of being (or thinking like) a foreigner.

For instance, after I had questioned him about his self-presentation as “a white catholic that lives in a bourgeois residence,” a judge riposted, “Are you an Israelite?”\textsuperscript{31} The use of the outmoded word “Israelite,” which designates an origin, rather than a religion struck me as symptomatic of some respondents’ discomfort with the topic of racial and ethnic diversity.\textsuperscript{32} Despite my very French first name and native French proficiency, a few other participants presumed that, or inquired as to whether, I was a U.S. citizen—I am in fact a dual French-U.S. citizen. Though he had read my C.V., which marks me as unmistakably French, a judge marveled at my command of French. Even after I had assured him that I was French and had grown up in France, he kept saying, including to his colleagues, “but you have an accent. Doesn’t she have an accent?”\textsuperscript{33}

I interpret this urge to foreignize me when probed about their own social identities as reflecting participants’ struggle to make sense of my inquiry. Some subjects were genuinely baffled by my interest in racial, ethnic, and sexual diversity in the judiciary, which by their own avowal, they had never thought about. An obvious way for them to rationalize my questioning would be to infer that I was myself a diverse other. How else could one be interested in such a bizarre topic? This distancing could also have been meant to disqualify my questions by highlighting that they originated from someone who does not know what she is talking about because she is not French. These othering episodes typically occurred when I moved from discussing the judiciary’s internal (lack of) diversity to the possible institutional role of the justice system in maintaining and reinforcing systems of oppression, domination, and discrimination in French society. During a particularly uncomfortable interview, a senior white male judge lost his temper after I inquired about the frequency of local protests against the French court system in overseas French territories. After implying that I was not French, he reprimanded me for questions which evidenced my shameful ignorance of the legal and political history of

\textsuperscript{29} See Michael Warner, \textit{Introduction: Fear of a Queer Planet}, 29 SOCIAL TEXT 3 (1991) (coining the term heteronormativity to denounce the institutions, discourses, and practices which construct heterosexuality as normative and superior, relegating other sexualities to a marginal status position).

\textsuperscript{30} See \textit{Feagin supra}, note 17 (developing the concept of “white racial frame” to uncover the dominant vantage point from which white Americans understand racialized society).

\textsuperscript{31} Interview with 12, Senior Judge (2015).

\textsuperscript{32} Since the nineteenth century, French Jews considered to have assimilated into French society were called “Israelites,” rather than “Jews,” which connoted refusal to assimilate. The word “Israelite” fell into disfavor after World War II, the word “Jew” being reclaimed as a positive association.

\textsuperscript{33} Field Observations (2016).
overseas France, going as far as to questioning my research project, “Watch out, I feel that you are fluctuating at the methodological level.”

After having presented the basic features of the French judiciary as well as the methods employed to collect this study’s data, the rest of the Article examines the three avoidance strategies identified in judicial discourses on diversity.

II. The French Judiciary and its Context

A. Measuring Diversity

The French judiciary is a national, unitary institution staffed by a cadre of career judges and prosecutors recruited, trained, and employed by the same centralized agency and dispatched throughout the country. This study includes both judges and prosecutors given that the French judicial function is defined more broadly than in the United States, encompassing two types of “magistrats,” the prosecutors and the judges. Technically, prosecutors are judges (and vice versa), as both sets of professionals attended the same national school for the judiciary, enjoy the same civil servant status, and are able to transfer back and forth throughout their career between judgeships and prosecutorial posts.

Significant practical and normative barriers exist in studying judicial diversity in France. As one of the judges quoted above intimated with her question “won’t you run into trouble with the CNIL?”, not only data collection on sexual orientation is not common, but it could be illegal. Under French law, the collection and analysis of “sensitive data”—defined as including not only sexual orientation, but also race and ethnicity—is prohibited in principle and in practice severely restricted. Even the French census does not collect such information, with the consequence that the precise racial and ethnic makeup of the French population as a whole remains unknown. How is one to investigate a phenomenon which cannot be measured and, as discussed below, can hardly be named?

34 Interview with 10, Senior Judge (2015).
36 See Mathilde Cohen, The Carpenter’s Mistake. The Prosecutor as Judge in France, in PROSECUTORs AND DEMOcracy (Maximo Langer & David Sklansky, eds., forthcoming) (explaining that in practice these two sets of magistrats are in constant interaction and share the same occupational ideology).
37 See CODE PENAL [C. PEN.] art. 226-19 (Fr.) (criminally punishing the collection of racial and ethnic data in violation of the 1978 statute Informatique et Liberté. A few exceptions are authorized when the data is public, subjects provide written consent, religious organizations maintain database of members and sympathizers, and for research purposes under the condition of anonymity).
38 The French census, performed by the National Institute of Statistics and Economic Studies (INSEE), includes data about nationality and country of birth, but not about race, ethnicity, or religion. On the debate on whether or not to allow racial and ethnic statistics, see Patrick Simon, The Choice of Ignorance. The Debate on Ethnic and Racial Statistics in France, 26 FRENCH POLITICS, CULTURE & SOCIETY 7 (2008); Tin, supra note 14, at 37; David B. Oppenheimer, Why France Needs to Collect Data on Racial Identity...in a French Way, 31 HASTINGS INT’L & COMP. L. REV. 735 (2008).
Not all forms of diversity are taboo, however. Two strands of judicial diversity—gender and socio-economic diversity—are widely discussed, dominating debates and reform initiatives.39 The judiciary does collect data on magistrates’ genders and socio-economic status,40 seeking to make progress toward an organization where magistrates are recruited among broader social and educational backgrounds (rather than predominantly from the urban middle classes) and where women accede to top judicial positions on par with men.41 By contrast, race, ethnicity, and sexuality remain officially invisible. To the best of my knowledge, no internal or external study exists on the racial, ethnic, and sexual composition of the French judiciary or on its relevance to the organization’s legitimacy and substantive decision-making. Few studies can be found, which discuss the personal demographics of criminal defendants and litigants, but not magistrates’ races and ethnicities.42 As Leslie Moran has pointed out, “[d]ata and scholarship relating to sexuality in the context of the judiciary is very limited. No jurisdiction has official data on the sexual diversity of the judiciary and none has plans to change this state of

39 On gender see, e.g., Anne Boigeol, La magistrature française au féminin: entre spécificité et banalisation, 25 DROIT & SOCIÉTÉ 489 (1993) (analyzing the growing feminization of the French judiciary since females were first admitted in the corps in 1946); Anne Boigeol, Les femmes et les Cours. La difficile mise en œuvre de l’égalité des sexes dans l’accès à la magistrature, 22 GÉNÉSE 107 (1996) (recounting the history of the French judiciary’s feminization); ÉCOLE NATIONALE DE LA MAGISTRATURE, LA RÉPARTITION DES FEMMES ET DES HOMMES DANS LA MAGISTRATURE, Press Release (Feb. 15, 2010) (press release prepared by the Judiciary School comparing the evolution of the French judiciary’s gender balance to that of foreign judiciaries); Céline Bessière & Muriel Mille, The Judge is often a Woman. Professional Perceptions and Practices of Male and Female Family Court Judges in France, 56 SOCIOLOGIE DU TRAVAIL e43 (2014) (arguing that family court judges tend to reach similar substantive outcomes regardless of gender); Adélaïde Remiche, When Judging is Power. A Gender Perspective on the French and American Judiciaries, 3 J. LAW & COURTS 95 (2015) (explaining the American underrepresentation of females on the bench compared to the French feminization as resulting from different conceptualization of the judicial office—seen as an automaton in France and a powerful decision-maker in the United States). On socio-economic diversity, see, e.g., Jean-Pierre Mounier, Du corps judiciaire à la crise de la magistrature, 64 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 20 (1986) (offering a social history of the judiciary); Valérie Albouy & Thomas Waneqc, Les inégalités sociales d’accès aux grandes écoles suivi d’un commentaire de Louis-André Vallet, 361 ÉCONOMIE & STATISTIQUE 27 (2003) (documenting the socio-economic inequalities in accessing elite higher education, including the Judiciary School); Michel Miaille, Les prédispositions à l’esprit de corps: les candidats au concours de la magistrature, in L’ESPRIT DE CORPS, DÉMOCRATIE ET ESPACE PUBLIC 227 (Gilles J. Guglielmi & Claudine Haroche, eds., 2005) (discussing socio-professional backgrounds as a factor in shaping an “esprit de corps” in the judiciary).

40 The judiciary’s annual reports include gender statistics, tracking the evolution of the judiciary’s composition and women’s access to management posts. The Judiciary School collects information on students’ socio-economic background via survey questions about their parents’ profession.

41 The French judiciary is unusual in that it is a predominantly female organization. Yet, males continue to hold the lion’s share of high-level positions.

affairs.” In the French context as elsewhere, this gap is yet but another symptom of the invisibility to which sexual minorities are often relegated, as will be discussed below.\(^{44}\) However, the lack of information on (and interest in) the French judiciary’s racial and ethnic diversity is all the more surprising given how established research and reform initiatives on the topic have become elsewhere.\(^{45}\)

One of the judges interviewed for this project, a self-identified citizen of Tunisian descent, was so exasperated by the French judiciary’s lack of interest in measuring judicial diversity, that she decided to take the matter in her own hands. She endeavored to estimate the corps’ composition based on her colleagues’ first and last names, finding that only 1.5% of foreign-sounding names.\(^{46}\) Though questionable from a methodological perspective,\(^ {47}\) this approximation is at least indicative of how little ethnoracial diversity certain magistrats believe exists in their ranks. Other research subjects validated this low figure. For instance, a prosecutor who had served as a chief prosecutor (he had just retired when I met him) and was still involved in continuing judicial education, gauged that he had met fewer than twenty black magistrats throughout his close to four decades career.\(^ {48}\)

To put these estimates into perspective, it suffices to point out that France’s population is informally estimated to include at least 9% Arabs, 6% blacks, and 2.2% Asians,\(^ {49}\) suggesting that the judiciary is at odds with the society it is supposed to serve. The discrepancy between the magistrats and those suspected or convicted of criminal

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\(^{44}\) See infra Part IV.A.


