

Court Review

Volume 57, Issue 2

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 57, Issue 2

2021

EDITOR'S NOTE

The world—and we in the courts—faced a unique set of challenges in 2020. In this issue, we look for lessons from the social protest movements of the last year. As judges, we are dedicated to achieving actual fairness and impartiality; at the same time, we are limited in the roles we can play in advocating for or against contemplated reforms.

We in the courts can be of two minds in discussing reforms. We cherish the strengths of our system of justice and want to defend those strengths even as we may see shortcomings that merit change. At the same time, we are mindful of the dangers of undermining the credibility of the strengths in the existing system even as we recognize the need for transparency about our shortcomings to enhance that desired credibility.

The community can also be of two minds in approaching the courts. For many of us, protestors gathered at our courthouses demanding greater justice. But, at times, they also halted our provision of the very justice they demanded.

Our cover is a graphic illustration of the contradictions inherent in approaching the strengths and weaknesses of our courts. The photograph depicts the state supreme court building in my state, Colorado. It is relatively new and a fitting symbol of the judiciary in this state with many innovations. In 2020, it was shut down by protests. The windows were smashed and fences were erected to bar the public even from approaching the seat of our judiciary.

We as a community and as members of the judiciary see the condition of the courthouse every day (figuratively for some) and, if we bother to look, can easily see its injuries and flaws that need tending. Yet, I am sorry to say, it still sits there in 2021 with broken windows untended, boarded up sections gathering more scars, and surrounded by that fence preventing the people's approach.

A shortcoming in an institution can be like a hole in a wall of your home. You mean to address it when you first notice it. But, daily life keeps you from getting to it and, before long, you become blind to it, you begin to accept it, and, sometimes, you don't even notice as it leads to greater undermining of your home's structural integrity.

In this issue, we try to take a hard look at our beloved institution and address that deferred maintenance most of us already know needs our attention. We look to start the momentum for concrete steps to address those issues we've all set aside for too long.

We start with a discussion of the challenges of our dual roles in *As Judge and Citizen: An Ethical Path to Racial Justice* from former AJA president, Justice Robert

Continued on page 71

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 118 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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On the cover: The Ralph L. Carr Colorado Judicial Center, in Denver, Colorado, was built in 2012 and designed by Fentress Architects. The Center incorporates an innovative Judicial Learning Center, cjl.c.colorado.gov. Photographer Bryan Lopez, taken November 17, 2020.

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President's Column

Peter Sferrazza

In the conclusion of *Nineteen Eighty-Four: A Novel*, George Orwell describes his protagonist Winston: “[E]verything was alright, the struggle was finished. He had won the victory over himself. He loved Big Brother.” Winston had tried to fight against Big Brother but failed. To achieve domination, Orwell’s dystopian state had used physical and mental torture, drugs, as well as control of news and history. Even control of the English language was used, reducing it to Newspeak, which only allowed for limited thought and expression. In the end, the individuals were subjugated to the complete control of the state.

In the non-fiction world, the year 1984 came and went without the thought police. But in 2020 we saw how a coordinated segment of the media could shape the belief of our citizens and create disparate views of core facts. In *Nineteen Eighty-Four* there was no external or objective truth. The “truth” was what the collective mind says it was, a prescient forerunner of our “wiki” on the Internet.

Is it a fact that Joe Biden won the election? Despite scores of failed legal challenges, numerous recounts, and Congress’s confirmation of Joe Biden’s Electoral College victory, a large majority of those who voted for Donald Trump say their candidate received the most votes cast by eligible voters in enough states to win the election.

According to Pew Research, “Among Trump voters, 40% say he ‘definitely’ won and another 36% say he ‘probably’ won the election. Only 7% of Trump voters concede that Biden definitely won the 2020 election, while another 15% say he probably won. Biden voters nearly unanimously believe their candidate won.” Among Trump voters, 70% believe he lost because of widespread election fraud.

“In free countries, every man is entitled to express his opinions and every other man is entitled not to listen.” G. Norman Collie.

In light of the disputed 2020 election results, one must ask whether every person is now entitled to their own facts. I say “no” and am grateful that in our society we have institutions like the courts dedicated to determining the facts. In our society, we all have the right to our own opinion. However, we rely on the courts to weigh the evidence to separate fact from opinion. Under our Constitution, judges and juries have the awesome responsibility to determine what is true.

With respect to the facts of the 2020 election, the courts have decided these issues contrary to the majority of Trump voters who believe he won. Helping each other understand the role of

courts in our democratic system is more important than ever before. Your AJA, in partnership with the National Judicial College, is presenting a webinar on “The Role of the Judiciary in Preserving Our Constitutional Democracy.” Please mark your calendars for April 15, 2021 at noon pacific time for a fascinating discussion of these issues.

Distinguished Professor Erwin Chemerinsky will be our lead panelist discussing the cases that were appealed to the United States Supreme Court relative to the 2020 election, and prior election law cases decided by the court.

We will have presentations on four states, Pennsylvania, Nevada, Arizona, and Georgia, that were not decided on election night and were determinative of the outcome of the election.

Nevada Attorney General Aaron Ford, former majority leader of the Nevada State Senate, will discuss the cases that were filed in the state of Nevada challenging the 2020 election results.

Professor Neil Kinkopf, staff member for President Joe Biden’s Senate Judiciary committee, will give his perspective on the cases that were filed in the state of Georgia challenging the 2020 election results and the aftermath.

Retired Arizona Chief Justice Scott Bales will share his insight on the Arizona election challenges. He taught election law courses as a professor at Arizona law schools before joining the Arizona Supreme Court.

Attorney Mark Aronchick defended Pennsylvania in the lawsuits challenging the results. He will share his story about going head-to-head with Rudy Giuliani.

This is an important webinar because our fragile democracy is at stake.

For the first time in the history of our country on January 6, 2020 we witnessed an armed insurrection to delay certification of the electoral college votes by the U.S. Congress.

A majority of voters believe they have a constitutional right to vote for president.

They don’t realize an armed insurrection is not necessary to overturn the popular vote.

When members of the Florida legislature in 2000 threatened to abandon the results of the statewide popular contest and appoint Electors for a particular candidate, the Supreme Court in *Bush v. Gore* (2000) held that “The individual citizen has no federal constitutional right to vote for Electors for the President of the United States.” When it comes to presidential elections, the voters are at the mercy of the state legislatures.



The Admissibility of Social Media Evidence in Canada:

Part 1

Wayne K. Gorman

Any trials arising out of the events in Washington, D.C., on Wednesday, January 6, 2021, are likely to result in attempts to introduce what has been described in Canada as “social media evidence,” i.e., text messages, Facebook postings, selfies, etc. (see Lisa A. Silver, *The Unclear Picture of Social Media Evidence*, MANITOBA L. J., 43, no. 3 (2020) at 111). Professor Silver has noted that “social media is often the context in which criminal offences can be committed. It can provide a space in which offences are committed and it can provide proof of it as well” (at 117-118).

Interestingly, social media evidence is often viewed as extremely reliable because it is presented in a manner in which judges can hold, see, and review on their own. Like other documentary evidence, it can be viewed as superior to testimonial evidence, though it is subject to many of the same inherent frailties (see *Scott v. Harris*, 550 U.S. 372 (2007), for an example of how viewing the same video recording led numerous judges to different conclusions).

Some of the issues raised by electronic evidence were summarized by the authors of McWILLIAMS’ CANADIAN CRIMINAL EVIDENCE (Casey Hill, David M. Tanovich, and Louis P. Strezos, 5th ed., Toronto: Canada Law Book, 2020, loose-leaf) in the following manner (at paragraph 24:90.10):

Electronic evidence poses unique problems from an evidentiary standpoint. One problem is classification. Are records generated on, or even by, a computer analogous to documents, to real evidence, or to neither? Is a printout the original? Are there any “originals” for electronic evidence?

In this column, I am going to review how this relatively new area of evidence law has developed in Canada. As will be seen, in assessing the admissibility of such evidence, Canadian judges have relied upon both common-law principles and statutory provisions contained within the Canada Evidence Act, R.S.C. 1985. The column, because of its length, is divided into two parts. The first part, presented here, will consider the admissibility of social media evidence in Canada at common law. The second part (which will be presented in volume 57:3), will consider the admissibility of such evidence in Canada pursuant to the Canada Evidence Act as well as a summary/conclusion.

PART 1

This area of evidence law has received significant appellate consideration in Canada in 2020 and early 2021. One of the most important areas considered in these decisions involves the issue of authentication. This is, in many ways, the key question because it is crucial to admissibility. However, before considering

this area of law, the first question to ask is: Does a trial judge have to hold a *voir dire* when social media evidence is sought to be introduced?

IS A VOIR DIRE NECESSARY?

In *R. v. Durocher*, 2019 SKCA 97, this question arose in the context of a trial in which the Crown was allowed to introduce text messages said to have been sent by the accused to the complainant (L.A.) through Facebook.

L.A. testified that the accused “had sent Facebook messages to her several days before the alleged assaults took place, saying ‘gross things.’ On several such occasions, she responded by telling him to ‘shut up’ and once used the abbreviation ‘STFU’ (shut the fuck up). L.A. says she continued to receive Facebook messages from Mr. Durocher for several weeks after the alleged assaults took place.” When asked how she knew that it was the accused who had sent her the messages, she responded: “Because it says his name.”

These messages were entered as evidence without a *voir dire* being held. The accused was convicted and appealed, arguing that the trial judge erred in allowing the social media evidence to be introduced without conducting a *voir dire*.

The Saskatchewan Court of Appeal indicated that the “impugned evidence in this appeal concerns an out-of-court statement purportedly made by Mr. Durocher who, at trial, took issue with whether he was the author of the Facebook messages. Mr. Durocher now argues this evidence should not have been admitted without a ruling to that effect following a *voir dire*” (at paragraph 41).

The Court of Appeal held that a *voir dire* was not necessary “to address threshold admissibility when authorship is in issue. Considering that the authorship of the Facebook messages was at issue, the trial judge was only required to consider whether the evidence proved on a balance of probabilities that Mr. Durocher wrote the Facebook messages” (at paragraph 46). The Court of Appeal stressed that in “exercising his gatekeeper function at the threshold admissibility stage, the trial judge only needed to be satisfied on a balance of probabilities that the statements were made by Mr. Durocher. He was entitled to rely on circumstantial evidence to do so and, importantly, he was not required to hold a *voir dire* to make a threshold determination at this stage” (at paragraph 52).

This, however, appears to “beg the question.” Authentication will always require some evidence. How is this evidence to be considered without a *voir dire* if the admissibility of the evidence is contested? This does not mean that the *voir dire* has to be extensive. For instance, in Canada statements made by the

accused to someone other than a “person in authority” are generally admissible as an exception to the hearsay rule and do not require a *voir dire* (see *R v S.G.T.* [2010], 1 SCR 688, at paragraph 20).¹ But, if it is argued that the statement was not made by the accused, some evidence that it was must be presented. As noted in *R. v. Ball*, 2019 BCCA 32, “as with other admissibility issues, where there is reason to question whether an electronic document meets the statutory requirements, a *voir dire* should be held and a reasoned determination made as to its admissibility” (at paragraph 67).

In *Ball*, the accused was convicted of the offence of arson. At his trial, his girlfriend (Ms. Lacey) testified that the accused had sent her Facebook messages indicating that he had committed the offence. The Crown introduced photographs the police had taken from a computer screen illustrating the contents of the messages. The British Columbia Court of Appeal noted that Ms. Lacey “was the only Crown witness called to explain the operation of Facebook Messenger, which she characterized as similar to text messaging” and that a *voir dire* had not been held.

The accused appealed from conviction. The appeal was allowed and a new trial was ordered. The British Columbia Court of Appeal pointed out that the Facebook messages “were extremely important Crown evidence. They included Mr. Ball’s alleged admission to setting the fires and a computer-generated time stamp associating the first message with the time” of the fire. . . . Nevertheless, their admissibility was not questioned and a *voir dire* was not conducted. Therefore, the judge did not make a reasoned determination on whether the photographed messages were admissible and, if so, the permissible use for their computer by-product content” (at paragraph 81).

Professor Silver notes that authenticity “requires an investigation into whether the real evidence is what it claims to be. This differs from testimonial evidence where the person, for admissibility purposes, is taken at their word, leaving credibility issues for the final determination” (at 122). She concludes that “an electronic evidence admissibility *voir dire* should be required in all instances where social media evidence will be introduced. This is so ‘a reasoned determination’ may be made on its admissibility. The trial judge should not wait for counsel to engage the process but should raise the issue at the outset. For consistency, the *voir dire* should apply the admissibility regime under the *Canada Evidence Act*” (at 153).

Interestingly, in *Durocher*, despite having concluded that the trial judge did not err in failing to hold a *voir dire*, the Court of Appeal indicated that that it would have been “preferable” for a *voir dire* to have been held in relation to whether the *Canada Evidence Act*’s threshold authenticity and integrity requirements had been established by the Crown (at paragraph 96):

Since the Crown sought to adduce electronic documents into evidence, it would have been preferable for the trial judge to have conducted a *voir dire* to determine threshold authenticity and integrity. However, bearing in mind the low bar attached to s. 31.1, the functional approach adopted by the courts with regard to its application, the presumption of integrity under the *CEA* and the fact the trial judge ultimately found Mr. Durocher was the author of the Facebook messages, I am satisfied that the evidence adduced by the Crown was capable of authenticating the Facebook messages.

Despite what may have been said in *Durocher*, anytime an objection to the introduction of social media evidence is raised, it is imperative that a *voir dire* be conducted. There may be times that admissibility can be readily established, but this does not alter the *voir dire* requirement.

AUTHENTICATING ELECTRONIC EVIDENCE

Evidence in the form of text messages, Facebook postings, and other electronic communications, once unknown, are now common forms of evidence sought to be introduced in Canadian courts. They constitute various forms of evidence, including confessions and prior inconsistent statements. They can be of great probative value, though they raise concerns about how their reliability can be ensured. Thus, the admission of such evidence, like many forms of evidence, requires proof of authentication, including, in certain cases, proof that they were sent by a relevant party. However, this proof must be analyzed in the context of the manner in which people in present-day society communicate.

Statements contained in text messages or other forms of electronic communication are a type of evidence that has been admitted for centuries. It is not the content of the evidence that is new. It is the format that is new. For instance, there would be nothing wrong with counsel cross-examining a complainant on a telephone call purportedly made to the accused or the Crown seeking to introduce a letter sent to by the accused, if relevant.

Thus, the authors of *ELECTRONIC EVIDENCE IN CANADA* note that “proof of authenticity and reliability is not concerned specifically with the substantive content of the proffered ESI [electronically stored information], but rather with where the ESI comes from, how it was obtained and handled, whether it can be trusted to be what it purports to be, and how reliable a source of information it is about a material issue (Graham Underwood and Jonathan Penner, Thomsen Reuters, 2020, loose-leaf, at 11-11). The authors also point out that authenticity “is not the same as reliability. ‘Authenticity’ refers to the quality of the ESI in being what

Footnotes

1. In *R v S.G.T.*, the Supreme Court made a “distinction between an admission and a confession.” The Court stated (at paragraph 20):

Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an accused to ordi-

nary persons, such as friends or family members, they are presumptively admissible without the necessity of a *voir dire*. It is only where the accused makes a statement to a “person in authority”, that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.

its proponent claims it to be. Authenticity is a measure of the likelihood that the proffered ESI is actually what it is described as, whereas ‘reliability’ is a measure of how well the proffered ESI communicates useful information about a matter that is in dispute” (at 11-15).

The Court of Appeal of Newfoundland and Labrador has made the same point, holding that “authentication does not mean the document is genuine . . . a piece of electronic evidence does not have to meet an additional standard of proof like the balance of probabilities or beyond a reasonable doubt in order to be admitted into evidence. Individual pieces of evidence tendered in a trial are admitted on the basis of relevance to a fact in issue, subject to exclusionary rules and the prejudice versus probative value inquiry” (see *R. v. Martin*, 2021 NLCA 1, at paragraph 49).

THE TWO STAGES OF AUTHENTICATION

Authentication has two distinct stages: threshold admissibility and ultimate weight. It has also been held that the “threshold for authentication of evidence, both at common law and under s. 31.1 of the *Canada Evidence Act*, is modest: there must be evidence that is capable of supporting a finding that the electronic document ‘is that which it is purported to be’” (see *R. v. Farouk*, 2019 ONCA 662, at paragraph 60). I intend to consider the admissibility issue from both the common-law perspective and how this is achieved through the *Canada Evidence Act*.

AUTHENTICATION AT COMMON LAW

In *Durocher*, it was noted that at “common law, authentication is a prerequisite to the admissibility of a document at trial.” The Saskatchewan Court of Appeal explained that “this ‘simply means that the trier of fact must be satisfied that the document in issue is what it purports to be.’ . . . Methods of authentication include *viva voce* testimony, common law rules and presumptions, or statutory instruments” (at paragraph 75).

The issue of authentication was also considered by the Ontario Court of Appeal in *R. v. C.B.*, 2019 ONCA 380. This case illustrates how easily authentication can be established in Canada.

In *C.B.*, the accused was convicted of the offence of sexual assault. At his trial, the complainant (DP) was cross-examined on text messages she had purportedly exchanged with the accused. This was designed to contradict her testimony. DP agreed that telephone number from which various texts were sent was her cellphone number.

In convicting the accused, the trial judge ruled that the questioning in relation to the text messages was of no “probative value” because it had not been established that DP had sent the messages.

On appeal, the Ontario Court of Appeal ordered a new trial, holding that the trial judge “erred in concluding that the text messages had no probative value because they had not been properly authenticated by direct evidence” (at paragraph 73).

The Ontario Court of Appeal indicated that “the requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be. . . . At common law, authentication

requires the introduction of some evidence that the item is what it purports to be. The requirement is not onerous and may be established by either or both direct and circumstantial evidence” (at paragraphs 64 and 66).

The Court of Appeal pointed out that “text messages may be linked to particular phones by examining the recorded number of the sender and receiving evidence linking that number to a specific individual, as for example, by admission. . . . As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient. . . . And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight” (at paragraphs 70 and 72).

The Court of Appeal concluded that the evidence presented at the trial was “capable of supporting a finding that the text messages were what they purported to be: an exchange of communications between D.P. and the appellant C.B. The trial judge erred in holding, as he appears to have done, that the authenticity threshold could only be met by direct evidence from the sender or expert opinion evidence from a forensic examiner” (at paragraph 77).

Thus, the simple admission that the text messages came from the witness’s telephone was a sufficient basis for authentication and this admissibility.

In *Durocher*, the issue involved text messages said to have been sent by the accused to the complainant (L.A.) through Facebook. The accused was convicted at trial and appealed from conviction, arguing that the trial judge erred in allowing this evidence to be introduced. The accused argued that it had not been proven that he sent the text messages.

On the issue of admissibility, the Saskatchewan Court of Appeal held that for “purposes of threshold admissibility, the Crown had to establish there was some evidence capable of supporting a finding—on a balance of probabilities—that the Facebook statements were made by Mr. Durocher” (at paragraph 48).

In considering this question, the Court of Appeal referred to the Supreme Court of Canada’s decision in *R. v. Evans* [1993], 3 S.C.R. 653, in which the Supreme Court indicated that when the authorship of a statement attributed to an accused is in issue, a two-staged approach should be adopted (at page 668):

. . . the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. In the second stage the contents are evidence of the truth of the assertions contained therein.

The Court of Appeal concluded in *Durocher* that the trial judge “properly applied the *Evans* test to determine threshold admissibility. Examining the circumstantial evidence as a whole, it was open to him to draw an inference that Mr. Durocher was

the author of the Facebook messages. L.A. provided *viva voce* testimony and a statement to the police that Mr. Durocher was the person who had sent the Facebook messages to her” (at paragraph 50).

The Court of Appeal stressed that in “exercising his gatekeeper function at the threshold admissibility stage, the trial judge only needed to be satisfied on a balance of probabilities that the statements were made by Mr. Durocher. He was entitled to rely on circumstantial evidence to do so” (at page 52).

In summary, the test for authentication and, thus, admissibility of social media evidence in Canada at common law involves a very low threshold, which can easily be established. What if the party seeks admission of an “electronic document” pursuant to the provisions of the Canada Evidence Act? This will be considered in Part 2.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge's Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial

Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

EDITOR'S NOTE

Continued from page 66

Torres and his colleague Judge Reba Page. Judges Page and Torres lay down the gauntlet encouraging us to take up the challenges articulated in the articles that follow.

Next, we turn to one of the leading researchers and thinkers on implicit bias. If you are anything like me, you've had many trainings on implicit bias (and may have even taught a few) but you are tired of just learning about the problem and want to move to a meaningful discussion of what to do about it. Prof. Jerry Kang of UCLA brings his years of study and a truly delightful writing style to help you understand *What Judges Can Do About Implicit Bias*. I predict that this will be one of the most heavily circulated articles from *Court Review* across many years. We include a bench card illustrating Prof. Kang's discussion as our back cover.

The Washington State Supreme Court has long been a leader in tackling ways to improve racial justice in the courts. Two of its innovative champions, Chief Justice Debra Stephens and Judge Veronica Galvin, share with us some of what Washington has done and thoughts on how judges can take action in *Why Judges Should Not Mistake the Norm for the Neutral*.

In *A Call to Action*, we hear one judge's experience when he heard and heeded that call. Judge Gary Jackson shares his insights after a lifetime of championing the cause of racial justice, providing concrete examples of what judges can accomplish within the confines of our position.

Hewing to our theme of identifying practical steps to take on the path forward, we move to a report on the National Center for State Courts' Justice for All program in *Charting a Path Forward to Create Justice for All* by Danielle Hirsch and Lillian Wood.

For our final article, we turn to a movement previously started right here in the pages of *Court Review*. Judge Jamey Hueston (ret.) follows up her article of 2017, issue 54:2, to provide a prescription for reform in *The Compassionate Court: Reforming the Justice System Inside and Out*.

We also have contributions from our ethics columnist, Cynthia Grey, and our regular view from Canada by Judge Wayne Gorman. You may also enjoy the crossword and the Resource Page.

Our goal in this issue is to move forward from “awareness raising” about the shortcomings of justice in our system and move to pursuing constructive steps. You will agree with some of what you read in this issue and you may be outraged by some of it. My greatest hope is that you will be inspired to find the options that best fit your skills and outlook for addressing those broken windows in your courthouse—and that you will roll up your sleeves, pry those graffitied boards off the courthouse, get that new, better glass installed, and take down those barricades to our collective mission of delivering justice to all.

—David Prince



As Judge and Citizen:

An Ethical Path to Racial Justice

Judge Reba Ann Page & Justice Robert J. Torres, Jr.

The headlines have become frighteningly familiar: a deadly pandemic is engulfing the world including our nation, our streets have become byways for mobs intent on committing racially motivated violence, and our government institutions of public safety are being used as instruments of political control. Although these are among today's captions, this was also the state of affairs a hundred years ago.¹ According to the United States Centers for Disease Control, approximately one-third of the world's then-population was affected by the deadly global pandemic of 1918-1919. There were an estimated 50 million deaths worldwide, with about 675,000 of these occurring in the United States.² In 2020 the ravages of a viral pandemic, as well as racial and political unrest, have struck yet again. Although 2020 has been a year of "it can't happen here," the harsh reality is that it already did, and these devastations are not a first.

At this writing, we are physically constrained by the COVID-19 pandemic that has infected over 30 million and killed almost 550,000 Americans, there has been racial unrest across the county, and the outcome of the 2020 presidential election remains divisive.³ Despite these challenges, we as judges carry a sacred duty to uphold the rule of law. In addition, we must each answer the deeply personal question of what can I, as a private citizen, do to ensure the lessons now being hard-learned result in a better society. This article examines ethical constraints placed on judges by virtue of position and considers appropriate yet meaningful action for those seeking racial justice. As the Rev. Dr. Martin Luther King, Jr., wrote in 1963 from a Birmingham jail: "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."⁴

This article looks at both judicial and extra-judicial aspects of the turmoil of today and yesteryear that can affect how we go forward. From a judicial perspective, it examines how dreadful circumstances brought about significant societal change. The United States Supreme Court's ruling in *Moore v. Dempsey* is an important decision from that earlier period that remains instructive. Although the legal gains from the strengths of that opinion can never overcome the horror from which it arose, it is an example of an "on the bench" ruling that resonates today for racial justice. The case serves as a reminder to judges to consider how the

law may properly advance social justice for all. The article considers ethical constraints placed upon today's judges who take extrajudicial action to support social causes. It summarizes select codes of judicial conduct, looks at opinions issued by various state judicial ethics advisory committees that pertain to how a judge may act privately for public good, and suggests resources for judges wanting to know and do more.

CALLING JUDGES TO ACTION

Judge Jeremy D. Fogel, now of Berkeley's Justice Institute, published a powerful article on June 19, 2020: "Courts Had an Ethical Obligation to Speak Out After George Floyd's Death." He issued a call for judges to act, predicated on Canon 2A of the Code of Conduct for United States Judges. This canon, which is echoed in states' judicial codes, provides judges with an express mandate to act in ways "that promote public confidence in the integrity and impartiality of the judiciary." Judge Fogel urged that measures such as the formal statements issued by justices of the Supreme Courts of California, Texas, Massachusetts, and Washington, as well as judges of other courts, be used to fulfill this mandate. His view is that judges acting appropriately to decry injustice facilitate the judiciary's obligation to address racial disparities and will "earn and maintain the trust and confidence of all of the people it serves."⁵

RESOURCES FOR JUDGES SEEKING TO TAKE APPROPRIATE ACTION

Recent editions of *Court Review* from 2020 have also looked at the leadership roles judges play, both on the bench and off. Volume 56, combined issues 3 and 4 looked at countering racial inequality (including addressing implicit bias), whereas volume 56, issue 2 brought a collection of articles addressing judicial leadership. These editions are part of the American Judges Association's longtime efforts to enhance justice and were published during 2020's greatest time of unrest. Thoughtful articles therein examine the challenges faced today, frame the issues judges must consider in acting privately and professionally, and present ethical considerations that must be considered when gauging appropriate action. Articles by Cynthia Gray, Esq., of the National Center for State Courts, and by Dr. Shawn C. Marsh and Ms. Diane

Footnotes

1. See, e.g., Roudabeh Kishi and Sam Jones, *Demonstrations and Political Violence in America: New Data for Summer 2020*, <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>; Robert Greenstein, *Greenstein: CBPP Adds Its Voice to Calls for Justice and Systemic Reform*, Center on Budget and Policy Priorities (June 2, 2020), <https://www.cbpp.org/press/statements/greenstein-cbpp-adds-its-voice-to-calls-for-justice-and-systemic-reform>; Jonathan A. Greenblatt, *Fighting Hate in the Era of Coronavirus*, 17 HORIZONS: J. INT'L REL. AND SUSTAINABLE DEV. 208 (2020).
2. Ctrs. for Disease Control and Prevention, *1918 Pandemic*, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last visited Nov. 9, 2020).
3. *Id.*
4. Rev. Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail*, 71 J. NEGRO HIST. 38 (1986), <http://www.jstor.org/stable/2717650>.
5. Jeremy D. Fogel, *Courts Had an Ethical Obligation to Speak Out After George Floyd's Death* (June 19, 2020), <https://www.law.berkeley.edu/research/berkeley-judicial-institute/news-from-bji/>.

C. Marsh of the University of Nevada, Reno (UNR) and National Judicial College (NJC), respectively, are of particular note. These authors not only call cogently for judges to act but represent organizations that furnish invaluable resources to the judicial community.

THE NATIONAL CENTER FOR STATE COURTS

Noting that “[t]he problems that roil society affect the judiciary,” Ms. Gray called upon “[i]ndividual judges willing to take up the challenge of justice movements [to] remember the ethical restrictions that require both impartiality and the appearance of impartiality to protect the judiciary’s credibility.” Her article, *Ethical Judicial Culture*, encourages judges to act, albeit within the constraints imposed by relevant codes of judicial conduct, and to make good use of advisory opinions from state judicial ethics commissions to first ascertain the propriety of proposed conduct.⁶

Since 1990, Ms. Gray has been the director of the Center for Judicial Ethics (CJE), which is a “national clearinghouse for information about judicial ethics that is part of the National Center for State Courts [NCSC].”⁷ The mission of the NCSC is “improv[ing] the administration of justice through leadership and service to state courts,” and it remains an organization committed to “play[ing] a key role in the development of court administration worldwide.” Through the CJE, the NCSC provides an invaluable resource for understanding and remaining current in judicial ethics requirements.⁸

THE JUDICIAL STUDIES PROGRAM AT THE UNIVERSITY OF NEVADA, RENO AND THE NATIONAL JUDICIAL COLLEGE

Two unique resources for judicial education are housed at UNR. Although separate, these institutions work in concert to provide exceptional training for judges throughout the United States and abroad. Judicial ethics is an important part of the curriculum for each.

The Judicial Studies Program, UNR

In *Being Explicit about Implicit Bias Education for the Judiciary*,⁹ Dr. Shawn C. Marsh and Diane C. Marsh¹⁰ write of ways for judges to confront implicit bias on the bench and elsewhere. These authors are among the leadership of two separate but affiliated judicial education entities at the UNR: the university’s Judicial Studies Graduate Degree Program (JSP) and the National Judicial College. The JSP, which also partners with the National

Council of Juvenile and Family Court Judges (NCJFCJ), was established in 1986. With concentrated study for Trial Court Judges and Juvenile and Family Court Judges, JSP offers a Master of Judicial Studies (MSJ) and a Doctor of Philosophy (Ph.D.) in Judicial Studies.

The program brings together experts who lecture on various legal specialties and relevant associated fields including medicine, social science, literature, economics, and media.¹¹

The National Judicial College

The National Judicial College began as part of a 1961 initiative of the American Bar Association, along with the American Judicature Association and the Institute of Judicial Administration. Since 1964, NJC’s permanent academic location is on the UNR campus. It was the first American institution to offer nationwide judicial education to judges of all jurisdictions and it continues that tradition by offering over 100 courses/programs each year on a wide variety of legal topics. NJC continues to pursue its mission of making the world a more just place by educating and inspiring the judiciary, and during this time of public health restrictions, it has augmented its traditional in-person offerings with expanded online courses.¹²

On June 22, 2020, NJC President Benes Aldana issued a statement¹³ decrying the recent killings of African Americans George Floyd, Ahmaud Arbery, Breonna Taylor, Rayshard Brooks, and others. The statement carried a clarion call: “We call for all people of conscience to commit to the hard work of confronting bigotry at every turn and ending racial injustice.” In reiterating NJC’s mission “to make the world a more just place through educating and inspiring its judiciary,” President Aldana highlighted one of the most important courses offered by NJC. For decades, *When Justice Fails: Threats to the Independence of the Judiciary* has examined periods when justice was corrupted, and tackles the hard question: what can we as judges do differently to avoid the mistakes of the past to keep the promise of equal justice? Among those failures of justice examined in depth are the rise of Hitler, Nazism, and Fascism in Europe; the civil rights struggles of African Americans; and the incarceration and disparate treatment of Japanese Americans following the attack on Pearl Harbor. NJC has also sponsored widely attended webinars that have discussed the need for achieving racial equality and social justice. These and other NJC courses critically examine the roles judges have

“‘[T]he problems that roil society affect the judiciary’”

6. Cynthia Gray, *Ethical Judicial Culture*, 56 Ct. Rev. 144 (2020).
7. *Id.* Ms. Gray also “summarizes recent cases and advisory opinions, answers requests for information about judicial conduct,” publishes a weekly blog, and has spoken and written extensively on judicial ethics. See Cynthia Gray, *The Code of Judicial Conduct and Public Education*, 39 JUDGES’ J. 6 (1999); Cynthia Gray and Frances Kahn Zemans, *Instructing Judges: Ethical Experience and Educational Technique*, 58 L. & CONTEMP. PROBS. 305 (1995); Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405 (2007).
8. See generally, National Center for State Courts, <https://www.ncsc.org/> (last visited Nov. 28, 2020); Center for Judicial Ethics, <https://www.ncsc.org/topics/judicial-officers/ethics/center-for-judicial-ethics> (last visited Nov. 28, 2020).

