
# Rising to the Challenge: Overcoming Obstacles and Challenges on the Path to the Bench

## *Speakers:*

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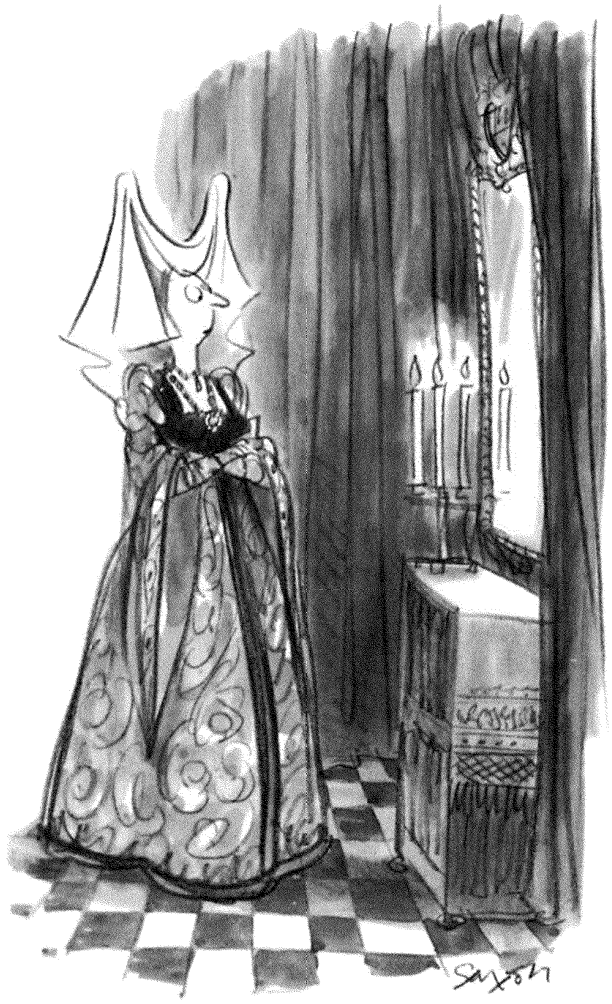
***Conference Reference Materials***

# Canons of Judicial Ethics

Canon 1. A judge shall uphold the integrity and independence of the judiciary. Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities. Cannon 3. A judge shall perform the duties of judicial office impartially, competently, and diligently. Cannon 4. A judge shall so conduct the judge’s quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations. Cannon 5. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. Cannon 6. Compliance with the Code of Judicial Ethics.

# APPENDIX A

## The Central Principle of Being a Judge and the Eight Pillars



*"Mirror, mirror, on the wall,*
*who is the fairest of them all?"*
*"Oliver Wendell Holmes."*

Charles Saxon/The New Yorker Collection/The Cartoon Bank

## The Central Principle of Being a Judge

(*Handbook*, section 1:1)

**"The basic function of an independent, impartial and honorable judiciary is to maintain the utmost integrity in decision making, and this code should be read and interpreted with that function in mind."** (Advisory Com. com, Cal. Code of Jud. Ethics, canon 1.)

The Central Principle of Being a Judge provides a single foundational idea unifying the elements of judging based on constitutional provisions, statutes, precedents, the rules on procedure, and the code of judicial ethics governing the conduct of judges in court and in private life. The Central Principle derives from the long historic development of the idea that those who sit in judgment on the lives of others must render honest decisions. For example both Deuteronomy, 16:18–20 and the Law of the Twelve Tablets in the Republican Period in Roman history require judges to be honest and impartial.

Accomplishing the goal of ensuring the honesty and integrity of decisions is probably the most difficult and subtle of tasks. It is an activity that takes place in the privacy of a judge's mind. Unless the judge says something revealing or provides a nonverbal clue, no one else would know whether the judgment was guided by fear of public opinion, desire for advancement, favoritism, or personal bias. Moreover, wrested judgment may also be influenced by unconscious factors.