\(^{46}\) She counted as “foreign-sounding” any African, Arabic, or Hispanic names.

\(^{47}\) Last name analysis and coding have recognized limitations. Particular names do not necessarily belong exclusively to particular groups defined by race or ethnicity. Individuals change names via marriage, adoption, or voluntary name changing procedures. Name analysis and coding poses specific problems for certain groups, for instance, it has little ability to distinguish blacks from the overseas territories from whites given that slave descendants often carry the French names of their former oppressors, mixed race individuals may have French last names, and so on. Finally, it is debatable whether certain ethnicity identifiers chosen (such as Hispanic names) are relevant to the French context.

\(^{48}\) Interview with J., retired Chief Prosecutor (2015).

\(^{49}\) These figures are estimates informally communicated to me by French colleagues.
offenses is even more stunning. While the *magistrats* are overwhelmingly white and of Christian backgrounds, the majority of incarcerated inmates belong to racial and ethnic minorities.  

In his 2015 study of a prison in the suburbs of Paris, anthropologist Didier Fassin was able to “visualize the astonishing presence of minorities.” According to him, black and Arab men represented two thirds of the prisoners’ population, closer to three quarters of those below the age of 30. Other researchers have documented the fact that minorities and second-generation immigrants are more likely to be confined than whites and those of French descent.

B. Cultural and Judicial Attitudes

Well-known cultural attitudes conjoined with the *magistrats*’ professional identity may explain, in part, the dearth of racial, ethnic, and sexual orientation data on French judges and prosecutors. Despite the colonial and racialized foundation of the French state, official representations of the past have taken colorblindness and indifference to differences to be the defining traits of the French republic, a position often referred to as “republican universalism.” According to this credo, since the Revolution of 1789, France has embraced the values of liberty, equality and fraternity, dismissing racial and ethnic differences as irrelevant. This foundational myth rests on two interrelated abstractions: that of the individual and that of the nation. The nation itself is proclaimed by the 1958 Constitution to be “one and indivisible,” recognizing equal citizens, “without distinction of origin, race or religion.” As historian Joan Wallach Scott has shown, “[t]he ability of any citizen to stand for (to represent) the nation came from the fact that political individuals were understood to be abstracted from their social attributes (wealth, family, occupation, religion, profession),” which include gender, sexual orientation, religion, race, and ethnicity.

51 Id.
55 Id.
56 Fr. Const. Art. 1 (a paradoxical statement within the French ideology given that it recognizes the notion of race all the why committing to ignoring it).
58 One well-known dimension of republican universalism is “laïcité,” or the French conception of secularity, which has been used to justify the prohibition on clothing that “conspicuously manifest a religious affiliation” in public schools, most infamously, the Islamic headscarf. See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. Rev. 419, 422 (2004) (comparing and contrasting French *laïcité* to American freedom of religion).
This deep-rooted understanding of French cultural identity shifted in the last decade with the introduction of anti-discrimination policies, though they are premised on an explicit rejection of racialized and sexualized understandings of social personhood and the preservation of legal fiction that France recognizes only individual citizens, not groups or communities. According to this worldview, performing non-racism and inclusion implies that one abstains from recognizing or naming racial and sexual differences. As Mathias Möschel has argued, by refraining from using racial categories in particular, universalists assume that racism and the perpetuation of the idea that biological human races exist will be avoided. Similarly, in his study of French security personnel’s race talk, sociologist François Bonnet noted, “[t]he problem for French respondents is that straightforward designations of minorities sound racist, regardless of the intentions of the speaker. . . . As a consequence of colour-blind speech norms, French respondents cannot use straightforward words for minorities such as ‘Arabs’ or ‘North Africans’.”

Republican universalism is not specific to the judiciary, but it is particularly salient in a public institution devoted to the defense and preservation of the French legal and political order. In the judicial context, diversity talk is all the more sacrilegious in that it is seen as conflicting with an occupational ideology: judges and prosecutors’ longstanding self-perception as anonymous cogs in the judicial machine. It is not only that magistrats buy into the universalist doctrine according to which government officials are able to “abstract” their particularities (racial, sexual, religious, socio-economic, and so on) in order to speak for the people as a whole, but also that the judicial ethos excludes minoritarian or pluralist interests. The official portrait of the judicial role, as Mitchell Lasser has shown, “depicts the French civil judge as the faithful agent of the statutory law. Montesquieu states, in a passage endlessly quoted by French legal academics for over two hundred years, that judges should be ‘the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor.’”

French legal professionals conceive the legal system as a disembodied, neutral entity in which magistrats are homogenous workers objectively administer the law. When they speak or write publicly, the magistrats are neither supposed to be distinguishable from the statutory law nor allowed to express identifiable or personal opinions. They do not use the first person singular “I” in their opinions, but speak as “The Court” in the third person.

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59 See MAZOUZ, supra note 10. See also Patrick Simon, La lutte contre les discriminations n’a pas eu lieu. La France multiculturelle et ses adversaires, 83 MOUVEMENTS 87 (2015) (arguing that despite the introduction of new anti-discrimination policies in the past decades, nothing has changed, with elites holding to racist explanations for ongoing inequalities and blaming the victims).

60 See Bonnet, supra note 7.

61 MATHIAS MÖSCHEL, LAW, LAWYERS AND RACE. CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE 3 (2014).

62 See Bonnet, supra note 7, at 1281-2.

63 Interview with 14, Judge (2015).

singular.65 When on the bench or in the prosecutor’s stand, they see themselves as race-less, gender-less, religion-less, sexual orientation-less, and class-less.

Deviations from this disembodied persona are sometimes construed as biases in an organization that relies on a conception of judicial impartiality conceived by and for white straight males.66 A senior female judge, who has the reputation of being very progressive, declared that one of the main challenges currently facing the judiciary is “what is the impartiality of a magistrat? . . . I think that all magistrats have emotions and opinions and we live by the myth—but I’m in the minority to hold this view in the judiciary—that we are perfectly impartial from the moment we put on our gown.”67 The established conception of judicial impartiality requires conformity to the dominant heteronormative white racial frame,68 which determines a certain type of behavior as the model for how every magistrat should act. Any comportment or identity deviating from this frame becomes a form of partiality or bias, particularly being categorized as a sexual, racial, or ethnic minority.69

The only openly gay judge I met confided, “in the French construction of the judicial office, being LGB would be a form of partiality because we are the mouth of the law; it has nothing to do with the judgment. We aren’t supposed to be pro-gardening or pro-anything.”70 Similarly, non-white races and ethnicities are construed as particular interests potentially in tension with the judicial function. In May of 2015, the liberal satirical weekly Le Canard Enchaîné revealed that a trial judge had been denied a case involving Moroccan pensioners of the French rail operator (SNCF).71 Over 800 Moroccan railway workers claimed that for decades they had been the victims of systemic discrimination, involving different employment status, pay, advancement scale, and inferior retirement plans. What was the justification for refusing to assign the case to the judge? According to the newspaper, “she was pushed away for the sole reason that she was, like the petitioners, of Moroccan origin. . . . her department head feared that her ‘Moroccan ancestry’ would jeopardize her ‘impartiality.’”72

The judiciary’s professional self-image, therefore, reinforces the background French universalist ideology and its malaise (or downright hostility) toward certain “particularities”—most notably non-white races and ethnicities, non-Christian religions, and sexual orientations other than heterosexuality. As the next Part argues, this pluralism anxiety is particularly manifest in the language used by magistrats and other legal actors.

65 Id., at 107.
66 This construction of judicial impartiality is not uniquely French. See Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & LAW 1 (1997) (arguing that in Canada and the United States women and minority judges are scrutinized more closely for bias for the very diverse characteristics that they are said to bring to the bench).
67 Interview with 24, Senior Judge (2015).
68 See FEAGIN supra, note 17.
69 See MAZOUZ, supra note 10 (showing that in the universalist paradigm these minority identities are singled out because they appear insufficiently neutral or “abstractable”).
70 Interview with 25, Judge (2016).
72 Id.
III. Speech Avoidance

This Part focuses on magistrats’ speech avoidance when it comes to talking about diversity. During my field work, this form of elision proved particularly strong in the case of racial and ethnic diversity. It was also present, but to a lesser extent, for sexual diversity, for which there was no naming taboo, but rather a reluctance to use language associated, in dominant heteronormative French society, with “militant” LGBTQ agendas. The term “homosexual” is considered a derogatory epithet in North American culture, where umbrella terms “queer” and “LGB/TQ” are preferred. In France, current orthodoxy holds that no stigma is attached to the word “homosexual” and the diminutive “homo.” The overwhelming majority of research subjects employed these words, even when I framed my questioning in terms of “sexual diversity” or “LGBT representation.” For example, to underline her dissociation from my choice of words, a straight appellate judge answered the question whether she had LGBT colleagues by declaring, “I know that some colleagues are, as you say, gay or lesbian.” The qualifier “as you say” indicated that the words “gay” and “lesbian” were mine, not hers. These linguistic practices illustrate the weight of heteronormative culture on French language in general and on the institution and identity of the judiciary in particular, a topic to which I shall return in the next Part.