9. Shawn C. Marsh and Diane C. Marsh. *Being Explicit about Implicit Bias Education for the Judiciary*, 56 Ct. Rev. 92 (2020).
10. *Id.* at 97. Dr. Marsh is the director of the Judicial Studies Program and associate professor of judicial studies, communication studies, and social psychology at UNR. Ms. Marsh, now retired, was formerly the chief advancement officer for NJC.
11. See generally, UNR Judicial Studies, <https://www.unr.edu/judicial-studies> (last visited Nov. 28, 2020).
12. See NJC, *History*, <https://www.judges.org/about/njc-history> (last visited Nov. 28, 2020).
13. Benes Z. Aldana, *A Message from President Aldana on Recent Events* (Jun. 22, 2020), <https://www.judges.org/news-and-info/a-message-from-president-aldana-on-recent-events/>.

“We are reminded of ... the responsibilities of judges to ensure that justice is fairly administered for all.”

played in these examples, and whether they were complacent, courageous, complicit, or insufficiently involved.

Moore v. Dempsey: A Continuing Lesson on Racial Justice Learned “On the Bench”

Tragically, the United States has a long history of racial injustice that adversely affected the development of the nation and still reverberates today. The United

States Supreme Court’s opinion in *Moore v. Dempsey*, 261 U.S. 86 (1923), grew out of that difficult period a hundred years ago when the nation faced some of the same challenges we struggle to meet today. While this decision was a seminal procedural ruling on habeas corpus, the underlying facts show it also remains highly relevant to today’s crying need for racial justice and to our responsibilities as judges to ensure fair and just trials. This Supreme Court decision also demonstrates how important institutional remedies can emerge from the direst circumstances.¹⁴

The case came about during the infamous “Red Scare of 1919,” when “red” referred both to fears of communism and bloodshed, especially as black soldiers returning from World War I were denied the freedoms they had fought for. Race riots broke out in over two dozen cities, including Washington, D.C., Chicago, Omaha, and Tulsa, but urban areas were not the only cauldrons of unrest.

One (if not the worst) of the riots, known as the “Elaine Massacre,” took place in Phillips County, surrounding rural Elaine, Arkansas. *Moore v. Dempsey* arose from the outcome of that horrible clash in September 1919 between Black agricultural workers and White landowners. A group of Black sharecroppers had quietly met late on the night of September 30, 1919, in a nearby country church. Their purpose was to discuss possible unionization so they could band together to resist unfair economic and social treatment. Shots rang out after a carload of White men drove up to challenge them. One White man was killed, and another was wounded. False rumors quickly spread of a Black insurrection being planned with the aim of killing all Whites.¹⁵

Retaliation by the White community was swift and brutal. Although an accurate death toll is lost to history, within days an estimated 100 to 800 Black men, women, and children were killed. Local police and paramilitary groups, augmented by 500 federal troops, seized control of the area. No Whites were charged in the violence, but 300 Blacks were arrested, and many were badly beaten and tortured. Some pled guilty to lesser crimes, and many spent the rest of their lives in prison. After 73 Blacks were indicted for murder on October 29, 1919, those who agreed to testify against the others were punished less or released.¹⁶

The trial was held on November 3, 1919, little more than a month after the confrontation at the church, and 12 Black defen-

dants were convicted of murder. It was a foregone conclusion they would be found guilty by the all-White jury. The trial itself was less than an hour, and deliberations took under ten minutes. During the proceeding, the courthouse was surrounded by a teeming mob so unruly that the judge could not hear, defense counsel called none of the available witnesses, and the defendants feared for their lives as the throng outside clamored for lynching them on the spot.¹⁷

Eventually, the plight of these 12 men reached the United States Supreme Court under a petition for habeas corpus. Writing for the Court, Justice Oliver Wendell Holmes, Jr., ruled in their favor. His straightforward recitation of the underlying facts reveals the intensity of the violent racial conflict, which carried through in the systemic bias displayed by the state courts at both trial and appellate levels. Justice Holmes harkened back to an earlier mob-dominated trial, *Frank v. Mangum*, 237 U.S. 309 (1915) (from which he dissented), in which the Court found that state court efforts were sufficient to erase the improprieties of wrongful intimidation and the denial of due process.¹⁸

This time, Justice Holmes found that the defendants in *Moore v. Dempsey* had been denied their constitutional rights to a fair trial and equal protection and ordered a retrial. He wrote of the lower courts’ proceedings:

But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.”

Moore, 261 U.S. at 91.

There are critical and hard-earned lessons from *Moore v. Dempsey* we must not forget. We are reminded of the ongoing need for racial equality and the responsibilities of judges to ensure that justice is fairly administered for all. As the events of 2020 show, although strides have been made, our society and our legal system have not come far enough. Each judge should consider what he or she can do prevent the repeat of these injustices.

Weighing Extrajudicial Actions Against Judicial Codes of Conduct

The American Bar Association, the world’s largest voluntary legal organization, first developed a code of ethics for lawyers in 1908 and first proposed its “Canons of Judicial Ethics” in 1909. The latter were not formally adopted until 1924, following the extrajudicial actions of the colorful United States Federal District Judge Kennesaw Mountain Landis (N.D. IL). While a full-time sitting judge making \$7,500 per year, Judge Landis took on a second, full-time job. In 1920 he began concurrently serving as both a judge and as the commissioner of Major League Baseball,

14. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379 (2009).

15. Jeannie M. Whayne, *Low Villains and Wickedness in High Places: Race and Class in the Elaine Riots*, 58 ARK. HIST. Q. 285 (1999); RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS

RIOT CASES (1988).

16. *Id.*

17. *Id.*; see also *Moore*, 261 U.S. at 87-90.

18. *Id.* at 90-91.

for which he was paid \$42,000 annually. While Judge Landis was lauded by many for restoring honor to the game, which had suffered greatly because of the infamous “Black Sox” game-fixing scandal of the 1919 World Series, he was pilloried by others for doing so while still on the bench.¹⁹

Although many in the public and legal community were outraged, Judge Landis had broken no laws and could not be penalized for violating a required code of conduct because none yet existed. The outcry led to the ABA’s promulgation in 1924 of the first model judicial code, which has been updated periodically. Although it does not carry the force of law, the states have used the model code as the template for their judicial standards. The ABA Model Code of Judicial Conduct also served as the basis for ethical conduct of federal judges until 1973, when the Judicial Conference of the United States adopted the Code of Conduct for United States Judges (Federal Code of Conduct) in response to particular issues facing the federal judiciary.

The preamble of the ABA Model Code emphasizes the “principle that an independent, impartial, and competent judiciary, [is] composed of men and women of integrity.” Judges are exhorted to “maintain the dignity of the judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.” Although it “establishes standards for the conduct of judges and judicial candidates,” the ABA Model Code “is not intended as an exhaustive guide” for these individuals’ conduct, as they are also “governed in their judicial and personal conduct by general ethical standards as well as by the Code.”²⁰ The code broadly defines the “judges” to which it applies as “anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.”²¹

The fundamental tenets of the ABA Model Code of Judicial Conduct are in its canons:

CANON 1 A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2 A judge shall perform the duties of judicial office impartially, competently, and diligently.

CANON 3 A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

CANON 4 A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsis-

tent with the independence, integrity, or impartiality of the judiciary.²²

Each canon is augmented by numbered rules and comments that further explain each rule.²³ These rules, which are more specific in elucidating the conduct covered by the relevant canon, were added beginning in 1972, when the ABA also supplemented the canons with penalties for their violation. The ABA Model Code has been adopted by several states, which have modified its requirements to meet the needs of their judiciaries.²⁴ As states have adopted their own judicial codes of conduct, they have also formed advisory committees on judicial ethics that provide important guidance interpreting relevant canons and responding to queries raised.²⁵

The state judicial advisory committees have addressed several situations that have arisen or may occur, clarifying whether the questioned conduct is acceptable or actionable and under what circumstances. For example, questions have come up following the outpouring of public sentiment against recent racially linked violence, as well as other social causes including women’s rights, climate change, and advocacy for victims of domestic violence and drunk driving. While laudable that judges wish to support these causes by participating in events such as protests, marches, rallies, and vigils, or by issuing statements on these issues, they must do so with great care, if at all. The authors surveyed a sampling of judicial ethics opinions from select states across the country, and provide the following summary of perspectives on participating in events of this sort:

Participating in Protests, Marches, and Rallies, and Making Public Statements regarding Social Issues

Judges seeking to participate in such events associated with Black Lives Matter, Women’s March on Washington, March on Science (climate change), and immigration were told to avoid doing so where it could undermine public confidence in the judiciary or if related issues were pending before the court. However, specific statements made by Justices of the Washington Supreme Court and the Chief Justice of Louisiana that recognized the need to improve the legal system to address problem of police misconduct and racial bias were regarded as acceptable. *See, e.g.,* California Supreme Court Committee on Judicial Ethics For-

“While laudable that judges wish to support these causes ..., they must do so with great care, if at all.”

19. *See, e.g.,* RAYMOND J. MCKOSKI, JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH 10-13, 55 (2017); *see also* Andrew J. Lieven and Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of Ways*, 28 JUST. SYS. J. 272-73 (2007).

20. Model Code of Judicial Conduct, Preamble (Am. Bar. Ass’n 2010), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf.

21. *Id.*, Application, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_application.pdf.

22. *Id.*, Canons, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

23. *Id.*, Scope, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf.

24. Jessica Conser, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. OF INT’L L. & COM. REG. 274-286 (2005).

25. Barry R. Schaller, *Ethical Aspects of Political Dilemmas Faced by Appointed Judges*, 30 YALE L. & POL’Y REV. 101 (2011). In this article, Justice Schaller, who has taught in the UNR Judicial Studies Program, offered the unique perspective as chair of the Committee on Judicial Ethics for the Connecticut Judicial Branch.

mal Opinion 2020-014, entitled “Judicial Participation in Public Demonstrations and Rallies”²⁶; Colorado Judicial Ethics Advisory Board’s Advisory Opinion 2020-02, regarding whether judges and their staff may properly use social media to make public posts condemning racism and to express general support for various reforms being discussed in the public arena²⁷; Connecticut Committee on Judicial Ethics Opinion 2020-03 concerning participation in “A Silent March of Black Female Attorneys of Connecticut” by meeting the marchers at the steps of the Connecticut Supreme Court and reading an excerpt from the state constitution²⁸; Florida Advisory Opinion 1995-41, which permitted judges to attend a candlelight vigil held by “Mothers Against Drunk Driving” (MADD) because it was “not an event calling for changes in the law, such as harsher penalties for impaired drivers”²⁹; Indiana Advisory Opinion 2020-1, which cautioned judges about attending and participating in marches, demonstrations, vigils, protests, and other public events aimed at addressing various social issues³⁰; New York Advisory Opinion 2017-108 disallowing judges’ participation in a “Call to Service and Compassionate Workshop” sponsored by local child advocacy groups that honored victims of child abuse victims and survivors³¹; New York Advisory Opinions 2020-59³² and 2004-91³³, and New Jersey Advisory Opinion 2008-1, which prohibited judges from participating in candlelight vigils for victims of domestic abuse.³⁴

A readable and helpful guide for judges seeking to better understand the ABA Model Code of Judicial Conduct and the state requirements patterned after it is Judge Raymond J. McKoski’s 2017 book, *Judges in Street Clothes: Acting Ethically Off-the-Bench*.³⁵

Some Final Thoughts for Judges Seeking Racial Justice within Ethical Bounds

As citizens and lawyers, judges must make choices in this time of unprecedented turmoil as the nation struggles to properly respond to widespread racial unrest amid a pandemic that has altered virtually every aspect of daily life. While what the authors propose may seem simplistic, none is an anodyne. To begin with, you must carry out your responsibilities as a judge. Consistent

with the ABA Model Code, we are reminded by the Code of Conduct for United States Judges that “an independent and honorable judiciary is indispensable to justice in our society,” and that our faithfulness to these standards, which are reiterated in other judicial codes of conduct, is essential “so that the integrity and independence of the judiciary may be preserved.”³⁶

We encourage each judge to consider first the ethical restrictions placed upon your position. Then, within those constraints, develop a plan of meaningful action, which we recommend include these measures: learn, teach, give, and vote your conscience. While “learn, discern, and return” lacks the popular appeal of a title such as “eat, pray, love,” we urge you to consider these steps. “Learn” more about the racial history of our nation, the disparate treatment of minorities, and how to effectuate the civil rights guaranteed by the United States Constitution; “discern” the ethical limits placed upon your actions on the bench and as a private citizen; and “return” to the greater good of society by giving of your time, talent, and money to appropriate causes and organizations, as well as exercising your precious right to vote even where you cannot engage in partisan politics.



Judge Page sits on the United States Armed Services Board of Contract Appeals (ASBCA). She has a BA and MS (biology) and a JD from the University of Louisville, and an MJS and PhD (judicial studies) from the University of Nevada, Reno. The views expressed herein are strictly those of the author, and do not represent those of the United States Department of Defense or the ASBCA.



Justice Torres is a justice on the Supreme Court of Guam and served two terms as chief justice of Guam. He has a BBA from the University of Notre Dame and a JD from Harvard Law School.

26. California Supreme Court Committee on Judicial Ethics, Formal Opn. No. 2020-014 (July 20, 2020), <https://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Formal-Opinion-2020-014.pdf>.

27. Colorado Judicial Ethics Advisory Board, Advisory Opinion 2020-02 (July 17, 2020), https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/C_J_E_A_B_%20Ad_%20Op_%202020-02.pdf.

28. Connecticut Committee on Judicial Ethics, Informal Opinion No. 2020-03 (June 5, 2020), <https://jud.ct.gov/Committees/ethics/sum/2020-03.pdf>.

29. Florida Judicial Ethics Advisory Committee, Opinion 95-41 (Dec. 19, 1995), <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/ninet5/95-41.html>.

30. Indiana Judicial Qualifications Commission, Advisory Opinion 1-20 (July 20, 2020), [https://www.in.gov/judiciary/jud-qual/files/jud-](https://www.in.gov/judiciary/jud-qual/files/jud-qual-adops-1-20.pdf)

[qual-adops-1-20.pdf](https://www.in.gov/judiciary/jud-qual/files/jud-qual-adops-1-20.pdf).

31. New York Advisory Committee on Judicial Ethics, Opinion 17-108 (Sept. 7, 2017), <http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/17-108.htm>.

32. *Id.*, Opinion 20-59 (May 19, 2020), <https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/20-59.htm>.

33. *Id.*, Opinion 04-91 (Sept. 14, 2004), https://www.nycourts.gov/ipjudicialethicsopinions/04-91_.htm.

34. New Jersey Advisory Committee on Extrajudicial Activities, Guidelines for Extrajudicial Activities (May 2004), http://njlegallib.rutgers.edu/misc/EJ_guide_anno_2004_May.html.

35. See McKoski, *supra* n. 19, at 10-13, 55.

36. Code of Conduct for United States Judges, Canon 1 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

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What Judges Can Do About Implicit Bias

Jerry Kang

“Implicit bias” was not well known in legal communities twenty years ago. But now, the idea of implicit bias circulates widely in both popular and academic discussions. Even the casually interested judge knows a great deal about the topic. Still, even as the problem of implicit bias has grown familiar, potential solutions remain out of focus. Specifically, what can judges do about implicit bias, in their capacities as managers of a workplace, as well as vessels of state power?

In 2009 I wrote a Primer for the National Center for State Courts, which described the challenge of implicit bias to judicial audiences.¹ In 2012, I was the lead author of a more systematic examination titled *Implicit Bias in the Courtroom*.² That author team included not only legal scholars but also psychology professors such as the inventor of the Implicit Association Test (IAT), as well as a sitting federal judge. Together, we described the then-state-of-the-art and recommended potential countermeasures.

The goal of this article, nearly a decade later, is to update the scientific understanding since 2012. It also revises, reorganizes, and streamlines recommendations for judges who believe that implicit bias is a genuine problem but don't know what to do about it.³ To keep length manageable, it focuses on the challenge of implicit biases held by judges themselves and does not directly address the biases held by others, such as police officers, probation officers, prosecutors, and jurors. It also focuses mostly on individual-level responses that judges can take themselves although institutional-level reforms may be what's most important.

Before jumping to recommendations, let's begin with clear definitions and a scientific update.

I. WHAT IS IMPLICIT BIAS? THE IDEA

BIAS AS ATTITUDE OR STEREOTYPE

Let's start by defining “implicit bias.” Focus first on the noun: “bias.” Bias just means deviation from some baseline of comparison, which is presumably neutral or fair. Because we are thinking about human beings, bias here means some deviation in an attitude or stereotype about a social category, such as Black women, immigrants, or the elderly.

Author's Note: Thanks to Judge Mark W. Bennett (retired), Devon Car-bado, Magistrate Judge Sarah Cave, Rachel Godsil, Sung Hui Kim, Calvin Lai, Judge David Prince, Judge Lorna Schofield, and Stephen Yeazell. © 2021 by Jerry Kang.

Footnotes

1. JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS (Aug. 2009) (prepared for the National Center for State Courts) (available at <http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/>).
2. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV.

The words “attitude” and “stereotype” are terms-of-art in social psychology. An “attitude” is an overall evaluative valence toward a category, which ranges from positive to negative. To take an uncontroversial example, some people prefer dogs to cats. Their attitude toward dogs is positive whereas their attitude toward cats is less so and sometimes even negative.

More narrow and particular than a global attitude is a “stereotype,” which is a specific trait that is probabilistically associated with a category. Consider the traits of “loyal” or “finicky” and how they might be more strongly associated with dogs versus cats, especially for dog lovers. Of course, we know that not all dogs are loyal, and not all cats are finicky—however, those traits might be scientifically measured. But almost all of us have stereotypes about these pet categories. We tend to “profile” animals and don't feel especially embarrassed in doing so.

To sum up (and return to human categories), a bias is an attitude or stereotype about a social category that departs from some designated baseline. To measure racial bias against non-Whites, we might select that baseline to be the attitude toward Whites. On gender bias against women, we might designate the baseline to be stereotypes about men. And so on.

EXPLICIT V. IMPLICIT BIAS

What does the adjective “implicit” add to the term? To understand implicit, it's easier to start with its opposite “explicit.” Although understandable, it's a mistake to think of “explicit” in the way that that word is used in terms like “explicit lyrics” or “explicit violence.” Explicit bias need not be graphic, extreme, or large in magnitude although it sometimes is. Instead, it's better to understand “explicit” as being *subject to direct introspection*.

Let's return to cats and dogs. Suppose I ask you what you think about cats. This is not a hard question. Suppose you adore cats. Indeed, you have a ragdoll purring on your lap right now. The fact that you're able to ask yourself and get a clear, immediate answer back through direct introspection means that you have accessed and reported an explicit attitude. And because there isn't much stigma about loving cats (at least in the United States), there's little pressure for you to conceal that explicit attitude from others.

By contrast, an “implicit” bias is an attitude or stereotype that

1124 (2012). The author team included Anthony G. Greenwald, who invented the IAT, and then District Judge Mark W. Bennett for the Northern District of Iowa.

3. Thoughtful advice has, of course, already been given to judges throughout the years. See, e.g., Bernice B. Donald & Sarah E. Redfield, *Implicit Bias: Should the Legal Community Be Bothered?*, 2 PLI CURRENT 615 (20818); Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 442 (2013) (Casey was also on the author team of the 2012 UCLA article).

is *not* subject to direct introspection, or at least not easily.⁴ In other words, we cannot easily or accurately measure implicit social cognitions by asking ourselves direct questions about our attitudes and stereotypes. How can this be? Suppose you were born in a country with a culture that despised cats. That preference suffused childhood bedtime stories, holidays (think some version of Halloween), and the fact that all the rich, powerful, and beautiful people on television had dogs, not cats. But then suppose as a teenager you emigrated to a new country that espoused equal treatment for dogs and cats. In this new land, you learned not to dislike cats and stopped generalizing about them. After all, they weren't *all* dirty and diseased, roaming the alleys for vermin, incessantly screeching for food. As you enter middle age, after significant cultural assimilation and personal growth, when asked directly whether you prefer dogs to cats, you pause, mull it over briefly, and honestly report that you have no preferences either way. Your explicit attitudes have changed. Terrific. Nevertheless, is it possible that you still retain traces of that negative feline attitude?

Our understanding of human memories suggests that it is indeed possible. It's this plausible hypothesis—that we retain attitudes and stereotypes that we cannot readily access—that prompted scientists to devise novel instruments with which to measure implicit associations. To repeat, truthfully answering an anonymous survey will not suffice. Instead, we need some external instrument to measure implicit biases. One category of such instruments measures reaction times to differing stimuli flashed quickly on a computer screen. A prominent example is the well-known Implicit Association Test (IAT) invented by Anthony Greenwald based on theoretical work done together with Mahzarin Banaji.⁵

Current research suggests that the ideas of explicit bias and implicit bias are overlapping but independent constructs. Neither one is more authentic or real than the other. Each construct does its own work and must be measured in its own way. Because explicit bias is subject to direct introspection, it is typically measured by scientists through a survey or questionnaire, with the hope that participants answer honestly. As judges know, that hope is not always well-founded, especially on socially sensitive or inculpatory topics. By contrast, because implicit bias is not readily subject to direct introspection, direct questioning is largely pointless. It must be measured some other way.

II. HOW DO WE MEASURE IMPLICIT BIAS? THE MANY INSTRUMENTS, INCLUDING THE IAT

Experimental social psychologists have developed multiple instruments. Recently, Calvin Lai and Megan Wilson compiled an inventory of 18 different implicit bias instruments (or tasks) organized into three categories: (1) the Implicit Association Test (IAT) and

its variants; (2) priming tasks (where brief exposure to priming stimuli facilitates or inhibits subsequent reactions); and (3) miscellaneous other tasks, including linguistic or writing exercises.⁶ The length of this list reminds us to disentangle the *idea* of implicit bias from any particular *instrument* by which it is measured.

The pandemic, which is top of mind, provides useful analogies. We have learned that there are multiple tests (using blood, spit, swabs, etc.) with different sensitivities, specificities, and reliabilities to determine whether anyone has or had a COVID-19 infection. We also roughly understand what false positives and false negatives mean for such tests. Few of us would confuse the *infection* for the *instrument* by which infection is detected. We should do the same with implicit bias and remember that the *idea* of implicit bias is separate from any specific *instrument* to detect that bias, including the exhaustively studied Implicit Association Test (IAT).

The IAT is the most used and best validated instrument for measuring implicit bias. I think of it as a sort of “videogame” requiring fast sorting of stimuli representing two social categories (e.g., White faces versus Black faces) and two sets of words representing, for example, a positive versus negative attitude. Sometimes the stimuli require keyboard responses that are consistent with our implicit social cognitions, and sometimes inconsistent. The former responses come faster than the latter. The raw reaction time delta, which is typically a few hundred milliseconds, is mathematically processed and transformed into statistical units that crudely signal the strength of the underlying implicit association. Since this test has been described extensively elsewhere,⁷ I won't do so here. But if you're unfamiliar, try taking one for free, anonymously, at Project Implicit.⁸

Millions of people have already done so, in the United States and around the globe. The first systematic analysis of the pervasiveness and correlates of implicit attitudes and stereotypes, as measured by the IAT, was conducted by Brian Nosek and colleagues in 2007 (describing data collected on 17 different tests at Project Implicit during 2000-2006).⁹ They found that implicit bias—as measured by the IAT—was pervasive. I have it. You have it. Not in precisely the same amounts, toward the same categories, but we all have it. Implicit bias was also found to be larger in magnitude than self-reported explicit bias.

Recently, Kate Ratliff and colleagues compiled an update with Project Implicit data from 2007-2015. They again found that implicit bias “favoring culturally dominant or societally valued

“The IAT is the most used and best validated instrument for measuring implicit bias.”

4. I add the qualifier because of recent work suggesting that implicit social cognitions may be preconscious, subject to some forms of introspection when it is guided by concrete stimuli and directions to pay attention to immediate affective responses. See generally Adam Hahn & Alexandra Goedderz, *Trait-Unconsciousness, State-Unconsciousness, Pre-Consciousness, and Social Miscalibration in the Context of the Implicit Evaluation*, 38 SOC. COGNITION S115 (2020) (supplement).
5. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the IAT); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Atti-*

tudes, Self-Esteem, and Stereotypes, 102 PSYCHOL. REV. 4 (1995).
6. Calvin K. Lai & Megan E. Wilson, *Measuring Implicit Intergroup Biases*, 15 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2021).
7. See, e.g., Kristin A. Lane, Jerry Kang, and Mahzarin R. Banaji, *Implicit Social Cognition and the Law*, 3 ANNU. REV. LAW SOC. SCI. 19.1, .2-3 (2007); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 472-73 (2010).
8. See <<http://projectimplicit.org>>.
9. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1 (2007).

“So, what should skeptical judges ... make of all this?”

groups” remains pervasive and stronger in magnitude than explicit bias. They also found that “ingroups are evaluated more positively than outgroups.”¹⁰ This finding underscores the importance of being on guard not only against outgroup derogation but also ingroup favoritism, which some scholars believe to be the dominant source of discrimination in modern

times.¹¹ Overall, these large data set analyses are consistent with IAT data generated from experiments conducted in hundreds of laboratories around the world over the past two decades.

To sum up: When asked if we are colorblind (or genderblind, etc.), we may scratch our heads, then with all sincerity reply that we judge people only by the content of their character not the color of their skin (or gender, etc.). But at least on the IAT sorting game, it isn't so. Most of us tend to respond faster when White faces (as compared to Black faces) are on the same response key as Good words. Most of us tend to respond faster when Black faces are on the same response key as weapons (as compared to harmless objects). And so on. Lawyers, judges, and professors regardless of fancy degrees are no exception.¹²

III. WHY DOES IMPLICIT BIAS MATTER? THE IMPACT

By now, implicit bias enthusiasts may be losing patience. They are thankful for the refresher but want to cut to the chase and find out how to solve the problem. (For those who can't wait any longer, please skip to Part IV and the Appendix.) But skeptical readers still have questions, including whether these sorting asymmetries predict real-world behavior, like worse treatment? Judges are sophisticated enough to know that simply because something is *statistically* significant (and not likely due to chance) does not mean it is *socially* significant (and worthy of individual or institutional reform).

The topline answer is that implicit bias does predict discriminatory behavior, but to a low degree. The best way to avoid cherry-picking studies is to review meta-analyses. (A meta-analysis takes all studies that can be found in the relevant domain and

stitches together their findings into a single composite number, usually the “effect size.” In this literature, the effect size is the degree of correlation between an implicit bias measure and discriminatory behavior. The correlation is indicated by Pearson's r , which runs from 0, which means no relationship between bias and behavior, to ± 1 , which means a perfectly linear positive or negative relationship.) Multiple meta-analyses have been conducted specifically on IAT scores. Although differing in important ways, they all tend to show that IAT scores predict intergroup discriminatory behavior at a very low level. (The range of r values goes from 0.24 down to 0.10.¹³ By convention, r values greater than or equal to 0.1, 0.3, and 0.5 are called small, medium, and large, respectively.) The small effect size that has been found should not be surprising given how crude an instrument the IAT is and how hard it is to measure discriminatory behavior, especially in realistic contexts. And imprecise measures of any two variables (in this case bias and behavior) make it difficult to discern the strength of any relationship between those two variables.

So, what should skeptical judges (who are unlikely also to be professional statisticians) make of all this? First, consider a direct comparison that comes from every jury trial you've heard. The meta-analyses generally confirm that implicit measures of bias predict intergroup discriminatory behavior better than explicit measures of bias.¹⁴ Ponder this the next time you or the attorneys ask potential jurors about their explicit biases during voir dire. What information do you think their self-reports really reveal? Whatever that is, implicit bias measures probably tell you more.

Second, consider a stylized BigLaw hypothetical, which demonstrates how even slight differences in treatment caused by implicit bias can create headwinds and tailwinds that accumulate powerfully over time. Greg and Brandie have just started as associates at an elite firm and are initiated into the partnership “hunger games.” Each month they must survive an up-or-out decision based on that month's performance. If they can survive 8 years of these monthly cuts, they are elected to equity partnership and win life tenure filled with esteem, repose, and high remuneration. (I did warn you that this was stylized.) To make this simulation more realistic, suppose that the base rate of survival for all associates is a generous 98.5%.

10. See Kate A. Ratliff et al, Documenting Bias from 2007-2015: Pervasiveness and Correlates of Implicit Attitudes and Stereotypes II (unpublished preprint) at 2. The meta-analytic effect size for implicit bias was Cohen's $d = .80$ (by convention called “large”) as compared to explicit bias of $d = .51$ (by convention called “medium”). *Id.* at 21.

11. See Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669 (2014). Even if every ingroup favors itself equally, the population and resource advantage of certain groups will lock in a net advantage indefinitely.

12. See, e.g., Mark W. Bennett, *The Implicit Racial Bias in Sentencing: the Next Frontier*, YALE L. J. FORUM (January 31, 2017), at 396-397; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545-55 (2004). See also Ratliff et al., *supra* note 10, at 18 (finding a correlation between implicit attitudes/stereotypes and education to be $r = .005$).

13. See Anthony G. Greenwald et al., *Understanding and Using the Implicit*

Association Test: III. Meta-Analysis of Predictive Validity, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19-20 (2009) ($r = .024$ for Black/White bias); Frederick Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Research*, 105 J. PERSONALITY & SOC. PSYCHOL. 171 (2013) ($r = .15$ on Black/White implicit bias); Benedikt Kurdi et al., *Relationship between the Implicit Association Test and Intergroup Behavior: A Meta-Analysis*, 74 AM. PSYCHOLOGIST 569 (2019) (personal communication to Anthony Greenwald that $r = .10$ for behavior in the *combined* domains of Black/White, gender, sexual orientation, weight, and disabilities). The highest estimate ($r = 0.24$) would mean that an IAT score predicts approximately 5.6% of the statistical variance in the discriminatory behavior variable.

14. See, e.g., Greenwald et al., *supra* note 13, at 73, Table 3 (finding that implicit attitude scores predicted behavior in the Black/White domain at an average correlation of $r = 0.24$, whereas explicit attitude scores had correlations of average $r = 0.12$); Kurdi et al, *supra* note 13 (finding that implicit biases provide a unique contribution to predicting behavior ($B = .14$) and does so more than explicit measures ($B = .11$)).

But now let's superimpose implicit bias, which produces a slight tailwind for Greg, who happens to be a White man. He gets a half percent boost so that his monthly survival chance goes up to 99%. By contrast, Brandie, who happens to be Black woman, suffers a slight headwind, which means that her monthly survival chance goes down to 98%.¹⁵ In other words, the invisible winds of implicit bias create a mere 1% delta on the monthly survival rate between these two identically talented associates.

Under these assumptions, what are the chances that Greg and Brandie make partner? Assuming that each month's probability is independent, we would simply multiply the probability for each month. Greg's survival chance would thus be 0.99 (for month 1) x 0.99 (for month 2) x ... 0.99 (all the way up to month 96). Similarly, Brandie's survival chance would be 0.98 (for month 1) x (0.98 for month 2) . . . x 0.98 (all the way up to month 96). After eight years (or 96 cuts), it turns out that Greg's partnership chance is 38.1% ($0.99^{96} = .381$). Brandie's is only 14.4% ($0.98^{96} = .144$).

That's a stunning disparity driven by a tiny difference. How can this be? It's the power of compound interest. It's why we should start investing in our retirement accounts early. Little differences compounded over time have huge consequences on the trajectory of an individual (not to mention a stock portfolio). And if we aggregate this across an entire population of individuals (e.g., all men versus all women), little differences can generate huge societal impacts. In emphasizing the impact of implicit bias, I am not suggesting that explicit bias or "structural" bias (however that term is defined) are irrelevant or matter less in the real world. They all matter.¹⁶ But I have one unique reason to focus on implicit bias. It's the one strain of bias that cannot be easily relegated to a few "bad apples," or extremists, or the history books. Implicit bias is here, right now, in your own courtroom, in your own mind, and in mine.