The fact that distortion in judgment may not be conscious makes it no less a breach of the Central Principle of Being a Judge because part of the judicial responsibility is to know what is influencing one's decision. In spite of the importance of this issue, there are instances, though rare, where disciplinary action has resulted from the decisionmaking process. To serve justice, the Central Principle needs to move to the top of one's consciousness, for example:

- Did I consciously or unconsciously allow the intrusion of insidious bias to command?
- Did I allow my caseload and time pressures to transcend justice?
- Have I pretended to hear when, in fact, I did not listen?
- Have I failed to throw off the role of advocate on assuming the bench?
- Have I bowed to popular opinion, reaching decisions to gain public favor, career advancement, electoral victory, or to please the powerful?

The unifying idea of the Central Principal of Being a Judge is all about providing a judge with a clear focus on the goal of what it means to be a judge *and also* giving a judge a single guidepost when faced with any question, whether it be an ethics issue or any other issue where the judge must choose which path to take and what decision to make. It is the guide to doing what is right. (*Handbook*, § 1:37)

As a judge you sit in judgment of disputes of others. You are responsible for protecting the interests of those who are not able to take care of themselves. In each of these areas, judges hold a position of enormous importance, as set out in the Federalist papers:

> "Justice is the end [goal] of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." (The Federalist No. 51, attributed to Madison and/or Hamilton.)

Constitutions, statutes, rules, precedents, and so forth are tools that serve the judge's ability to understand the Central Principle and guide the judge's actions. But, the most important tools are in the judge's mind, honor, and heart.

## The Eight Pillars of Being a Judge

### PURPOSE of the Eight Pillars

The Eight Pillars of Being a Judge focus on the thinking and organizational processes to help maintain a connection to judicial conduct and to the Central Principle of Being a Judge. The *Handbook*, sections 1:30–1:38, has a detailed explanation of the Eight Pillars.

### PILLAR I—Mindfulness of Who You Are

(Summary of *Handbook* section 1:31)

**Always be mindful that you are a judge—whether on the bench, at a party, or online.** As you go about your daily lives, awareness that you are a judge should be running in the background like an antivirus program. As you concentrate on this element of mindfulness this awareness of who you are will be so much a part of you that, as information, events, or perceptions enter your mind, the idea that "*I am a judge*" is integral to your definition of self: you are a public figure who is seen as a symbol of justice.

In essence mindfulness "involves slowing down one's mental processes enough to allow one to notice as much as possible about a given moment or situation, and then act thoughtfully based on what one has noticed. It sometimes is described as approaching each moment with a 'beginner's mind' or 'thinking about thinking while thinking.' " (Fogel, Mindfulness and Judging, Federal Judicial Center (2016), p. 2.)

Advancing the legitimate goals and objectives of being a judge. As one who holds high office, a judge must be acutely and constantly aware that everything he or she does or says must be managed through the filter of identity with this high office. What you do and say must always be in the service of (or, at the very least, be neutral to) the goals and objectives of your office. A judge needs to develop the mental process that allows for this kind of mindfulness to take place. The key question,

of course, is whether the conduct undermines those legitimate goals and objectives of high office, leading to an examination of whether the conduct comports with the Central Principle of Being a Judge.

What is expected of a judge? Most of the conduct that reinforces the Central Principle of Being a Judge is set out in the Code of Judicial Ethics and is based on the following foundational principles:

- *Uphold the independence, integrity, probity, fairness, honesty, and high standards of conduct*;
- *Eschew bias and prejudice, be impartial, and maintain an open mind*;
- *Avoid impropriety and appearance of impropriety*;
- *Maintain integrity, probity, uprightness, soundness of character, high standards of conduct, and follow the law, court rules and the Code of Judicial Ethics*;
- *Promote public confidence in the judiciary.*

Although these ideals obviously relate primarily to conduct in court proceedings, they are also central to a judge's conduct in everyday life away from court.

Notice-Reflect-Respond, described in sections 1:43, 2:46, and Appendix B, is a systematic means for ensuring mindfulness and managing self-control and is discussed in both Pillar I and Pillar II. (*Handbook,* §§ 1:31 and 1:32).

## PILLAR II—Mindfulness in the Courtroom

(Summary of *Handbook* section 1:32)

**Mindfulness and awareness in the courtroom require consistency of focus on your mission as a judge in court proceedings.**

This means being conscious of what you do and say, and being attentive to what others do and say. Notice your own reactions, feelings, and thoughts in regard to what is taking place.