When I brought up racial and ethnic diversity, responses were far more radical in their commitment to maintaining the rule of silence. Ann Laura Stoler has coined the expression “colonial aphasia” to describe French social scientists’ difficulty in speaking of France’s colonial past and post-colonial present. I noticed a comparable form of aphasia among French magistrats on race and ethnicity. Some respondents simply refused to engage with the issue, remaining speechless, others attempted to circumvent it by answering a different question, and still others used a variety of euphemisms to designate racial and ethnic minorities without naming them explicitly. Only five of the 35 interviewees seemed comfortable talking about race and racial discrimination. Among those five, four identified as racial or ethnic minorities and one as a white overseas citizen having grown up in one of France’s Indian Ocean islands. In what follows, I propose a taxonomy of the linguistic strategies used to abstain from explicitly speaking about race and ethnicity.

73 Leading French LGBTIQ organizations typically use the initialism LGBT, for instance the French federation of organizations campaigning for lesbian, gay, bisexual, trans and intersex rights since 1999 is called “Inter-LGBT.”
74 See generally DENIS M. PROVENCHER, QUEER FRENCH: GLOBALIZATION, LANGUAGE, AND SEXUAL CITIZENSHIP IN FRANCE (2007) (arguing that French gay and lesbian culture both participates and resists in the globalization of American culture, including its linguistic encoding of queer sexual identities).
75 Interview with 18, Court of Appeals Judge (2015).
76 See Stoler, supra note 20.
77 On the French difficulty of naming race, see Tin, supra note 14 (analyzing the “labeling taboo” to name French blacks); Didier Fassin, Nommer, interpréter. Le sens commun de la question raciale, in DE LA QUESTION SOCIALE À LA QUESTION RACIALE? 17, 25 (Didier Fassin & Éric Fassin, eds. 2006) (seeing a value in the difficulty to name race and ethnicity in that it reveals that the “social world . . . resists any descriptive reduction”) (my translation).
A. Not Naming

When asked about racial and ethnic diversity, some respondents simply refused to name specific minorities, repeatedly using the third-person plural personal pronoun “they” instead. The use of “they” emphasizes the clear separation between an implied solidary collective “we” comprised of (presumably) white magistrats and a permanently alien group of others. This “us-them” language indicates that race solidarity and insularity are very much present in the judiciary, even among supposedly “very progressive” magistrats. Thus, a white judge active in the left-wing magistrats’ union (syndicat de la magistrature) and known for her efforts at reforming penal policies stated that she did not know how to name “them.” She used a variety of euphemisms, talking about “certain categories of population,” “other populations,” or the “question of the origin of magistrats.” Yet, toward the end of our conversation (and perhaps prompted by my straightforward use of racial and ethnic categories) she proved to be one of the few white judges who spontaneously brought up that the judiciary is predominantly “white”, with “very, very, few Maghrebi and blacks.”

A number of other magistrats not only refused to name racial and ethnic groups, but also denied the legitimacy of these categories, declaring they actively refrain from thinking along these lines. When this happened, I insisted on using unmistakably racialized words in my follow-up questions such as “white,” “black,” “Asian,” or “Maghrebi.” Several subjects persisted in evading the conversation, saying things such as “I don’t know. I’m not the person to ask. Honestly, I avoid asking myself questions from this angle, but there are some [i.e., non-white judges and prosecutors].” My probing led to an awkward exchange with a recently retired white chief judge. Obviously startled by my vocabulary, he asked what I meant by the word “white,” before admitting that he had never seen himself along racial lines—not a surprising admission given that as a successful white male, he had likely enjoyed the life-long privilege of distancing himself from the concept of race and, in particular, from his own whiteness.

B. Foreignizing

Another rhetorical move consisted in talking about colleagues of color without naming them as such, but speaking of them as if they were noncitizens. “Immigrant” or “foreigner” are often used as shorthands for racial or ethnic minorities treated as permanent others. As Véronique Hélenon observed, the term “immigrant” (immigré) “is increasingly used to speak of any non-white living” in France, “whether they indeed migrated or were born in that country.” For instance, a white senior administrative

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78 Interview with 9, Court of Appeals Judge (2016).
79 Interview with 9, Court of Appeals Judge (2016).
80 Interview with 9, Court of Appeals Judge (2016).
81 Interview with 7, Court of Appeals Judge (2016).
82 Interview with 5, retired Chief Judge (2015).
83 See Flagg, supra note 18, at 970–71 (arguing that the ultimate privilege of whiteness is blindness to itself and its own privilege).
84 Hélenon, supra note 8, at 91.
judge I met during the exploratory phase of my research could simply not fathom how I could be interested in “such a topic” (i.e., judicial diversity). With a scolding tone, she proclaimed, “there are citizenship requirements to enter the judiciary. One must be a French national,” adding that the few colleagues she knew who were “of foreign origin,” would be disinclined to discuss their ancestry. By way of an explanation, she proudly announced, “You know, entering the judiciary has a whitening effect.” As her statements and others illustrate, the immigration paradigm still pervades race talk in French legal circles. Whiteness and Frenchness are entangled. Non-white French people are seen as non-French. Frenchness is always whiteness, even if the reverse is not true—whiteness is not a guarantee of accession to Frenchness.

Some of the subjects I observed and interviewed used interchangeably words connoting non-white races or ethnicities with words indicating un-Frenchness or foreign origin. Asked about diversity in her court, the white chief judge of a large appellate court responded, conflating race and nationality, that “there are no foreigners,” before correcting herself, “they [the judges and prosecutors] are French. But I have someone of Vietnamese origin. Her father or mother, I don’t know, but it’s exceptional.” Similarly, a white senior prosecutor, who previously served as a judge, framed his perception of judicial diversity along a citizen versus noncitizen dualism, declaring the he “was not certain that just because there are foreign offenders, foreign judges should judge them.” He conceded that “there should be no roadblocks for people whose parents or grandparents were not French to access the judiciary” before reminding me, in a somewhat patronizing tone, “note that one must be French to be a magistrat, of course.”

Other subjects used the euphemistic opposition between “citizens of French stock” (Français de souche) versus “citizens of diverse origins” (Français issus de la diversité) to distinguish whites from non-whites. The two expressions vividly illustrate the conflation between, race, ethnicity, and nationality as well as the reluctance to conceptualize Frenchness as dissociated from whiteness. When asked about his current students, a white professor who has been preparing aspiring magistrats for the Judiciary School during the last two decades, and who considers himself an anti-racist liberal, replied that in a class of 40, apart from one “African” student, there were only “citizens of French stock” (Français de souche). Unlike the professor, the magistrats who employed the dichotomy between “citizens of French stock” and “citizens of diverse origins” did so with qualifications, as if they wanted to apologize for their circuitous language. For example, a black prosecutor maintained, “Honestly I think that not being a

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85 Conversation with Administrative Judge (2013).
86 In French, the sentence was: "Vous savez, l’entrée dans le corps c’est comme une blanchisseuse." "Blanchisseuse" literally means a washer-woman, the word having derived from the verb blanchir, to whiten.
88 Interview with 6, Appellate Court Chief Judge (2015).
89 Interview with 15, Senior Prosecutor (2015).
90 Interview with A, prep course Professor (2015).
citizen of French stock [Français de souche], if you can say it that way, isn’t an obstacle to becoming a magistrat.”\textsuperscript{91} Comparably, a retired white chief judge declared that she endeavored “to use politically correct language” before employing the phrase “[citizens] of diverse origins.”\textsuperscript{92}

C. Onomastic

First and last names commonly serve as proxies for racial and ethnic identification, not only in French popular culture, but also in social science research and anti-discrimination advocacy.\textsuperscript{93} Be it to evidence discrimination or simply to measure diversity, variables such as place of birth, nationality, spoken languages, and first and last name are used to approximate a population’s demographics.\textsuperscript{94} Consistent with this practice, a few magistrats reframed the question of judicial diversity into that of whether “foreign names” could be found in their court’s directory. Similarly, asked whether there was any racial or ethnic diversity in her appellate court, one of the largest in France, a white chief judge answered, “Nowadays, we have quite a lot of names of foreign origins.”\textsuperscript{95} To the same question, a white senior prosecutor responded: “We must look at the organization chart. [Pulling the chart out of his desk and showing it to me] You see the names. [Reading them one by one] . . . There’s someone of Polish origin, apparently: [Repeating the name out loud]. It could be that she’s been French for 200 years. I can’t tell you exactly from which origin they are.”\textsuperscript{96} For both these magistrats, a cursory review of their colleagues’ names represented the beginning and the end of a reflection on judicial diversity. There was nothing more to be said on the subject.