IV. WHAT TO DO ABOUT IMPLICIT BIAS? SOME EVIDENCE-BASED INTERVENTIONS

Given these inconvenient truths, most judges will want to do something about implicit bias if the interventions are practical and not too costly. What might judges do? I offer four strategies: deflate, debias, defend, and data. A list of specific tactics organized by strategy appears in the Appendix. Finally, to reiterate, these recommendations focus on challenges caused by implicit biases held by judges themselves and not by others, such as prosecutors or jurors. And they focus mostly on individual-level responses that

judges can adopt by themselves as compared to institutional-level ones that would require substantial coordination.

A. DEFLATE (YOUR EGO) AND EMBRACE FALLIBILITY

First, we must *deflate* our egos. We must recognize that we are not as objective, as fair, as virtuous as we view ourselves to be.¹⁷ Justice Anthony Kennedy was right to observe that "bias is easy

to attribute to others and difficult to discern in oneself."¹⁸ Worse, thinking ourselves to be fair and objective leads us to perform worse on audit or tester studies.¹⁹ When we confidently assume that we already get things right, we pay less attention and take less care in decision making. Paradoxically, only by assuming that we will be biased will we have any chance of being truly fair.

I want to highlight the related danger of "moral credentialing."²⁰ One danger of implicit bias education, which includes reading this article, is assuming that education has directly cured the malady. That, of course, is not the case. Education does not directly change behavior. For example, learning about mRNA and virus-replication doesn't directly generate antibodies or alter long-standing habits of touching our faces with our hands. Frankly, education is not even training—as you likely recall the difference between a law school doctrinal class versus a clinic with live clients. So, it behooves us to avoid the pride, confidence, and moral credentialing that creeps in with greater expertise.

Having deflated our egos, we should simultaneously cultivate our *internal motivation* to be fair.²¹ Social psychology distinguishes between internal and external motivations for behavior. Internal motivation to be fair means that we are striving to achieve our personal values, consistent with our genuine ethical commitments. It's how we behave even when no one is watching, as we strive toward our ideal selves. By contrast, external motivation means that we feel more coerced than persuaded into the behavior. We are driven by fear that we will be shunned, punished, or canceled. As compared to internal motivation, external motivation to avoid appearing prejudiced is less helpful and may even backfire.²² It's generally correlated with larger explicit biases that are concealed but eventually leak out in expression or behavior.

"Justice Anthony Kennedy was right ... that 'bias is easy to attribute to others and difficult to discern in oneself.'"

15. The 1% difference in this hypothetical is mathematically equivalent to $r = .041$, which is far smaller than the effect sizes found by the three meta-analyses. See Anthony G. Greenwald et al., *Importance of Small-to-Moderate IAT Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 558 (2015).
 16. For discussion on the various layers of bias and their interactions, see Jerry Kang, *The Realities of Race*, 358 SCI. 1137 (2017) (book review); Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS L. REV. 1139 (2010).
 17. For slightly embarrassing evidence, consider the fact that 87% of (non-senior) federal district judges and 92% of senior federal district judges view themselves as in the top 25% of their colleagues in their ability to make decisions free from racial bias. This is not mathematically possible. See Bennett, *supra* note 12, at 396-97.
 18. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

19. See Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": *Effects of Self-perceived Objectivity on Hiring Discrimination*, 104 ORG. BEHAVIOR & HUM. DECISION PROCESSES 207, 210 (2007).
 20. Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001).
 21. See Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSON. PSYCHOL. COMPASS 211 (2009).
 22. See generally, George V. Gushue & Kimberly A. Hinman, *Promoting Justice or Preventing Prejudice? Interrupting External Motivation in Multicultural Training*, 88 AM. J. ORTHOPSYCHIATRY 142 (2018); Lisa Legault et al., *Ironic Effects of Anti-Prejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011).

“Social contact generally decreases biases.”

B. DEBIAS (WITH SHORT-TERM “SPOT CLEANING” AND LONG-TERM INTERACTIONS)

With this humble mindset, what else might we do? For example, can we simply delete the embarrassing

or unwanted implicit biases from our brains so that our social cognitions line up with our explicit commitments? This is the *debiasing* strategy. Early research into implicit bias suggested that implicit social cognitions were highly malleable and could be changed by brief imagination exercises or exposures to people who defied stereotypes (think Black woman surgeon, male nurse, or Asian leading man).²³ But in the past ten years, that initial optimism has waned.

A useful place to start is the 2014 paper by Calvin Lai and colleagues, who created a tournament and invited scientists to submit quick interventions (no longer than five minutes) that could decrease implicit bias as measured by the Black/White IAT.²⁴ Here’s the good news. Three categories of interventions, including exposure to counterstereotypical exemplars,²⁵ successfully decreased implicit bias scores. Now for the bad news. As Lai reported in 2016, none of these successes persisted for even a few days.²⁶ Put another way, there seems to be no quick fix that creates long-lasting or durable changes in implicit bias, as measured by the IAT. In retrospect, we should not be surprised. Our implicit associations were not created overnight. They are like old stains on a well-trodden carpet. Why should they magically disappear after a five-minute scrub?²⁷

Given what we’ve learned, we should distinguish short-term and long-term debiasing tactics. In the *short term*, we might investigate ways to deploy “spot cleaning,” even if the debiasing lasts only a few hours. To take an extreme example, in the tournament, Lai and colleagues found that imagining a vivid scenario of being beaten unconscious by a White sadist and saved by a Black hero produced a significant (although temporary) reduction in implicit

bias. But I can’t in good conscience recommend that judges start their day with a cappuccino and a five-minute contemplation of being tortured by White people. That would be awkward.

But it’s not at all awkward to have pictures and other reminders of admired figures from racial minority communities within one’s office, bookshelf, courtroom, and building.²⁸ Who are the “firsts” in your jurisdiction (first lawyer, first judge, first prosecutor, first law professor)? Are they celebrated on your walls and websites? Why not feature the new Americans, beaming with pride, who have recently been naturalized in your courthouse?²⁹ These techniques always risk being window dressing, but there may be some value in “spot cleaning” the built environment that surrounds you and thus constantly reminds you. Even if their value is ephemeral, they also serve an important expressive function that signals belonging to the diverse community members who enter the courthouse, often with anxiety and reservations.

The *long-term* debiasing tactics look different. If quick-and-dirty doesn’t create lasting change, slow-and-steady wins the race. Social contact generally decreases biases, and the longer and greater the amount and depth of contact with members of other groups, including those who defy stereotypes, the greater the improvement.³⁰ Nilanjana Dasgupta has conducted field studies that suggest that repeat exposure, in the real world, to people who defy stereotypes and expectations decreases implicit biases. In one study, she and Shaki Asgari studied women who attended either an all-women’s college or a comparable coed institution.³¹ For the women who attended the coed institution, their implicit stereotypes (that Men = Leaders and Women = Supporters) surprisingly *increased* after freshman year of college. By contrast, the implicit stereotypes of women who attended the all-women’s college decreased to an average of zero. After examining multiple variables, such as courses taken, extracurricular activities, and other campus variables, the one variable that mattered most was the number of women professors and deans they had. And students in the all-women’s college were simply exposed to more women professors and deans.

23. See generally Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

24. Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. GEN. 1765 (2014).

25. The other two categories were called “intentional strategies to overcome biases” and “evaluative conditioning.” These categories included techniques that will seem “Pavlovian” in the lay sense. It involved, for example, setting an intention of thinking good whenever one saw a Black face, or repeated exposures of Black faces with good words, and White faces with bad words. See *id.* at 1773-74.

26. Calvin K. Lai et al., *Reducing Implicit Preferences: II. Intervention Effectiveness across Time*, 145 J. EXPERIMENTAL PSYCHOL. GEN. 1001 (2016).

27. If my tongue-in-cheek use of “scrubbing” raises autonomy concerns, see my discussion of the “autonomy objection.” See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1584-89 (2005).

28. See, e.g., Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001); See Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81

J. PERSONALITY & SOC. PSYCHOL. 815, 818-19 (2001) (finding that situating African Americans in a positive versus negative setting, e.g., outdoor barbecue versus gang-related incident, produced lower implicit bias scores).

29. I am reliably informed that one federal district judge has replaced the portraits of district judges with professional portraits of a more demographically diverse group of citizens who recently underwent naturalization ceremonies at the courthouse.

30. See Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test and Reformulation of Intergroup Contact Theory*, J. PERSONALITY & SOC. PSYCHOL. (2006) (explicit measures). For examples regarding implicit measures, see, e.g., Natalie J. Shook & Russell H. Fazio, *Interracial Roommate Relationships: An Experimental Field Test of the Contact Hypothesis*, 19 PSYCHOL. SCI. 717 (2008); Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

31. See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649-54 (2004).

Dasgupta and her co-authors have produced two other studies with consistent findings. For example, they examined students who were randomly assigned to male or female professors for the same calculus course. Women students assigned to the female professor improved their implicit attitudes toward mathematics and how much they identified with mathematics as a discipline. Importantly, this difference persisted up to three months later.³² In another study, women engineering students who were assigned randomly a female (versus male) senior engineering student mentor experienced changes in implicit associations, which persisted up to a year after mentoring had completed.³³

Recall the nutritional adage “you are what you eat.” Taking this statement seriously encourages more mindful eating—the what, when, why, and how we stuff food into our mouths. The same might be true with our minds. *You are what you see.* And if you proactively cultivate an environment that involves seeing and meeting people in their full complexity and diversity, these interactions may slowly alter the negative attitudes and stereotypes we hold. This is valuable, difficult, long-term work that all Americans should engage in, including judges. We would all be better served if we affirmatively cultivated colleagues, friendships, social relations, civic participation, and even media consumption³⁴ that expand our horizons and comfort levels with anyone marked as “other.” Indeed, we could go beyond passive and casual social integration and seek out civic, community, and charitable projects that require us to cooperate actively, deeply, and repeatedly with fellow Americans that we would not otherwise interact with, except as objects within a hierarchical judicial system.

In addition, leverage your market power the next time you are invited to speak on a panel or keynote a conference, or are given an award, to see if organizers are lazily inviting and recognizing the usual suspects. This does not mean insisting rigidly that, for example, every single panel must have maximum demographic diversity. That’s difficult to achieve and breeds tokenism. Instead, take a more gracious longitudinal view, and examine their long-term practices and trends. On that view, you may still have good grounds to nudge organizers to do better than reprogramming with the same-old-same-old. Even better, provide a referral. This both creates opportunity for the speaker who’s featured and increases the audience’s exposure to someone who varies from what’s expected and thus functions as a “debiasing agent.”³⁵

All these strategies are long-term investments in life and country that will not show immediate or easily quantifiable returns. And we should recall the Kantian injunction to treat human beings as ends in and of themselves and not just the means for some self-improvement makeover project. But overall, I see much to admire in embracing such a life strategy, especially for those who have chosen the honorable profession of judge.

C. DEFEND (AGAINST THE BIAS THAT PERSISTS)

When people brainstorm countermeasures to implicit bias, their natural inclination is to focus on debiasing. But I discourage people from obsessing over reducing their individual IAT scores. Far more valuable will be creating *defenses* against the implicit biases that will persist or soon return. Here’s a (non-coronavirus) virus analogy. Suppose you have an irreplaceable computer (your brain). Suppose that it has been infected with a Trojan Horse virus (implicit bias), and none of the antivirus software packages work.³⁶ Even when the problem seems fixed, the infection returns within 24 hours. Maybe that’s because the virus has burrowed deeply into the operating system or boot sector. Or maybe it’s because surfing the Internet guarantees daily re-infection. Thankfully, the virus is not a game stopper; it doesn’t crash your machine, steal your passwords, encrypt your storage and ask for ransom, or randomly transpose digits on budget spreadsheets. In fact, most users don’t even realize that their machines are infected. But after careful study, you believe that this Trojan Horse virus influences your computer’s work in small but consequential ways. Even if the virus cannot be removed, can you nevertheless *defend* against its impact? And might those defenses have the added benefit of countering other variants of bias, beyond just the implicit?

“I discourage ... obsessing over ... individual IAT scores.”

1. Carefully consider blinding, dimming, or temporary cloaking of social category information

One logical approach to consider is *blinding*. If we are entirely unaware of (and do not assume and cannot infer) the social category of a person, implicit biases regarding that category cannot directly impact our decision making. In this sense, even though the implicit bias persists, it can’t easily be activated because we have been *blinded* to the triggering datum. This is the rationale behind blind grading of examinations, as well as orchestra auditions behind curtains.³⁷

In judicial practice, there may be situations in which removing social category identity, for example, from paper files, may successfully defend against the activation of implicit bias. Some examples include tasks that judges might do as managers of a workplace, such as initial sorting of clerkship and employment applications. But as attractive a solution as blinding may seem, this tactic suffers numerous limitations.

First, the identity of the person of interest will often be known or assumed, for example, after an in-person or video interaction. We read identity off of faces and names. Removing that information will often be difficult, expensive, or impractical.

32. Jane G. Stout et al., *STEMming the Tide: Using Ingroup Experts to Inoculate Women’s Self-Concept in Science, Technology, Engineering, and Mathematics (STEM)*, 100 J. PERSONALITY & SOC. PSYCHOL. 255 (2011).
 33. See Tara C. Dennehy & Nilanjana Dasgupta, *Female Peer Mentors Early in College Increase Women’s Positive Academic Experiences and Retention in Engineering*, 114 PROC. NAT’L. ACAD. SCI. 5964 (2017).
 34. Jerry Kang, *Bits of Bias*, in IMPLICIT BIAS ACROSS THE LAW 132-45 (JUSTIN LEVINSON & ROBERT SMITH, EDS. 2012).
 35. For legal analysis of role models and debiasing agents, see Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of*

Affirmative Action, 94 CALIF. L. REV. 1063, 1109-15 (2006).
 36. I introduced this analogy in the first systematic exploration of implicit bias, including the Implicit Association Test, in the law reviews. See Kang, *supra* note 27.
 37. See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 717, 725 (2000) (explaining how the number of female new hires increased anywhere between 25 to 46% once auditions were conducted behind screens).

“Like most actors in the judicial system, judges are stressed, overworked, and starved for time.”

Second, blinding may not be appropriate if social identity is partially relevant to the decision to be made. Consider, for example, some equitable decision on parole, punishment, or child custody. Part of that decision may require appreciation of a person’s biography to gauge “distance traveled,” trajectory, or cultural context. By deleting certain social category information, such as race, ethnicity, religion, or language spoken, we may be deleting specific streams of relevant information.³⁸

Third, blinding risks “pass-through” discrimination. Let’s revisit the orchestra audition. Suppose that a high school orchestra program gave male students preferential equipment, training, and encouragement over eight weeks, then conducted a blind audition for some first chair. A blind decision-making process at summer’s end would simply pass through the gender-based tailwind enjoyed by men and headwind suffered by women. Worse, it could morally “launder” the prior discrimination because any male winner could proudly assert that he was chosen behind a curtain, entirely on the merits.

Notwithstanding these limitations, blinding still can be useful in the selection or judging process when identity should be entirely irrelevant. But because blinding may have unintended consequences, any implementation of this tactic ought to be carefully analyzed. In addition, consider the following variations to blinding, which I call “dimming” and “temporary cloaking.”

Dimming. There are multiple ways in which we can know social category information, such as the race of someone about to be sentenced. We could see the race listed on some demographic form, we could infer it from the name, or we could see a picture (black-and-white, color, high-resolution, small- or large-size, etc.) There is troubling evidence that darkness of skin hue and the Afrocentricity of a defendant’s facial features may drive severity in punishment.³⁹ Given this concern, one could reasonably decide that a presentencing report need not have a prominent

photograph of the defendant on the first page.⁴⁰ Race information will be available throughout, and it may be a hassle to remove. Moreover, it may actually be relevant depending on the context. But it’s hard to see any need to observe specific facial features. By declining to see them, we are not blinding ourselves to race per se, but we would be *dimming* the intensity of that information, including the potential impact of implicit stereotypes associated with Afrocentric features.

Temporary cloaking. Consider a two-stage process of temporary cloaking. In the first stage, blinding can remove social category information, for example, in the initial sort of clerkship applications. After making a tentative decision (e.g., to produce a rough shortlist), in the second stage, the cloak is lifted to check for other factors, such as possible pass-through discrimination and unintended consequences.⁴¹ Of course, this second stage of analysis can raise hard questions about race and gender consciousness, the social construction of merit, and corrective justice—all of which require careful explication.⁴²

2. Give yourself ample time, emotional calm, and mental energy

Like most actors in the judicial system, judges are stressed, overworked, and starved for time.⁴³ Unfortunately, there’s general evidence that stress leads us to scan alternatives less systematically and completely.⁴⁴ Intense emotions, including happiness⁴⁵ and disgust,⁴⁶ are also linked to less systematic thinking. Finally, time pressures are correlated with less accurate decisions.⁴⁷

The above findings are not specifically or uniquely connected to the problem of implicit bias. However, recent work by Jordan Axt and Calvin Lai demonstrates how accuracy can be increased by providing more time on two tasks connected with implicit measures of bias. One task was the First-Person Shooter Task (FPST) created by Joshua Correll,⁴⁸ which requires people to respond quickly and “shoot” if they see a gun and “not shoot” if they see something harmless held by either White or Black men in photorealistic settings. They found that “[m]ore time pressure meant more errors.”⁴⁹ Because the distribution of errors was biased—favoring White lives (erring by not shooting Whites

38. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

39. See Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 773-85 (2018) (summarizing studies).

40. This is Judge Bennett’s practice. See *id.* at 801.

41. See, e.g., Annabelle Krause et al., *Anonymous Job Applications of Fresh PhD Economists*, 117 ECON. LETTERS 441, 443 (2012) (showing that women had a higher probability to receive an interview invitation on standard application processes, but that higher probability disappeared with anonymous applications).

42. For further discussion of the social and psychological construction merit, see Kang & Banaji, *supra* note 35, at 1081-82.

43. See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L. J. 862 (2017).

44. See Giora Keinan, *Decision-Making under Stress: Scanning of Alternatives under Controllable and Uncontrollable Threats*, 52 J. PERSONALITY & SOC. PSYCHOL. 639 (1987) (“psychological stress, in and of itself, has a significant effect on the manner in which the decision-makers scanned the alternatives available to them”).

45. See Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818-19 (2001).

46. See Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009).

47. Various studies with accountants show that decreased time and mental resources produce less thorough results. See, e.g., Robert L. Braun, *The Effective Time Pressure on Auditor Attention to Qualitative Aspects of Misstatements Indicative of Potential Fraudulent Financial Reporting*, 25 ACCT., ORG. & SOC’Y 243, 255 (2000) (“Lack of attention to qualitative aspects of misstatements indicative of potential fraudulent financial reporting may be a manifestation of a lack of professional skepticism. The data appear to indicate that those under time pressure may not have maintained a questioning mind and may not have critically examined audit evidence to the same extent as those under less time pressure.”).

48. See Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17 (2002) (describing FPST) (available at < <http://psych.colorado.edu/~jclab/FPST.html>>).

49. Jordan R. Axt & Calvin K. Lai, *Reducing Discrimination: A Bias Versus Noise Perspective*, 117 J. PERSONALITY & SOC. PSYCHOL. 26, 34 (2019).

even when they held guns) and devaluing Black lives (erring by shooting Blacks even when they lacked guns)—the increase in total number of errors produced an increase in overall race-based discrimination.

The other task they tested was an academic version of the recently created Judgment Bias Task (JBT).⁵⁰ It requires participants to decide whether students should be admitted into an honor society. Each candidate's profile includes only bare-bones information: a photograph (to signal social category), science GPA (on a 4 point scale), humanities GPA (on a 4 point scale), recommendation quality (either "excellent" versus "good"), and interview score (on a 100 point scale). Half of the profiles were objectively better than the other half, and participants were instructed to admit about half of the students they reviewed. In addition, half of the pictures were clearly more attractive than the other half (thus testing for attractiveness bias).

In making selections, participants were told either to take all the time they needed or were forced to evaluate each profile for less than two seconds. Again, time pressure produced more errors. Because the distribution of errors was biased in favor of attractive people (erring by admitting unqualified attractive people) and disfavored unattractive people (erring by rejecting qualified unattractive people), the increase in total number of errors increased overall attractiveness-based discrimination. The general upshot, confirmed in these experiments, is that time matters.

3. Instruct yourself to deliberate carefully

To promote accuracy, we must have not only the *ability* but also the *willingness* to be careful. The prior suggestion focused on ability, supported by ample time and cognitive resources. What about willingness? One way to increase willingness is to give ourselves an instruction to slow down and take care. In another study, Axt and Lai had participants read the following general instruction to take care:

Prior research suggest that people may do a better job on this task if they put in more time to deliberate and think over their decisions. As a result, it is important that you think hard and slow down when making your decisions.⁵¹

In contrast, another group heard the opposite instruction that said that it was "important that you go with your gut and make your decisions more quickly." The "be careful" group demonstrated higher accuracy than the "trust your gut" group on the academic JBT.

There are almost never one-size-fits-all recommendations. And in certain contexts, such as picking an ice cream flavor, "going with one's gut" might produce more accurate or more satisfying answers. That said, if the goal is to avoid social category bias, we should all be skeptical of our guts. We should be wary of intuitive responses and remind ourselves to deliberate and reason carefully.

50. See Jordan R. Axt et al., *The Judgment Bias Task: A Flexible Method for Assessing Individual Differences in Social Judgment Biases*, 76 J. EXPERIMENTAL SOC. PSYCHOL. 337 (2018).

51. *Id.* at 38.

4. Cabin discretion by using checklists and rubrics

What I hate most about being a professor is grading exams. I don't mind giving feedback and lots of it; I just dread scoring exams and assigning grades. Over my decades in teaching, I've vacillated between the "gestalt" and "spreadsheet" methods of grading. On one extreme, I've just read the exam, jotted down some reactions on the margins, come to an overall reaction, and gave a gestalt grade. On the other extreme, I've created elaborate spreadsheets with a hundred entries grouped by issues and sub-issues, with weighting factors and bonus points for novel thinking or cogent writing. The raw scores are then converted into standard units (Z-scores), weighted, aggregated, and fit into a curve.

The gestalt is easy and enjoyable. It allows me freedom to credit originality and brilliance and to penalize catastrophic errors. But I worry about consistency. Would it matter if I were grading the same exam in the morning instead of evening, after a snack or a beer, after exercising or arguing with a family member? Would that "B" move up or down by half a grade, or more?

By contrast, the spreadsheet method feels like a mechanistic grind. It's as if I've given an essay exam but am now perversely trying to grade it as if it were multiple-choice. At times I'll fill out the spreadsheet and be surprised that some mediocre exam grazed enough of the issues to register a high total. Or an insightful and beautifully written exam dropped one important matter and therefore scores below average. In these moments, the spreadsheet method feels off. Still, it produces more consistent results.

I offer this digression about grading exams for two reasons. First, it highlights the pervasiveness of the problem that all experts face when making highly subjective decisions that rely on professional "judgment." Faculty, managers, judges all struggle with the basic choice between some version of the gestalt and spreadsheet methods. Second, it empathizes with judges who chafe at the idea of being forced to adopt some spreadsheet when they prefer the gestalt. I get it. No professional wants her expert judgment to be constrained by forms, checklists, rubrics, and algorithms especially if they are created by bureaucratic others.

Still, there's one crucial difference between exam grading and judging. In most of my classes, I have the luxury of grading blind. This is one of the rarefied environments in which blinding prevents implicit biases from activation, with few if any unintended consequences. Accordingly, I'm not worried about implicit bias influencing my grading even when I go gestalt. But you, as judges, generally do not have that option. Accordingly, I encourage you to find ways to move, at least incrementally, toward the spreadsheet model.

The justification is that checklists and rubrics help cabin discretion in ways that increase overall accuracy.⁵² Much of that evidence was presented in the 2012 *Implicit Bias in the Courtroom* article, which discussed how phenomena such as "constructed criteria,"

"[W]e should be skeptical of our guts."

52. See, e.g., Robert H. Ashton, *Effective Justification and a Mechanical Aid on Judgment Performance*, 52 ORG. BEHAV. & HUM. DECISION PROCESSES 292 (1992).

“Recent work suggests, for example, the value of a specific ‘countersteering’ instruction.”

“shifting standards,” and “casuistry” lead decision makers to alter their decision criteria subtly and unconsciously, in real time, to justify an underlying intuition or preference. In other words, we often go with our gut, which often means preferring people we like (warmth)⁵³ or seem to be like us (ingroup favoritism), then rationalize a post hoc explanation to justify that decision.⁵⁴

But when we constrain our decision making, by adopting some features of a spreadsheet-like approach, our decisions tend to be more accurate and consistent. This recommendation jibes with the structured interview literature,⁵⁵ which suggests that asking a similar set of validated questions across candidates makes it easier to conduct more accurate interpersonal comparisons. It’s also consistent with the grading literature.⁵⁶ Frankly, it’s consistent with “thinking like a lawyer,” which features element-by-element analysis of a larger legal doctrine. It’s reflected in the careful way that we design jury instructions on each claim or cause of action.

The responsibility for building the checklists, rubrics, and algorithms falls on judges themselves, working together and with relevant stakeholders toward consolidating best practices.⁵⁷ In designing these decision aids, we should take care not to bake in biases into the “spreadsheet” (think about federal sentencing guidelines treatment of powder versus crack cocaine) or formalistically pass through prior acts of discrimination.⁵⁸

5. Give yourself specific countersteering instructions

In many cases, race (or some other salient social category) is not directly at issue. Nevertheless, race looms in the air. This presents the judge a choice. On the one hand, you could embrace colorblindness and reason that because race is not directly relevant, you shouldn’t think about it. It could be a distraction, or worse activate racialized thinking when it’s unnecessary. On the other hand, you could embrace race-consciousness. After all, from an implicit social cognition perspective, you can’t really be colorblind.

53. See Erik J. Girvan, *Wise Restraints?: Learning Legal Rules, Not Standards, Reduces the Effects of Stereotypes and Legal Decision-Making*, 22 *PSYCHOL., PUB. POL’Y & L.* 31 (2016).

54. See Kang et al., *supra* note 2, at 1156-59, 1164-66.

55. See, e.g., Julie M. McCarthy et al., *Are Highly Structured Job Interviews Resistant to Demographic Similarity Effects?*, 63 *PERSONNEL PSYCHOL.* 325 (2010); Julia Levasina et al., *The Structured Employment Interview: Narrative and Quantitative Review of the Research Literature*, 67 *PERSONNEL PSYCHOL.* 241, 274 (2014).

56. See, e.g., David M. Quinn, *Experimental Evidence on Teachers’ Racial Bias in Student Evaluation: The Role of Grading Scales*, 42 *EDUC. EVALUATION & POL’Y ANALYSIS* 375 (2020); John M. Malouff & Einar Thorsteinsson, *Bias in Grading: A Meta-Analysis of Experimental Research Findings*, 60 *AUSTL. J. EDUC.* 245 (2016).

57. See, e.g., Crystal Soderman Duarte & Alicia Summers, *A Three-Pronged Approach to Addressing Racial Disproportionality and Disparities in Child Welfare: The Santa Clara County Example of Leadership, Collaboration, and Data-Driven Decisions*, 30 *CHILD & ADOLESCENT SOC. WORK J.* 1, 14 (2013) (discussing implementation of the CCC bench card in the Santa Clara County dependency court); Bennett &

Back in the 2012 *Implicit Bias in the Courtroom* article, my co-authors and I argued in favor of the race consciousness approach in the context of instructing jurors.⁵⁹ This recommendation relied on mock juror research that found that White jurors were less likely to be biased when they were specifically put “on guard” about the potential of racial bias when evaluating ambiguous facts regarding an interracial dispute.⁶⁰ I still stand by this recommendation and thoughtful commentators, such as Cynthia Lee, have elaborated further, in the context of instructing juries.⁶¹

I also recommend this approach for judges themselves, who are the focus of this article. Recent work suggests, for example, the value of a specific “countersteering” instruction. I call this a countersteering instruction for two reasons. First, it is more *particular* than the general injunction to “drive carefully.” When you learned how to drive (especially if you lived in a snowy climate), you may recall learning to countersteer in response to a skid: if the rear of your car starts skidding left, turn the steering wheel to the left. If it skids right, then turn the steering wheel to the right. Second, for many drivers, the countersteering instruction is *counterintuitive*: If your car is drifting left, why wouldn’t you steer towards the right? By rough analogy, if you’re worried about noticing race (implicitly), why wouldn’t you try extra hard to push it (explicitly) out of your mind? The answer is that explicitly noticing the potential for bias is the best way to counter it.

In the series of studies we’ve already discussed, Axt and Lai measured the impact of a very specific instruction to notice and avoid the attractiveness bias when selecting students for the honor society. Instead of just being told generically to “be careful,” participants were more particularly instructed:

In addition to differing on their qualifications, applicants will differ in physical attractiveness. Prior research suggests that decision makers are easier on more physically attractive applicants and tougher on less physically attractive applicants.

In the prior interventions, we saw that more time and the general instruction to “be careful” improved accuracy and decreased

Plaut, *supra* note 39, at 801 (describing sentencing range algorithm); National Council of Juvenile and Family Court Judges, *Addressing Bias in Delinquency and Child Welfare Systems* (bench card), available at <<https://www.ncjfcj.org/publications/addressing-bias-in-delinquency-and-child-welfare-systems>>.

58. As you may know, these are the same challenges facing Artificial Intelligence (AI) systems that suffer from what computer scientists call a “garbage in-garbage out” problem.

59. See Kang et al., *supra* note 2, at 1184.

60. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions, 27 *BEHAV. SCI. & L.* 599 (2009).

61. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 *N.C. L. REV.* 1555, 1597-1600 (2013). In one study, which examined whether a specific implicit bias jury instruction might mitigate against racial bias, the researchers could not replicate the racial bias under the control condition that had previously been found by Sommers and Ellsworth. See Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 *CT. REV.* 116, 120 (2015).

the overall number of errors. Interestingly, that's not the effect that this countersteering instruction had. It didn't decrease the total number of errors—in other words, the same total number of unqualified students were elected and the same total number of qualified students were rejected. But it did change the biased distribution of those errors such that attractive and unattractive candidates were now equally likely to receive leniency (admitted to the honor society when they were unqualified) and harshness (rejected from the honor society when they were qualified). By removing the bias in the distribution of errors, this instruction decreased the total amount of discrimination suffered by the disfavored group even though the absolute number of errors remained constant.

In sum, it appears that both the general “be careful” instruction (Part IV.C.3) and the more specific countersteering instruction (do not try to suppress and instead notice and respond to a particular bias) reduce discrimination but through different causal pathways. The former reduces the *absolute number* of errors, whereas the latter changes the unfair *distribution* of those errors.

Here's one specific application of a countersteering instruction especially useful for judges (and your staff). As judges, you are constantly interacting with members of the community, who are nervous at being in the courthouse. For example, it is a site filled with what Rachel Godsil has extensively elaborated as “racial anxiety.”⁶² On their side, this anxiety is likely to manifest in awkward body language, which can come off as nervousness, unresponsiveness, unfriendliness, untrustworthiness, and even hostility. To make matters worse, on your side, implicit biases alter the way we read nonverbal behavior. For example, it may take longer for us to recognize a smile on a Black face compared to a White one, even though the smiles are identical.⁶³ Numerous field studies in medicine have found that implicit bias predicts awkwardness in doctor-patient communication patterns,⁶⁴ and it's not a stretch to think the same might happen with judges interacting with parties or witnesses.

Accordingly, give yourself a very specific countersteering instruction on friendliness. Whenever you interact with someone who belongs to some outgroup (someone who is not of your race, ethnicity, religion, sexual orientation, eliteness of educational credentials, etc.) or group with marginalized status (non-

native speaker, immigrant, lower socioeconomic status, etc.), make sure to countersteer and err on the side of warmth, respect, and welcome. Doing so can trigger recursive benefits.⁶⁵ Your hospitality may decrease environmental threat, which may relax their behavior, which may alter their body language in a way that you and your staff will respond to positively, which can further decrease threat, and so on in a virtuous cycle.

“To make matters worse, ... implicit biases alter the way we read nonverbal behavior.”