The work of judges is not confined to mastering the fine points of evidence, rules of law, intricacies of sentencing, or moving the calendar. If, at the end of each day, the judge goes into chambers satisfied at getting through the calendar while those who have appeared before the judge are smarting from a burst of judicial temper, sarcasm, or an unwillingness to listen, the judge's duty has not been fulfilled.

Learning the skills to deal with the pressures of a flawed and overloaded judicial system is as important as any other judicial skill. Sections 1:43 and 2:48 of the *Handbook* have practical guides to avoid ethical problems, and section 2:46 addresses loss of judicial demeanor.

Always remain focused on the judicial task before you. If what you do and say does not advance the legitimate goals and objectives of being a judge, including accomplishing the particular task before you, learn to notice and be aware when this takes place, and get yourself back on

track. Parties, lawyers, jurors, witnesses, and court observers expect a judge to pay close attention to the matter before the court. A court proceeding is not a place to berate the lawyers for wasting your time, entertain an "audience" with your wit and wisdom, catch up on social media, or prepare your law and motion calendar for the next day.

## PILLAR III—The Rule of Law

(Summary of *Handbook* section 1:33)

**Actions and decisions in court must be within the law.** Judges are not in courtrooms to make up the rules as they go along. Observing the *rule of law* involves the fair application of the constitutions, statutes, case law, rules of court, the Code of Judicial Ethics, and other laws, ensuring the constitutional rights of all before the court, including self-represented persons.

The rule of law is the foundation of modern social order, replacing force and despotic whim. In administering justice, judges must respect and comply with the law. (Cal. Code Jud. Ethics, canons 2A, 3B(2).) Judicial independence does not mean freedom from constraints of the law, but is a basis for our confidence that judicial decisions are not influenced by political considerations, public opinion, the need to be popular, fear of losing an election, or the desire to curry favor with the powerful. Judicial independence requires that judges have the courage to do what is right regardless of these pressures, as well as the courage to stand between abuse of power by the state and the individual before the court.

Public confidence in the judicial institution is necessary to preserve the rule of law. We need not be reminded of the fragility of the rule of law when public confidence is shaken, or of the degree to which public confidence in public institutions has deteriorated in recent times. Articulation of the moral principles and values to which the judicial institution binds itself should serve to encourage public confidence in that institution, and respect for its decisions.

## PILLAR IV—Make No Assumptions

(Summary of *Handbook* section 1:34)

**Keep an open mind, never prejudge, learn, and remain aware of your biases and prejudices.** These are essential elements to fairness and impartiality. It is natural for humans to make assumptions and to harbor biases and prejudices, whether knowingly or unconsciously, and to take mental shortcuts in order to quickly arrive at conclusions. It is also a part of our nature that once a conclusion is reached (whether based on a bias, an assumption, or a "fact" triggered by evidence presented in a trial), it is difficult to accept as "fact" something contrary to that conclusion. The instruction to jurors to "keep

an open mind" is often easier spoken than successfully accomplished. The same holds true for judges.

"If you don't make assumptions, you can focus your attention on the truth, not on what you *think* is the truth. Then you see life the way it is, not the way you want to see it." (Excerpted and adapted from The Four Agreements: A Practical Guide to Personal Freedom, by don Miguel Ruiz, (Amber-Allen Pub. 2001).)

Judicial Empathy. The Code of Judicial Ethics requires judges to treat those who come before the court with fairness, impartiality, and courtesy. (Cal. Code Jud. Ethics, canon 3, 3B(4).) The Code also mandates that judges perform duties "without bias or prejudice." (*Id.*, canon 3B(5), 3C(1), 3C(5)) and to require attorneys and court staff to refrain from manifesting bias or prejudice (*id.*, canon 3B(6), 3C(3)). A judge must conduct all extrajudicial activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge. (Advisory Com. com., Cal. Code Jud. Ethics, canon 4A.)

Judicial empathy moves the judge to understand the lives and challenges of those who come before the court. This understanding is necessary to avoid assuming that others experience life the same way you do. Appropriate judicial empathy should be undertaken when warranted by the circumstances of the case and the parties. The honesty and integrity of a judge's decisions benefit greatly from such introspection. Thomas B. Colby defines empathy in a judicial context as "the cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people's emotions in that situation." (Colby, *In Defense of Empathy* (2012) 96 Minn. L.Rev. 1944, 1945.)