Not only are names used as rhetorical tools to talk about race and ethnicity while pretending not to, they also form a central conduit for discrimination and micro-aggressions. During one of my court observations, a white judge introduced me to her new Maghrebi intern, who had begun her placement a couple of days earlier. The judge stumbled over the intern’s last name. She asked her, chuckling, “is that right?” before adding, “you’ll see, I will eventually succeed in pronouncing your name.”\textsuperscript{97} The few minority magistrats I met were particularly sensitive to the issue of mispronunciation, having been on the receiving end of botched name pronunciations. At a small claims court where I was about to observe a hearing, there was some unexpected delay. To excuse the wait, the presiding judge, a woman of Tunisian ancestry, told her Maghrebi

\textsuperscript{91} Interview with 4, Prosecutor (2016).
\textsuperscript{92} Interview with 17, retired Chief Judge (2015).
\textsuperscript{93} See, e.g., Jean-François Amadieu, CV anonyme et prévention des discriminations, CAHIER DE RECHERCHE PRISM-CERGORS (Jul. 28, 2014), available at http://cergor.univ-paris1.fr/docsatelecharger/CVanonymousetdiscriminations.pdf (presenting the results of a field experiment which used name variations and anonymous CVs to evidence employment discrimination in hiring).
\textsuperscript{94} See Patrick Simon, French Social Sciences and Ethnic and Racial Social Relations, 51 REVUE FRANÇAISE DE SOCIOLOGIE 156, 166-7 (2010) (critically reviewing these strategies).
\textsuperscript{95} Interview with 6, Appellate Court Chief Judge (2015).
\textsuperscript{96} Interview with 2, Senior Prosecutor (2016).
\textsuperscript{97} Field Observations (2016).
intern and me, half-jokingly, “there are too many foreign names for the bailiff.”98 Another illustration came from a South Asian trainee-magistrat, who recounted that she

was pleasantly surprised when the day before her oath-taking ceremony at the Judiciary School she found a note in her locker summoning her to the bureau . . . they told me “We called you simply to ask you how to pronounce your name, because we don’t want to mispronounce it tomorrow during the oath.” So I wrote it down phonetically and as a result there wasn’t any problem. But I had totally prepared myself for it to be mispronounced during the oath.99

The fact that she was “pleasantly surprised,” despite having been singled out and filled with anxiety by the note (which did not specify why she needed to report to the school administration), emphasizes the low expectations she had upon joining the judiciary. Compared to her past experiences of discrimination and stereotyping—including during a clerkship where judges mistook her for a secretary—the School’s modus operandi appeared quite considerate.

D. Color Terminology

Another form of discourse purporting to avoid racial categories relied on a color terminology, as evidenced by the following dialogue I had with a white judge:

Q: Do you think there is enough ethnic and racial diversity among magistrats?
A: It’s hard to respond to this question because without ethnic statistics, it would be difficult for me to tell you. Now if you ask me if the ENM’s [the acronym for the Judiciary School] classrooms are colored, I would answer, not enough, but increasingly.100

Instead of acknowledging and naming racial differences and oppressions, this judge conjured an image of diversity, as if diversity itself was a form of aesthetics.101 Similarly, a recently retired white chief judge instructed me that to find out whether recent recruits were more diverse than older generations of magistrats, I should “take a picture of the audience during the oath-taking ceremony.”102 These visual representations of diversity were not limited to the context of the Judiciary School. Asked about diversity in his office, a white senior prosecutor in the South of France responded, using a color terminology painfully reminiscent of early scientific racist discourse, “We stopped looking at that a long time ago. They are all magistrats working for the prosecutor’s office, so for me, I don’t care if they’re white, yellow, red, or black.”103 A white judge

98 Field observations (2016).
99 Interview with 26, Trainee-Magistrat (2016).
100 Interview with 7, Court of Appeals Judge (2016).
101 I rely in part on Justice Clarence Thomas’ critique of classroom aesthetics in American educational institutions developed in Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part). I do not, however, subscribe to Justice Thomas’ conclusion that diversity is ineffective and deceptive.
102 Interview with 17, retired Chief Judge (2015).
103 Interview with 22, Chief Prosecutor (2016).
went as far as to personify judicial decisions themselves, which became a canvass for colorism: “the more diverse justice will be, the more viewpoints will be discussed, the more we will make decisions which aren’t monochrome.”

Differences in skin color have long been the basis of racial distinctions, but color terminology is paradoxical among a group ostensibly committed to color-blind universalism. Beyond the obvious diagnosis of skin color racism, this rhetorical move can be analyzed as a visual bypass for explicitly racial language. But the strategy raises the question whether for some subjects it is the image or visibility of diversity, rather than its reality, which is a worthy topic of praise and conversation. The promotional materials released by the Judiciary School in 2014 (which were still used in admissions brochures in 2016), illustrate the French judiciary’s reliance on an aspirational definition of diversity based on skin color:

Stating, “Becoming a magistrat will be your first decision,” this poster casts two young recruits wearing their judicial gowns. A neatly groomed male of color (his hair is so short and tapered that his curls are barely visible), authoritatively holding a bright red case file stand next to a white female, her long straight hair lose and smooth, smiling broadly. What the judiciary and many of its members fail to publicly acknowledge—that diversity is lacking among their ranks—is symbolically translated via official communications with potential applicants. At the same time, this photographic portrayal of racial diversity expresses the preferred identity attached to the post and post holder. Visual cues indicate that people of color can be magistrats but their racial character should not be too salient

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104 Interview with 9, Court of Appeals Judge (2016).
106 In another version, the male figure raises his right hand as if he were taking an oath, holding a pair of white gloves and a thin black satchel in his left hand, while the female clutches a red case file.
(their skin tone should be on the lighter side and their curls tamed). White fluted columns are identifiable in the background, suggesting the portico of a monumental courthouse. This classical architecture exhibits a white aesthetic that is presumably appealing to viewers for whom the judiciary is a bastion of bourgeois (and white?) morality and who may otherwise be troubled by the image of a racially diverse corps of magistrats. This visual rhetoric raises a number of questions. Do representations of racial and ethnic diversity through color terminology and brochures constitute an admission of a diversity problem? Or quite the opposite, do they refute the suggestion of a problem by showing diversity (implicitly saying “we’ve got minorities”)?

E. The Banlieues

A last rhetorical strategy in judicial discourses of diversity lies in the recourse to geographical metaphors. Several research subjects used the spatial expression “banlieue” (suburb) or “kids from the projects” (jeunes des cités) as euphemic metonyms for ethnic and racial minorities, as has become commonplace in contemporary middle class white parlance. The word “banlieue” designates segregated suburban communities, which are geographically isolated and ethnically distinct (but often internally diverse) from their surrounding communities. Evoking images of public housing complexes predominantly inhabited by low-income populations, racial and ethnic minorities, and immigrants, the word “banlieue” (especially in the expression “suburban youth”—jeunes de banlieues) has become a shorthand for non-white citizens.

One of the aspiring magistrats I interviewed, who self-identifies as Maghrebi, introduced himself as coming “from the banlieues, as we say, but I don’t like this word, which means ‘banished.’ I’m not banished.” He was referring to the etymology of the word banlieue. In Medieval Latin, “banleuca” was a space surrounding a city over which feudal society extended its ban. The contemporary signification of the term is not so far from its medieval meaning given that today, the banlieues could be described as spaces surrounding large cities over which French society exerts racial and socio-economic oppression. The word banlieue connotes race, but also poverty, hence its appeal to the dominant French discourse, which tends to dissolve racial and ethnic categories into socio-economic ones.

For instance, asked whether she thought the composition of the judiciary had diversified, a white appellate court judge responded somewhat apologetically: “we have quite a bit of people coming from what we call the banlieues.” Another white appellate judge framed the question of judicial diversity in

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107 Another question is why the judiciary chose to represent diversity through skin tone by showcasing a black magistrat, rather than casting, for example, a Maghrebi magistrat. Is it because the division between black and white is the most visible form of racial categorization? The photo also suggests that magistrats’ gender character should conform to dominant norms (it seems to say: if you are female, brush your long hair and smile; if you are male, look assertive and self-confident).


109 Field Observations (2016).

110 See infra, Part IV.B.

111 Interview with 7, Court of Appeals Judge (2016).
terms of integrating a “banlieue audience” into the corps.\textsuperscript{112} The use of the expression “banlieues” to designate minority magistrats emphasizes the intersecting forms of exclusion which tend keep them off the bench. The designation casts them as not only racially and ethnically different, but also as coming from a distinct space, as if they were exfiltrated from a parallel universe whose language, norms, and practices are at odds with that of the judicial institution.

\textbf{IV. Category Displacement}

Whether or not they were willing to name sexual, racial, and ethnic diversity, the majority of research subjects downplayed or dismissed these forms of diversity as legitimate categories for analyzing the judiciary’s composition, self-definition, and role in society. Respondents had different reactions to my questions. All thirty-five denied that the judiciary lacked sexual diversity. By contrast, some participants conceded that racial and ethnic minorities were underrepresented among their ranks. The root causes for this underrepresentation, however, were determined to lie not in racial and ethnic exclusion but in socio-economic and educational disparities. In either case, the judiciary’s institutional responsibility for promoting diversity and integration was dismissed.