6. Engage in perspective shifting and category switching

In the 2012 *Implicit Bias in the Courtroom* paper, we encouraged judges to recommend to jurors that they engage in perspective-taking.⁶⁶ Perspective-taking roughly means putting oneself in the shoes of another. We pointed out that actively contemplating the feelings and experiences of others, especially outgroups, could weaken automatic expression of bias, including implicit bias measured by the IAT.⁶⁷ Since that time, slightly greater evidence has accumulated in favor of perspective-taking.⁶⁸

For example, certain studies have demonstrated that perspective-taking improved implicit measures of bias regarding various social groups, such as Turks, elderly,⁶⁹ and Asians.⁷⁰ Unfortunately, the evidence is mixed with some researchers finding no changes in implicit bias, at least as measured by the IAT, from one of the perspective-taking interventions.⁷¹ We find ourselves again in a position with imperfect scientific knowledge. But this is an opportune moment to remind ourselves that the goal is not to reduce IAT scores *per se*. Instead, we should keep our eyes on the prize, which is to decrease discriminatory behavior. And if perspective-taking might incrementally nudge us toward that goal, we should pursue it regardless of whether our implicit bias scores change.

Perspective-taking interventions have correlated with changes in behavior, including subtle choices such as seating distance and helping behaviors (such as helping to pick up dropped keys). In the medical context, perspective-taking has decreased the racial gap in empathizing with the pain experienced by White and Black patients.⁷² Based on such evidence, I

62. For a discussion of the concept, see Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2239 (2017) (identifying “concerns that often arise both before and during interracial interactions” even when the interacting parties seek a positive experience); RACHEL D. GODSIL ET AL., *THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE* (Perception Institute 2014).

63. See Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003).

64. See Ivy W. Maina et al., *A Decade of Studying Implicit Racial/Ethnic Bias in Healthcare Providers Using the Implicit Association Test*, 199 SOC. SCI. & MED. 219, 223 (2017).

65. For discussion of how small interventions can produce substantial changes through recursive phenomena, see Gregory M. Walton & Timothy D. Wilson, *Wise Interventions: Psychological Remedies for Social and Personal Problems*, 125 PSYCHOL. REV. 617 (2018).

66. See Kang et al., *supra* note 2, at 1185-86.

67. See, e.g., Andrew R. Todd et al., *Perspective Taking Combats Automatic*

Expressions of Racial Bias, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1031-33 (2011).

68. For a useful review of perspective taking, see Andrew R. Todd & Adam D. Galinsky, *Perspective-Taking as a Strategy for Improving Intergroup Relations: Evidence, Mechanisms, and Qualifications*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 374 (2014).

69. See Andrew R. Todd & Pascal Burgmer, *Perspective Taking and Automatic Intergroup Evaluation Change: Testing An Associative Self-Anchoring Account*, 104 J. PERSONALITY & SOC. PSYCHOL. 786 (2013).

70. See Margaret J. Shih et al., *Perspective-Taking and Empathy: Generalizing the Reduction of Group Bias toward Asian Americans to General Outgroups*, 4 J. ABNORMAL PSYCHOL. 79 (2013).

71. This is what Lai found in his tournament approach. See Lai et al., *supra* note 24, at 1770.

72. See Adam T. Hirsh et al., *A Randomized Controlled Trial Testing a Virtual Perspective-Taking Intervention to Reduce Race and SES Disparities in Pain Care*, 160 PAIN 2229 (2019); Brian B. Drwecki et al., *Reducing Racial Disparities in Pain Treatment: The Role of Empathy and Perspective-Taking*, 152 PAIN 1001 (2011).

“[T]ry to stand still in that perspective, and see if your judgment moves at all.”

recommend that judges experiment with *perspective-taking*. More specifically, before exercising discretion or making a judgment call (e.g., granting a motion to dismiss or a motion for summary judgment on an employment discrimination claim) against an outgroup member or

target of implicit bias, put yourself briefly in the shoes of a member of that group.⁷³ While doing so, try to resist any immediate impulse to say something like “I would have never done that!” Instead, try to stand still in that perspective, and see if your judgment moves at all. In addition, I encourage you to experiment with the tactic of *counterfactual category switching*. For example, if you are about to depart upward from sentencing guidelines, ask yourself whether you would do the same if the defendant were of a different race or member of your ingroup.

7. Prefer diverse decision-making teams

There is a rich literature examining whether diverse teams—according to various metrics—deliberate differently and produce better answers.⁷⁴ In some cases, they clearly do deliberate differently, often by canvassing a larger solution space. And in some cases, they clearly do generate better answers. But here, I focus narrowly on how the diversity of teams might counter implicit bias.

One way to mitigate a headwind is to combine it with a tailwind. So, if most members of a decision-making body lean implicitly in one direction, it could be useful to have another member of that body who leans implicitly in another direction. The goal cannot be anything like precise calibration so that the vector sum of all possible implicit associations equals zero. That is infeasible. That said, it's reasonable to assume that a more heterogeneous group is likely to have a more heterogeneous set of implicit (and explicit) biases, with the inevitable result of some members' biases dampening out the impact of others'.

One final way that diversity could help counter implicit bias

is that the very existence of a member of another social category can function as a physical reminder to be mindful about how to think and talk about that category.⁷⁵ This may be most important in constructing a diverse jury,⁷⁶ which is outside the scope of this article. But even if we stay focused on judges themselves, we know that judges form and participate in various panels, teams, committees, and task forces. As they do so, they should be mindful of the kinds of diversity that might decrease the vector sum of implicit biases within the group. We should, as always, not be overconfident given the possibility that “token” representation could produce moral credentialing, and an unwarranted confidence that the group itself couldn't possibly be biased, which would then backfire.⁷⁷

D. DATA (TO CREATE EARLY WARNING SYSTEMS)

Scientific advancements allow us to see what was previously invisible, from the microscopic to the galactic. Arguably that's what instruments such as the IAT give us, a blurry window into an otherwise opaque mental domain. Collecting and visualizing data often allow us to do the same. As individual judges of goodwill exercise their daily discretion, it will often be impossible to spot in any specific case whether an implicit or other variant of bias played a causal role. However, if similar decisions are logged across time and/or multiple decision makers, the data may reveal interesting patterns.

For instance, would it surprise you to find out that regional IAT scores (which average over a large population of people, and thus wash out the noise in individual measurement errors) correlate with regional differences in racially disproportionate lethal force⁷⁸ and school discipline?⁷⁹ Of course, correlation does not mean causation. As such, the data often cannot definitively answer whether discrimination is taking place. But they do plant red flags and identify areas of concern that warrant deeper examination.

Judges should initiate data collection on decisions that involve substantial discretion. At the individual level, it could involve ordinary human resources processes within your chambers such as hiring law clerks and staff. Or it can involve your individual

73. See Stefanie Simon et al., *Pick Your Perspective: Racial Group Membership and Judgments of Intent, Harm, and Discrimination*, 22 GROUP PROCESSES & INTERGROUP REL. 215, 229 (2019) (showing that perspective-taking alters assessments of intent and harm for White participants).

74. See, e.g., SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

75. See Kang et al., *supra* note 2, at 1180; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

76. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror).

77. See Manuel Bagues et al., *Does the Gender Composition of Scientific Committees Matter?*, 107 AM. ECON. REV. 1207, 1227 (2017) (finding that “increasing the proportion of women and scientific committees does not increase the success rate of female candidates” in Italian and Spanish promotion decisions to full professorships partly because female evaluators do not vote more in favor of female candidates in a statistically significant manner and “the presence of women in the committee decreases the probability that female candidates receive a positive vote from male evaluators”).

78. Eric Hehman et al., *Disproportionate Use of Lethal Force in Policing Is Associated with Regional Racial Biases of Residents*, 9 SOC. PSYCHOL. & PERSONALITY SCI. 393, 397 (2018) (finding that “the implicit racial biases [both attitudes and weapon stereotypes] of White residents predict disproportionate regional use of lethal force with Blacks by police. This association is robust, reliably emerging across two conceptually distinct measures of racial bias, multiple imputations, three different transformations of the outcome measure, traditional and bootstrapped distributions, and above and beyond 14 sociodemographic covariates.”). By contrast, explicit measures had no statistically significant effect. *Id.* at 396.

79. See Travis Riddle & Stacy Sinclair, *Racial Disparities in School-based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PROC. NAT'L ACAD. SCI. 8255 (2019). They found that explicit bias scores were more predictive but also found that implicit bias and disciplinary disparities were correlated. They checked for confounds that typically occur, including socioeconomic status and population demographics. *See id.* at 8258.

patterns in exercising judicial power. For instance, on federal sentencing matters, it would not be difficult to keep a running record of the computed “guideline range,” your final sentencing recommendation within that range, and the key social category variables of the defendant (e.g., race and gender). By computing averages and standard deviations, you could easily alert yourself to disparities that warrant a closer examination.

At the institutional level, judges could call for broader counting of the exercise of sovereign power in areas such as prosecutorial charging decisions,⁸⁰ plea bargains, setting bail,⁸¹ sentencing recommendations made by probation officers, and sentencing.⁸² Anywhere judges believe that implicit bias might be infecting the decision-making process is a good place to start counting.

The first cut of the data would examine whether the exercise of discretion seems correlated with salient demographic categories, such as race. The second cut would examine whether that relationship persists after controlling for confounding factors. If the data reveal, for example, racial disparities that cannot easily be explained by other relevant factors, then we should plant a red flag. If these disparities appear at the institutional level, judges should call for the convening of (diverse) task forces to analyze their causes and examine whether checklists, rubrics, and other algorithmic guardrails might improve accuracy and decrease biased results.

Another benefit of data collection is that it generates soft accountability pressures. If you are accountable to explain and justify publicly your decisions, for example, in a published opinion with precedential value, you will make them more carefully and more accurately. Similarly, if you know that your exercise of discretion, which historically has been invisible, will now suddenly become more visible through individual and institutional counting practices, you will start taking greater care.

Supporting evidence comes from economists studying referees and judges in professional sports. For example, large data analyses found referees and umpires making calls in a race-based way, under certain conditions. Interestingly, these racially biased decisions stopped when the judges were subject to greater scrutiny, either in the form of video data collection (through Questec cameras installed in ballparks that measured human umpire accuracy in calling balls and strikes)⁸³ or increased media coverage after news outlets such as ESPN popularized the research findings.⁸⁴

CONCLUSION

Over the past twenty years, we have come to accept the *idea* of implicit bias. It no longer seems odd to believe that we have attitudes and stereotypes that we largely lack access to. Scientists continue to innovate and improve the *instruments* that can measure this idea. The most popular instrument remains the Implicit Association Test (IAT). As good as it is, frankly, it's just a videogame, and we should not be shocked that it lacks the measurement precision necessary for responsible individual diagnostics.⁸⁵ Nevertheless, it speaks volumes about society.

Implicit biases about social categories are pervasive, stronger than explicit biases, and show low-level correlation with discriminatory behavior. The correlations are small, partly due to the difficulties in getting precise measurements of either bias or behavior. Nevertheless, when we aggregate these effects over time and across entire populations, implicit bias can produce tailwinds and headwinds that profoundly perturb our commitment to giving everyone a fair shot and equal justice under law.

So, what can judges do? Unfortunately, there is no silver bullet or panacea, and the scientific evidence remains sometimes frustratingly limited. In this article, which is already too long and complex, I addressed only the problem of implicit bias held by judges themselves. To be explicit, I did not directly discuss how judges might confront the implicit biases of jurors or other players within the judicial system, such as prosecutors or lawyers. I also have also not repeated my call for a “behavioral realism” in legal doctrine and jurisprudence since I've discussed those matters extensively elsewhere.⁸⁶

Judges who believe that implicit bias is a genuine problem can organize their response according to the four “D’s”: deflate, debias, defend, and data. Specific and concrete tactics under these strategies appear in the Appendix. I confess that it's hard to know whether the strategies will have great impact. And implementation will take hard, persistent work, driven by your internal motivation to be fair, not only as individuals but also as parts of a larger system of justice. Still, I have curated these evidence-based recommendations not to be especially costly, impractical, or objectionable. In addition, they are unlikely to backfire or produce ironic consequences that make matters worse. Finally, many

“Judges ... can organize their response according to the four ‘D’s’: deflate, debias, defend, and data.”

80. See Kang et al., *supra* note 2, at 1140 (collecting evidence of disparities).

81. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables).

82. See Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004).

83. See Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011).

84. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010).

85. See, e.g., Kang et al., *supra* note 2, at 1179. For an updated discus-

sion of the measurement precision of various implicit bias instruments, including the IAT, see Anthony G. Greenwald & Calvin K. Lai, *Implicit Social Cognition*, 71 ANN. REV. PSYCHOL. 419, 425-26 (2020) (elaborating the relationships between internal consistency and test-retest reliability).

86. See, e.g., Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism about Equal Protection*, 66 ALABAMA L. REV. 627 -51 (2015) (Meador Endowed Lecture); Jerry Kang, *The Missing Quadrants of Anti-discrimination: Going Beyond the “Prejudice Polygraph,”* 68 J. SOC. ISSUES 314-27 (2012); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465-520 (2010).

of these recommendations will improve decision making regardless of the precise variant of bias.

Much work remains to be done. At the individual level, it will require judges to work methodically and consistently toward deeper scientific understanding and personal introspection, improved habits, and increased experimentation with procedures and practices. At the institutional level, it will require convening judges, legal scholars, and social scientists to sit together on blue-ribbon committees with the charge, resources, and access to data to generate scientifically sophisticated and evidence-based guidance. It will be hard work.



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APPENDIX 24 THINGS JUDGES CAN DO ABOUT IMPLICIT BIAS

I. DEFLATE (YOUR EGO) AND EMBRACE FALLIBILITY

1. Recognize that **you are fallible**.
2. Avoid “**moral credentialing**” simply because you have studied implicit bias.
3. Don’t fret over *external* motivations for political correctness. Instead, **cultivate your internal motivation** to be fair.
4. Continue to **learn more** about all kinds of biases and decision-making errors⁸⁷ not because education directly decreases those errors but because deeper awareness will support your internal motivation to improve continuously both individually and institutionally.⁸⁸

II. DEBIAS (WITH SHORT-TERM “SPOT CLEANING” AND LONG-TERM INTERACTIONS)

A. SHORT-TERM TACTICS

5. **Change the built environment** (e.g., photographs, art, posters, statues, books) to include regular, consistent exposure to admired figures from diverse groups and countertypical exemplars (“debiasing agents”).

B. LONG-TERM TACTICS

6. **Expand social contact** with other, less familiar social groups directly and vicariously.⁸⁹ In so doing, always **curate complexity, not caricature**.
7. **Leverage your market power** to nudge others to be mindful of whom they feature as speakers or experts because “we are what we see.”

III. DEFEND (AGAINST THE BIAS THAT PERSISTS)

A. CAREFULLY CONSIDER BLINDING, DIMMING, OR TEMPORARY CLOAKING SOCIAL CATEGORY INFORMATION

8. Consider whether **blinding** may improve fairness and not simply pass through prior acts of discrimination by the judicial system and others.
9. Consider **dimming** by decreasing the intensity, salience, or completeness of social category information. For example, you can keep the race field in documents but remove the photograph.
10. Consider using the two-stage process of **temporary cloaking** to first cloak identity and make a tentative decision, then uncloak to check for unintended consequences.

B. GIVE YOURSELF AMPLE TIME, EMOTIONAL CALM, AND MENTAL ENERGY

11. Give yourself **ample time** to improve accuracy in making complex, subjective, multifaceted decisions.
12. If you are in an especially high or low emotional state or feel especially stressed or cognitively depleted, try to delay making complex, subjective, multifaceted decisions until you **return closer to your baseline**.

C. REMIND YOURSELF TO DELIBERATE CAREFULLY

13. **Remind yourself to be careful** instead of jumping to conclusions or relying on intuitions or gut feelings.

87. See, e.g., Pamela Casey et al., *Minding the Court: Enhancing the Decision-Making Process* (American Judges Association 2012) (white paper); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

88. On implicit bias, here are some resources I periodically update: <http://jerrykang.net/2011/03/13/getting-up-to-speed-on-implicit-bias/>. For evidence that education can drive awareness and internal motivation, see Patrick Forscher et al., *Breaking the Prejudice Habit: Mechanisms, Time Course, and Longevity*, 72 J. EXPERIMENTAL SOC. PSY-

CHOL. 133 (2017) (showing that intervention produced changes in knowledge and belief about race-related issues, which correlated with behavior measured years later); Molly Carnes et al., *Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*, 90 ACAD. MED. 221 (2015) (finding changes in self-efficacy, self-reported action to promote gender equity).

89. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

Why Judges Should Not Mistake the Norm for the Neutral

Justice Debra Stephens & Judge Veronica Galván

“The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.”

– Washington State Supreme Court
Open Letter to the Legal Community, June 4, 2020.

This statement from the Washington Supreme Court Open Letter, issued after Minneapolis police officers killed George Floyd on May 25, 2020, reflects both an acknowledgment of responsibility and a commitment to action. The Washington Supreme Court’s letter was one of many written by courts and individual judges across the United States, who felt compelled to speak out about racial injustice and our role as keepers of a system called Justice. Questions quickly followed: Are those who speak out against racial injustice taking sides on a social issue? What can a judge do or say within the ethical constraints of codes of judicial conduct? How can courts as neutral arbiters of disputes address systemic racism in the court system?

To be clear, judges were asking such important questions long before 2020. The judicial profession is a path of public service, and most of us would say we became judges because we want to “make a difference.” But what it means to remain impartial while making a difference has become an increasingly urgent question as we are all called to reckon with our nation’s history of racial injustice and the role that we, as judges, play. None of us put on a black robe to become an instrument of discrimination and oppression, so it is fair to ask what we can do—indeed what we must do—as individuals committed to the values of impartiality and equal justice.

We write to you as a Supreme Court justice and a trial judge in Washington State. One deals daily with the doctrines and broad themes that shape our law, while the other applies such doctrines every day to real people facing difficult situations. When we attended the state judicial college together 13 years ago, our training in judicial ethics focused on caution. We were taught—like generations of judges before and since—that the surest way to stay out of trouble with the judicial conduct commission was to follow the old adage: “When in doubt, don’t do it.” But today we suggest that advice must be reconsidered in the face of an unavoidable reality: Doing nothing to address systemic injustice is doing something. Every judicial decision we make

exists within a legal structure that does not impact everyone equally. Moreover, many of our decisions allow for significant discretion, interpretation, and the application of our considered judgment. So, when we apply a precedent, rule, or common-law doctrine to a set of facts, it is important to critically evaluate what we are doing and consider the broader context.

Throughout this country’s history, our courts have played a primary role as architects for the construct of race within our society. It is built into our legal structure. From the moment a court determined that a black man had no cognizable right to even seek justice, as he could not be deemed a citizen under law (*Dred Scott v. Sanford*, 60 U.S. 393 (1857)), and later allowed its citizens to be imprisoned for simply belonging to a particular ethnic group (*Korematsu v. United States*, 323 U.S. 214 (1944)), it became apparent that interpreting and applying the law too often results in decisions that stray in practice from the principles of equity espoused in our venerated Constitution. Nevertheless, it is important also to recognize our courts have been a primary vehicle for redressing racial injustices and correcting historical inequities. Through case law, changes in court rules, and policy advocacy, courts at all levels have tackled the issue of race head on and forced institutions (including our own) to confront the legacy of systemic injustice we have inherited.

We must accept the role of the judicial system in both legitimating and challenging the history of race and bias in America. This understanding carries with it a responsibility to confront how bias and racism play out in the justice system, and how we individually and collectively have the ability to either re-entrench the status quo or instead help bend the long arc of the moral universe ever toward justice.¹

Court decisions have recognized that unconscious, implicit bias permeates human decision making. The Supreme Court of Washington in *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013), observed that racism today often “lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.” In *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017), the United States Supreme Court affirmed this concept when it held that the no-impeachment rule pertaining to jury verdicts could not stand in the face of racial animus in jury deliberations. The court recognized that racial bias is “a familiar and recurring evil that, if left unad-

Footnotes

1. Dr. Martin Luther King, during the 1965 march in Selma, paraphrased 19th-century Unitarian minister and abolitionist Theodore Parker, when he said: “The arc of the moral universe is long, but it bends towards justice.” In a sermon in 1853, Parker wrote: “I do not

pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice.”

dressed, would risk systemic injury to the administration of justice.” *Id.* at 868. While these particular decisions concerned jurors, the cognitive processes judicial officers employ in making decisions are no different. The black robe is not an inoculation against bias.

Courts have unique authority to address racial bias in judicial systems, including through court rules. The Washington Supreme Court recently exercised this authority in promulgating General Rule (GR) 37. Recognizing the inadequacies of the *Batson*² framework to safeguard against racial bias in jury selection, the rule modified the analysis to require the court to determine whether an objective observer could view race or ethnicity as a factor in a party’s use of a peremptory challenge. It further defines an objective observer as someone who is aware that implicit, institutional, and unconscious biases have resulted in the exclusion of potential jurors and recognizes that some proffered race-neutral justifications for striking jurors, such as demeanor, are anything but. The effect of GR 37 is that judicial officers in Washington are obligated to know about the science and history of bias and to consciously and openly discuss the issues of race and bias with attorneys, parties, and jurors. By its operation, the rule makes understanding bias and its impacts not merely a theoretical exercise for judicial officers, but also a substantive point of decision. The rule is but one example of how a change in procedure can produce a change in thinking and create a rubric of decision making around race-informed practices.

Another example of how court rules and their application can address disproportionate impacts of entrenched practices is in the area of risk assessment and pretrial release decisions. These decisions involve the exercise of significant judicial discretion—a fact that was brought into stark relief last year when Washington trial courts were directed to reevaluate bail decisions in an effort to reduce jail populations due to the risk of COVID-19.³ The language of the governing court rule, Criminal Rule 3.2, did not change. Yet in hearing motions for release and in making pretrial release decisions in new cases, courts dramatically reduced jail populations—by as much as 40% in some counties. The release decisions have proven consistent with public safety and, moreover, have been life-changing for many defendants who were black, indigenous, and people of color (BIPOC) and who would otherwise still be waiting in jail for criminal trials that continue to be delayed due to the pandemic. While appreciating some of the positive outcomes of this COVID-19 emergency measure, we must acknowledge what it reveals about the biases inherent in the exercise of judicial discretion. Every trial judge knows public criticism will follow if they release a pretrial defendant who commits a new crime awaiting trial, yet detaining a person who might be appropriate for release will never hit the front page of the newspaper. Though we may strive to effectuate the presumption of release, we often in close cases err on the side of “caution” in a way that leans on implicit biases about who is a flight risk or a public safety risk. These decisions inevitably perpetuate racial disparities. While it should not take

a pandemic to see how bias permeates human decisions, the lesson learned from pretrial release decisions made during the COVID-19 emergency can guide us in making better decisions going forward.

Perhaps no area of policy consideration for judicial decision making has received more attention than legal financial obligations (LFOs). In March of 2015, The U.S. Department of Justice issued a report following the investigation of the Ferguson Police Department and the impacts of LFOs there. The report not only questioned the culture of policing in Ferguson, Missouri, but also the practices and policies of the local court that created substantial barriers to fairly resolving violations. These barriers included a lack of transparency, failure to explain court processes and potential consequences of adjudication, and the imposition of fines, which, if unpaid, led to the issuance of arrest warrants, which resulted in the disproportionate detention of African Americans. The DOJ report on Ferguson illustrates how court policies that may appear race-neutral on their face can produce dramatic racial disparities in practice. The judges making decisions in individual cases likely saw themselves as treating everyone equally, but when there is clear bias in who is impacted by a law and how it is enforced, as the report found, then the seemingly neutral application of the law by the courts merely reinforces disparities and re-entrenches racial bias.

Courts are not powerless to address these disparities, just as they are not excused from seeing them. As a result of the findings in Ferguson, many courts have looked critically at their own policies and practices, particularly surrounding legal financial obligations. Many have actively tried to redress the harms caused in their communities by instituting programs such as LFO reconsideration days, promulgating new court rules for imposing LFOs, and supporting legislative reform efforts to mitigate the harm caused by practices that needed only to be examined to be changed.

These few examples serve to highlight the ways in which everyday judicial decisions directly impact issues of race and inequity. It is no exaggeration to say that the daily decisions judges make in individual cases are intertwined with the success—or failure—of the justice system to eradicate racism. The system was built over time through a series of individual and collective actions, and that’s how it will continue to be shaped. If ever there was a time when judges could separate their decisions from the disparate impacts of those decisions, that time has long since passed.

We should never forget that the law is a social construct reflecting our shared values, and it is, therefore, in constant motion. In this sense, systemic racism follows Newton’s First Law of motion, in that legal doctrines tend to be propelled forward until met by a force capable of stopping them. As the writer Tim Wise observed, “unless that force not only stops the forward motion but then repairs the damage the moving object created—in this case, the moving object of discrimination and unequal opportunity—the shock waves of that motion will con-

2. *Batson v. Kentucky*, 476 U.S. 79 (1986).

3. See Amended Order, In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency (March 20, 2020)(and subsequent revised and extended emergency

orders), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf> (last visited Jan. 28, 2021).

tinue to travel, seen or unseen, well into the future.”⁴ Our responsibility as keepers of the law is to recognize that our decisions—even the decision to do what we’ve always done—inevitably affect the momentum of the law and, by extension, the society we are creating.

Recognizing the central role of judicial decision making in advancing or impeding racial justice marks an important step in understanding why “don’t do it” is sometimes the wrong advice for judges. While that advice may be useful in deciding whether to refrain from nonessential social or business activities that may call into question a judge’s impartiality, it is not possible to refrain from making difficult decisions on the bench. Indeed, judges are valued and respected precisely because we exercise informed judgment. Further, making decisions with a full and honest assessment of their impacts, including racial impacts, is consistent with the highest standards of neutrality and impartiality. No decision exists in a vacuum but rather as a conscious choice measured against a set of values.

When courts fail to make decisions that promote justice and equity in practice, the rule of law itself is delegitimized. Claims that judges are simply applying the law neutrally and that justice is blind ring hollow when we acknowledge all the ways in which judicial decisions shape the direction of the law. We must acknowledge that, for many individuals in this country, the status quo has never been neutral. We should embrace our responsibility as stewards of justice and resist the myth that being neutral requires rote obeisance to settled traditions or norms. Precedent does not prevent us from moving toward a more equitable future. The young poet laureate, Amanda Gorman, perhaps said it best when she observed that our experience has taught us: “the norms

and notions of what ‘just’ is isn’t always justice.”⁵ Law and justice are not one. They often travel parallel, even divergent, paths. As judicial officers, we should seek to have them intersect more often by not being afraid to acknowledge, confront, and correct past practices that have far too often led to unjust results.



Debra Stephens is a member of the Washington State Supreme Court, where she has served since 2008. As Chief Justice in 2020, she received the “Innovating Justice Award” for her leadership of the judiciary’s response to the COVID-19 pandemic with a focus on race equity and access to justice. Justice Stephens was a longtime Gonzaga University adjunct law professor, and remains deeply involved in legal education for judges, lawyers and the public, including as Co-Chair of the National Association of Women Judges Judicial Independence Committee.



Veronica Galván is the Chief Judge of Maleng Regional Justice Center in Washington State and a 1994 graduate of the University of Washington. Judge Galván Has been recognized through a number of awards for her outstanding service to the law, including implementing Washington’s only Spanish-language court to provide litigants direct communication with the court. Judge Galván is also Dean of the Washington State Judicial College, also teaching courses including Emerging Through Bias: Toward a More Fair and Equitable Courtroom.

4. Tim Wise, *Systemic Racism, Explained by Newton’s First Law of Motion*, GOOD MEN PROJECT, Nov. 16, 2020, [https://goodmenproject.com/featured-content/systemic-racism-explained-by-newtons-first-law-](https://goodmenproject.com/featured-content/systemic-racism-explained-by-newtons-first-law-of-motion/)

[of-motion/](https://goodmenproject.com/featured-content/systemic-racism-explained-by-newtons-first-law-of-motion/).

5. AMANDA GORMAN, *The Hill We Climb*, in *THE HILL WE CLIMB AND OTHER POEMS* (forthcoming Sept. 2021).



The National Center for State Courts (NCSC) offers a series of webinars to help courts improve their operations and better serve the public during the COVID-19 pandemic. These webinars cover many aspects of court operations from jury management to access to justice. For example:

- Essential Steps to Tackle Backlog and Prepare for a Surge in New Cases
- Approaches to Managing Juvenile Cases in the COVID Era
- Court Management of Guardianships and Conservatorships During the Pandemic
- How State Courts Are Using Innovative Technologies and Responsible Health and Safety Practices to Resume Jury Trials

Videos of these and other webinars are available online and free of charge at: <https://www.ncsc.org/newsroom/public-health-emergency/webinars>.

The Supreme Court
State of Washington



June 4, 2020

Dear Members of the Judiciary and the Legal Community:

We are compelled by recent events to join other state supreme courts around the nation in addressing our legal community.

The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

As judges, we must recognize the role we have played in devaluing black lives. This very court once held that a cemetery could lawfully deny grieving black parents the right to bury their infant. We cannot undo this wrong—but we can recognize our ability to do better in the future. We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.

As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a *justice* system must operate. Too often in the legal profession, we feel bound by tradition and the way things have "always" been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.

Finally, as individuals, we must recognize that systemic racial injustice against black Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions—every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.

As we lean in to do this hard and necessary work, may we also remember to support our black colleagues by lifting their voices. Listening to and acknowledging their experiences will enrich and inform our shared cause of dismantling systemic racism.

We go by the title of "Justice" and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.

Sincerely,

 Debra L. Stephens, Chief Justice	 Charles W. Johnson, Justice	 Barbara A. Madsen, Justice
 Susan Owens, Justice	 Steven C. González, Justice	 Sheryl Gordon McCloud, Justice
 Mary I. Yu, Justice	 Raquel Montoya-Levis, Justice	 G. Helen Whitener, Justice



A Call to Action

Gary M. Jackson

In October 2018, I had a call to action. It was not the result of an unarmed Black man unnecessarily killed by a white police officer, nor the horrific botching of a no-knock search warrant in a woman's apartment resulting in her death. My call to action came when a Black colleague, Denver District Court Judge William Robbins, announced his retirement. At that time, Judge Robbins was the only Black district court judge out of 181 in the state of Colorado. Soon after, Colorado Court of Appeals Judge Karen Ashby, a Black woman, announced her retirement. She was the only Black appellate court judge or justice out of 29 in Colorado. These two announced retirements could have resulted in zero Black judges on the highest courts of Colorado. This possibility distressed me. It seemed that the prospect of bringing diversity to Colorado's judicial branch, initiated by the Civil Rights movement of the 1950s and 1960s, had come to a halt. The potential of zero Black judges and an equally bleak number of Hispanic judges at the highest judicial levels was more than just an embarrassment to our legal system—it was an affront to our judiciary and to the citizens of Colorado.

I have been aware of the lack of Black judges in Colorado long before 2018. Since I became a deputy district attorney in 1970, I discovered many times that I was the only Black person in the room. But this was 2018. And if you were not digging into the demographics of Colorado judges, you would assume that in a progressive-minded state like Colorado we would have had more than two Black judges serving on our appellate and highest trial courts. When I realized that Colorado's courts were about to look like Alabama's—a state that still has zero Black judges on its supreme and appellate courts—I realized that I must take action.

In 2019 the Brennan Center released its State Supreme Court Diversity study. Twenty-three states had zero Black judges on their supreme courts. Since 1994, every Black candidate for Alabama's 19 appellate judgeships has lost to a white candidate. ThinkProgress wrote, "At-large elections have been a common tactic across the country to minimize the political influence of voters of color." Colorado and Alabama are not the only courts that fail to reflect the diversity of their citizens. This failure has damaged the reputation and perceptions of the judicial system, not to mention a plethora of injustices due to intentional or implicit bias. All of this must serve as a call to action for every individual on every level of America's judicial branch of government.