Judicial empathy requires a judge to be open to the idea that unconscious or implicit biases may unwittingly influence a judge's view of the facts, causing one to make assumptions and thereby impact decisions. In understanding judicial empathy the judge needs to differentiate it from sympathy which might well interfere with the judge's duty to ensure fairness, impartiality and appearance of impartiality. The *Handbook*, Pillars I and V, sections 1:31 and 1.35, and sections 2:03 through 2:28, has an extended discussion of fairness, impartiality, and absence of bias.

The greatest failure of a judiciary and judges in modern times took place in Nazi Germany. As recounted in the article in California Litigation, Nobel Peace Prize Laureate Professor Elie Wiesel said that the Nazi judges ignored the impact of their decisions on individual people and demonstrated a total absence of "humanity." (See Fybel, *When Mass Murder and Theft of All Human Rights Were "Legal": The Nazi Judiciary and Judges* (2012) vol. 25, No. 2, California Litigation, 15–21.)

Keeping an open mind, controlling assumptions, and recognizing our responsibility of humanity and empathy, may be the most difficult and vital of judicial burdens. Thwarting the impact of bias, prejudice and assumptions requires constant mindfulness of what one is thinking, or failing to think, and focusing on reason. **Judicial empathy is an antidote to prejudice**.

## PILLAR V—Professional Distance

(Summary of *Handbook* section 1:35)

**Do not become embroiled, take things personally, or be an advocate.** You are no longer a lawyer, and your *only stake* in a matter before you is that justice must be administered fairly, impartially, honestly, and without fear or favor.

Embroilment is the process by which a judge surrenders impartiality. In doing so, the judge becomes a party to the quarrel, involved rather than impartial and losing professional distance. Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom. Embroilment is a frequent cause of judicial misconduct and discipline. Loss of self-control, loss of control of the courtroom, frustration that produces anger, acting in a way that favors one side in a matter, assuming the role of a prosecutor or defense attorney, and coercing a plea or settlement, are examples of losing professional distance. (see Pillar VI below.) The humility to seek out and accept advice is a hallmark of professionalism.

## PILLAR VI—Ensure Both Reality and Public Perception of Honesty and Integrity

(Summary of *Handbook* section 1:36)

Ensuring honesty and integrity in the process of making decisions and in the decisions themselves encompasses both the *reality* as well as the *public perception* of integrity. The California Constitution, Code of Civil Procedure, Penal Code, Rules of Court, Code of Judicial Ethics, Evidence Code, and all the other rules that govern the system of justice in California are focused on this one ultimate objective, this one unifying idea: ensuring the honesty and integrity of decisionmaking. Not only must a judge do what is right according to law, he or she must also be *perceived* to be doing so. Ensuring honesty and integrity in actions outside of court is also essential to the public perception of the integrity of judicial actions and the judiciary.

To secure public confidence in the independence, integrity, and impartiality of the judiciary, judges need to speak honestly about their institution and undertake the processes necessary for its improvement. The courthouse is not an exclusive club that looks after the judge's self-interest. Public confidence is earned when judges take actions that place the good of society above their self-interest.

## PILLAR VII—Courage to Do the Right Thing

(Summary of *Handbook* section 1:37)

**Do what is right according to the law and have the courage to**

**do so.** Judges are ordinary people asked to do the extraordinary. They are given enormous power and are required to eschew any temptation to abuse that power. Judicial integrity is tested by the challenge to do what is right regardless of fear or the judge's unwillingness to do what is right.

You are entrusted to protect the liberty of the people, and not compromise honor and abandon trust by succumbing to biases and prejudices. Judges and ordinary people have the natural desire for acceptance and advancement, but judges have the obligation never to yield these desires by giving in to political pressure or public opinion. (See Cal. Code Jud. Ethics, canon 3B(2).)

There are many things one can do to counter these influences. As mentioned in section 1:22 of the *Handbook*, keep copies of the Central Principle and the Eight Pillars on your bench. Focus on who you are and what you have been entrusted to do, and remember the qualities of the great judges you have known, including their integrity and courage.