\textbf{A. Sexual Diversity—Not A Problem}

1. A “Non-Subject”

The consensus among those I interviewed was that sexual diversity is emphatically not a problem, either in a descriptive or in a normative sense. The recurring tune was that the judiciary is sexually diverse and it is a gay and lesbian friendly professional environment. Asked whether she knew LBGTIQ judges, a straight chief judge notorious for her conservatism responded, annoyed by the very question: “Yes, of course, there are chief judges married to men in very high-level positions. It’s particularly common in Paris. It’s a non-subject. One does not even always know about it.”\textsuperscript{113} Along the same lines, a straight appellate judge declared, “Me personally, I know many.”\textsuperscript{114} Yet, when I asked since when magistrats had been able to come out of the closet, a less cheery narrative emerged. Participants recognized that the judiciary had not always been an inclusive environment. The same appellate judge declared:

the judiciary evolved a lot in a short time span because I remember that when I entered the judiciary [in the early 1990s] and had homo [sic] colleagues, they didn’t speak about it professionally, they didn’t say anything. And today we have homosexual colleagues who are in civil unions (pacsés) or married, who sometimes even have children, and I haven’t noticed that it was a problem for

\textsuperscript{112} Interview with 20, Court of Appeals Judge (2015).
\textsuperscript{113} Interview with 3, Appellate Court Chief Judge (2015).
\textsuperscript{114} Interview with 7, Court of Appeals Judge (2016).
anyone. In any event they don’t complain. They don’t bring it in the public square, but they absolutely do not make a secret of it.115

These observations offer a number of insights. First, they illustrate respondents’ tendency to gloss over centuries of sexual repression and homophobia by insisting on the rapid and supposedly complete betterment of gay and lesbian magistrates’ situation (other nonnormative sexualities remaining absent from this discourse). The declaration that the problem of homophobia has been solved serves as a justification for LGBTIQ magistrates’ invisibility; their visibility would be seen as a potential barrier to unity, a rebuttal of the occupational ideology of the judiciary as a corps of homogenous workers. Second, the quick transition from the assertion that the judiciary is a sexually diverse organization, in which being gay or lesbian is “not a problem,” to the observation that sexual orientation is not “in the public square” betrays the limits of present-day inclusion and the permanence of a hegemonic heterosexual culture. The claims to sexual diversity and to the private nature of non-heterosexual sexual orientation stand in open contradiction. How do people know, absent statistical validation and open talk, that the judiciary is in fact sexually diverse if sexuality remains a “private” matter? How can sexual orientation be both omitted from the “public square” and not a “secret”?

Queer theorists such as Lauren Berlant and Michael Warner have been central in exposing the biases and assumptions which shape sexual identity categories, in particular the idea that sexuality is a private matter not appropriate for public display.116 They have shown that sexuality is always public, coming into play in many aspects of human life, including public institutions such as the judiciary. For queer critic Anthony Slagle, “when people suggest that is inappropriate to discuss issues of sexuality, they are really saying that nonnormative sexualities are inappropriate.”117 I was able to see for myself that heterosexuality was displayed publicly in the courts I visited, most obviously, I noticed pictures of magistrates’ different sex husbands or wives on desks, including in offices that hosted in camera hearings. During a hearing observation, I also heard the judges mentioning, giggling, that one of the litigants in an upcoming case was “in a same sex relationship with a woman”—a fact legally irrelevant to the dispute at stake. Thus, as Leslie Moran, one of the few legal academics who studies the sexual diversity of the judiciary, has pointed out, “the perceived and proposed absence of sexuality from the institution of the judiciary in general, and judicial diversity debates, in particular, needs to be treated with caution. More specifically, a requirement to be silent about sexuality is not the absence or disappearance of sexuality but a key dimension of its mode of public appearance and operation.”118 In her view, the central issue in understanding the dynamic of sexual diversity in the judiciary is its supposed invisibility through which the dominance of heterosexual norms and sexualities are maintained and reinforced.

115 Interview with 7, Court of Appeals Judge (2016).
116 See Berlant & Warner, supra note 15.
117 R. Anthony Slagle, Queer Criticism and Sexual Normativity: The Case of Pee-wee Herman, in Queer Theory and Communication: From Disciplining Queers to Queering the Discipline(s) 129, 134 (Gust A. Yep, Karen E. Lovaas & John P. Elia, eds., 2003).
2. “Not in the Public Square”

As queer theorist Eve Sedgwick has shown, the closet is the “defining structure for gay oppression in this century,” which can only be maintained if the line between what is “public” and what is “private” is drawn against the backdrop of a heterosexual regime. In this regime, heterosexuality figures as the default, unmarked form of sexuality which does not need to be communicated, while non-heterosexual identities must be disclosed through speech or expressive conduct. Respondents’ sexual orientation talk typically unfolded along the pairings of secrecy/disclosure and public/private. As the following quotes indicate, they framed the LGBTIQ experience as inappropriate to the “public sphere,” revealing their unstated assumption that the judiciary’s sexual culture is a heterosexual one and that the nature of the LGBTIQ difference has to do with sex and the bedroom.

A straight trial judge, who had herself been the victim of racial discrimination and professed sensitiveness to homophobia, stated that sexual orientation “belongs to the private realm,” before asking “do they want everybody to know?” Other straight judges proclaimed, “they don’t put it onto the public square,” “it is known, but it isn’t said,” “the magistrat should not unveil his or her private life. No one needs to know if he’s gay or lesbian or not. I don’t see what it changes in the way of judging.” The only openly gay judge I met had internalized this discourse, declaring, “I’m openly gay, but not everybody knows it because it is a matter of personal life and one doesn’t talk about one’s private life to all of one’s colleagues.” Sexual orientation, I was told again and again, is not something that should be taken into account to think about judges’ identities and their work.

It is not only that LGBTIQ magistrats do not advertise their sexuality to the public in their official role on the bench, but more fundamentally that non-normative sexualities do not belong to any professional spheres, including the informal judicial or prosecutorial workplace in courts’ back offices, internal meetings, conferences and deliberations, judicial social events such as meals, lectures, continuing education, but even extra judicial settings such as encounters with the wider legal community (the bar, law enforcement, NGOs, and academics).

Interviewees assured me that the judiciary had transitioned out of an era of homophobia during which LGBTIQ judges were in the closet. Yet, through the private-public dichotomy, heterosexual norms are reproduced and reinforced. The unspoken assumption is that the “public” or judicial space is perceived, occupied, and represented as heterosexual. While straight magistrats’ places of residence, families, people with whom they associate, hobbies, dress, speech, hair style, social and political affiliations are legitimately overt and acknowledged, that of their LGBTIQ colleagues are relegated

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120 Interview with 14, Judge (2015).
121 Interview with 7, Court of Appeals Judge (2016).
122 Interview with 18, Court of Appeals Judge (2015).
123 Interview with 4, Prosecutor (2016).
124 Interview with 25, Judge (2016).
125 This finding echoes Leslie Moran’s research on sexual diversity in the judiciaries of Australia, South Africa, England, and Wales. See Moran, supra note 118.
to the private inasmuch as they betray any form of LGBTIQ identity. Discrimination, once aimed at sexually nonconforming magistrats, now aims at subsets that refuse to “cover”—a term Erving Goffman coined in 1963 to mean to assimilate to dominant norms. Kenji Yoshino argues that covering represents a third phase in gay history in the United States, succeeding to the earlier demands to convert to heterosexuality or to “pass,” that is, to appear as straight in public. According to him, it is today’s newfound visibility of LGBTIQ people that led to “the demand to cover,” which refers to how “gays are increasingly permitted to be gay and out so long as we do not ‘flaunt’ our identities.” Has the French judiciary reached this third phase?

Trans and gender non-conforming individuals remain wholly unrepresented in the judiciary according to the magistrats I met (are they passing?). For LGBTIQ magistrats, crossing the boundary from invisibility to visibility is still fraught with difficulties, if not unfeasible. According to two judges of the Cour de cassation (France’s supreme court for private law issues), there are currently no openly gay or lesbian judges among the court’s approximately 270 members (again, are they passing?). Even at those courts where gays and lesbian judges are out, they must play down their identity to blend in. A straight appellate judge recognized that some of her colleagues were gay and lesbian, immediately specifying “but it’s not a political statement (revendication), it remains an intimate, personal matter; it is because we become closer that we get to know other people’s lives, but again there’s no particular political statement involved.” There is no LGBT judges’ association, nor is there a LGBT student’s organization at the Judiciary School, despite the fact that most French grandes écoles now include one. The gay judge I talked belongs to an international association of LGBT judges. He never mentions his membership in his C.V. for fear of being accused of partiality and denied promotions. In other words, gay and lesbian sexuality is tolerated so long as it remains invisible, or at least covered. As a judge noted, “I had a gay colleague who never spoke about it and I felt really bad for him.”

Homophobic behavior and micro-aggressions, whether targeting magistrats, support staffers, or litigants, appear common. A judge who evaded self-identification with any sexual orientation revealed the persistence of homophobic banter, all the while minimizing it, “I never heard any rude remarks [about being gay or lesbian], apart from a few jokes, which are never very mean.” A straight, former chief judge who declared that he “never concerned himself” with whether his colleagues were gay or lesbian or not,

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126 ERVING GOFFMAN, STIGMA. NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) (using the term “covering” to describe the behaviors of certain stigmatized groups to manage the stigmas they possess).
127 See YOSHINO, supra note 21.
128 YOSHINO, supra note 21, at 19.
129 The Cour de cassation is the ultimate authority on LGBTIQ-sensitive matters such as marriage, adoption, surrogacy, or name change.
130 Interview with 18, Court of Appeals Judge (2015).
131 In and Outside (HEC), Plug n’Play (Sciences-Po Paris) Divercity (Essec), Binet XY (Polytechnique), Homônerie (ENS-Ulm).
132 Interview with 25, Judge (2016).
133 Interview with 14, Judge (2016).
134 Interview with 11, Judge (2015).
conceded that in one of the courts where he served in the 1990s, “there was a gay judge, and it posed a lot of problems to a colleague who worried about the image of justice it projected.” Another retired straight chief judge who claimed that sexual orientation is a non-issue recounted the day, a few years earlier, when she adjudicated a custody dispute involving two sets of gay and lesbian parents. She recalled that on the 3-judge panel, “I had a colleague, a charming old man, who had trouble breathing. I listened very attentively [to the presentation of the case] but it was still quite new... We handled the case as a normal case. As a normal case.” The use of the language of normalcy betrays the continuing normative views of sexual orientation and the construction of the heterosexual as the privileged sexual subject.