One would think that during the last fifty years significant changes would have occurred in the judicial system, and that my experiences of being the only Black person in the room in the 1970s would now be outdated and irrelevant. It is true that there are more minority lawyers and municipal, county, district, and even appellate judges; however, the number of justices remains few and far between, and the pool of potential up-and-coming minority attorneys continues to be low nationwide. Changing these demographics will require a commitment backed by clear intention and consistent effort. But bringing about change must take far less time than the fifty years since the foundation for my own call to action was laid.

In 1970 I was the only Black prosecutor out of more than four hundred in the state's district attorney's offices, and in 1974, when

I was hired as an Assistant U.S. Attorney for the District of Colorado, I was the only Black federal prosecutor in the Tenth Circuit. As one of the founders of the Sam Cary Bar Association of Black Lawyers and Judges in 1971, I developed longstanding relationships with all the associations of color and specialty bars in Colorado. Seven years later, I joined a boutique trial firm where I remained for 37 years.

My call to action was leveraged by my insider role in the Colorado legal community over this lengthy period. Most recently, as a Denver county court judge, I made a commitment to actively speak out about how diversity on the bench in Colorado was moving backwards. In October of 2018 there were only three Black judges out of 334 judges in the state. According to an in-depth study by the *Denver Post*, published on July 19, 2020, more than 25% of Colorado's population is Black or Hispanic.

My seat on the bench gave me a greater platform to raise the level of awareness of the issue and the growing danger to the legitimacy of our judicial system. Hence, my call for action became a dogged pursuit. Now, during these times of social unrest where truth is lost in rhetoric and lies, increasing public awareness of the need for a strong, fair-minded, constitutionally oriented judicial system could not be greater. Regardless of one's role—justice, judge, attorney, advocate, or one's gender, race, or background—it is incumbent upon each of us in the legal profession to use our voices, resources, and platform to change the trajectory of the "gavel gap" trend. The gavel gap refers to the disparity between race and gender composition of the courts and the demographics of communities they serve.

R. Buckminster Fuller spoke about the concept of "trim-tabling," a metaphor where the giant rudder on ships can only be moved by turning a little rudder at the tail of the big rudder. The smaller rudder "trim-tabs" the larger rudder. We all must become trim-tabbers whose individual and group efforts move the great ship of state.

What follows is the course of action I have chosen. Each person's path will differ, but everyone can become a trim-tabber. I offer my experience to clarify the long-term work that is required and the importance of perseverance, grit, experience, and most of all, networking.

I began by identifying approximately 20 legal and judicial organizations and bar leaders to approach with my concerns. Strategically, it was important to identify those organizations with whom I had a past relationship and those organizations with sound leadership and respected reputations throughout the legal community. First, I met with the leadership of the American Board of Trial Advocates (ABOTA), whose charge is to ensure jury trials are available to everyone in the nation's court systems. The membership pledged to work to correct the disparity and several people volunteered immediately.

Over the next year, I met individually with representatives of legal and judicial organizations and bar leaders to discuss the diversity gap in Colorado. Critical to this initial effort were meetings held with members of the Colorado Supreme Court. The buy-in by the justices was immediate. It was obvious to all concerned that the

appellate courts did not reflect the population they served. There had not been a Black supreme court justice since 1993 when Justice Greg Scott became the first and only Black supreme court justice in Colorado. When he retired, followed by the retirement of the only Black appellate court judge, there would be zero Black justices and appellate judges. By speaking about the paucity of Black and Hispanic judges and pointing out that Colorado was on the verge of having zero Black judges on its highest-level benches, the justices of the supreme court, other judges, and I appeared at various venues to highlight the lack of diversity in all 22 judicial districts across the state.

Next, I went to the Colorado Judicial Institute (CJI). CJI has a 50-year history of promoting the nonpartisan selection of judges and judicial excellence. Its board is comprised equally of lawyers and non-legal members, including the retired former Chief Justice of the Colorado Supreme Court. In 2016 I was selected as County Court Judge of the Year by CJI. I subsequently became a member of the Board of Directors, which increased my platform of influence.

At CJI's 2019 Fall Board meeting, I expressed my concerns regarding racial disparity in the court system. Again, I was met with great support. By unanimous vote the board agreed to be a founding member of a Diversity on the Bench Coalition and to use its resources to dismantle the barriers to diversity that have caused the gavel gap. The next major step was meeting with the Colorado Bar Association (CBA), its president, and executive council. By unanimous approval, the CBA agreed to be a co-sponsor with CJI. The CBA provided its statewide resources, including a staff member and website access, and the president of the organization agreed to be one of the founding leaders of the CBA/CJI Diversity on the Bench Coalition (Coalition).

The Coalition's framework started with the assumption that of the three branches of government, citizens have the most direct contact with the judicial branch. Although citizens participate in the legislative and executive branches of government, it is in the judicial branch where citizens come into direct contact with their government. Hence, diversity on the bench becomes personal. The court system needs to reflect the demographics of the community. CJI and the CBA have teamed up to lead a movement that will comprehensively address our state courts' lack of diversity. The Coalition's goal is to harness our broader community's power to implement systemic changes that survive and thrive beyond the current leadership teams. The Coalition has a hand-selected group of what we call "super volunteers," from diversity bar presidents to law school deans, the Attorney General's office, big and small firms, and judges around the state to create our 19-member coordinating council. Each of the coordinating council members had to have these qualities to be selected:

- Respected within the diversity and inclusivity community.
- Track record of getting things done.
- Skilled at bringing people together.
- Ability to work with CBA and CJI.
- Willingness and availability.

Patricia M. Jarzowski, CBA past president and Colorado Women's Bar Association past president, and I were selected to chair the Coalition. The Coalition wanted to ensure that our work is action oriented and not just aspirational. The coordinating council has been meeting for the past year to design an action plan. The

plan is action oriented and results driven.

We gave priority to the five largest counties with the greatest disproportionate minority representation in the judicial system, and set a course of action centering on five primary areas:

1. *Candidate Development*: Increasing the number of applicants for judicial openings.
2. *Nominating Commissions*: Increasing the diversity of commission members and providing additional training.
3. *Deciding Officials*: Educating decision makers at every level of the process of the value of a diverse bench.
4. *Accountability and Tracking*: Tracking ongoing judicial appointments and judicial nominating commissioners to ensure that data are accurate.
5. *Messaging and Promoting*: Publishing stories from all sources of the value of diversity to the broader community and emphasizing the need for a more diverse judiciary.

The Coalition is now in the implementation phase of our work. Our leaders have broken into seven teams organized by a goal and focused on implementing a section of the action plan. One of the Coalition's goals is to harness the power of our broader community. The Coalition's work does not usurp the individual work of community partners. Our goal is to design a plan to work together in a new way by:

- Sharing ideas
- Designing new approaches
- Building a broad, coordinated coalition
- Tackling systemic changes

In addition to the seven teams, we have built a powerhouse of community coalition members that include:

- The Colorado Supreme Court, the Court of Appeals and the Chief Judges' Council, District and County Court Judges' Associations
- All of the diversity bar associations and specialty bar associations
- The State Public Defender's Office, the Attorney General's Office, and the Colorado District Attorney's Council
- The American Board of Trial Advocates, the American College of Trial Lawyers, the Faculty of Federal Advocates
- The Center for Legal Inclusiveness

The Coalition has 60 community leaders representing over 27 community organizations working together to implement the action plan.

The results have been promising. Forty percent of judges in Colorado are now women, including five Black female judges. In one of the five counties on which we focused, the first-ever Black judge has been appointed, and in the county with the highest number of Black people, the first Black judge in over a decade was appointed to the district court bench. In 2018 Colorado had three Black, 27 Hispanic, five Asian, and 296 white judges on the bench. Today, there are 10 Black, 32 Hispanic, one Native American, six Asian, and 138 female judges.

Although there has been important growth, there remains substantial work to be done. For example, the county with one of

JUDGE JACKSON'S INCLUSIVENESS OUTREACH EXAMPLE CONTACTS

CBA/CJI Diversity on the Bench Coalition Website:
<https://www.cobar.org/For-Members/Diversity-on-the-Bench>

Coalition Chair Patricia Jarzowski: Patricia.Jarzowski@iclqud.com
303.322.3344

Colorado Judicial Diversity Outreach Coordinator Sumi Lee:
sumi.lee@judicial.state.co.us 720.625.5953

Judge (ret.) Gary Jackson: gmjackson303@gmail.com
303.929.2413

largest minority population has zero Black judges at any trial level, and no Hispanic judges on its district court bench.

When a new governor took office in our state, Gov. Polis, in January of 2019, the Chief Justice of the Colorado Supreme Court invited me to join a group of ten appellate and district judges to advise him about judicial diversity issues. After that meeting I made a point of developing a working relationship with the Head of Boards and Commissions for Colorado who monitors the composition of the 23 state judicial nominating committees for judges, and the chief legal officer for the Governor, who coordinates the interviews for the three finalists for each position. Through regular contact, I kept the conversation regarding the elimination of the gavel gap in the forefront of their deliberations. Meanwhile, on the legislative side, the Colorado legislature approved a new position in the State Court Administrator's Office called Outreach Coordinator who is responsible for education and outreach related to judicial vacancies. This new position, the first of its kind in the nation, is applying a data-driven approach. The Outreach Coordinator's responsibilities include education and outreach to attorneys and students, both undergraduate and law school, about judicial opportunities; recognition and eradication of systemic barriers; education on the application process; and work on existing judicial programs and committees. The Coalition is working closely with the Outreach Coordinator, with whom I have made several presentations to local bar associations, specialty bars, and universities to encourage individuals of color to consider judgeship a part of their career path.

But working behind the scenes as an insider will not be enough. Public pressure was needed to speed the process of change. We needed more trim-tabbers. Over the course of my career, I developed relationships with the mainstream press, as well as neighborhood and minority media outlets. I wrote several articles about my pathway to the bench and the lack of judges of color. One media outlet after another found the issue newsworthy. On July 19, 2020, the *Denver Post*, Colorado's only state-wide print publication, published a Sunday front page investigative report outlining in statistical detail the lack of judicial diversity at all levels throughout the state. The issue was picked up by local television news shows, and then by blogs and podcasts that have continued to expand across social media.

Just as in football, an effective ground game is essential to an offense strategy, my ground game required weekly meetings with representatives from a variety of trial organizations, including many specialty/diversity bar associations in Colorado, such as the Sam Cary Bar Association, the Colorado Hispanic Bar Association, the Asian Pacific American Bar Association of Colorado, the South Asian Bar Association of Colorado, the Colorado Lesbian Gay Bisexual Transgender Bar Association, the Colorado Criminal Defense

Bar, and the American College of Trial Lawyers. Each specialty/diversity bar became an active participant in working to eliminate the gavel gap. Twenty-three organizations eventually became coalition partners, along with numerous volunteers working in teams.

But even with all of the above work and effort, it still will not be enough. Many public and charter schools remain segregated by race and economic background. Students of color do not see themselves as agents of change within the legal system. More often they feel victimized by that system. Hence, the most essential work needs to begin by sparking the imaginations of middle school students so they recognize that a career in the legal profession is within their reach; then, continuing to nurture that possibility through presentations and programs sponsored by lawyers and judges in the high schools; and finally, supporting college students with strong, formal mentorship programs that guide them through law school. My colleagues and I regularly talk to students in middle and high schools about how they can make a difference as attorneys and judges. We inform them of the avenues available to diverse students to join the profession, and the specialty bars have established scholarship opportunities for deserving men and women. I am also a part of a group of alumni from the University of Colorado who connect with undergraduates from a variety of colleges and universities to recruit students to the CU law school. We have organized a mentor program to guide students of color through the challenges of being in the minority in their law school classes.

In 2009, when I was presented with the Colorado Bar Association's Award of Merit, in my acceptance speech, I acknowledged all of the "helping hands" that assisted me in my career trajectory. Now I realize that "helping hands" was an understatement. Today, there can be no single voice, no one leader who can bring these urgent changes. The works of Dr. Martin Luther King, César Chávez, Dolores Huerta, President John F. Kennedy, Justice Ruth Bader Ginsburg, and John Lewis served to inspire, but now the hard work of "trim-tabbing" falls equally upon all of us in the legal profession. What is at stake is no less than the health of the American judicial system. We have just witnessed what calamity exists when the system of checks and balances in our government is thrown out of balance. As America grows more racially and ethnically diverse, that delicate balance can only be maintained when the members of the judicial branch, from municipal and county courts to the state and United States Supreme Court, look like the citizens they serve. No longer can we afford a kind of lazy truthfulness that does no more than hope for change. The call to action for each one of us cannot be ignored any longer.



Hon. Gary M. Jackson, a Colorado native, worked as a prosecutor for seven years, a senior partner in law firms for thirty-seven years, and a judge for seven years before retiring from the Denver County Court in 2020. Co-founder of the Sam Cary Bar Association, the Colorado Association for Black Attorneys and Judges, and the Colorado Criminal Defense Bar, he has received a multitude

of awards for judicial excellence and service to the community. Judge Jackson will provide mediation and arbitration services with Judicial Arbitrator Group, Inc.

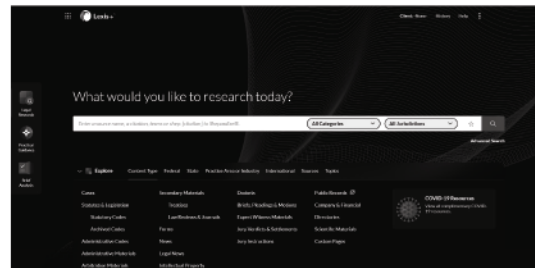


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Charting a Path Forward to Create Justice for All

Danielle Elyce Hirsch & Lillian Wood

If we are willing to search for new ways to solve old problems, if we are willing to put our egos aside and remember that it is not about us, if we are willing to work our tails off, if we are willing to work together, I know that we can build a justice system that will not only dispense fair, sensible, and efficient justice, that will not only help to address the formidable problems faced by so many of the [residents of our communities], we can be a model for the nation and for the world.”—Chief Justice Ralph D. Gants¹

It has been an unprecedented year, and the challenges we face are not yet over. Chief among them are the dual crises of coronavirus and racism, challenges which are distinct, yet undeniably intertwined. Existing research indicates that members of poor and minority groups are less likely than their white and higher-income counterparts to seek help when they experience a civil legal problem. Indeed, roughly three-quarters of the members of poor and minority groups do not seek legal help when they experience such problems.² Frequently, people’s legal problems are connected to other issues in their lives, including domestic violence, substance abuse, mental health, poverty, or lack of housing or employment.³ This article showcases the Justice for All Initiative as one way forward for courts and a broad range of partner stakeholders to increase capacity and address the challenges faced by all people—with special emphasis on those traditionally underserved—with unmet civil legal needs. Through grants and engagement in fourteen states and the District of Columbia, the Justice for All Initiative (JFA) has supported systems-oriented strategic planning and systemic collaboration to establish new ways for all people with unmet civil legal issues to get the help they need, in the form they need it, when they need it.⁴

The pandemic has cast a spotlight on systemic inequity and

how those with less education, less money, and fewer resources bear a disproportionate burden of the suffering. Public health officials have long known that systemic racism is a public health issue, and Black, Latinx individuals, and Native and Indigenous Americans have experienced a disproportionate burden of pandemic-related infections and deaths. The killings of George Floyd, Brionna Taylor, and Ahmaud Arbery brought into sharp focus the issue of racial inequity, in terms of not only policing, but also the pervasiveness of systemic racism.

Race affects who can flee from a viral hotspot to a second home and who shares a roof with family members across generations. It affects access to running water, sewage, and sanitation facilities. It affects who is able to work remotely and who has to leave home to work and keep society afloat. It affects who has easy access to testing and who puts off treatment because of the worry about the costs. All of this is to say, race plays a major role in who lives, who dies, and who gets help. And as such, the fracture lines of society have been horribly exposed, with people of color living in underserved communities hardest hit.

Between half and two-thirds of the U.S. population confront at least one civil justice problem each year, commonly affecting health, housing, employment, or money; this includes issues of wage theft, eviction, debt collection, bankruptcy, domestic violence, mortgage foreclosure, immigration, obtainment of public benefits, access to special education services, and the care and custody of children and dependent adults.⁵ When these issues are not resolved effectively, it can result in homelessness, poverty, illness, injury, or family instability. Despite their seriousness, most of these civil justice issues receive no legal attention: those who experience them get no legal counsel, and they are not brought to court. Instead, those who experience most of these unmet civil needs—commonly referred to as a justice gap—must figure out how to address these problems on their own. The access-to-justice gap is a crisis of exclusion and inequality. Only some people, and only some kinds of justice problems, receive

Footnotes

1. This quotation is taken from remarks made by Chief Justice Gants during his installation ceremony to become Chief Justice of the Supreme Judicial Court (July 28, 2014). Before his untimely and tragic death in September 2020, Chief Justice Gants also served as a founding co-chair of the National Justice for All Advisory Committee.
2. See, e.g., R.L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* (2014).
3. Matthew Desmond writes about the importance of residential stability and the “heavy toll” that eviction exacts on families, communities, and children. “Losing your home and possessions and often your job; being stamped with an eviction record and denied govern-

ment housing assistance; relocating to degrading housing in poor and dangerous neighborhoods; and suffering from increased material hardship, homelessness, depression, and illness—this is eviction’s fallout.” M. DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2017), at 298.

4. JFA is housed at the National Center for State Courts in collaboration with the Self-Represented Litigant Network. The fourteen states who have received direct JFA grants as of January 2021 are Alaska, Colorado, Florida, Georgia, Hawai‘i, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, New Mexico, and New York.
5. See, e.g., Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017).

legal resolution. The access-to-justice gap is also systemically unequal: some groups (wealthy people and white people, most often) get more access than other groups (like poor people and racial minorities).

As the nation confronts issues of racial justice and equitable treatment for all, state court leaders are looking at ways to reduce disparities in their operations, and at how efforts to modernize court procedures can help. In statements and guidance, state court leaders have acknowledged that severe racial disparities are not merely an unfortunate byproduct of a race-blind system, but the manifestation of discrimination embedded in the system itself.⁶ Many of these state court leaders see racial equity considerations as among the most critical they face as they oversee court operations. Long-standing concerns about racial disparities may be most prevalent in the criminal courts, but they play significant roles in civil courts as well. Among the many huge questions this raises are:

- How do people find out that their problems have a potential legal solution?
- How can an overextended civil legal aid and pro bono system meet the needs of all those with civil legal issues when they are already turning away more people than they are able to serve?
- Have courts developed the necessary self-help resources to educate people—especially those with traditionally unmet civil legal issues—about the substantive and procedural law necessary to engage the legal system?
- How can the processes for dealing with housing disputes or civil debt claims, for example, be changed to ensure fair treatment of litigants, regardless of race?
- Have court reforms made it easier for people to represent themselves, whether in remote, online, or in-person court proceedings?
- How does the digital divide affect people's access to the courts?

There are many ways that state courts and their partners can and must respond to the challenges of the pandemic and racism. This work has never been more urgent.

As such, it is important to share the JFA framework and early lessons from states that have adopted it so that other jurisdictions can use these tools and benefit from their experiences to help meet the moment. This paper will describe the JFA framework and will offer several tangible examples of how it has been applied by participating state courts and their partners to expand access to justice. While this kind of intentional strategic planning is undeniably resource-intensive and challenging, it has helped to build the “institutional muscle” necessary to address the needs of all people with unmet civil legal needs and will help participating jurisdictions meet these challenges in the months and years ahead.

WHAT IS JUSTICE FOR ALL?

The aim of JFA is a reframing of the concept of what the justice “system” means. A brief history of JFA begins with national leadership from the Conference of Chief Justices and Conference of State Court Administrators. In 2015 these bodies unanimously passed Resolution 5, Reaffirming the Commitment to Meaningful Access to Justice for All.⁷ This resolution recognized the significant advances in the access-to-justice field over the past decade and concluded with a call to action to achieve the aspirational goal of meaningful access to justice for all:

“Long-standing concerns about racial disparities may be most prevalent in the criminal courts ...”

... the Conference of Chief Justices and the Conference of State Court Administrators support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urge their members to provide leadership in achieving that goal and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes; and ... the Conferences urge the National Center for State Courts and other national organizations to develop tools and provide assistance to states in achieving the goal of 100 percent access through a continuum of meaningful and appropriate services.

By accepting the challenge of Resolution 5, access-to-civil-justice experts launched the JFA Initiative. To begin, a national JFA Advisory Committee of incredible national thought leaders was formed to develop the JFA framework and guidance and to determine the multistage process for how state teams could plan and then achieve systemic access-to-justice change. This national JFA Advisory Committee—including leaders within state supreme courts and state court administration, national legal aid organizations, the Self-Represented Litigation Network, bar associations, and access-to-justice commissions—were propelled by the desire to solve the access-to-justice gap creatively and collaboratively. Significantly, the Public Welfare Foundation, the Kresge Foundation, the Open Society Foundations, and the JPB Foundation have each provided generous support to fund this work nationally and locally.

The goal of JFA is every bit as fundamental as its name suggests: to help courts and their partners reimagine what the justice ecosystem must be to assist all those who need civil legal help. At its most basic, JFA has four main objectives:

1. Identify the existing spectrum of legal services, from self-help legal information, to unbundled legal services, to full legal representation;

6. CCJ/COSCA, Resolution 1: In Support of Racial Equality and Justice for All (proposed July 2020), https://ccj.ncsc.org/__data/assets/pdf_file/0029/42869/07302020-Racial-Equality-and-Justice-for-All.pdf.

7. CCJ/COSCA, Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All (adopted as proposed, 2015), https://ccj.ncsc.org/__data/assets/pdf_file/0013/23602/07252015-reaffirming-commitment-meaningful-access-to-justice-for-all.pdf.

“As with any thoughtful reform, the process starts with inventory, reflection, and analysis.”

2. Analyze gaps in service to understand what is missing from the civil justice ecosystem;
3. Create an action plan to fill those gaps; and
4. Identify the ways that the JFA team will sustain momentum and measure progress toward providing 100% access to justice for all.

Traditionally, courts and the legal community focus their efforts on serving the people turned away by civil legal aid providers and those who end up representing themselves in court.⁸ To be clear, it is hugely important that courts and the legal community provide the resources to address the needs of those who seek free or low-cost legal representation and cannot find it, as well as those who must handle their civil court cases on their own, without legal representation. And yet, JFA demands a wider scope: helping *all people with unmet civil legal needs*, including both those who take action on their legal needs as well as those who do not realize that their problems have a legal component.

JFA guides state teams to collaborate with a wide range of legal and nonlegal stakeholders to work together, share resources, and, ultimately, build capacity so that all people get the appropriate help to address their civil legal needs. As a vital part of this work, state teams must form new collaborations among diverse partners, including nonlegal stakeholders such as

direct human services providers, libraries, schools, community organizations, faith communities, law enforcement, and other state and local branches of government.

As with any thoughtful reform, the process starts with inventory, reflection, and analysis. JFA calls for state teams to conduct a careful inventory of their existing processes, partners, self-help services, and anything that will influence the court users' experience and ability to get their legal needs met. At a conceptual level, JFA teams use this period to better understand what kinds of legal problems people face, where legal information and legal representation is currently available,⁹ and where people currently turn for help, including to medical professionals, faith leaders, public librarians, or others. Taking this broader approach is not the conventional instinct within the legal community. After all, our system of state courts was designed by and for trained legal advocates, but this lawyer-centric approach is not meeting the needs of the majority of those who need assistance within the courts.

This JFA analysis includes looking at fifteen different components of the access-to-justice system, which includes:

- Stakeholder Capacity and Governance of Traditional Stakeholders;¹⁰
- Emerging Practices and Innovations;¹¹
- Judicial and Court Staff Education;¹²
- Consumer Needs and Experience;¹³
- Self-Help Centers and Plain Language Forms;¹⁴
- Triage and Referral;¹⁵
- Non-lawyer Services;¹⁶
- Limited Scope Representation;¹⁷

8. By “legal community,” we mean to include state access-to-justice committees, task forces or commissions, state and local bar associations and bar foundations, civil legal aid and pro bono organizations, law school clinics and pro bono programs, IOLTA and other legal aid funders, and modest means incubators.
9. This must include information about available legal programs, including the scope of the services, target populations for services, service priorities, service restrictions, geographic reach, service-delivery numbers, and which, if any, legal and nonlegal entities with whom they partner. And this must also include allied professionals that people access, including as it relates to housing, employment, education, safety and security, food security, health care, and public benefits.
10. The “Stakeholder Capacity and Governance of Traditional Stakeholders” component offers insight into the structure of all stakeholders engaging in the JFA process to inform what roles different players can take in access-to-justice activities. For example, courts cannot undertake substantive law reform, although community groups can. Likewise, legal aid providers funded by the Legal Services Corporation (LSC) cannot handle class-action litigation, but private attorneys or non-LSC-funded legal aid providers can.
11. The “Emerging Practices and Innovations” component asks the project team to mark the frontier of innovation today. This component is often changing and will depend on the jurisdiction and the stakeholder.
12. The “Judicial and Court Staff Education” component focuses on the investment state and local courts make in educating judges and court staff about how to engage with people without lawyers ethically and effectively. For judges, these education efforts typically focus on the procedural and substantive rules that govern their

work, while court staff education can be framed in terms of offering the highest level of customer service possible as neutral and impartial public servants.

13. The “Consumer Needs and Experience” component is designed to help inventory how stakeholders learn about the public's needs and experiences in and outcomes from the civil justice system, with a focus on the individual court user's experience. The JFA project team is encouraged to collect data on how various stakeholders incorporate user experience in their work.
14. The “Self-Help Centers and Plain Language Forms” components focus on the delivery of assisted and unassisted legal self-help to the public, which can also be provided in-person, remotely, or as posted on a website, as well as the promulgation and maintenance of standardized, plain-language forms that address common areas of need.
15. The “Triage and Referral” component focuses on how courts, civil legal aid, and pro bono providers assess and sort inquiries for legal help. The gold standard is for a robust and integrated triage that assesses what services an individual and situation need and then is followed by appropriate, connected, and verified referrals.
16. The “Non-lawyer Services” component assesses the development of non-lawyer services, that is, people and things (e.g., computer and smartphone applications, fixed-choice forms, books, do-it-yourself kits, human beings) that are not lawyers but can help people with legal and procedural information.
17. Most jurisdictions have amended their rules of ethics and procedure to allow for limited scope representation, otherwise referred to as unbundled or discrete task legal assistance. The “Limited Scope Representation” component measures the acceptance by the courts and adoption of limited scope representation by the bar.

- Full Representation;¹⁸ and
- Community Integration and Prevention.¹⁹

This framework offers sample survey questions for court users and nontraditional partners, topics to inventory and consider, and other resources to allow an interested jurisdiction to analyze its progress as it relates to each component. The JFA framework is adaptable, allowing for modification to account for unique needs and resources of each participating jurisdiction. JFA state teams have approached the challenges of this project and the current events of the past year in different ways, and as such, each jurisdiction must customize the strategic planning/inventorying in a way that makes sense for its needs.

LESSONS LEARNED AND INITIAL SUCCESSES OF THE JFA PROJECT

JFA was designed as the scaffolding to support states working to better understand the existing capabilities and resources that support access to justice and to identify ways to fill in gaps of service to reach those who have been unable to obtain the legal help they need. As the many examples below will demonstrate, JFA has begun to change each participating state's access-to-justice landscape in a sustainable way as part of building a more integrated and more interconnected system to accomplish a common vision of meaningful access to justice for all. Put another way, JFA offers new thinking and new approaches that have helped participating states to focus their vision and chart a path forward to fulfill that vision.

CONVENING DIVERSE PARTICIPANTS CREATES A ROBUST OPPORTUNITY FOR CHANGE

Expanding access to justice requires innovation and moving past the idea that an attorney or a courtroom is the best or only solution for meeting legal needs. Partnering across legal, social services, medical, and information providers to address the array of justice needs that people face may be critical to early detection, diagnosis, and intervention to empower people to solve their problems before they find themselves in the legal system. Partnerships with nontraditional partners are vital to extend the reach of existing legal help.

A core component of JFA is a recognition of the power of listening to new voices and partnering with diverse stakeholders. By reframing justice as more than the traditional legal system, it freed up JFA teams to think of this as an ecosystem of interconnected services provided by both legal and nonlegal service providers who address the myriad of issues that people encounter. Unless justice needs are addressed together, individual problems will persist.

18. The "Full Representation" component addresses how full legal representation fits into the full picture. Because there is such unmet need, full representation should be reserved for people with circumstances so complex or for whom a negative outcome is so devastating that full representation is the only way to address the issue.
19. The "Community Integration and Prevention" component contemplates collaborative partnerships with robust information exchange, early issue identification, cross-training between organizations and stakeholders, and all associations and practices that can integrate community resources into provider and court services to intercede

Surveys, focus groups, and community-listening sessions exposed barriers invisible to traditional access-to-justice partners, and they also highlighted existing resources that were not being exploited. Many states found that the act of meeting created a knowledge base of resources that had previously been siloed, unknown to all but those who had created or regularly used them.

JFA states engaged with diverse partners in ways that fit their unique geographies and communities. Some of the many examples include:

- Alaska used a social-network-analysis tool to identify the nontraditional legal partners to join in maximizing human capacity to solve legal problems.
- Michigan completed a thorough assessment of its civil justice system through town hall meetings, stakeholder surveys, virtual focus groups, and work group summits with more than 100 stakeholders, including members of the public, court administrators, judges, civil-legal-aid agencies, community organizations, public libraries, and domestic-violence-shelter advocates.
- Minnesota partnered with United Way and thus had access to a large and robust net of human-services providers.
- Georgia and New York found strong partnerships in public and law libraries to serve traditionally underserved communities in rural and suburban communities.
- Kentucky began to train legal navigators in drug recovery centers to serve the often-unmet legal needs of those living in recovery.

Several states found partners in the business community, organizations like the AARP, faith-based coalitions, medical providers, and so many others. When applied correctly, JFA information gathering identifies the networks where people with unmet civil legal needs have been and are currently going to look for legal information, especially when they might not yet realize that their problem is a legal one.

Interestingly, several JFA teams discovered that rural communities were often more connected and coordinated than their urban counterparts.²⁰ These existing rural networks have served as models for larger communities in maximizing the human capacity to solve problems.

20. For example, the Alaska JFA team concluded that "Rural community hubs show a higher density of collaboration and great number of connections between partner organizations than larger communities." Alaska JFA Report, https://www.ncsc.org/__data/assets/pdf_file/0022/25519/ak-jfa-plan.pdf, at 20. This study revealed that a high number of organizations located in rural hub communities have strong ties and relationships with Anchorage- and Fairbanks-based organizations.

"A core component of JFA is a recognition of the power of listening to new voices ..."

“The cataloging of previously hidden barriers and resources marks the first step...”

From our initial experience, JFA underscores that legal providers and courts must partner with providers in the medical field, social services, and information organizations such as libraries and local governments to fill the justice gap. Partnering across sectors illuminates new ways of problem solving, and may be the key to the early detection, diagnosis, and intervention necessary to

help people solve their problems before they find themselves in the court system.

IDENTIFICATION OF GAPS IN EXISTING SERVICES MAPS A DIRECTION FORWARD

All JFA states have used the inventory process outlined in the guidance materials as a tool to identify gaps. Despite all of the great work being done across these JFA states, all states have found areas in which essential services were lacking and where people continue to face obstacles to secure the services and information they need. This identification process provided critical information for prioritization and planning. The cataloging of previously hidden barriers and resources marks the first step; next, the challenge is to create mechanisms to fill identified gaps by utilizing existing resources and/or creating new ones.