To sum up, there is a self-reinforcing circle between relegating sexual orientation to the private sphere and viewing it as a non-subject: sexual diversity is deemed a non-problem precisely because it is not discussed openly. By contrast, as I argue in the next section, the judiciary’s racial and ethnic homogeneity is recognized by a number of research subjects as a genuine problem, albeit not one lying within the power of magistrats to resolve.

B. Racial and Ethnic Diversity—Problems Beyond Reach

All but a few of those I interviewed proved unwilling to examine the issue of diversity through a racial lens. The judiciary’s homogeneity was presented as having nothing to do with race, but everything to do with socio-economic and educational inequalities. The consequence of this ascription was to free the judiciary from any sense of institutional responsibility.

1. Diversity as a Socio-Economic Problem

France’s universalist ideology has long included the belief, now increasingly contested, that any inequality along racial lines is the result of some other form of oppression, in particular socio-economic and educational, or due to personal responsibility. When I broached the topic of systemic racial discrimination in French society and within the justice system, interviewees discounted racial explanations, shifting the focus toward socio-economic problems in the banlieues. For instance, asked what he had to say about the racial, ethnic, and religious diversity of the judiciary, a retired white chief judge entirely missed the point, lecturing me instead about the social transformation of the judiciary throughout the twentieth century, from a corps attracting “landowners, aristocrats,” to an organization staffed by middle class females. My mention of race and ethnicity must have been so perplexing that he retreated to the more familiar terrain of class hierarchies. Asked the same question, a white appellate judge hastily changed the direction of the conversation, turning to the broadening the bench via increased professional diversity: “Diversity is not necessarily relative to origins, but I

135 Interview with 5, retired Chief Judge (2015).
136 Interview with 17, retired Chief Judge (2015).
137 But see FASSIN & FASSIN, supra note 6.
138 Interview with 5, retired Chief Judge (2015).
would say to cultural backgrounds [i.e., social class]. . . . There’s a lateral hiring procedure every year open to those who already have some professional experience. That constitutes diversity in the judiciary.”  

To be sure, the French judiciary is a career judiciary, highly homogeneous socio-economically and in terms of professional backgrounds. The vast majority of the magistrats are recruited straight out of law school among middle class students in their mid-twenties who lack any professional experience. In its quest for “diversity,” the judiciary has prioritized the issue of professional background, seeking to attract candidates from all corners of the legal profession, in particular practicing lawyers, and even beyond—academics, civil servants, and private sector employees. Ironically, the only judge I interviewed who had a truly unusual career path, having been a postman until his fortiess after dropping out of high school, dismissed the idea that the judiciary is insufficiently diverse socio-economically and professionally: “I don’t share this view. There are people who come from everywhere, human resource managers, academics, etc.” 140 This assessment suggests that prioritizing professional and socio-economic diversity over other forms of diversity is another way of evading the racial, ethnic, and sexual homogeneity of the judiciary. It may also signal that the magistrats only notice the lack of diversity they are culturally equipped to perceive and conceptualize.

The magistrats of color I met had contrasting response to this dilution of racial issues into socio-economic issues. The judge of Tunisian descent from a modest background shared personal stories of discrimination and micro-aggressions in the judiciary, putting the blame on “social racism,” which she conceptualized as classism, rather than racial animosity. 141 In contrast, a black prosecutor from an upper class Parisian background expressed her irritation toward the widespread assumption underlying diversity discourse that certain racial and socio-economic stratifications coincide, declaring, “blacks and Arabs are everywhere. They’re not only in the banlieues. . . . they can be very assimilated and it’s not because you’re black and Arab that you’re under-privileged. So you can be anywhere like everybody else. Unless you have a study, which I haven’t seen, in my view, being black or Arab or something else is not an obstacle to accessing the judiciary.” 142 She dismissed both racial and socio-economic categories as explanatory factors for the judiciary’s homogeneity, pointing out, “all blacks and all Arabs can sit for the entrance exam [to the Judiciary School]. Now, if they fail, they fail, period.” 143 In making the entrance exam the focus point, she echoed a number of her colleagues who saw it as the root cause of the judiciary’s diversity deficit.

2. Judicial Diversity as an Educational Problem

Subjects willing to acknowledge the judiciary’s racial homogeneity as a problem were swift to put the blame on legal education and entry-level judicial selection rather

139 Interview with 20, Court of Appeals Judge (2015).
140 Interview with 11, Judge (2015).
141 Interview with 14, Judge (2015).
142 Interview with 4, Prosecutor (2016).
143 Interview with 4, Prosecutor (2016).
than on systemic racial discrimination within French society and the judiciary. A white chief judge currently serving on the High Council for the Judiciary (Conseil supérieur de la magistrature), the body in charge of promotions and appointments to high-level positions, rationalized the fact all chief judges and chief prosecutors are white by saying “it’s a problem which falls within the entrance exam to the judiciary. I haven’t looked at this topic at all. It’s a candidates’ pool problem.”

There are three types of entrance exams (or “concours”) to the Judiciary School, depending on the applicant’s age, level of education, and employment status, but the vast majority of magistrats are recruited through the so-called “first entrance exam” (premier concours) reserved for young law graduates. Successful candidates typically sit for the exam after one or two years of intensive study at preparatory courses, some of which are quite costly. The discourses I collected on the exam are contradictory. On the one hand, interviewees unequivocally praised it as a color-blind and meritocratic selection mechanism. On the other hand, and often within the same sentence, some subjects denounced it for preserving racial inequalities. As legacies of the French revolution, these exams participate in the foundational republican myth of an egalitarian society in which access to education and power should be based on individual merit rather than birth, even if in practice it has been demonstrated that they reproduce elites and exclude outsiders. Consisting of a series of written tests graded anonymously, followed by highly formalized oral examinations, entrance exams typically exclude applicants’ résumés, statements of purpose, or letters of recommendation, perpetuating the illusion of an inclusive and transparent process. In line with this vision, an appellate judge celebrated the Judiciary School’s exam as a “republican exam . . ., a recruitment procedure which gives satisfaction because it has a republican legitimacy based on competence.”

While praising the exam, the three prep course professors I interviewed as well as a few magistrats acknowledged that it might have discriminatory effects. Most notably, the written and oral portions of the exam include a humanities core requirement, known as the “general culture” test (culture générale). It is the most heavily weighted subject for admission, well ahead of legal subjects, counting for one third of the total grade. The expectations are that students will have digested an extensive body of knowledge about literature, history, art, as well as continental philosophy. Far from “general,” however, this culture purports to convey a unified, homogeneous notion of dominant French white,

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144 Interview with 3, Appellate Court Chief Judge (2015).
145 See Pierre Bourdieu & Monique de Saint Martin, Agrégation et ségrégation. Le champ des grandes écoles et le champ du pouvoir, 69 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 2 (1987); Albouy & Waneq, supra note 39. See also Fabien Jobard, Police, Justice, et Discriminations Raciales, in DE LA QUESTION SOCIALE À LA QUESTION RACIALE? 211, 214 (Didier Fassin & Éric Fassin, eds., 2006) (showing the discriminatory effects of the concours system in police recruitment whereby Maghrebi candidates are three times less likely to succeed in some cities).
146 Interview with 7, Court of Appeals Judge (2016).
147 The test was renamed in 2008 and is now officially known as the “Knowledge and Understanding of the Contemporary World” test.
male, and Christian culture. A professor who spent the past twenty years teaching general culture at a Parisian preparatory course declared,

it’s in the general culture test that the widest differences between social backgrounds appear. . . . I was told that in the old days, some students were asked [during the orals] extravagant questions of pure erudition such as about the Hittites. Supposedly this no longer happens. . . . This test will remain unjust. It is less so than 20 years ago. It was totally unjust. During the orals, they were asked questions implying that they belonged to social circles where they were prepared [for the test] since their early childhood.  

It is certainly hard to fathom why future magistrats should be tested upon their knowledge of Ancient Anatolian people whose history is primarily known through reference from the Bible. The experience of the judge of Tunisian ancestry mentioned above resonated with the professor’s analysis. During her oral examination, she was asked a question about French music she did not know how to answer. She told the jury, “it’s not my culture.” One of the examiners retorted: “What’s your culture? Faudel?” (Faudel is a French born Algerian singer of raï who became hugely popular in France in the mid-2000s with lyrics expressing the hopes and frustration of the French-born youth of North African descent.) Through this reference to Faudel, the examiner was disparaging her presumed particularistic culture, relegating her to the ostracized space of the banlieues. In hindsight, citing Pierre Bourdieu, the judge saw the attack as evidence that the test operates as a screening mechanism for “the general culture of the dominant.”

Rather than overhauling the entrance exam itself, the judiciary has focused its diversity efforts on providing free preparatory courses to help underprivileged students. In 2008, under the leadership of Rachida Dati, the first Minister of Justice of North African ancestry, the “Equality of Opportunity Preparatory Course” (classes préparatoires égalité des chances) was established. Fifty-four students are now selected yearly to be dispatched to Paris, Bordeaux, or Douai, where they receive 11 months of instruction and coaching. They are provided a stipend and assigned a personal tutor. Their success rate at the exam is much higher than the national average—about 30% versus 10%. The stated purpose of the program is emphatically not, according to the magistrats and professors I interviewed, to promote racial or ethnic diversity, but socio-economic diversity. A white judge involved in the course management declared, “We are seeking a diversity in social origins. . . . The analysis is based on the criterion of academic excellence and parents’ income. We don’t go after skin color.” A white professor reiterated the point, emphasizing, “the criterion we take into account is a social

149 Interview with A, prep course Professor (2015).
150 Interview with 14, Judge (2015).
151 Interview with 14, Judge (2015).
152 Interview with 7, Court of Appeals Judge (2016).
153 In reality the success rate is even higher considering that Equality of Opportunity Preparatory Courses students who fail the exam during their first year tend to have higher success rate the following year.
154 Interview with 24, Senior Judge (2015).
criterion,” as opposed to a racial one. When asked whether the course had been created with the goal of producing some affirmative action for underrepresented racial and ethnic groups, he dismissed the thought based on a legalistic argument: “it’s impossible, it’s against the French Constitution . . . because of the way in which we interpret the anti-discrimination principle in the Constitution we can’t have ethnic statistics, etc.” At the same time, he was not opposed to recognizing that increased racial and ethnic diversity could be an unintended consequence of the program, pointing out, “I’m not a sociologist, but as soon as you take into account the social criterion, automatically because this type of population [circumlocution for racial and ethnic minorities] belongs to the underprivileged, for obvious reasons, there are more than usual.” In other words, greater racial and ethnic diversity is only a legitimate result if it is an accidental outcome of socio-economic diversity.

I was curious to find out what it is that students learn in a few months that enables them to obtain such impressive results at the exam. A white appellate judge noted that the program’s primary mission is to “offer them [students] what I would describe as access to culture. We take them to the opera house, to the theater, to museums.” Another white judge involved with the program recognized, “the problem of access, there’s nothing new since Bourdieu, are cultural codes, which is why we tell them ‘Read Le Monde [the serious daily newspaper read by center-left educated middle classes], go to the theater, go to the movies.’” The subtext here is that students lack the cultural values, orientations, language, and practices, which define the white middle classes. A white professor was even more candid in her description of the type of skills being inculcated, reporting, “I am very direct, I tell them frankly what’s not quite right in terms of oral expression, appearance, or dress code . . . For instance if one of my students wears too much make-up, I tell her. I tell her very frankly.” The prep course offers an expedited transmission of the “dominant social capital” (to use Bourdieu’s jargon) necessary for entering high status social groups and organizations. Aspiring magistrats are taught to perform whiteness and middle-classness through standards of speech, demeanor, clothing, and interactional styles. In this way, as Devon Carbado and Mitu Gulati would put it, the judiciary can benefit from some degree of skin color and socio-economic diversity without worrying about creating tensions within the institution—a socialization process which is not without similarities with the experience of LGBTIQ judges expected to downplay their sexuality in a heteronormative environment.

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155 Interview with C, prep course Professor (2016).
156 Interview with C, prep course Professor (2016).
157 Interview with C, prep course Professor (2016).
158 Interview with 7, Court of Appeals Judge (2016).
159 Interview with 24, Senior Judge (2015).
160 See generally CARBADO & GULATI, supra note 16 (discussing racial identity and performance in the United States in the context of education, employment, and law enforcement and showing that racial and ethnic minorities are required to conform to white middle class norms to succeed).
161 Interview with B, prep course Professor (2016).
162 See Pierre Bourdieu, Cultural Reproduction and Social Reproduction, in Power and Ideology in Education 487 (Jerome Karabel & A. H. Halsey, eds., 1977) (developing the notion of “cultural capital” to explain how individuals’ command of certain cultural signals enables or prevents them from accessing high status groups or institutions).
163 See CARBADO & GULATI, supra note 16.
To sum up, judicial discourses of diversity rationalize minorities’ exclusion from the judiciary as the result of social and educational dynamics and minorities’ imputed cultural limitations, which are presented as naturally occurring phenomena over which the judiciary has little power.

V. Geographic Dislocation

This Part sets forth a final form of avoidance in judicial discourses of diversity: geographic dislocation, by which I mean the relegation of racial and sexual diversity to distant places. Diversity talk in general was seen as an American import. Racial and ethnic diversity talk in particular was relegated to the context of overseas French courts.

A. “This Is Such an American Question”

Much like the rest of the French population, the magistrats are eager to endlessly compare the French and the American national projects, contrasting the American recognition of ethnoracial identities to France’s ostensibly universalistic citizenship. During my field work, the mere mention of the word “diversity” raised the specter of the United States and its affirmative action policies as imagined by the French public. A third of the subjects I interviewed dismissed my use of sexual, racial, and ethnic diversity categories as “American.”

For instance, when asked if there was any racial diversity in his office, a senior white, straight prosecutor of a suburban court responded disdainfully, “This is such an American question.” 164 Undeterred, I reformulated my question, inquiring whether he had any non-white, non-Christian colleagues among his 50-prosecutor office. He paused, ostensibly to reflect, and announced: “I am obliged to think to see if there are people of a particular origin. It wouldn’t even come to my mind. It’s such an American thing.” Similarly, a white, straight chief judge proceeded to lecture me on the French state model, emphasizing that in France, there are no minorities, no communities, but only an abstract model of citizenship, which supplants other forms of identities. He went on to contrast this French model to the American model, concluding, “France is a unitary state. Americans govern via communities, but in France there is no communitarianism.” 165 Positively contrasting France with U.S. racial politics can be read as both an expression of nationalism and rejection of American cultural imperialism. But in practice, it also functions as a justification for refraining from adopting (what are seen as) American policies to tackle racial and sexual inequalities, such as encouraging racial and LGBTIQ organizations, sensitivity training, affirmative action, and reparation.

The few magistrats who criticize their colleagues’ turning a blind eye to the lack of diversity do so within the French-American dualism, as illustrated by the judge of Tunisian ancestry who explicated,

164 Interview with 2, Senior Prosecutor (2016).
165 Interview with 10, Senior Judge (2015).
there is this form of ideology of the Republic with a capital “R,” which is a melting pot of origins, but where there are no ethnicities, no affirmative action, none of that. We don’t want to hear about it. They [other magistrats] don’t really want to ask themselves the question. They ask the question of socio-economic origins, they establish prep courses to diversify judicial recruitment a little bit, but the ethnicity question is un-French actually. It doesn’t interest them. I must say it’s very American.\textsuperscript{166}

This frequent deflection of diversity as an American thing may have been provoked by my affiliation with an American university and subjects’ perception that I was American, or sufficiently Americanized to be interested in what they understood as “American” issues. Yet, I surmise that my own identity played a marginal role given the commonplace practice of comparing and contrasting “French and American responses to racial pluralism.”\textsuperscript{167} To the magistrats, just like to segments of the French elite, the United States represents a counter-model of identity politics, characterized by divisive communitarianism and rigid quotas. To illustrate this conception, here is an exchange I had with a black prosecutor:

Prosecutor: It’s a bit embarrassing to see whites only in the judiciary because it doesn’t reflect the image of society. But, we’re not going to impose quotas saying, “we need that many blacks, that many Arabs.” . . . To be sure, for the perception of justice, litigants will always prefer to see a panel representing French society. But we are not in the United States.

Q: What do you mean when you say that we’re not in the United States?

Prosecutor: The quotas. We don’t need them. As much as I understand the need for quotas in the United States, . . . in France I would be absolutely opposed to them. . . . Thank God we don’t have quotas for homosexuals in the judiciary. We should not seek representativity at all costs.\textsuperscript{168}

This discourse comes across as ironic given, that quotas are perhaps more common in French law and society (in the form of gender quotas\textsuperscript{169}) than in the United States, where public universities and other government institutions are constitutionally prohibited from

\textsuperscript{166} Interview with 14, Judge (2015).
\textsuperscript{167} George M. Fredrickson, \textit{Diverse Republics: French & American Responses to Racial Pluralism}, 134 \textit{Daedalus} 88 (2005). This practice is not only common in popular culture, but also in academic circles, see e.g., the special 2001 volume 100 of the \textit{Yale French Studies}, titled “France/USA: The Cultural Wars”; Erik Bleich, \textit{From Republican Citizens to ‘Young Ethnics’ in the ‘Other France’? Race and Identity in France and the United States}, 6 \textit{French Politics} 166 (2008). More recently, in June of 2013, Daniel Sabbagh and Maud Simonet organized a conference in Paris titled “Comparaisons franco-américaines” (French-American Comparisons), the proceeding of which will soon be published as an edited volume.
\textsuperscript{168} Interview with 4, Prosecutor (2016).
\textsuperscript{169} See Éléonore Lépinard, \textit{For Women Only? Gender Quotas and Intersectionality in France}, 9 \textit{Politics & Gender} 276, 279–83 (2013) (retracing the history of France’s constitutional and political reforms which led to the adoption of gender quotas across the board as a tool to redress gender imbalance in decision-making bodies, from electoral politics, to supervisory boards of public institutions, to the highest category of civil servants in public administrations, to corporate boards).
using numerical targets based on race. Once upon a time, the French judiciary itself toyed with the idea of quotas. In 1959, in the midst of the Algerian war, which led to Algeria gaining its independence from France in 1962, the French Parliament decided to set aside 10% of the Judiciary School’s seats for “Muslim French citizens” (a then-standard expression which used Islam as an ethnic euphemism to distinguish French citizens indigenous to Algeria from those of metropolitan or European descent). The measure established in effect a 10% quota for a five-year period. The statute also created a lateral hiring process for indigenous Shari’a judges to access the bench directly, bypassing the entrance exam and years of schooling at the Judiciary School. According to the statute’s legislative history, legislators’ motivation was, “to increase the number of Muslim French citizens native to Algeria participating in the exercise of public responsibilities,” the draft preamble noting that “the number of Muslim judges is utterly insufficient.” In reality, these reforms were opportunistic, eleventh hour attempts to secure buy in from the indigenous Algerian elite at a time of state crisis when France’s control of the country was in jeopardy. Algeria’s independence and the end of the war in 1962 marked the end of the short-lived experiment.