Armed with this information and these collaborative relationships, the JFA framework asks state teams to look at the data they have gathered in a new way. Some examples include:

- After absorbing the needs assessments and strategic planning done through JFA, Montana’s JFA team confronted the reality of a family law court system that is too often overwhelmed by—and overwhelming to—self-represented litigants, and as such, the JFA team has considered whether process improvements, including informal domestic relations trials (IDRTs), can be made to make it easier for people to address their family law needs.²¹
- Among the Massachusetts JFA team’s *many* improvements to the state justice ecosystem was something very simple: they piloted a plan to have expanded hours in three individual courthouses. They used the feedback and data from those pilots to recommend that expanded hours can lead to easier access to many people, especially those who work during conventional court hours.²²
- The New York JFA team held multiple listening sessions around the state, getting multiday, in-depth feedback from more than 200 community members. The sessions

confirmed that “legal issues faced by community members do not always require representation,” and so the JFA team focused some of their efforts on expanding the role of non-lawyer navigators who can spot legal issues and give information, hopefully before the matters escalate to needing the court.²³

Geographic Information Systems (GIS) mapping is designed to capture, manage, analyze, and display all forms of geographically referenced information, and this is an emerging tool for justice-related work. Many different types of data can be integrated into GIS and represented as a map layer, including communities, roads, records, locations of legal services and courthouses, available broadband services, or languages spoken at home. When these maps are layered on top of one another, it reveals insights into the relevant characteristics of a community that may be important for strengthening justice infrastructure.

- The Alaska JFA team used GIS mapping to show, among other things, that there is a sizable gap between the number of filed cases and the projected legal needs, which demonstrated that Alaskans were not going to court to address all of their legal needs.²⁴ The Alaska research showed the power imbalance in who is most often represented in court versus who represents themselves. For instance, “Close to 99% of debt cases involved a lawyer, but 92% of those cases had only the debt collector represented and less than 1% had a lawyer representing just the debtor. Only 6% of the cases involved both sides having representation.”²⁵ Moreover, mapping was a particularly appropriate way to assess unmet legal needs in Alaska, because many communities are not connected to each other by roads and are accessible only by airplane, boat, or snow machine.
- Through their GIS work, the Louisiana JFA team discovered that nearly 15% of the state’s population living at or below 200% of the federal poverty line live in “civil legal resource deserts,” that is, areas that are not within driving distance of legal aid centers, self-help centers, or legal libraries. Now, the JFA team and their partners and stakeholders have a precise idea of where they ought to focus their efforts.

Whether it is through GIS mapping or a more traditional form of inventory and analysis, JFA has revealed which areas of a jurisdiction have the weakest ties with nonlegal service providers and which areas of law have the most need and the lowest density of available resources.

21. Family, or domestic relations, cases represent one of the largest categories of civil law. A formidable fraction of those cases involves at least one party without a lawyer. To even the playing field for self-represented litigants, in IDRTs, the formal rules of evidence do not apply, and there are no objections or cross-examinations. The parties speak directly to the judge—with or without guidance from a lawyer—and do not have to worry about whether the information is admissible. IDRTs provide a more affordable, accessible, and less intimidating forum than the formal court procedure. Alaska courts have offered the option of IDRTs since the Alaska Supreme Court

adopted Civil Rule 16.2 in 2015.

22. Massachusetts Justice for All Strategic Action Plan (December 2017), https://www.ncsc.org/___data/assets/pdf_file/0017/25532/ma-jfa-plan.pdf.

23. See, e.g., <https://www.legalhand.org/>; New York Justice for All Strategic Plan (December 2017), at 20.

24. See Alaska JFA team’s story map, Alaska’s Justice Ecosystem: Building a Partnership of Providers, <https://is.gd/qguSRT>.

25. Alaska Justice for All Strategic Action Plan (December 2017), <https://www.ncsc.org/jfa/lessons-learned/alaska>.

THE PANDEMIC HAS BEEN A MASSIVE DISRUPTION, AND TECHNOLOGY CAN BE A STRONG MULTIPLIER OF HUMAN EFFORTS

Before the pandemic, in the majority of states, court users had no choice about whether to visit a courthouse to resolve their cases—they were required to appear in person. The pandemic has forced state courts to figure out how to maintain access to justice while keeping court users, the public, and court employees safe. The pandemic has led state courts to embrace online platforms like never before. Often, the introduction of innovations like the option to appear remotely in court proceedings by telephone or video or e-filing systems that sync automatically with the courts' digital case files make it easier and less intimidating (especially for self-represented litigants) to participate meaningfully in the court process without having to take off work or find childcare. The exploration and adoption of new technologies are a vital part of JFA and all access-to-justice work, and JFA teams have been critical voices in advocating that any adoption of technologies also considers the needs of court users related to the digital divide.

One innovation that several JFA teams have worked on has been the development of statewide legal information and referral portals.

- Colorado has had success with a specialized online portal designed to conduct triage and provide seniors, vulnerable adults, and their caregivers with information and direct access to legal and community resources.²⁶ The portal guides a user through basic questions to direct her to the proper resource, and it also has opened up communications between the organizations and stakeholders who were already involved in the civil justice system.
- The Minnesota JFA team spotted the inefficiencies in the state courts, bar association, and civil legal aid each maintaining their own legal information web pages and referral lists. Each site linked to each other, but they did not share user data nor did they automatically update each other with any new or expiring resources. "This means that there is staff time spent at each civil legal aid program, the statewide self-help center, law libraries, and bar associations creating and maintaining referral lists. When new services are created or existing services end, there is no easy way to inform all stakeholders."²⁷ The JFA team and their partners worked to build an online portal at which a user answers directed questions about herself and her legal issue, gets self-help results (e.g., fact sheets, articles, links to and info on the appropriate free or low-cost services available), and can apply for a lawyer (if the user qualifies and one is available) online.²⁸

Of course, an online portal or even a smartphone app is limited in its ability to serve unmet legal needs of vulnerable people if those people happen to lack access to the technology the portal requires. Some promising JFA pilot projects designed to mitigate

the digital divide have faced setbacks since the pandemic's onset. For example, many state JFA teams have worked to install court service kiosks in courthouses, community centers, libraries, or any other public place.

"The pandemic has led state courts to embrace online platforms like never before."

- In New Mexico, the JFA team noted how court closures and the fast move to online court and legal services ran the risk of shutting out people from the court process because of the digital divide. Working with legal services providers and courts, the JFA team supported telephone legal clinics to advance the number of community members who could provide telephone or in-person (but distanced) legal information to those who could not find it online. Also, the JFA team launched a project to identify and publicize Wi-Fi hotspots to enable court users without Internet access or adequate data to benefit from the court and community resources that are easier to find and use online.
- In Hawai'i, JFA work sensitized the courts to the digital divide challenges facing many of its state's residents, especially on neighboring islands. As such, when court operations went online in spring 2021 in response to public health needs due to the pandemic, the JFA team developed vital resources, including tips for getting online and assembling a state free-WiFi map that were shared widely, including throughout public library networks.²⁹

The move to online court services is likely beneficial for most court users. JFA state teams will play increasingly important roles to ensure that the best innovations to go remote necessitated by the pandemic remain, and that those who need in-person help are able to still get it when we are on the other side.

ACCESS-TO-JUSTICE PROJECTS MUST ENGAGE WITH UNDERSERVED VOICES TO FULLY UNDERSTAND WHAT IS EXPERIENCED AND HOW TO WORK TOGETHER TO CRAFT LASTING SOLUTIONS

Some of the projects and components of a JFA-informed justice ecosystem may not seem, on their face, to further racial equity. As the framework iterates, evolves, and improves, the JFA framework may be modified to explicitly name the racialized justice gap and the goal of eliminating it. Still, when implemented correctly, each of the blended concepts that make up JFA should have the effect of improving access to civil justice for all, but especially for Black, Indigenous, and people of color whose voices have not traditionally informed the way court processes are built.

A few examples of JFA work that has expressly looked at racial equity issues are as follows:

26. See <https://www.coloradosourcenetwork.com/>.

27. Minnesota's Justice for All Strategic Action Plan (December 2017), <https://www.ncsc.org/jfa/lessons-learned/minnesota>.

28. See <https://www.lawhelpmn.org/>.

29. See <https://hstatelawlibrary.com/hawaii-free-wi-fi-hotspots/> and also Tips to Get Online (paper handout on file with authors).

- When New Mexico, for instance, conducted their self-inventory while racial equity protests were dominating the public's attention, the JFA team was able to admit that their commission itself was not properly representative of the people it aims to serve. Put simply, the demographics of their access-to-justice commission and subcommittees did not look like the demographics of the state. Recognizing the value in knowing when you need help, they have engaged a race equity expert to assess the commission structure, how it recruits and engages participants, and how its processes and participation methods could better reflect equity principles.
- The Hawai'i JFA team, for example, held community meetings hosted by trusted and established diverse and often indigenous community organizations on O'ahu, Maui, Moloka'i, Lāna'i, the Hawai'i Island, and Kaua'i. They held meetings with government directors and managers, healthcare leaders, labor unions, and service partners related to immigration to discuss unmet civil legal needs for their constituencies. Instead of tackling whatever issues the court leaders thought were most urgent, their assessment was informed by a wide variety of stakeholders, including their most vulnerable residents.
- The Illinois JFA team used existing research and information on self-representation in family court as a foundation for understanding self-represented litigants.³⁰ From that baseline, they supplemented the information with telephone interviews. The Illinois team found that the state population of Latinx self-represented litigants did not match up with the baseline research, and so the JFA team targeted their phone interviews to members of the Latinx community to fill that gap in community input. They utilized their wide net of community resources and offered to conduct interviews in English and Spanish to capture input from a diverse group of participants using data that had shown the access gaps in their system.

WHERE DO WE GO FROM HERE?

The JFA framework is exactly the tool court leaders can use to learn from other jurisdictions who may have already done more work to wrestle with the racial disparities baked into the traditional justice system. Time will tell if this will be a sustainable shift toward a more equal society.

In theory, the kind of systemic collaboration the JFA process compels is both fashionable and uncontroversial. In practice, it is hard and time-consuming work that requires sustained attention to adapt to ever-changing needs. The work inventorying, strategizing, partnership building, and implementing the components of JFA is like fitness training and building muscle. If your justice system is in fit shape and is thoughtfully maintained and advanced, you can be ready for anything.

Creating a continuum of linked, meaningful, and appropriate services is key to expanding access to justice. In addition to

building and maintaining partnerships with faith leaders, human service providers, information service providers, and other government agencies and units, access-to-justice teams must also develop and share legal information and leverage technological and human capacity to expand the reach of legal assistance and to educate people about their options and empower them to successfully access the legal system.

Solving civil legal problems will not be achieved by the legal system alone. The JFA approach is one of integration and collaboration to create an expansive ecosystem of services to make sure that no matter where a person goes for help or information, they can find the help they need for their unique issues. The goal must be that whatever proverbial door clients, patients, or customers walk through, it is the right one to get where they need to go.³¹



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30. See Institute for the Advancement of the American Legal System, Cases Without Counsel project, at <https://iaals.du.edu/projects/cases-without-counsel>.

31. Information about the state teams' work, guidance materials about the JFA process, and more can be found at www.ncsc.org/jfa. Anyone interested in speaking with us more about JFA should contact the authors at justiceforall@ncsc.org



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The Compassionate Court: Reforming the Justice System Inside and Outside

Jamey H. Hueston, Judge, Ret'd

There is growing scholarship and justice system attention regarding the quality and effect of court interactions on citizens who come before the bar, as well as court system employees. From this research and the impact of therapeutic court experience, the Compassionate Court is born. The Compassionate Court considers court matters from a wider perspective that factors human behavior and disabilities, as well as community and societal influences that caused conflicts, and encourages courts to formulate alternative therapeutic solutions. The Compassionate Court reflects a coherent, navigable, and humanistic judicial process no matter the severity of the matter or difficulty of the personalities involved. It embodies compassion as part of a cohesive, integrated structure at each door, floor, person, and component in the court. The result is a court system whose focus is on the well-being of its users, not just resolving the narrow issue at bar.

By integrating the tripartite practices of procedural fairness, therapeutic jurisprudence, and judicial engagement with all judicial system components, and with contributions from behavioral disciplines, courts will formulate creative solutions to hinder the revolving door of repeat litigation. In the end, the compassionate environment will positively affect the well-being of both judges and litigants alike.

This article paints a tableau of how court components can be enhanced and integrated to strengthen the systemic whole.

Section I describes compassion and its foundational underpinnings and explains its *raison d'être*—essential purpose in the enhanced court system. The section proposes that a Compassionate Court, which is reflected in all components of the court structure, will benefit its citizenry and the community while simultaneously manifesting core judicial values.

Section II proposes that the tripartite therapeutic components of procedural fairness, therapeutic jurisprudence, and judicial engagement form the central core of the compassion philosophy. Together, they will positively improve the quality of communications with the parties, increase respect for the justice system, and enhance a compassionate administration.

Section III explores the court's physical components—bricks and mortar, materials, and architectural elements—that tangibly convey openness, transparency, and compassion in the court. It also considers non-tangible elements—systems, processes, and services—that constitute a Compassionate Court. This section continues with a discussion on judicial wellness and scientific research that demonstrates the beneficial health benefits of compassion and related mindfulness and empathetic practices. Practicing compassion generates a more positive milieu for judges and those who support the administration of justice by reducing

daily stress and its harmful consequences. This occurs as they benefit from dynamically contributing to solution-driven, therapeutic processes.

Section IV explores the training requirements of building a Compassionate Court. As with any new comprehensive idea, creating a Compassionate Court requires training, thoughtful planning, and financial investment. Strategic planning develops the roadmap essential to establish a comprehensive design and determines numerous other details that comprise system change.

Ultimately, this article offers that a Compassionate Court begins from the moment the public enters the building and lasts until the litigation process ends with the gavel's final fall. Its synergism can improve public respect for the court system and improve the experience of court users at every intersection.

SECTION I: THE COMPASSIONATE COURT

The judicial system, replete with its many components and complexities, can be intimidating and difficult to navigate for both novices and seasoned users alike. Many enter the court with psychological issues, physical disabilities, and societal influences that may have contributed to the court conflict. Individual tension, as well as general negativity in the court environment, can be palpable at times with often counterproductive consequences to judiciary goals of efficiency and quality of justice. However, the judicial system can transform this environment by improving the quality of human interactions, adopting therapeutic multifaceted approaches to resolving conflicts, and constructing a healthy court environment through principles of the *Compassionate Court*.

THE COMPASSIONATE COURT CONCEPT

Compassion has been defined as “kindness or generosity of the heart,” “sympathy in action,” and “sympathy with another's distress combined with a desire to do something about it.”¹ It offers the means to confront difficult emotions of individuals and to understand events from their perspective with an “attitude of curiosity and care.”² Compassion is the glue, which connects individuals and validates our humanity. Demonstrating compassion during court interactions with litigants is the standard to which judges should strive. It is displayed by showing respect, civility, providing clarity of process and language, and easing stress. It is empathy with healing action and can be expressed in a myriad of ways.

A Compassionate Court requires a more expansive and creative way of administering the court system as a whole, and for each of its segments, than a traditional court. The Compassionate Court calls for a stylistic reorientation from merely resolving the narrow issues at bar to understanding the background of the parties and reasons of the legal action, and for constructing resilient,

Footnotes

1. Anselm Eldergill, *Compassion and the Law: A Judicial Perspective*, INST. ADVANCED LEGAL STUD. 1 (2018), <https://www.slideshare.net/AnselmEldergill/compassion-and-the-law>.

2. Boris Borneman & Tanya Singer, *A Cognitive Neuroscience Perspective the ReSource Model*, in *COMPASSION: BRIDGING PRACTICE AND SCIENCE* (Tania Singer & Matthias Bolz eds., 2013) at 183.

long-term resolutions when possible.³ The effectiveness of a remedy is increased by understanding the underlying causes of the problems.⁴

A Compassionate Court considers features from behavioral, psychological, neurological, criminology, social work sciences, and jurisprudential concepts,⁵ and determines how they can be integrated into the legal system.⁶ At the central core of the Compassionate Court is the tripartite philosophies of procedural fairness, therapeutic jurisprudence, and judicial engagement, which shelter under the overarching structure of compassion. Indeed, all segments of the court are embraced under compassion's framework for its unified operation.

Compassion is generally considered in context of human interactions and communications—how people treat each other. In the legal setting compassion is also typically associated with communications; how the court speaks to litigants, how the court considers and resolves legal issues, and the effect of its sentencing decisions. However, compassion is also displayed in numerous nonverbal ways. Every component in the court system, from security screening at the front door, signage throughout the building, availability of information, paperwork and forms, services, and court processes, to human interaction, and the physical courthouse structure should contribute to the positive compassionate setting, particularly when coalesced in a unified system. This broader characterization of compassion more aptly captures the scope of this systemic transformation. Its success depends on the breadth and creativity of its application.

THE FOUNDATION OF THE COMPASSION MOVEMENT AND THE INFLUENCE OF DRUG COURTS

During the last three decades, legal and health system collaboration has led to sentencing reforms, which incorporate rehabilitation and social reintegration in lieu of traditional punishment.⁷ Drug Courts emerged in the late 1980s from the burgeoning recognition that a fresh approach was needed to address crime caused by those suffering from drug and mental-health-related problems. The bold thinking and unconventional methods of early Drug Court judges heralded the beginning of the Compassionate Court movement. They normalized judging to encompass comprehensive, innovative, and compassionate methods of increasing compliance with court orders and improving offender

behavior. They recognized the need to engage offenders in drug treatment and afford support services at the earliest moment after arrest when offenders were most amenable to change, resistance was diminished, and the crises of the arrest was still fresh and motivating.

Over time, Drug Courts have continued to evolve and refine their therapeutic approach. They provide comprehensive services for each participant to address their particular needs and sustain recovery. Drug Courts provide intensive supervision and oversight and demand accountability of both the offender and participating agencies. Generations of subsequent Drug Court judges, and those who sit in the many iterations of problem-solving courts, acknowledge the salient healing benefits of addressing fundamental problems that give rise to aberrant behavior. They use the power of the courts to corral resources, encourage collective problem solving among justice system partners, and employ sustainable, therapeutic approaches. Above all, the hallmark of a successful Drug Court is the relationship between the offender and the judge—the critical factor in reducing substance abuse and the success of the program.⁸

Problem-solving judges routinely transport the techniques they employ in Drug Courts to their traditional courtrooms and readily utilize learned skills and strategies in various courtroom settings and venues.⁹ The key to their success is effective communication. They learn the language of compassion, called judicial engagement.

SECTION II: THE COMPASSION CORE AND COMMUNICATION

THE TRIPARTITE CORE

The core of the Compassionate Court is therapeutic jurisprudence, procedural fairness, and judicial engagement. Successful communication of these core principles is a critical trademark of the Compassionate Court. It allows the court to connect with the

“Every component in the court system ... should contribute to the position compassionate setting”

3. See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J., reprinted in *RESOLVING FAMILY CONFLICTS* (Jana Singer and Jane Murphy, eds., 2008) (proposes an interdisciplinary approach, which considers influences on human behavior and social science to craft solutions in family law matters).

4. Eldergill, *supra* n. 1.

5. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 COOLEY L. REV. (2001) (article is a revised version of a public lecture presented on Oct. 29, 1999 at the Thomas Cooley law review disabilities law symposium).

6. David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17-30 (2008).

7. Jamey H. Hueston, Caroline S. Cooper & Richard Bennett, *The Crucial Role of the Justice System in Addressing the Use of Drugs: An Introduction*, in *Future of Drug Policy: Real Solutions Grounded in Global Evidence*, in *DRUG POLICY FUTURES* 113-129, 114 (Linda Nilsson & Erik

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8. Shannon M. Carey, Michael W. Finigan & Kimberly Pukstas, *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes, and Costs* (report submitted to the U.S. Dept. of Justice by NPC Research, 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>; Shelli B. Rossman et al., *The Multi-Site Adult Drug Court Evaluation: Executive Summary* (report submitted to the U.S. Dept. of Justice by Urban Institute, 2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237108.pdf>; Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts*, 52 CT. REV. 8-34 (2016).

9. See Jamey H. Hueston & Kevin Burke, *Exporting Drug Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court*, 52 CT. REV. 44 (2016), <http://aja.ncsc.dni.us/publications/courtrv/cr52-1/CR52-1AHueston.pdf>.

“Therapeutic justice is available in many legal settings.”

parties, influence behavior, and resolve issues, which can promote respect for the judicial system and compliance with its orders. Communication, be it verbal, written, or atmosphere, must be effective at every juncture. These three cogent philosophies offer structure and

direction regarding how courts can effectively interact with litigants and use the law to further therapeutic ends.

THERAPEUTIC JURISPRUDENCE—A VEHICLE OF THE COMPASSION TRIPARTITE

Therapeutic jurisprudence was conceived within the disciplines of psychology and mental health law in the 1990s and considers the law as a social force and a therapeutic agent.¹⁰ It studies the extent to which substantive rules, legal procedures, and the actions of legal practitioners produce therapeutic or anti-therapeutic consequences for individuals involved in the legal process.¹¹ Courts accustomed to traditional judicial roles may fail to consider the textured nature of problems and miss opportunities for creative, robust remedies. In contrast, therapeutic jurisprudence emphasizes using the law and process to promote healing by considering underlying issues and dysfunctions that contribute to problems in a non-coercive, non-paternalistic manner. At no time does therapeutic jurisprudence advocate relinquishing legal application of the law to the facts. However, instead of narrowly employing the legal process, it indorses court involvement and originality in resolving issues where suitable. This approach is accomplished by understanding interdisciplinary sciences and using therapeutic techniques and viewing judging with a more extensive eye.

Therapeutic jurisprudence is available in many legal settings. Bail hearings, sentencing decisions, probation violations, and family and juvenile courts provide many suitable opportunities for its use. Therapeutic jurisprudence is also closely aligned with Drug Courts. Utilizing routine Drug Court offender reviews as a model, targeted defendants are placed on “personal probation” in traditional courts and required to return for periodic appearances before the judge.¹² Therapeutic jurisprudence is reflected in innovative collaboration between justice partners, as well as private and community sectors where appropriate. By example, the Maryland Parole Board ceded supervisory power of parolees to the Baltimore City Drug Court during their participation in the program in place of rapid offender revocations for minor parole infractions.¹³ As well, therapeutic jurisprudence principles reflected in court process and procedures in family violence and child sexual abuse matters can be beneficial where

shared respect between the judge and the defendant may be instrumental in achieving defendant compliance with court orders.¹⁴ Therapeutic jurisprudence also promotes meaningful results by educating the parties to listen carefully and to consider the position of the opposing side while emphasizing healthy aspects of a relationship.¹⁵

There are multiple ways to resolve conflicts and court systems are extending therapeutic procedures and related concepts in other modalities, such as alternative dispute resolution, mediation, restorative and transformative justice, teen courts, talking circles, and pretrial judicial involvement. External third parties often supervise these interventions, but judges too can take an active role in alternative solution methods. Ultimately, the success of these programs depends on judges and their court administrations to promote and facilitate modalities. It requires an openness to different methods of judging, communicating, and understanding human behavior instead of examining a slice of conduct in one moment in time. Therapeutic judging involves a comprehensive approach that considers the whole person with genuine concern and caring. Over time, judicial approaches have progressed to embrace the needs and requirements of its users—judging adapts.

PROCEDURAL FAIRNESS AS A VEHICLE OF THE COMPASSION TRIPARTITE

Tom Tyler’s body of work on procedural fairness, the second Compassionate Court core principle, has greatly contributed to raising the consciousness of court systems and judges regarding fairness that is due the public. Tyler offers a template as to how to conduct a fair court and effectively communicate with the public to garner their respect. Specifically, procedural fairness recognizes that affording voice, respect, trustworthiness, and neutrality are essential elements to improve the experience of litigants.¹⁶ People want a voice—the opportunity to fully air their grievances, be heard and understood—and it is one of the most important considerations of court users and their willingness to accept court decisions.¹⁷ Respect and politeness shown the parties during the process by a judge who has allowed appropriate time and listened thoughtfully are important elements. Trustworthiness speaks to the magistrate who is benevolent toward the litigants and their cases and treats them fairly, with dignity and respect. Finally, the public wants to understand the court processes and expects that decisions are clear and transparent from a judge who is neutral, fair, and balanced.

Communication is a two-way street with the court respectfully listening and fully hearing litigants in one direction. From the other direction, the court disseminates important information and orders. The court can demonstrate effective listening skills and promote discourse through open, nonverbal behaviors,

10. See International Society of Therapeutic Jurisprudence, <https://www.intlj.com/>; LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

11. *Id.*; DAVID WEXLER & BRUCE WINICK (eds.), JUDGING IN A THERAPEUTIC KEY (Carolina Academic Press, 2003).

12. Hueston & Burke, *supra* n. 9.

13. Baltimore City Drug Treatment Court and Maryland Parole Commission Protocol Agreement.

14. Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court That Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002).

15. See Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, CT. REV., spring 2000, at 62.

16. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

17. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007).

body language, expressions. When delivering information tone, manner, and method are important indicators of how the hearer will perceive the message.¹⁸ Communication skills, therefore, are critical to successful interactions with litigants. Additionally, the court has didactic opportunities to connect with the entire courtroom as communications from the bench are often absorbed effectively by those who are not immediately experiencing the stress of directly facing the judge awaiting judgment, sentencing, or other responses.

Procedural fairness ensures that individuals and their cases are treated justly, and not only as numbers, even amid busy dockets and strenuous time restraints. Indeed, winning one's case is not the final predictor of case satisfaction—fairness in the process is,¹⁹ and leads to greater satisfaction and respect for the court system.²⁰ Shared respect between the judicial officer and the parties may serve to encourage compliance with sentencing requirements.²¹ These positive reactions to the justice system flow directly from the communication skills of the judge in conveying important principles.

JUDICIAL ENGAGEMENT AS A VEHICLE OF THE COMPASSION TRIPARTITE

Judicial engagement is the third prong of the tripartite relationship, which focuses on the power of communications themselves, their potency, and therapeutic quality in providing lasting and impactful impressions on court users. Procedural fairness provides methods for conducting court fairly and respectfully. Its essential feature is **How** judges afford litigants their “voice.” The **How** requires providing ample time for parties to explain their versions of the case and the effect on their lives. The **How** involves court demeanor, tone of voice, and communication techniques. Judicial engagement more fully describes **What** is the communication that creates a human connection. Judicial engagement is **What** the judge says to convey empathy, understanding, cultural sensitivity, motivation, genuine interest in the parties to promote dialogue, rehabilitation, and resolution. The judge is the face of the courthouse and its most important conveyor of inherent fairness. Judicial communications demonstrate the court's concern for the individuals who rely on its wisdom and the desire to alleviate suffering. The judge's ability to resonate with the parties can be the difference between success or failure in changing the dynamics in difficult situations or quelling tensions between the parties.

Drug Court research supports that the relationship between the judge and the participant is the critical factor in reducing substance abuse and improving the program's chances for success,²² which laid the groundwork for effective judicial engagement. Drug Court judges routinely display empathy, care, and compassion,²³ and sincere concern for the welfare and success of their charges. They also utilize therapeutic techniques such as motivational interviewing and nontraditional avenues to penetrate destructive thinking and establish the trust needed to build

positive relationships and remove barriers to success. Drug Court judges, though not therapists, call upon their understanding of interdisciplinary behavioral techniques to advance the court's goals of participant recovery and public safety. Judicial engagement is the essence of their communications—the core of **What** they say.

Meaningful discussions take time, which traditional courts with crowded dockets often lack. As demonstrated in Drug Courts, judicial engagement techniques are varied and creative, and transportable to every court. Judges in the Compassionate Court can stimulate meaningful exchanges with the parties to determine how together they can tackle underlying issues and promote positive outcomes. It starts by slowing the court process to allow sufficient time to engage the offender and to encourage dialogue. Prompts and artful questioning techniques aid the court's search for understanding offender conduct. Encouraging alternative forms of expression such as photography, artwork, poetry, music, and written essays assignments, borrowing from the Drug Court playbook, are additional creative methods to encourage meaningful communication. In other settings, judges' thoughtful judicial engagement skills can often diffuse disruptive individuals with sensitive and compassionate intervention, instead of reactive detention, which can activate distressed persons and heighten courtroom tensions. Keeping the best interests of the child in mind, judges are able to guide parents to reach reasonable visitation arrangements during temporary child visitation hearings while fashioning appropriate child exchanges to protect the parties. The judge can even motivate defendants sentenced to jail to utilize their time productively by obtaining an education or skill. The examples of compassionate judicial engagement interchanges are infinite.

Communication, through the power of judicial engagement, is the bridge that links the interdisciplinary practices of therapeutic jurisprudence and procedural fairness completing the compassion triangle and fortifying the Compassionate Court framework as a whole. Judicial engagement requires sincere and meaningful communication between the judge and parties—skills that can be learned. It is compassion in action.

SECTION III: TANGIBLE AND INTANGIBLE ASPECTS OF COMPASSION

THE COMPASSION OF BRICKS AND MORTAR

Shaping the Physical Courthouse Landscape

The foundation of any structure is the key to its stability. Both the internal and external building where the court resides, and

“Meaningful discussions take time, which traditional courts with crowded dockets often lack.”

18. Michael King, *Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities*, 28 ALTERNATIVE L.J. 172 (2003).

19. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

20. *Id.*

21. Petrucci, *supra* note 14, at 263, 295 (2002).

22. See *supra* n. 8.

23. James L. Nolan, *Therapeutic Adjudication*, 39 Soc. 29-38 (2002).

**“The
Compassionate
Courthouse
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of a book,
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lays within.”**

the contents inside, speak to the goals of the local justice system, and the image and values it wishes to convey. A poorly designed courthouse environment and atmosphere can be intimidating and cause anxiety.²⁴ A Compassionate Courthouse, in contrast, incorporates accommodating and supportive architectural design and flow, which will minimize stress and improve the user

experience.

In a 2012 *New York Times* interview of Associate Supreme Court Justice Stephen Breyer on courthouse architecture, he stated:

The point of all these projects is to say to people—through the architecture of the building and the construction of the building and the use of the building—that the government is you. There isn't a wall of separation. It's very important to break the idea of the wall down because otherwise people think this is a foreign entity. But this is a democracy, and the government is the community.²⁵

Preliminarily, the Compassionate Court will undertake a thorough inventory of the justice system from the ground up by examining the visible courthouse landscape, from its exterior to its interior physical structure and environment.

The External Courthouse Environment

The Compassionate Courthouse environs—pathways, sitting areas, and gardens—like the cover of a book, convey what lays within. As the saying goes “you never get a second chance to make a good first impression.” Contrast the impression conveyed by courthouses that incorporate large windows and ample outdoor green spaces, pathways, and sitting and eating areas with heavy, seemingly impenetrable, imposing monolithic structures typical in older traditional buildings that offered limited

access to the outside. A therapeutic Compassionate Courthouse would incorporate outdoor views and access to nature, along with entrees to gardens and restful areas.²⁶ The notion is to create more psychologically healthy, lower-stress environments. While one cannot always judge a book by its cover in the courthouse context, consistency and “transparency in justice and community ownership”²⁷ are indeed worthy values. Ideally, the environment will project a sense of fairness and openness, and a design that promotes the importance of the people within the institution.

The Internal Courthouse Environment

Access and transitions from external to internal courthouse areas will connect the public to both environments. Internal spaces and offices would be visible and accessible to the public. Port Augusta Courthouse in Australia, for example, positioned courtrooms adjacent to courtyards utilizing lightweight materials and glass areas.²⁸ Notable exceptions to open vistas would be quiet rooms reserved for jurors, private spaces to meet with lawyers, and specialized or restricted areas for individuals attending domestic violence matters, with children's playrooms next to security and visible by their guardians.²⁹

Long waits, often in crowded areas, lack of familiarity with processes, dark corridors, difficult cases, and possible threats from others can also intensify unease and frustration.³⁰ In the process of resolving conflicts, courts can improve the sense of safety and security by minimizing perceived threats in and near the court. Separate courthouse circulation routes and courtroom access, for example, would aid in reducing stressful situations for victims, witnesses, and those involved in other combative or dangerous matters.³¹ Incorporating abundant natural lighting, nature views, gardens, and water elements,³² as well as interior colors to reflect the landscape, will also help to decrease stress in therapeutic court waiting areas.³³

Safety must always be a primary mandate of a court system, and separate prisoner, public, and judge circulation routes are necessary to protect the public and employees and decrease risk and anxiety.³⁴ However, the Compassionate Courthouse would

24. Katherine A. Kirkpatrick, *Healing Justice: A New Architecture for Therapeutic Justice Administration in Kentville* (2019) (submitted in support of Master of Architecture degree), at 97, 101 (hereinafter, *Healing Justice*).