None of the research subjects mentioned nor seemed to be aware of this precedent. This collective amnesia, combined with the widespread misunderstanding of American-style affirmative action could indicate that it is not so much the American national project which is rejected as a counter-model than the notion of diversity itself as a descriptive and normative concept relevant to contemporary France. Diversity is “American” because it is not French. “American” has become a shorthand for “un-French,” a rhetorical tool to keep an uncomfortable thought at a safe distance. Another explanation has to do with France’s scattered geography. The Algerian affirmative action program fell into oblivion, perhaps, because it was relegated, in collective memory, to France’s negative “other”—overseas France. As the next section argues, while research subjects were keen to talk about racial and ethnic diversity in the overseas courts context, they were not prepared to repatriate these notions to the metropole. This second form of

170 Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (declaring that public universities and other governmental institutions cannot set specific numerical targets based on race for admission or employment).
172 Id.
173 Id.
175 See Mark Q. Sawyer, Racial Politics in Post-Revolutionary Cuba 5 (2006) (summarizing the political science literature on state crises as critical moments for racial politics during which weakened states seek the support of subordinated groups to consolidate their power).
176 Making it all the more surprising that they do not recall the affirmative action program initiated in the then overseas départements of Algeria.
geographic dislocation does not apply to sexual diversity, but only to racial and ethnic diversity.

B. Race in Overseas France

Some research subjects granted that racial and ethnic diversity is an important and legitimate goal for the judiciary, but typically not in France, or at least not in metropolitan France, that is, the part of France located in Europe as opposed to the French-administered territories outside of the European continent known as overseas France (extérieur mer)—the collective name for the French-administered regions located outside of Europe such as Martinique, Guadeloupe, Réunion, French Guiana, New Caledonia, or Mayotte.\(^\text{177}\) Held as colonies until the 1940s, these territories share violent histories of slavery and oppression and became part of the French state with varying statuses and degrees of autonomy. Though this Article often lumps together overseas courts as if they constituted a coherent entity, my intention is not to perpetuate the post-colonial imaginary geography of non-European otherness, but to accurately reflect magistrats’ declarations, all the while protecting their confidentiality.

Compared with their racial aphasia with respect to metropolitan courts, I was struck by magistrats’ openness to discussing race and ethnicity in overseas courts—whether or not they had any direct experience with them.\(^\text{178}\) Two sets of reasons may explain this geographically dislocated discourse. First, by talking about race overseas but not in the metropole, the magistrats track the history of French colonial law, which deviated from the universalistic principles of French law in the colonies and protectorates by instituting a specific legal regime based on racial inequality and oppression. Overseas, slavery and race-based legislation was the norm, while slavery had been prohibited in metropolitan France since 1315 and citizenship was in principal universal.\(^\text{179}\) Second, white magistrats may be eager to discuss race in the overseas context because it is there that they likely experienced racialization first-hand. Overseas assignments force magistrats to interact with individuals from different racial and ethnic backgrounds be it inside or outside the courtroom. Of course, this is true in metropolitan France as well, but overseas, magistrats indoctrinated a colorblind ideology are propelled in an environment where race is constantly and openly discussed and problematized. Most importantly, as metropolitan whites who do not speak local languages, they themselves identify as a racial and ethnic minority. As Barbara Flagg has pointed out, “[w]hiteness attains opacity, becomes apparent to the white mind, only in relation to, and contrast with, the “color” of nonwhites.”\(^\text{180}\) Feeling racialized for the first time, they become anxious to recognize that race is a social reality that matters.


\(^{178}\) Nine out of the twenty-six magistrats I interviewed had been posted at least once in an overseas court. Two out of those nine are natives to one of these overseas territories.

\(^{179}\) See Hélenon, supra note 8, at 92. Though in the metropole people of color could hold formal citizenship status, they lived—and often still live—under highly unequal terms.

\(^{180}\) See Flagg, supra note 18, at 970.
Though variations exist among the different French territories, overall, white, metropolitan judges, prosecutors, and senior registry members preside over courts predominantly staffed by native overseas employees reflecting the racial makeup of the local population and adjudicate cases involving native peoples represented by a racially diverse bar.181 A retired white metropolitan chief judge who served in several French islands reported that among the hundred magistrats working at one of the courts where he served, perhaps “four or five” were native islanders, while the support staff “was overwhelmingly native.”182 Likewise, a mixed race native overseas judge lamented that at her overseas court, “on a total of 103 magistrats, there are two natives.”183 The other 101 magistrats are not only metropolitan, but they are also white, leading her to exclaim, “Can you imagine the picture it gives to a very mixed-race, black, creole-speaking population which feels misunderstood because my colleagues don’t understand them?”184 The disparity, she added, leads to a “a colonial judiciary . . . People tell me all the time: it’s a white justice rendered by whites.”185 Using her colleagues’ place of birth as a proxy, she crunched the numbers and found that less than 1% of French judges and prosecutors are overseas natives, when overseas citizens represent 4% of the total French population.186

Although some of the magistrats I interviewed connected racial disparities on the overseas courts to the perpetuation of a (post-)colonial rule, none of them took position regarding the effects of (post-)colonialism in the mainland. Yet, in impoverished urban and suburban areas of mainland France, courts appear surprisingly similar to their overseas counterparts. Litigants and the support staff are racially diverse and predominantly local residents. By contrast, the magistrats, who rarely linger more than a few years in posts considered as “tough,” are overwhelmingly white, especially those in high-level positions. They typically commute from the affluent city centers or suburban neighborhoods where they reside. I spent half a day at a trial court located in a poverty-stricken suburb of Paris observing the work a young, middle class white prosecutor who had studied at some of the most selective French colleges. When I inquired about her commute from the trendy Parisian district where she resides, she answered: “not one prosecutor lives in the area [where the court is located]. Oh, perhaps two or three [out of about 50].” adding by way of explanation, “You are a Parisian and . . . you work in Nanterre, Meaux, Créteil, etc. [i.e., the various Paris suburbs which have courts].”187 One of her colleagues noted that unlike the magistrats, “the support staff typically lives in the area.” I heard a similar narrative in an urban South of France trial court, where one of the chief prosecutors narrated that she asks the police to accompany her whenever she

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181 On the demographic of colonial judges from the 1830s until the late 1980s, see Jean-Claude Farcy, Quelques données statistiques sur la magistrature coloniale, 4 Clio Themis (2011) available at http://www.cliothemis.com/Quelques-donnees-statistiques-sur.
182 Interview with 5, retired Chief Judge (2015).
183 Interview with 23, Judge (2016).
184 Interview with 23, Judge (2016).
185 Interview with 23, Judge (2016).
186 Interview with 23, Judge (2016).
187 Field observations (2016).
investigates on the ground, “there are sensitive neighborhoods in this city and it is obvious that I’m not from the neighborhood, I don’t blend in with the local color.”

Research subjects did not fit metropolitan and overseas courts into a single analytic frame. As ready as they were to talk about racial inequality and oppression in the overseas court system, these discourses remained severed from racial politics in mainland France. When recounting her years at an Indian Ocean court, a white appellate judge spontaneously expounded on the racial and ethnic makeup of the local population, recognizing that judges and prosecutors failed to reflect it. A few minutes later, when I inquired as to whether she had black, Maghrebi, Asian, and LGBT colleagues at her current court in the East of France, she asked back, manifestly puzzled, as if my question lacked meaning, “Do you mean what one calls “minorities” in North America?”

Though she had registered the insufficient inclusion of people of color on the overseas bench, she could not fathom any connection between this state of affairs and the metropolitan judiciary’s whiteness. This attitude is reminiscent of French anthropologists of the French Caribbean and sub-Saharan who, according to Éric Fassin, “reject[. . .] any suggestion that the racialised world they studied in the French or former colonies ha[s] anything to do with France itself: they refuse[. . .] the repatriation of whiteness.” Similarly, magistrats refuse to repatriate race and ethnicity talk to the mainland. The colonial forces that grounded the migratory patterns leading to France’s multi-racial present remained unmentioned. The memory and experience of colonial oppression are left behind in the overseas territories rather than connected to metropolitan France’s current racial power structure.

Conclusion

This Article has argued that the dominant judicial discourses of diversity not only avoid engaging with diversity as a category of speech, but also dismiss the structural disadvantages and discriminatory practices which adversely affect minority magistrats as well as those who aspire to becoming magistrats. These discourses reflects in part the French nation’s inability to cope with its own diversity and to compensate for continuing inequalities, with colonialism and empire appearing as central threads in the nation’s unraveling republican fabric. The explanations I highlight for the unspoken, and sometimes unspeakable dimensions of judicial diversity warrant more systematic theoretical and empirical investigation in future scholarship. Promising lines of inquiry for further research in this area range from measuring judicial diversity through a quantitative study (which would seek exemption from the prohibition on collecting sensitive data), to scrutinizing the discriminatory effects of current judicial selection mechanisms, in particular the Judiciary School’s entrance exam, to examining the potential impact of mandating that all magistrats undergo sensitivity training.

188 Field observations (2015).
189 See Stoler, supra note 20, at 132 (noting that “French social science seemed inured if not impervious to a rethinking that brought metropole and colony, much less racism and republicanism, into a single analytic frame.”).
190 Interview with 18, Court of Appeals Judge (2015).
191 Fassin, supra note 87, at 236.