25. Justice Stephen Breyer, *Breyer Invited to Make a Case for Architecture*, interview by Robin Pogrebin, *N.Y. TIMES*, Oct. 6, 2012, <https://www.nytimes.com/2011/10/06/arts/design/stephen-breyer-pritzker-prize-jury-architecture.html>.

26. *Healing Justice*, *supra* n. 24, at 99, 101.

27. *Id.* at 81 (describing the Collingwood Neighbourhood Justice Centre, Melbourne, Australia).

28. *THE HANDBOOK OF CONTEMPORARY INDIGENOUS ARCHITECTURE* (Elizabeth Grant et al. eds., 2018) (hereinafter *Indigenous Architecture*) (describing the Port Augusta Courthouse at 505); *See also Id.* at 508 (describing connections between the internal/external environments using tilt-up glass doors and folding wood panels at the Kalgoolie Courthouse), [https://books.google.de/books?hl=en&lr=&id=rS9iDwAAQBAJ&oi=fnd&pg=PR9&dq=The+Handbook+of+Contemporary+Indigenous+Arch,+Editors+Elizabeth+Grant+&ots=MQf3FGEOBR&sig=9WzI0iseyYJnn547dY00AK9bTk&redir_esc=y](https://books.google.de/books?hl=en&lr=&id=rS9iDwAAQBAJ&oi=fnd&pg=PR9&dq=The+Handbook+of+Contemporary+Indigenous+Arch,+Editors+Elizabeth+Grant+&ots=MQf3FGEOBR&sig=9WzI0iseyYJnn547dY00AK9bTk&redir_esc=y#v=onepage&q&f=true)

[#v=onepage&q&f=true](https://books.google.de/books?hl=en&lr=&id=rS9iDwAAQBAJ&oi=fnd&pg=PR9&dq=The+Handbook+of+Contemporary+Indigenous+Arch,+Editors+Elizabeth+Grant+&ots=MQf3FGEOBR&sig=9WzI0iseyYJnn547dY00AK9bTk&redir_esc=y#v=onepage&q&f=true).

29. *Healing Justice*, *supra* n. 24, at 81 (describing the NJC Neighbourhood Justice Centre).

30. David Tait et al., *Fortress or Sanctuary? Enhancing Court Safety by Managing People, Places and Processes* (report on study funded by Australian Research Council, 2014), at 8, https://courtofthefuture.org/wp-content/uploads/2014/12/140924_FORTRESS-OR-SANCTUARY-low-res.pdf.

31. *Indigenous Architecture*, *supra* n. 28, at 500 (describing the Judicial Council on Cultural Diversity report, *The Path to Justice: Aboriginal and Torres Strait Islander Woman's Experience of the Courts*). *See also Indigenous Architecture*, *supra* n. 28 at 505 (describing several courthouse entrance paths at the Port Augusta Courthouse to avoid conflicts).

32. Tait et al., *supra* n. 30, at 75.

33. *Indigenous Architecture*, *supra* n. 28 at 509.

34. *See Alva James-Johnson & Tim Chitwood, Mayor's Commission Makes Recommendation on Government Center Building Project*, *LEDGER-ENQUIRER*, Dec. 12, 2017 (describing risk to judges and general population when transporting inmates through same elevators), <https://www.ledger-enquirer.com/news/local/article189346689.html>.

also consider the dignity and psychology of holding offenders in more environmentally positive courthouse detention cells in contrast to isolated and often outdated basement detention cells.³⁵

The Courtroom Environment

The courtroom, as the heart of the courthouse, should convey an atmosphere of respectability. Some older courtrooms and courthouses, however, suffer a panoply of serious visual aging and disrepair. Peeling paint, warped wood, missing tiles, frayed furniture, leaking roofs and water-stained ceiling tiles, duct tape patches on stairwells, and inadequate climate control are but a few building infirmities.³⁶ Shabby conditions and a depressing atmosphere create an undesirable milieu that will affect the mood and distress of both citizens and employees alike.

Justice Stephen Breyer stated that buildings, like life, are surrounded by color, sounds, and atmosphere that reflect feelings about one's self and what one thinks about the government in whose building they stand.³⁷ The Compassionate Courtroom will integrate lighter woods and other sustainable materials in lieu of dark traditional wooden wall panels, heavy dark carpeting, and drapery that convey a more imposing atmosphere. Courtrooms that incorporate recessed and natural lighting can reduce anxiety and improve the internal environment, as does artwork, photos, and projects that integrate the courtroom with the local community.³⁸ Glass doors can also offer direct views into the courtroom, augmenting transparency and openness.

The actual courtroom configuration can impact the Compassionate Courtroom and communicate impartiality—or not. Designs that promote collaboration and fairness are particularly fitting in problem solving, mediation, alternative dispute resolution, or restorative hearings. Curved or round tables that seat both the court and parties reinforce the cooperative nature of therapeutic court programs.³⁹ Another innovative design element is reducing the distance between the parties and the judge and lowering the elevation of the bench.⁴⁰

Conversely, implicit bias of court attitudes or stereotypes that affect understanding, decision making, and behavior, for example, might be conveyed to the public by the practice of reserved police seating in the front of the courtroom or closest to the judge or jury. Law enforcement personnel and attorneys are often permitted to sit in an empty jury box while the public may not. Defendant seating, in contrast, is generally positioned furthest

from the judge or jury. This practice silently signals favoritism and greater access (arguably influence) to the court by those who work in the justice system.

Safety concerns motivate jail guards or sheriffs to prematurely hover behind offenders who may be detained. This custom suggests that the court has already determined the outcome of the matter and may have a chilling effect on offenders, particularly before they have had an opportunity to address the court. Fairness is paramount to the process, and law enforcement officials should maintain a respectful distance from offenders until instructed by the court or safety is an issue. Another common practice occurs when lawyers request informal conversations with the judge at the bench after their matters are concluded. While seemingly innocuous, this custom might convey uneven access or equality and should be discouraged.

The courtroom that reflects a compassionate, fair, and positive atmosphere will improve the psychological impact on the citizenry and their regard for the judicial system. It must robustly extend in both design and structure beyond common areas into the courtroom.

SHAPING PROCESSES, PROCEDURES, AND TECHNIQUES

The myriad of processes, components, and divisions constituting a courthouse must contribute to and enrich the Compassionate Court environment. However, many litigants do not fully understand court processes and find the experience taxing, which may hinder their ability to successfully process the proceedings. Self-represented litigants, in particular, may experience stress in this foreign environment due to their lack of legal knowledge. Even represented individuals need to be clear regarding courtroom procedures that affect their future. The Compassionate Court will provide sufficient information to the parties and take steps to ensure their comprehension. Not all parties will be pleased with the outcome of their case, but they should not leave the court confused about the process, outcome, or the next steps. This demands that court procedures are clarified at each stage

“The courtroom, as the heart of the courthouse, should convey an atmosphere of respectability.”

35. Healing Justice, *supra* n. 24, at 82 (quoting Inglauer 1981) (describing archaic conditions of basement holding cells). See also Indigenous Architecture, *supra* n. 28, at 510-511 (describing inclusion of holding cell windows to the external environment).

36. See Guillermo Contreras, *San Antonio's Federal Courthouse Held Together by Duct Tape and Hope*, SAN ANTONIO EXPRESS NEWS, Oct. 7, 2015, <https://www.expressnews.com/news/local/article/San-Antonio's-federal-courthouse-held-together-6557444.php>; Chuck Williams, *Displaced Judges, Unusable Courtrooms has Columbus Justice System in a State of Flux*, LEDGER-ENQUIRER, Sept. 4, 2018, <https://www.ledger-enquirer.com/latest-news/article/217636110.html>; Walls Stand in Disrepair Outside the Courtroom at the Monroe County Courthouse in Clarendon, Arkansas, U.S., Oct. 1, 2013, <https://www.gettyimages.co.uk/detail/news-photo/walls-stand-in-disrepair-outside-the-courtroom-at-the-news-photo/186435503>; Jonathan Bandler, *State Seeks to Withhold Money*

Over Mount Vernon City-Court Conditions, ROCKLAND/WESTCHESTER JOURNAL NEWS, June 12, 2019, <https://eu.lohud.com/story/news/local/westchester/mount-vernon/2019/06/11/mount-vernon-city-court-conditions/1423110001/>.

37. Justice Stephen Breyer on Boston's New Moakley Courthouse, interview by Martin Pedersen & Susan Szenasy, METROPOLIS MAG., Nov. 20, 2012, <https://vimeo.com/53460779>.

38. Keith Fentress, *Is Your Courtroom Design Intimidating?*, FENTRESS BLOG, June 22, 2017, <https://blog.fentress.com/blog/is-your-courtroom-design-intimidating>.

39. Healing Justice, *supra* n. 24, at 131.

40. Healing Justice, *supra* n. 24, at 57, 80 (referencing NJC Neighbourhood Justice Centre 2019). See also Justice Breyer, *supra* n. 37 (commending the placement of lawyers in the center of the courtroom at the same level of judges to focus attention on those making the presentation).

“Access to justice ... must be visually accessible and navigable to all users.”

through written materials, verbal explanations, or both.

In civil court, judges can begin the education process as early as the opening statement by

- 1) explaining how cases will be called, e.g., complexity, length, age, and stipulations;
- 2) describing how to prepare matters for hearing, e.g., marking and preparing exhibits and notes on salient points, proving damages, and speaking with the opposing side to refine issues, stipulations, exhibits; and
- 3) explaining the trial process, e.g., order of trial events, motions, presentation of evidence, objections, and opening and closing arguments.

In criminal matters, judges must ensure that either the lawyer or the court properly explains the process and due-process rights, again especially crucial for self-represented individuals. Judges should also be mindful to consider that witnesses and victims comprehend the proceedings in which they are involved. A useful practice is for the court to encourage questions and request the parties to paraphrase or repeat specific orders and requirements.

Courthouse Signage and Services

Access to justice in the Compassionate Courthouse must be visually accessible and navigable to all users. The court will afford abundant signage with clear directions to courtrooms, offices, services, cafeterias, and lounges. Support services such as help desks and legal service areas are extremely important. Public courthouse computers and Internet services, which provide video links to legal forms, laws, statutes, regulations, and other help resources and websites, will improve customer experience. Additionally, easy-to-use remote access to online services and court information are especially important as court systems limit access to the courthouse and employ electronic hearings in view of COVID-19 restrictions. In all matters, the court should make available abundant written and electronic explanatory materials, e.g., pretrial brochures and instructions regarding preparing and presenting cases, motions, forms and legal processes, as well as posttrial procedures, including appeals, post-judgment collection, and mediation. Interpreter services should be available, as well as written materials in plain and community-representative languages. Coordinated services and availability of free, pro bono, and low-cost civil legal assistance will be important for targeted populations such as the elderly, veterans, youth, and those with mental health disabilities. Even small conveniences, such as pens, papers, and evidence stickers, in the courthouse should be considered. These efforts will help

shape a helpful environment, demystify the court experience, and convey respect for court users.

Access to Court Supervision, Treatment, and Other Services

Defendants are routinely placed under court supervision or ordered to obtain treatment for addiction or anger management. Others may seek assistance, such as domestic violence protection, housing assistance, and other social resources. Courts should be mindful that users frequently suffer from cognitive, physical, and other disabilities and are frequently confused and overwhelmed after court hearings. They often reenter dysfunctional or negative environments and have limited transportation and childcare resources. These and numerous other obstacles can hamper their ability to comply with court orders and navigate in the community to obtain needed services, particularly common with substance abusers.⁴¹

The Compassionate Court would conduct assessments in appropriate cases to identify social, health, educational, and court supervision requirements. Ideally, there would be a range of available services and agencies integrated under the courthouse roof or within close vicinity. Removing distance from the courthouse as a barrier will simplify access to services, consolidate resources, and improve compliance with court orders to more quickly address the cycle of negative behavior.⁴²

JUDICIAL WELLNESS

The adage “physician heal thy self” is apropos to the Compassionate Court. The daily effects of substantial caseloads, time restraints, and, importantly, difficult case content and decisions often have deleterious effects on the well-being of judges, including vicarious trauma, Posttraumatic Stress Disorder, and other disturbing symptoms.⁴³ The results of a 2019 study surmised that judicial stress, burnout, and secondary trauma can lead to elevated psychological distress and problematic alcohol use.⁴⁴

The vitality and health of courtroom decision makers are imperative to rendering quality decisions and for the effectiveness of the justice system. Achievement of a healthy working environment requires identifying and promoting wellness factors that provide meaning, fulfillment, satisfaction, and protection to the very judges and employees who are tasked with administering justice and protecting the public safety. That is the responsibility of a Compassionate Court.

Wellness Strategies and Self-Compassion

It is well accepted that proper nutrition; routine physical fitness including exercise, yoga, and Tai Chi; adequate sleep; nature immersion; meaningful relationships; and social activities can aid in physical, psychological, and brain health. Many court systems now acknowledge the real threat caused by judicial stress and provide training, materials, and services to support judicial

41. Richard C. Rapp et al., *Treatment Barriers Identified by Substance Abusers Assessed at a Centralized Intake Unit*, 30 J. SUBSTANCE ABUSE TREATMENT 227-235 (2006)(discussing barriers to treatment among substances abusers).

42. Healing Justice, *supra* n. 24, at 95.

43. See Jared Chamberlain & Monica K. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous*

Group of Judges in a Single Jurisdiction, 37 J. AM ACAD. PSYCHIATRY & LAW, 214 (2009); Peter G. Jaffee et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1 (2003).

44. Carly Schrever, Carol Hulbert & Tania Sourdin, *The Psychological Impact of Judicial Work: Australia’s First Empirical Research Measuring Judicial Stress and Wellbeing*, 28 J. JUD. ADMIN. 141-168 (2019).

employees.⁴⁵ Other courts are specifically including programs and initiatives to enhance the well-being of the workforce as a strategic plan strategy.⁴⁶ The Australia Judicial College of Victoria, in particular, has taken substantial supportive steps by affording information regarding warning signs and causes of stress, resources, checklists, well-being trainings, and a confidential judicial officers counselling assistance program.⁴⁷ They also provide a Coronavirus and Judicial Wellbeing website.⁴⁸

Despite difficult judicial assignments, job satisfaction that comes from helping those in court is an important factor for maintaining judicial wellness,⁴⁹ and judicial compassion is a powerful vehicle to achieve that result. Judicial compassion allows judges to expand their perspective and acknowledge another's suffering to more effectively resolve conflicts.⁵⁰ Importantly though, judges must be able to show themselves the same kindness that they express to others.

Self-compassion is showing kindness to one's self during difficult life moments and challenges. It teaches us to treat ourselves with the warmth, tenderness, understanding, and encouragement that we give others. It encompasses three main components—self-kindness, common humanity, and mindfulness.⁵¹ The role of self-empathy and the empathetic care of others has gained substantial purchase in neurobiological fields. Neurological research demonstrates changes in brain activity that occur while rendering aid to others while concomitantly self-regulating emotions.⁵² Research has also acknowledged the beneficial connections between self-compassion and physiological and psychological benefits, including better health and lower perceived stress.⁵³ It is a skill that can be learned.

The Compassionate Court will ensure that multi-prong, mental, physical, and emotional health strategies and services are available to nurture the well-being of their judicial officers. One particularly cogent and resilience strategy is meditation.

Meditation

Meditation has long been practiced throughout the world to promote physical, emotional healing and well-being. It can school judges how to navigate difficult and challenging conduct in court without emotional involvement. Disruptions can challenge the patience and skill of even the most seasoned jurist and add to a stressful court ambiance. Learning to diffuse contentious conduct calmly, with equipoise, will support judicial health. Meditation can help achieve that goal.

The popular mindfulness meditation is the art of being unconditionally present in the moment, paying attention with intent, and assessing physical and emotional feelings without reactivity or judgment. It is freeing the mind from constant inner chatter and achieving calm and control.⁵⁴ Research in psychology, neuroscience, and medical disciplines indicates that meditation and other mindfulness practices also have substantial recuperative benefits, and can improve various physical health problems, such as pain reduction, blood pressure, heart disease, Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome, and cancer.

Meditation also positively impacts overall human functioning and emotional and behavioral symptoms. Importantly, studies suggest that meditation improves the immune system⁵⁵ and helps to manage Posttraumatic Stress Disorder.⁵⁶ Mindfulness-based relapse meditation reduces drug cravings and substance abuse problems to achieve calmness that facilitates receptivity to treatment.⁵⁷ Even drug treatment programs and Drug Courts

“[J]ob satisfaction that comes from helping those in court is an important factor for ... judicial wellness....”

45. See National Judicial College, *Mindfulness for Judges* (2020); National Judicial Academy India, *National Seminar for Principal District and Sessions Judges on Stress Management* (2017); New York State Magistrates Association Conference, *Judicial Wellness* (2015); Florida Judicial Wellness Program (2019); Judicial Institute of Maryland, *The Importance of P.L.A.Y. (Prolonging Life and Youthfulness)* (2014); National Judicial College, *Stress Management* (2009).

46. Strategic Plan of the District of Columbia Courts, 2018-2022, https://www.dccourts.gov/sites/default/files/matters-docs/2018-2022_StrategicPlan.pdf.

47. Judicial College of Victoria, *Judicial Wellbeing Resources*, <https://www.judicialcollege.vic.edu.au/resources/judicial-wellbeing-resources>.

48. Judicial College of Victoria, *Coronavirus and Judicial Wellbeing*, <https://www.judicialcollege.vic.edu.au/coronavirus-and-judicial-wellbeing>.

49. See Deborah J. Chase & Peggy Fulton Hora, *The Best Seat in The House: The Court Assignment and Judicial Satisfaction*, 47 *FAM. CT. REV.*, 209 (2009) (problem-solving court judges were more likely to report being happy in their assignments and to believe that these assignments have a positive emotional effect).

50. Olga Klimecki, Ricard Matthieu & Tanya Singer, *Empathy Versus Compassion: Lessons from 1st and 3rd Person Methods*, in *COMPASSION: BRIDGING PRACTICE AND SCIENCE* (Tania Singer & Matthias Bolz eds., 2013), at 279.

51. Kristin J. Homan & Fuschia M. Sirois, *Self-compassion and Physical*

Health: Exploring the Roles of Perceived Stress and Health-Promoting Behaviors, 1 *HEALTH PSYCHOL. OPEN* (2017).

52. Helen Y. Weng et al., *Compassion Training Alters Altruism and Neural Responses to Suffering*, 24 *PSYCHOL. SCI.* 1171 (2013); Helen Y. Weng et al., *Visual Attention to Suffering After Compassion Training Is Associated with Decreased Amygdala Responses*, 9 *FRONTIERS PSYCHIATRY*. 771 (2018).

53. Homan & Fuschia, *supra* n. 51, at 7.

54. Jamey H. Hueston, *The Mindful Court: Mediation for Substance Abusers*, A.B.A. *CRIM. JUST. MAG.*, fall 2015, at 36, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2708023.

55. David S. Black & George M. Slavich, *Mindfulness Meditation and the Immune System: A Systematic Review of Randomized Controlled Trials*, 1373 *ANNALS N.Y. ACAD. SCI.* 13 (2016); Nicole Thibodeaux & Matt J. Rossano, *Meditation and Immune Function: The Impact of Stress Management on the Immune System*, *OBM INTEGRATIVE & COMPLEMENTARY MEDICINE* 3, no. 4 (2018).

56. Anthony P. King et al., *A Pilot Study of Mindfulness-Based Exposure Therapy in OEF/OIF Combat Veterans with PTSD: Altered Medial Frontal Cortex and Amygdala Responses in Social-Emotional Processing*, 7 *FRONTIERS PSYCHIATRY* 154 (2016).

57. S. Bowen et al., *Relative Efficacy of Mindfulness-Based Relapse Prevention, Standard Relapse Prevention, and Treatment as Usual for Substance Use Disorders A Randomized Clinical Trial*, 71 *JAMA PSYCHIATRY* 547 (2014).

“Not every case ... is suited for innovative sentencing solutions....”

have incorporated mindfulness meditation as an additional tool to aid calm and focus.⁵⁸

Meditation is not simply visualizing or calm breathing; it is learning to accept stressful situations both internally and externally to one's life. Meditating daily over eight weeks is associated with positive changes in regions in the brain

involved in learning, memory processes, and emotion regulation.⁵⁹ Importantly with regards to judicial functioning, compassion meditation training helps individuals stay tranquil in the face of suffering and more readily able to engage in prosocial action.⁶⁰ It beneficially reduces mind wandering that may promote well-being, longevity, and lifespan.⁶¹ Simply put, meditation can help judges regulate emotions and manifest self-compassion, and by so doing, improve the quality of their lives, their judging, and the beneficial impact on their Compassionate Courts.

We cannot always predict the events in our lives, but we are in charge of our responses. Meditation is now integrated into the wellness networks of many major corporations, medical, legal, law enforcement, religious, and academic professions. Why not the courts?

SECTION IV: APPLICATION, TRAINING, AND PLANNING

APPLICATION

Judges are duty bound to uphold the law and ensure its logical and precise application to the facts. Employing a compassionate approach does not endorse bending the law, but it does surpass mechanical and linear application of judging. Modern judging presents numerous opportunities if not the need for fertile and innovative approaches to achieve justice goals of resolving conflicts, decreasing the revolving door of repeat litigation, and increasing public confidence in the courts.⁶² Alternative resolu-

tions are particularly suited for *pro se*, small claims, and nonviolent criminal matters. Judges should vigilantly capitalize on these occasions to positively influence behavior and impact outcomes by healing disputes where suitable and circumstances permit.

Not every case though is suited for innovative sentencing solutions, such as perhaps for violent criminals. However, compassion is applicable in all cases no matter the seriousness or complexity. In the least, every person before the court is entitled to respect, politeness, and courtesy.

THE COURTS—TRAINING AND REFORM

Creating a Compassionate Court requires robust judicial training and skills development in fields not traditionally included in judicial curriculum. Analytical, substantive law, and other technical training, while necessary, will not adequately equip modern judges to address the complicated and varied array of issues and circumstances that may have taken months if not years to create, but for whom the court is called to quickly resolve, often within the course of one case. Judges will need effective communication, interpersonal, and motivational skills if they are to influence meaningful behavioral change. The study of human nature and behavior, implicit bias, emotional regulation, and trauma should be standard in training curricula. Significantly, a trauma-informed court is a critical brick in a Compassionate Court structure. The extent that many litigants suffer from past emotional and physical trauma is noteworthy,⁶³ and one can extrapolate that untreated issues may contribute to the volume of litigation. Trauma does not excuse negative or criminal behavior but offers a possible basis for addressing the conduct and responding thoughtfully to prevent its future occurrence.⁶⁴ Trauma training will enhance the sensitivity of judges to ensure a safe environment, and avoid exacerbating re-traumatization while supporting recovery of vulnerable constituents.⁶⁵

In the medical field, compassionate and empathetic care leads to increased health provider/patient satisfaction, greater adherence to treatment recommendations, and improved health out-

58. OFFICE OF PROBLEM-SOLVING COURTS, MARYLAND'S GUIDELINES FOR PLANNING AND IMPLEMENTING, ADULT DUI/DWI MARYLAND DRUG COURTS, vol. 4, <https://www.courts.state.md.us/sites/default/files/import/opsc/dtc/pdfs/manuals/adultduidwidrugtreatmentmanual.pdf>; Gennaro F. Vito & Richard A. Tewksbury, *The Impact of Treatment: The Jefferson County (Kentucky) Drug Court Program*, FED. PROBATION, December 1998, at 47, https://www.uscourts.gov/sites/default/files/62_2_7_0.pdf.

59. Britta Holzel et al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES. NEUROIMAGING 36 (2011).

60. Helen Y. Weng et al., *Visual Attention to Suffering After Compassion Training Is Associated with Decreased Amygdala Responses*, FRONTIERS PSYCHOL., May 22, 2018, <https://doi.org/10.3389/fpsyg.2018.00771>.

61. E.S. Epel et al., *Wandering Minds and Aging Cells*, 1 CLINICAL PSYCHOL. SCI., 753 (2012) (mind wandering found associated with shorter telomeres, a predictor of biological aging and severe stress); Q. A. Conklin et al., *Meditation, Stress Processes, and Telomere Biology*, CURRENT OPINION PSYCHOL. 28 (2019) (meditation training can improve telomere regulation, which may ultimately contribute to healthy aging).

62. Michael S. King, *Realizing the Potential of Judging*, 37 MONASH U. L.

REV. 171-186 (2011).

63. See National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System*, <https://www.ncmhjj.com/wp-content/uploads/2016/09/Trauma-Among-Youth-in-the-Juvenile-Justice-System-for-WEBSITE.pdf>; Karen M. Abram et al., *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth*, 61 ARCHIVES GEN. PSYCHIATRY 403 (2003); Lena J. Jäggi et al., *The Relationship between Trauma, Arrest, and Incarceration History among Black Americans: Findings from the National Survey of American Life*, 6 SOC. MENTAL HEALTH 187 (2016) (trauma exposure and trauma-associated psychopathology are associated with increased likelihood of arrest and incarceration in adulthood among Black Americans).

64. Nicole C. McKenna & Kristy Holtfreter, *Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness*, 29 J. AGGRESSION, MALTREATMENT & TRAUMA 1-21 (2020), <https://doi.org/10.1080/10926771.2020.1747128>.

65. Substance Abuse and Mental Health Services Administration (SAMHSA), *Essential Components of Trauma-informed Judicial Practice* (draft for review and comment, 2013), https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf.

comes. Understanding that self-empathy is necessary to provide empathic care to others is a vital part of wellness programs that are growing in popularity in medical education.⁶⁶ In the court milieu, compassion competency education will illuminate concepts regarding compassion in human interactions and the role of empathy to self and others and lead to revitalizing “a vital human competency.”⁶⁷ Empathy training should be standard in judicial wellness programs. Additionally, training in behavioral and neurological sciences, effective communication, motivational competency, wellness, and meditation will support the transformation of the courts. Compassion and empathy are skills that can be learned.⁶⁸

The success of a Compassionate Court will depend on the cohesive integration of all its parts. The laudable goal is to do no harm, and training must extend to the entire staff who individually represent the face of the court during their interactions with the public. It starts with security personnel at the courthouse entrance where the screening process, though necessary, is invasive and connotes a power differential. Training for all employees must include dealing with difficult personalities and addressing behavioral issues and challenges. Maintaining a nonjudgmental, polite, and professional demeanor is essential, and projecting a positive and helpful tone must be standard procedure. Those who work in the courts should provide the best service and achieve the optimum outcome at each desk, station, courtroom and office—this time, every time. Achieving this level of professionalism and compassion generates a healthier environment for judges and employees and creates a substantially better atmosphere for all within its walls.

THE BROADER JUSTICE SYSTEM—TRAINING AND REFORM

Compassion training does not stop at the courthouse. It should begin in law schools to develop a new age of attorneys who consider healing alternatives before justice system involvement.⁶⁹ Law enforcement personnel, as first responders, would benefit from compassion training as their decisions regarding the path of a matter into the justice system can have significant consequences. Compassionate law enforcement approaches can also manifest in a variety of circumstances, such as diffusing volatile situations, particularly those rooted in addiction, mental health, trauma, and related disorders; helping the needy locate treatment instead of detention; and resolving juvenile misbehavior through innovative neighborhood involvement. Multidisciplinary partnerships between the legal, public health, social service, and other community entities present avenues for system reform while saving money improving public health and fostering human rights. The American public, as well, favors alternative

therapeutic approaches for those charged with drug, minor, and non-violent offenses.⁷⁰ Ultimately, interdisciplinary and therapeutic training should extend throughout the entire justice system, with the courts advancing healing and restoration to better serve litigants and communities.⁷¹

“Compassion training does not stop at the courthouse.”

ORGANIZATIONAL PLANNING

Aspects of the Compassionate Court already exist in many court systems. However, as with any extensive idea, its development will require thoughtful strategic planning to create a comprehensive design and chart short- and long-term priorities, implementation requirements, and time frames. Organizational change is a process beginning with describing the current situation, creating a vision and strategy, and clearly communicating the need for change. Court administration, as the guiding force for change, will establish a representative coalition including different levels of management to create buy-in, to empower those who will be affected by the change and to address barriers to resistance. The process will also require funding initiatives to operationalize plans, training, and structural changes. Tracking and evaluating the impact of the implemented changes through process, outcome, and cost-benefit analyses must also be included in the strategic plan.

CONCLUSION AND THE CORONA JUSTICE SYSTEM

As a result of the coronavirus pandemic, many courts are relying on electronic hearings to conduct court business. Justice and fairness are without boundaries, be it in a courtroom or virtually. The principles of a Compassionate Court remain the same and are, arguably, more essential when health, economic, and emotional strains take their toll. Indeed, judges will need even greater judicial vigilance and therapeutic tools to resolve issues that have become more challenging due to the lack of traditional opportunities for discussion and resolution. In addition to their own personal challenges, judges will be called upon to navigate the angst and layering of virus-related problems that citizens face in this new reality. Now, more than ever, is the time to integrate and apply compassion into the judicial fiber.

The Compassionate Court responds to the clarion call to modernize and humanize the justice system by considering the broader underlying causes and societal problems of the citizenry and the matters they bring to court. It requires judges to play more expressive roles by employing resources, knowledge, and skills to promote healing of the parties seeking justice while concomitantly supporting those who work for the court. Problem-

66. Helen Riess, *The Science of Empathy*, 4 J. PATIENT EXPERIENCE 74-77 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5513638/>.

67. *Id.*

68. *See Id.* at 77; Olga M. Klimecki et al., *Differential Pattern of Functional Brain Plasticity after Compassion and Empathy Training* 9 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 873 (2014); Tania Singer & Olga M. Klimecki, *Empathy and Compassion*, 24 CURRENT BIOLOGY R875 (2014).

69. See MARJORIE SILVER, TRANSFORMING JUSTICE, LAWYERS, AND THE PRACTICE OF LAW (Carolina Academic Press 2017).

70. See *Americans Favor Expanded Pretrial Release, Limited Use of Jail*, PEW RESEARCH CENTER (jail is inappropriate for minor offenses, detention for misdemeanors, nonviolent offenses, and some violent charges), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail>.

71. Hueston et al., *supra* n. 7.

solving courts have revolutionized court hearings into non-adversarial, collaborative vehicles for productive exchanges and curative venues. The lessons learned from these courts provide fertile ground for innovative and successful evidence-based transferable practices. Additionally, emerging science regarding the neurobiology and brain/behavior connections of empathy and compassion are demonstrating positive benefits and healing for both the giver and the receiver.

The concept embodied in a holistic court adopts an empathetic role beyond routine dispensing of judgments—to one that heals, not just rules. The vision is a justice system that reflects an integrated, compassionate approach of all components under one structure whose whole is greater than the sum of its parts. The culmination is the Compassionate Court as a vital force in improving the lives of the individuals served, those who serve, and, ultimately, the community in which the court resides.



Jamey Hueston is the founding judge of the Baltimore City Drug Treatment Court. She administered the program for over 20 years and has hosted hundreds of national and international visiting judges and others seeking to observe its operations and adapt them to their respective jurisdictions. She also founded and chaired the Maryland Office of Problem-Solving Courts, one of the first statewide drug-court-oversight offices in the country, for over a decade and is a pioneer founder of the National Association of Drug Court Professionals. Judge Hueston lectures and consults throughout the U.S. and internationally regarding drug courts and court justice.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better

state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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FJC

Federal Judicial Center

Judicial education plays an important role in enhancing the professionalism of the judiciary and promoting the rule of law. This following list includes information about the International Organization for Judicial Training and judicial education providers in the United States.

INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING

The International Organization for Judicial Training (IOJT) was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. The organization convenes biannual conferences hosted by judicial training centers of different countries. These conferences provide an opportunity for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching methodology. The IOJT website includes links to materials from past conferences as well as its journal: *Judicial Education and Training*. <http://www.iojt.org>

FEDERAL JUDICIAL CENTER: EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS

An overview of the Federal Judicial Center, including its organization, history, and mission. For translated versions of this document, see Translated Briefing Materials under the Resources menu. <https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf>

NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS

The National Association of State Judicial Educators (NASJE) is a non-profit organization that strives to improve the justice system through judicial branch education. <http://nasje.org>

NATIONAL JUDICIAL COLLEGE

The National Judicial College provides judicial education and professional development for judges within the United States as well as for judges from other countries. <https://www.judges.org>

NATIONAL CENTER FOR STATE COURTS

The mission of National Center for State Courts (NCSC) is to improve the administration of justice through leadership and service to state courts, and courts around the world. <https://www.ncsc.org>

THE JUDICIAL EDUCATION REFERENCE, INFORMATION AND TECHNICAL TRANSFER PROJECT

The Judicial Education Reference, Information and Technical Transfer (JERITT) Project is the national clearinghouse for information on continuing judicial branch education for judges and other judicial officers, administrators and managers, and judicial branch educators. This site includes links to judicial education centers serving the United States state court systems. <https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf>

COUNCIL FOR COURT EXCELLENCE

Working primarily in Washington, D.C., courts, the Council is attempting to create an accessible, fast-moving justice system. The Council for Court Excellence works to achieve this through education of the citizenry on the justice system and by advocating reforms. <http://www.courtexcellence.org>

NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW

Working through the University of Mississippi School of Law, the National Center for Justice and the Rule of Law attempts to ensure fairness in the U.S. criminal justice system. It uses projects, conferences, and education, and it produces publications that study the criminal justice system. It seeks to highlight issues of justice and rule of law and discuss methods to address related problems. https://olemiss.edu/depts/ncjrl/Administration/about_mission.html

THE FEDERAL JUDICIARY CHANNEL ON YOUTUBE

This link will bring you to streaming video productions developed by the Federal Judicial Center, the Administrative Office of the United States Courts, and the United States Sentencing Commission. The videos cover a range of topics including analysis of U.S. Supreme Court decisions, discussion of sentencing law, and information about the U.S. judiciary. <https://www.youtube.com/user/uscourts?feature=watch>

Nexuses and Tangents

Cynthia Gray

The phrase “the law, the legal system, or the administration of justice” creates several exceptions to prohibitions in the code of judicial conduct. For example, a judge may only serve on governmental commissions¹ and only consult with the executive or legislative branches² on those issues. In general, judges can express themselves more and get involved more in extra-judicial activities that are related to “the law, the legal system, or the administration of justice.”

On the one hand, the exemptions make sense: legal-system-related issues are within the judiciary’s expertise, and judges’ interests, and promoting improvements in those areas may be an appropriate expenditure of the capital accumulated in the prestige of judicial office. On the other hand, “facets of almost every social problem facing today’s society will play themselves out in the courts,”³ and the law and the legal system are “used as a means to achieve social, political, or civic objectives.”⁴ Thus, the connection between “the law, the legal system, or the administration of justice” and judicial duties means involvement in those matters off-the-bench will more often raise more serious questions about judicial impartiality on the bench than would, for example, service on a library board.

Further, the phrase has a potentially all-encompassing sweep with uncertain limits. It has, for example, been broadly interpreted to include such issues as childcare, transit, a community-college-legal-secretary program, law school recruitment, police department improvement, and crime deterrence. Moreover, “practically everything the Legislature does” could arguably fall

within the exception because, by definition, legislation concerns the law.⁵

Several advisory committees have tightened up the phrase to prevent the exceptions from swallowing the rules. Those definitions condition judicial involvement on a direct,⁶ “readily articulable”⁷ nexus between the specific activity and the courts’ “core mission of . . . delivering unbiased, effective justice to all”⁸ and their “statutory and constitutional responsibilities—in other words, how the courts go about their business.”⁹ That narrower, more precise formulation of the phrase means that a concern “with justice in a broader sense” is not enough¹⁰ and that activities with a tangential, incidental, partial connection to the courts stay within the code’s restrictions.¹¹

Interpreting the phrase recently, the Utah judicial ethics committee refused a judge permission to be involved in efforts to get the state legislature to ratify the Equal Rights Amendment.¹² The committee acknowledged that “the judiciary is certainly concerned about equality and fairness” and that “any law that promotes equality is consistent with the judiciary’s objectives.” However, it explained:

[T]he proposed Equal Rights Amendment does not have a direct and primary impact on the administration of justice. The proposed Equal Rights Amendment may affect the judicial system, but the efforts are not directed toward the judicial system. The amendment would impact countless organizations, including private and public entities.

Footnotes

1. Rule 3.4, MODEL CODE OF JUDICIAL CONDUCT (ABA 2007) (https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_4appointmentstogovernmentalpositions/).
2. Rule 3.2, MODEL CODE OF JUDICIAL CONDUCT (ABA 2007) (https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_4appointmentstogovernmentalpositions/).
3. Massachusetts Advisory Opinion 1998-13 (<https://www.mass.gov/opinion/cje-opinion-no-98-13>).
4. U.S. Advisory Opinion 50 (2009) (https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf).
5. Utah Informal Advisory Opinion 2001-1 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/2001/01-1.htm).
6. See Connecticut Formal Advisory Opinion 2011-21 (https://www.jud.ct.gov/Committees/ethics/formal_op/JE_2011-21.pdf) (“there must be a direct nexus between what a governmental commission does and how the courts go about their business”); Ohio Advisory Opinion 2002-9 (<https://ohioadvop.org/advisory-opinion-by-year/2002-2/op-02-009/>) (there should be “a direct concern with the improvement of the law, the legal system, and the administration of justice”).
7. Minnesota Advisory Opinion 2014-2 (<http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2014-2.pdf>).
8. U.S. Advisory Opinion 50 (2009) (https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf).
9. Massachusetts Advisory Opinion 1998-13 (<https://www.mass.gov/opinion/cje-opinion-no-98-13>).
10. Utah Informal Advisory Opinion 1998-11 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/1998/98-11.htm).
11. See Indiana Advisory Opinion 2-2001 (<https://www.in.gov/courts/jqc/files/jud-qual-adops-2-01.pdf>) (a governmental commission concerned with the improvement of the law, the legal system, or the administration of justice is “one whose concern with the legal system is direct and exclusive,” not tangential or partial); Ohio Advisory Opinion 2002-9 (<https://www.ohioadvop.org/wp-content/uploads/2017/04/Op-02-009.pdf>) (there should be more than “a tangential relationship in which there is involvement with the law in some way”); Utah Informal Advisory Opinion 1998-11 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/1998/98-11.htm) (“if the nexus is less direct, incidental, or tangential, if the permitted subjects are just one aspect of a much broader mission or focus, then service by a judge is not permitted”).
12. Utah Informal Advisory Opinion 2020-2 (https://www.utcourts.gov/resources/ethadv/ethics_opinions/2020/20-02.pdf).

A judge thus may not express public support for or opposition to the proposed Equal Rights Amendment.

Repeating that “the judiciary wholeheartedly supports efforts that promote equality and fairness,” the committee encouraged judges to promote “diversity on the bench, for the judiciary as a whole, and among members of the bar” and to promote “equality and fairness in the legal system.”

Thus, a judge or group of judges may “voice a commitment or sign a resolution that says all judges should treat all litigants fairly and equally without regard to race, creed, color, national origin, sexual preference, gender, etc. and take steps to ensure that this goal of equality is achieved,” according to a recent Florida advisory opinion.¹³ Emphasizing that the proposed activity would take place “entirely within the judiciary,” the committee noted that the resolution “expresses a valid concern of both judges and litigants and seeks to remind each of us to be aware of the need to conduct ourselves in a manner that would encourage confidence on the part of all persons in the fairness of the judicial system.”

Although noting that law enforcement affects the courts, the Massachusetts judicial ethics committee rejected an expansive reading that would have equated the administration of justice with law enforcement, and the committee disapproved of a judge’s service on a commission focused “on how the police department goes about its business.”¹⁴ Similarly, the New York committee recently stated that a judge may not participate in a county executive’s initiative to “recommend changes to current police force deployments, strategies, policies, procedures, and practices.”¹⁵ The program began after “multiple high-profile, racially-charged incidents of police violence” that “resulted in ongoing or reasonably foreseeable litigation and intense local and national controversy.” The committee concluded that improving the county’s law enforcement model was not an “issue of fact or policy involving the improvement of the law, the legal system or the administration of justice.” The opinion explained that “while judges may be called upon, in their judicial capacity, to gauge the constitutionality of specific uses of force in cases that come before them, broad policy decisions concerning use or prohibition of specific law enforcement techniques are generally the province of the legislative or executive branches.” The committee was also concerned that participation in the initiative would “insert the judge ‘into the center of matters of substantial, local controversy’” and involve “frank conversations about recent events” that would violate the prohibition on judges making public comments on pending cases.

The California advisory committee has distinguished between

judges’ sharing their unique judicial perspective with the other branches and “judicial advocacy for or against the wisdom or morality” of a proposed policy.¹⁶ For example, the committee stated that a judge could, based on the judge’s experience, comment on whether the current death penalty system is dysfunctional for the courts or on increasing or decreasing sentence ranges for a particular type of offender but could not advocate as a policy matter for or against eliminating the death penalty or for longer or shorter sentences for certain crimes. The committee reasoned that the law-related exception does not allow the judicial branch to tell the legislative or executive branches “whether a law or proposed law is good or bad social or economic or scientific policy.”¹⁷

On and off the bench, judges are accustomed to balancing different interests that are in tension, but the lines should be as clear as possible given the changing variety of circumstances in which judges need to apply ethics rules. Distinguishing between the core judicial mission and other government and society concerns is simpler and less abstract than hypothesizing on what may or may not undermine judicial impartiality and public confidence in the courts. As tempted as judges may be to weigh in on how to right every societal wrong they see played out every day in their courts, that judges should keep to their own lane is one of the conservative principles (in the “marked by moderation or caution” meaning¹⁸ of “conservative”) underlying the code of judicial conduct and judicial independence and impartiality. There is enough work to do in-house to strengthen and reform the judiciary, a task judges cannot delegate to the other branches.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization’s October 2014 dissolution.) She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

13. Florida Advisory Opinion 2020-18 (<http://www.jud6.org/Legal-Community/LegalPractice/opinions/jeacopinions/2020/2020-18.html>).
14. Massachusetts Advisory Opinion 1998-13 (<https://www.mass.gov/opinion/cje-opinion-no-98-13>).
15. New York Advisory Opinion 2020-112 (<https://www.nycourts.gov/legacyhtml/ip/judicialethics/opinions/20-112.htm>).
16. California Supreme Court Committee Formal Opinion 2014-6 (https://www.judicialethicsopinions.ca.gov/wp-content/uploads/cjeo_formal_opinion_2014-006.pdf).
17. *Cf.*, Wyoming Advisory Opinion 2011-1 <https://www.courts.state.wy.us/wp-content/uploads/2017/05/201101.pdf> (a judge may

- not advocate for an increase in the maximum incarceration for a fourth or subsequent DUI but may provide empirical or anecdotal evidence about their experiences); Ohio Advisory Opinion 2002-9 (<https://ohioadvp.org/advisory-opinion-by-year/2002-2/op-02-009/>) (a judge may explain to the public a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, compare it to current law, and describe its potential impact on the constitution, the law, and the operation of the courts).
18. See <https://www.merriam-webster.com/dictionary/conservative>.

Results of Our 2020 Court Review Membership Survey

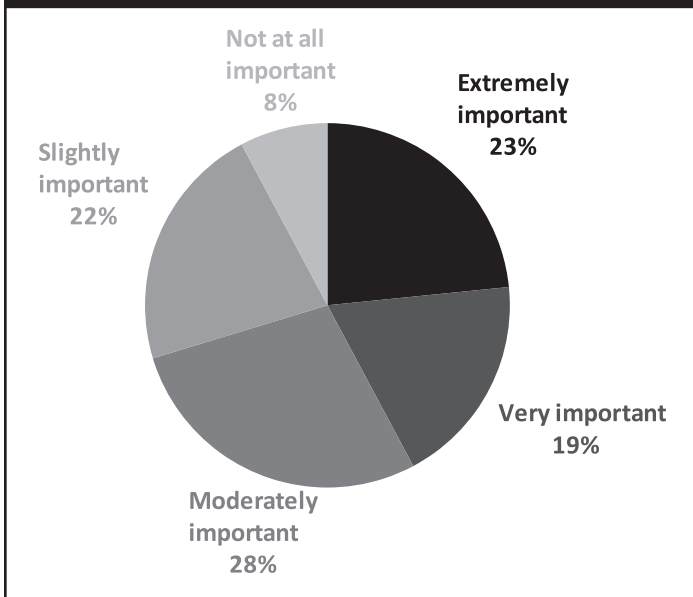
Court Review Editors

At the end of the calendar year 2020, the *Court Review* co-editors solicited feedback about the publication. A link to a survey was emailed to the American Judges Association membership (approximately 1400 members) and was included within the printed and online editions of *Court Review*. The questions in the survey asked about experiences as a reader and contributing author of *Court Review*.

We received 81 responses; however, 13 respondents only answered the first question (i.e., how long have you been receiving *Court Review*?) and are therefore not included in the responses below (n=68). Although we would have preferred to hear from many more *Court Review* readers, we also recognize that this was an uncompensated request during a very difficult year that involved many additional burdens.

Most of the respondents (63.2%) have been receiving *Court Review* for 7 or more years and most (54.4%) have been a judge for more than 10 years. The vast majority (84%) read *Court Review* in print rather than online and preferred that *Court Review* remain in-print rather than online only (See Figure 1). Most respondents

FIGURE 1. HOW IMPORTANT IS IT TO YOU THAT COURT REVIEW REMAINS A PRINTED RATHER THAN AN ONLINE-ONLY PUBLICATION?

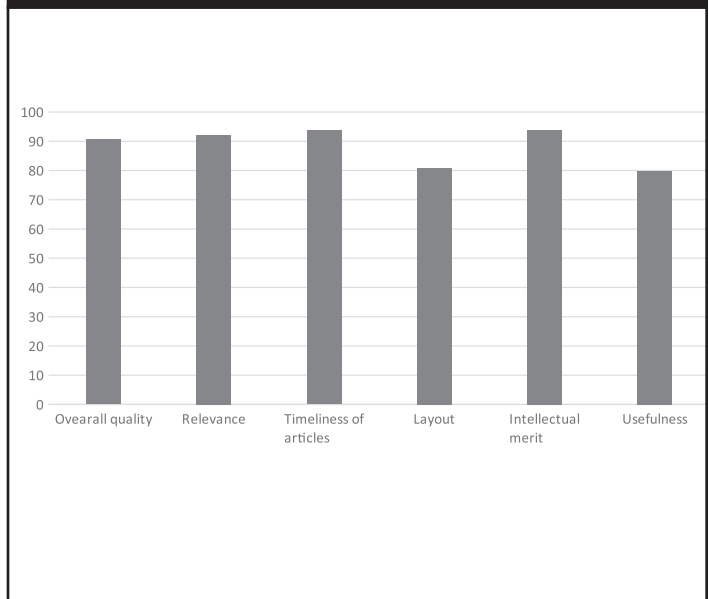


(69.1%) reported that they generally skim the issue to find relevant articles rather than reading the entire issue (11.8%), while 19.1% intend to read the entire issue but usually do not finish it.

We asked respondents to rate their most recent experience with *Court Review* in relation to factors such as quality and usefulness. Using a 7-point scale (1 =extremely satisfied, 2 = moderately satisfied, 3 = slightly satisfied, 4 = neither satisfied nor dissatisfied, 5 = slightly dissatisfied, 6 = moderately dissatisfied, 7 = extremely dissatisfied), respondents generally indicated that they were extremely or moderately satisfied with *Court Review* (see Figure 2).

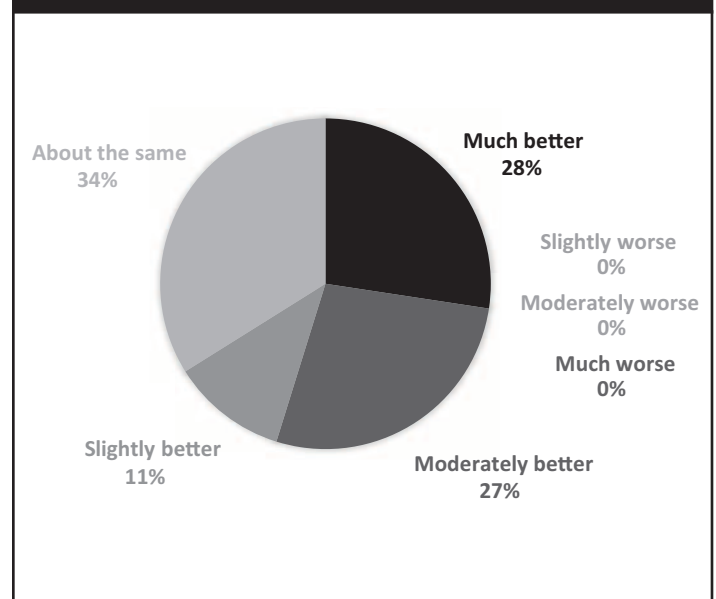
Many respondents indicated that they received other publica-

FIGURE 2. PERCENT EXTREMELY OR MODERATELY SATISFIED WITH:



tions aimed at judicial audiences. We asked the respondents how *Court Review* compared to those publications on a 7-point scale (1 = much better, 2 = moderately better, 3 = slightly better, 4 = about the same, 5 = slightly worse, 6 = moderately worse, 7 = much worse). All respondents indicated that *Court Review* was much better than or about the same (i.e., rated a 4 or lower) as any of the other publications they receive aimed at a judicial audience (see Figure 3).

FIGURE 3. IN GENERAL, HOW DOES COURT REVIEW COMPARE TO OTHER PUBLICATIONS FOR JUDICIAL AUDIENCES?





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RX4

WEBINAR SERIES



The American Judges Association is excited to announce a series of free webinars for judges, the court community, and the public. AJA, with generous support from the State Justice Institute, will present four webinars in the coming months. The webinar series will examine the challenges facing the country and state courts due to the pandemic and social unrest related to systemic racial inequality. Three of the four topics will echo President Franklin Roosevelt's response to the Great Depression, which focused on Relief, Recovery, and Reform. The fourth will address the steps state courts, and especially judges, can take to ensure that the state justice system provides equal justice to all.

RECOVERY

Date: November 18, 2020 from 6:00-7:15 p.m. EST / 3:00-4:15 p.m. PST

Presenter: Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law at UC Berkeley School of Law

Renowned constitutional law scholar Erwin Chemerinsky will discuss the legal challenges and constitutional issues courts will face during and after the pandemic, as well as the development of law in the past year. He will conclude with a reflection on Associate Justice Ruth Bader Ginsburg and what new Justice Amy Coney Barrett means for the Supreme Court.

[View Webinar Recording](#) | [Download Handout \(PDF\)](#)

RELIEF

Date: Friday, January 15, 2021 from 3:00-4:15 p.m. EST / 12:00-1:15 p.m. PST

Presenters: Judge George Grasso, Supervising Judge of Bronx County Criminal Court (NY), and David Slayton, Director of the Texas Office of Court Administration

This webinar panel discussion will highlight the steps courts have taken to resume suspended in-person hearings and jury trials, to adjust to judges and staff working remotely, and other issues.

[View Webinar Recording](#) | [Download Handouts \(ZIP\)](#)

RACIAL JUSTICE

Date: Tuesday, February 16, 2021 from 3:00-4:15 p.m. EST / 12:00-1:15 p.m. PST

Presenters: Chief Justice Bernette Johnson, Louisiana Supreme Court and Barbara Arnwine, President & Founder, Transformative Justice Coalition; Moderated by Judge Yvette Alexander, Baton Rouge City Court, Louisiana and President-Elect of AJA

This webinar will speak to the responsibility of judges and the state courts to address persistent racial inequality and the negative perceptions of the justice system among communities of color. Attendees will be fortunate to hear from recently retired Chief Justice Bernette Johnson of the Louisiana Supreme Court and Barbara Arnwine, President & Founder, Transformative Justice Coalition. CJ Johnson, the state's first African American Chief Justice, has emphasized the need for judges and lawmakers to recognize their roles in maintaining a system that leaves many persons of color dissatisfied. Ms Arnwine, the radio host of Igniting Change and a regular presence in the national media, is internationally renowned for contributions on critical justice issues. The discussion will be moderated by Judge Yvette Alexander of Baton Rouge City Court, Louisiana and President-Elect of AJA. You won't want to miss this provocative and enlightening discussion to include practical advice for criminal justice reform.

[View Webinar Recording](#) | [Download Slides \(PDF\)](#) | [Download Handout \(PDF\)](#)

REFORM

Date: Tuesday, April 20, 2021 from 3:00-4:15 p.m. EST / 12:00-1:15 p.m. PST

Presenters: Lisa Foster, Retired Judge and Co-Director of the Fines & Fees Justice Center; former Director of the Office for Access to Justice at the United States Department of Justice; David K. Byers, Director of the Administrative Office of the Arizona Supreme Court

This final webinar on REFORM will examine why Fines and Fees Reform will help courts weather the COVID-19 recession and move toward more equitable, effective ways of funding operations. The session will include policy recommendations offering strategies to address the immediate economic harms caused by fines and fees during the COVID-19 pandemic. The webinar will also explore institutional and systemic changes that resulted from, and may outlive, the immediate impact of the pandemic.

[REGISTER FOR THIS WEBINAR](#)

AN ESTIMATED 3 OUT OF 5 PEOPLE IN CIVIL CASES GO TO COURT WITHOUT A LAWYER.



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AJA ANNOUNCES *GET INVOLVED* AN AMBITIOUS NEW MEMBERSHIP DEVELOPMENT CAMPAIGN

In a recent message to every current AJA member, then-President, Justice Robert Torres (Guam Supreme Court) announced the launch of *Get Involved*, the Association's ambitious program to double the size of its membership. In doing so he said: "If AJA is to continue to be the pre-eminent voice of the judiciary, we will need every existing member to **GET INVOLVED** in this ambitious campaign. We simply must have more members to assume key roles in the organization for AJA to effectively continue to develop our well-respected brands of: *Judicial Excellence*, *Procedural Fairness*, *Making Better Judges*, and advocate for independent, accessible and fair courts. Getting and keeping judges involved in a member-driven, judges-only professional association is becoming an increasingly difficult challenge. If AJA is to succeed in this ambitious membership development campaign, **every current AJA member must GET INVOLVED.**"

To make it easier for AJA members to **GET INVOLVED**, they will be provided with a straightforward **toolkit** outlining what each member can do in less than 10 minutes to recruit judges to join AJA.



AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit <http://proceduralfairnessguide.org/interviews/> to watch the interviews.

OLD DOCTRINE, NEW APPLICATION by Judge Vic Fleming

Let us poetically reflect on what it once meant to do equity in order to receive equity.

Across

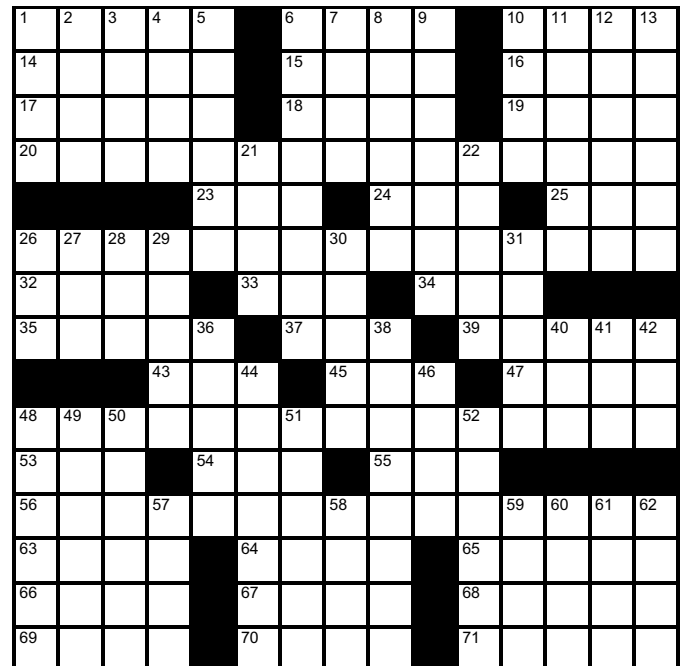
- 1 Bibliography abbr. (5)
- 6 Annoying child (4)
- 10 Christens (4)
- 14 Ben Stiller's mom Anne (5)
- 15 After-bath attire (4)
- 16 "I smell ___!" (4)
- 17 Big cheese (5)
- 18 Accrue, as interest (4)
- 19 Aptly named fruit (4)
- 20 Simile with a familiar ring?
- 23 "Benevolent" order member (3)
- 24 Cold war fighter plane (3)
- 25 Mudder's morsel (3)
- 26 Certain expression?
- 32 Grad-school exam (4)
- 33 Mo. when Shakespeare was born (3)
- 34 Appearing for the first time (3)
- 35 U-boat detector (5)
- 37 General address? (3)
- 39 "Bald" bird (5)
- 43 "... or ___ thought" (3)
- 45 Animate, with "up" (3)
- 47 Some savings plans, for short (4)
- 48 Our essence is of value? (15)
- 53 Disco '70s, e.g. (3)
- 54 Bernardino or Diego lead-in (3)
- 55 Org. alternative (3)
- 56 [Read 20-, 26-, and 48-Across, then write your own clue] (15)
- 63 Acoustical engineer's concern (4)
- 64 Fitzgerald of song (4)
- 65 Zoom meeting invitations, perhaps (5)
- 66 Whole bunch (4)
- 67 One with a crystal ball (4)

- 68 "8 Seconds" setting (5)

- 69 Tracy's Trueheart (4)
- 70 Put one's foot down (4)
- 71 Backspace over (5)

Down

- 1 "Discover" competitor (4)
- 2 Bog product (4)
- 3 Airport curb queue (4)
- 4 Camaro named for a race acronym (4)
- 5 Graphical representations (6)
- 6 Splits (8)
- 7 Expression of pride? (4)
- 8 "The ___ Report" (former MSNBC show) (6)
- 9 Anxiety (7)
- 10 Apply artlessly (4)
- 11 Impel (6)
- 12 Romantic song (6)
- 13 Circus boosters? (6)
- 21 Napoleon exile site (4)
- 22 Just say yes (5)
- 26 Uniform features (abbr.) (3)
- 27 "Conquistadores" quest (3)
- 28 "At Seventeen" singer Janis (3)
- 29 Back pocket liquor bottle (5)
- 30 Baloney (5)
- 31 Anticipate, as an arrival (5)
- 36 Vermouth choice (5)
- 38 1966-76 militant youth movement (8)
- 40 Miracle-___ (3)



- 41 Big dog, briefly (3)
- 42 Legal conclusion? (3)
- 44 Goofy to the max (7)
- 46 Cat's "I'm so happy!" (4)
- 48 Least (6)
- 49 All-seeing one (6)
- 50 Cilia (6)
- 51 Former Michigan governor John (6)
- 52 Area of expertise (6)
- 57 "___ it going?" (4)

- 58 Kitchen spread (4)
- 59 Cuban love? (4)
- 60 "Diddly," in Durango (4)
- 61 "___ Irae" (Latin hymn) (4)
- 62 Plumlike fruit (4)

Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.

Solution is on page 91.



The Resource Page

ONE MORE ITEM ON EQUAL JUSTICE IN THE COURTS

While many resources exist addressing the themes of this issue, one recent resource is worth noting separately here. On October 1, 2020, New York State released the results of a remarkable undertaking, the Report from the Special Advisor on Equal Justice in the New York State Courts. New York's Chief Judge DiFiore commissioned Jeh Johnson and his team to undertake this landmark examination of racial bias in the New York State court system. In this 100-page report, the authors evaluate extensive and detailed data seeking to identify racial bias in the court system. The authors pursue a comprehensive review and make productive suggestions for ways to advance equality in courts. Mr. Johnson's thoughtful Executive Summary is a "must read" for any person wishing to pursue constructive steps to improve our justice system. You can find the full report on the New York Courts website, <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

JUDICIAL WELL-BEING

Working at the courthouse has always been a high stress position that places unique pressures on the well-being of judges and courthouse personnel. The challenges of the last year have only exacerbated this perennial problem. In January of 2021, our friends at the National Center for State Courts released a helpful resource called *Addressing the Mental Health and Well-Being of Judges and Court Employees*. https://www.ncsc.org/__data/assets/pdf_file/0023/59603/Addressing-the-Mental-Health-and-Well-being-of-Judges-and-Court-Employees-Final.pdf. NCSC developed the guide in collaboration with the National Judicial Task Force to Examine State Court's Response to Mental Illness. This six-page guide provides tips and describes best practices for helping to build overall organizational health. Even more useful is the list of resources and links to sample programs in various states addressing mental health for court personnel. From the report, you can link directly to programs in Colorado, Florida, Georgia, Massachusetts, Michigan, Utah, and Virginia. Links for nationwide programs and resources are also provided.

AND FOR YOUR FAMILY

Another excellent resource for well-being extends beyond us as judicial officers to our family members. The Judicial Family Institute grew out of a training program for appellate judges in 1987. An innovation for the day was that spouses and children were invited. The ensuing discussion highlighted the need for a broader approach to judicial wellness and education. The Institute website, <https://www.judicialfamilyinstitute.org/>, provides information and resources on issues such as ethics guidance for the families of judicial officers, the gamut of wellness topics but including the unique needs of family members, and a helpful guide to security issues.

COMING SOON, EFFECTIVENESS OF REMOTE PROCEEDINGS IN FAMILY MATTERS

As a result of the pandemic, courts made a massive and unprecedented shift to remote proceedings, also called virtual hearings. This shift was particularly comprehensive in family law matters. Not long after this happened, court leaders and court observers began to wonder about the opportunities presented, such as increased appearance rates, as well as the dangers of the remoteness of remote hearings in such a personalized type of proceeding. The Anne E. Casey Foundation and Casey Family Programs funded multistate research programs to evaluate the efficacy of these virtual hearings in child welfare matters. This research is being examined by entities such as the American Bar Association's Center on Children and the Law as well the National Center for State Courts. The Center on Children and the Law has released an early summary of survey results at [https://www.americanbar.org/content/dam/aba/administrative/child_law/covidsurvey-1pager.pdf?ct=t\(EMAIL_CAMPAIGN_2_7_2018_COPY_01\)&mc_cid=9b99238dc2&mc_eid=830598019b](https://www.americanbar.org/content/dam/aba/administrative/child_law/covidsurvey-1pager.pdf?ct=t(EMAIL_CAMPAIGN_2_7_2018_COPY_01)&mc_cid=9b99238dc2&mc_eid=830598019b). The summary offers an overview of what is being done across the country. For example, approaches to in-person parenting time, prioritization based on age of child, and frequency of third-party funding of technological access. This short summary is only the beginning of more comprehensive reports to follow. "Watch this space," as the marketing old slogan goes.

FOR FAMILY LAW JUDICIAL OFFICERS

Speaking of the American Bar Association's Center on Children and the Law, their website is an informative resource that family law judicial officers should include in their regular reviews. The Center devotes a portion of their website to resources for courts, https://www.americanbar.org/groups/public_interest/child_law/project-areas/national-court-projects/#. The Center regularly posts informative articles for judges about innovative approaches to family law issues. They also post a series of "action alerts" for judges on new issues and developments related to child welfare. These "action alerts" are created with the National Council of Juvenile and Family Court Judges. A recent posting is an excellent examination of the role of the judge in prioritizing education when the child is in third-party care, such as foster care. Another "alert" addressing an issue critical to family law court leaders, the ever present problem of funding. In "Leveraging Federal IV-E Funding to Support Child and Parent Representation," the Center and the Council deliver on the title. They give you information and ideas about accessing one of the more recent funding sources that may not be widely known. Anyone looking for opportunities to enhance family law services at your court will want to review this "alert."

COVID-19 AND STATE COURTS

The National Center for State Courts is collecting information on a variety of ways that COVID-19 has impacted the courts. Just go to <https://www.ncsc.org/> and you will see, among other things, links to State Court COVID-19 websites and information on how states are dealing with jury trials and in-person proceedings.