"One must be true to the things by which one lives. The counsels of discretion and cowardice are appealing. The safe course is to avoid situations which are disagreeable and dangerous. Such a course might get one by the issue of the moment, but it has bitter and evil consequences. In the long days and years which stretch beyond that moment of decision, one must live with oneself; and the consequences of living with a decision which one knows has sprung from timidity and cowardice go to the roots of one's life. It is not merely a question of peace of mind, although it is vital; it is a matter of integrity of character." (Dean Acheson (United States Secretary of State, 1945–1953) Present at the Creation: My Years in the State Department (W.W. Norton & Co. 1987), p. 36.)

## PILLAR VIII—Accountability and Humility

(Summary of *Handbook* section 1:38)

**Acceptance of accountability.** Judicial accountability is an important element in public acceptance of court decisions. As you read the *Handbook* and look into ethics issues you need to focus on the Central Principle of Being a judge and incorporate the Eight Pillars into your thinking. As a member of the community, imagine if there were no place to lodge a complaint about the conduct of judges, where judges could act with impunity, where biases ran wild, and where self-interest and political power dominated judicial decisions.

Without honorable judges, who else would we have to protect against abuse of governmental power in order to ensure the rule of law? The Commission on Judicial Performance exists to oversee judges' ethics when judges fail to do so themselves. We cannot look at accountability as personally offensive, or see the institutions of accountability as "the enemy." As judges, you are not here to look out for yourselves or your personal interests. You are here as guardians of a system of justice that

protects our democracy. As a guardian of justice, a judge needs to recognize that accountability is an appropriate and fundamental obligation of this calling. A necessary corollary to the Central Principle of Being a Judge is acceptance of accountability and humility. Recognizing that you are accountable for your actions means having the humility to accept that you can make mistakes, and that learning never ends. It may even be a way of making fewer mistakes.

And, finally, the judge is the only person who knows for sure whether his or her decision and the process of decision making carried the integrity, honesty, impartiality, and fairness required of all judges.

Public confidence in the integrity of the judiciary is enhanced by the maintenance of these institutional systems of accountability. Over time, each judge will learn the legal rules, the relevant statutes and cases, along with the many rules of judicial ethics. But, as you learn these ethical and legal rules, the Central Principle and the Eight Pillars will be your touchstone.

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# Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and The Bench Trial

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# ARTICLES

## MAKING THE INVISIBLE VISIBLE: EXPLORING IMPLICIT BIAS, JUDICIAL DIVERSITY, AND THE BENCH TRIAL

*Melissa L. Breger* *

ABSTRACT

*All people harbor implicit biases—which by definition, are not always consciously recognized. Although trial judges are specifically trained to compartmentalize and shield their decisions from their own biases, implicit biases nonetheless seep into judicial decision making. This article explores various strategies to decrease implicit bias in bench trials. Questions are then raised about whether a judge who has faced bias personally would be more amenable and more open to curbing implicit bias professionally. Ultimately, does diversifying the trial court judiciary minimize implicit bias, while also creating a varied, multidimensional judicial voice comprised of multiple perspectives? This article will explore this potential interplay between diversifying the trial court judiciary and reducing implicit bias, while urging future quantitative research.*

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## INTRODUCTION

The exploration of implicit bias is flourishing within the academy. The particular intersection of law and implicit bias is a burgeoning area of thought-provoking study, combining concepts of law, legal decision making, brain science, psychology, and human behavior.

This article contributes to the existing body of literature by exploring implicit bias in trial courts, particularly in bench trials with a single decision maker. It addresses courts that encounter litigants who have appeared before the bench multiple times, such as in family courts and criminal courts. It also presents potential remedies for countering implicit bias in the courtroom. Ultimately, this article suggests exploring research pertaining to judicial diversity and its potential nexus to decreasing implicit bias in the courtroom.

Implicit biases have been described as the thoughts and preconceived notions that flow through our minds—often subconsciously—pertaining to particular people, groups, or situations. All humans harbor implicit biases in one way or another. Thus, it follows that judges themselves are not immune to implicit bias.[1] Nonetheless, judges are specifically trained to compartmentalize and shield their decisions from any extraneous influences, including any of their own biases, implicit or otherwise. "[J]udges are expected to" cull through and "transcend such internal biases."[2]

Yet, even if judges attempt to shield their decisions from their explicit biases, implicit biases may seep into judicial decision making.[3] This could be particularly consequential in trial courts

1. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 393, 396 (2017) ("[I]mplicit racial bias and other implicit biases exist even, and sometimes particularly, in egalitarian individuals. In fact, such individuals are less likely to be aware of these implicit biases, because they lack explicit biases.").

2. Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 25 (2006).

3. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1148 (2012); *see* A. Gail Prudenti, *No One Is Immune from Implicit Bias*, LONG ISLAND BUS. NEWS (Dec. 12, 2017), https://libn.com/2017/12/12/prudenti-no-one-is-immune-from-implicit-bias [https://perma.cc/D88S-NTUN].

when juries are not utilized, or when the same litigants appear before the same judges repeatedly.

How judges can recognize implicit bias—or even mitigate it—is the subject of ongoing research about human behavior and its relationship to bias. Research has identified ideas to reduce implicit bias ranging from the simple idea of identifying implicit bias as a reduction tool to novel ideas such as using technology, neuroscience, and virtual paraphernalia to reduce the effects of bias.[4] This article addresses potential bias reduction remedies and also raises the idea that perhaps a diverse judiciary would be more prone toward reducing implicit bias.[5] In other words, if a judge has faced bias and discrimination personally, would that judge then be more open to curbing his or her own biases professionally? If so, perhaps this awareness and sensitivity to implicit bias is an additional reason why diversifying the judiciary is beneficial, beyond creating a varied, multidimensional judicial voice comprised of multiple perspectives. This article urges further research to explore whether there is an actual association between a judge who has experienced bias personally and the amenability of that judge to identify and reduce implicit bias in courtroom decision making.

This article will address judicial diversity, implicit bias, and the potential ways in which they may be interrelated. In Part I, the article will provide definitions of implicit bias and cite to the pertinent social science literature on the topic. Part II will discuss how implicit bias impacts the legal system at the bench trial level, how litigants may perceive potential bias, and then proffer some suggestions for overcoming this bias. In Part III, the article introduces the possibility that a judge who has personally been

4. *See, e.g.*, Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484–85 (2005); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 407, 411 (2007); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 112 (2002); Antony Page, Batson*'s Blind-Spot*: *Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 237 (2005).

5. David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 377 (2012) ("Heterogeneity across judges in sentencing by race suggests that courtroom outcomes may not be race blind. This potential lack of partiality may be one source of the substantial overrepresentation of African Americans in the prison population. Understanding the sources of variation in the criminal justice system is an important first step toward reducing disparities of various kinds.").

discriminated against in life could be more amenable to eradicating his or her own implicit biases. In other words, if a judge has faced bias on a personal level, that judge is acutely aware of the pernicious effects of bias and may therefore be more cognizant of his or her own personal biases in decision making. The article then concludes with an urging for further quantitative research.

## I. THE UBIQUITY OF IMPLICIT BIAS

Bias is multifaceted. Although many speak of explicit bias and implicit bias, there are also various types of bias within and overlapping with these categories ranging from affinity bias,[6] to confirmation bias,[7] to hindsight bias,[8] to stereotype bias.[9] This article will focus primarily on implicit bias in the broader general sense.[10]

Implicit bias is distinct from explicit bias, but the two can coexist. Explicit bias typically refers to prejudice that a person

6. Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, COLO. LAW., May 2016, at 45, 46; Ronald M. Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part I—Implicit Bias,* COLO. LAW., Jan. 2016, at 45, 45 ("Many people automatically gravitate toward, trust, hire, and like those similar to themselves. This is often referred to as affinity bias, which may be learned, although some claim it has a biological component.").

7. Bill Kanasky, Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, TRIAL ADVOC. Q., Spring 2014, at 35, 35; Brian P. Kane, *Are Cognitive Biases Impeding Your Legal Advice Under Rule 2.1?,* ADVOCATE, Oct. 2015, at 23, 24; Nalty, *supra* note 6, at 45–46.

8. Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration That the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1400 (2006); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998).

9. *See* Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 180–82 (2018) (explaining how stereotypes in regards to gender and intimate partner relationships contribute to domestic violence being tacitly accepted in society); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 950 (2006); Caitlin Millett, *Humans Are Wired for Prejudice but That Doesn't Have to Be the End of the Story*, CONVERSATION (Feb. 4, 2015, 6:16 AM EST), http://theconversation.com/humans-are-wired-for-prejudice-but-that-doesnt-have-to-be-the-end-of-the-story-36829 [https://perma.cc/L37C-EEY3] ("In social psychology, prejudice is defined as an attitude toward a person on the basis of his or her group membership.").

10. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–93 (2004) (describing an experiment where employers were less likely to hire resumes with African American sounding names than Caucasian American sounding names); Kang et al., *supra* note 3, at 1129; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009).

maintains outwardly towards a particular group of people.[11] Examples of explicit bias might include hate crimes, the use of racial slurs, or misogynistic or homophobic language. While much of our society tends not to tolerate this kind of visible bias, it nevertheless endures.[12] Segments of our society, particularly in recent times, feel justified in displaying explicit prejudice in ways that were otherwise found unacceptable in an educated society years earlier.[13] In fact, explicit bias has become increasingly pervasive in our society, prompting some commentators to believe that literature and research focusing on implicit bias distract from the prevalence of open explicit bias in our society, that still very much exists.[14]

Unlike explicit biases, however, often the person holding the implicit bias does not consciously recognize it and would deny harboring such biases, if asked.[15] Similarly, people are often unaware of the impact of these biases upon their own decision making.[16] Implicit bias may reveal itself when individuals resort

11. Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 OR. L. REV. 359, 371 (2016).

12. Kang et al., *supra* note 3, at 1132–35, 1139.

13. *See* Girvan, *supra* note 11, at 371–72 ("Regular repetition of surveys on nationally representative samples of U.S. adults show that, at least as assessed in self-reported measures, explicit bias has declined substantially since the mid-1900s." (footnote omitted)).

14. *Cf.* Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/ [https://perma.cc/YG4V-9XF2] ("The implicit bias narrative also lets us off the hook. We can't feel as guilty or be held to account for racism that isn't conscious. . . . [W]e must confront the troubling reality that society is still, disturbingly, all too consciously racist and sexist. . . . If the science behind implicit bias is flawed, and unconscious prejudice isn't a major driver of discrimination, then society is likely far more consciously prejudiced than we pretend."); Rita Cameron Wedding, *Implicit Bias: More than Just a Few Bad Apples*, JUV. JUST. INFO. EXCHANGE (June 15, 2016), https://jjie.org/2016/06/15/implicit-bias-more-than-just-a-few-bad-apples/ [https://perma.cc/P8NG-MY63] ("In the absence of those more blatant and incontrovertible examples of racism, many people think that the racism that may exist is the result of the random acts of a few bad apples. But in this post-civil rights era racism has not disappeared. It has merely been transformed by colorblind practices that preclude us from noticing or talking explicitly about racism. By making conversations about race and racism taboo, colorblindness can mask the myriad ways that race and racism function today.").

15. *See* Justin D. Levinson, *Introduction* to IMPLICIT RACIAL BIAS ACROSS THE LAW 1, 2–3 (Justin D. Levinson & Robert J. Smith eds., 2012); Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias* 290 (GWU Law Sch. Pub. Law Res., Paper No. 2017-56, 2017), http://ssrn.com/abstract=3011381 [https://perma.cc/CRJ7-CDDA] ("One can honestly believe it is wrong to discriminate against others and thus have low self-reported measures of prejudice, yet still have biased thoughts and engage in discriminatory behavior.").

16. Kang et al., *supra* note 3, at 1129.

to preconceived notions or assumptions about particular groups, such as those defined by gender, gender identity, race or culture, automatically, without reflecting methodically upon what they are actually thinking.

Even though implicit biases can be damaging, such biases are not necessarily rooted in hate and negativity.[17] At times, biased thinking can be mistakenly construed as complimentary to a particular group, even though the so-called "positive" stereotype itself brings with it harm.[18] Because implicit biases are not generally deliberate or malicious, however, they can be that much harder to identify and to eradicate.[19]

When implicit biases are based on stereotypes, the concepts of stereotype bias and implicit bias are intertwined.[20] What I would call multipronged biases—in other words, biases that may fall under a variety of categories—are even more complicated to unravel because they involve the intersectionality of biases.[21]

When we engage in stereotype bias, for example, we often have difficulty modifying our thoughts "because our perceptions become impervious to new information. People interpret ambiguous information to confirm stereotypes and are often unaffected by information that a stereotype is invalid."[22]

17. *See* Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 560, 565–66 (2012) (addressing implicit biases about motherhood, that in some ways can be positive (nurturing or loving), but can manifest negatively in legal settings); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore,* 29 RES. ORGANIZATIONAL BEHAV. 39, 42–43 (2009).

18. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 33–35 (2009) (discussing the stereotyping of Muslims, Sikhs, and South Asians in the courtroom); Breger*, supra* note 17, at 565 (describing stereotypes about motherhood); Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 88–89, 104 (2017) (measuring federal judges bias toward Jewish and Asian litigants as compared to Christian and Caucasian litigants; stating that stereotypes that Asians are hardworking, for example, can elicit hostility).

19. Breger, *supra* note 17, at 560. Due to the nature of implicit bias, an actor may not realize he or she is laboring under the influence of implicit bias unless informed of its nature and upon further reflection of its effects. Lee, *supra* note 15, at 291–92.

20. Jost et al., *supra* note 17, at 43.

21. *See* Kimberle Crenshaw, *Mapping the Margins*: *Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

22. Breger, *supra* note 9, at 180 (quoting Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 943 (2014)).

Moreover, it is critical to remember that the formation of biases often start while very young in childhood, becoming hardened and increasingly solidified over time.[23] In fact, implicit biases can begin to form in children as young as three-years old.[24] Such biases are further reinforced through institutional bias and systemic biases in society.[25] As a result, these implicit biases can shade how one ultimately views the world.[26] Even if society shuns explicit biases, it may "reinforce[] deeply embedded constructs . . . emanating from childhood" as implicit and persistent biases.[27] Larger society then, in effect, may perpetuate the bias.[28]

An example of this relationship between worldview and decision making can be found in one particularly infamous resume experiment.[29] The resume experiment demonstrates the classic example of implicit bias in hiring practices.[30] In this psychological

For a particular example of how stereotypes have staying power in regards to gender norms, see *id*. at 180–82:

> It is convenient as a culture to resort to gendered stereotypes as a way to define the role of men and women in society. Gloria Steinem notes that "[w]hen it comes to the cult of gender, ideas are hard to challenge or even to see as open to challenge, because they are exaggerated versions of the earliest ways we may have been taught to see people as groups rather than as unique individuals."

*Id*. (alteration in original) (quoting Gloria Steinem, Comments on *Taking Stock: A Symposium Celebrating the New York State Judicial Committee on Women in the Courts*, 36 N.Y.U. REV. L. & SOC. CHANGE 525, 526 (2012)).

23. Levinson, *supra* note 4, at 363.

24. *See id*. On a similar note, a Yale study in 2016 found that preschool children face implicit bias in the classroom by their preschool teachers. WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 3–5 (2016), https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf [https://perma.cc/V8BJ-EFVF].

25. *See* Jerry Kang, *Communications Law: Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132, 134–45 (Justin D. Levinson & Robert J. Smith eds., 2012).

26. Page, *supra* note 4, at 203–04 ("Children as young as three years old have already formed stereotypes. These learned stereotypes become unconscious as a result of their frequent presentation and, eventually, overlearning. Even as people later develop their non-prejudiced views, the original beliefs remain in the unconscious, waiting to be activated." (footnotes omitted)). For instance, data indicates that children exposed to intimate partner violence at a young age create implicit bias and tendencies toward such violence. Breger, *supra* note 9, at 189. They may also be more likely to either be abused by or to abuse an intimate partner in the future. *Id*. at 180. Implicit bias, along with other cultural factors, may shape the worldview of intimate relationships in these individuals. *Id*.

27. Breger, *supra* note 9, at 182–83.

28. *See id*. at 181.

29. Bertrand & Mullainathan, *supra* note 10, at 991–92.

30. *See id*.

experiment, two identical resumes were sent out to employers who posted job openings in Boston and Chicago newspapers.[31] The resumes were identical in every way except that one set of applications was submitted with names that many might perceive as sounding white or Caucasian (Emily and Greg), while the other set of applications was submitted with names that many might perceive as sounding black or African American (Lakisha and Jamal).[32]

The results were dramatic. The applicants with Caucasian-sounding names received a disproportionately higher percentage of callbacks for interviews than did the African American ones.[33] Specifically, Emily and Greg received fifty percent more callbacks for interviews than did Lakisha and Jamal.[34] The statistical reporting of the callbacks was uniform across all occupations and industries.[35] Employers who advertised themselves to be Equal Opportunity employers discriminated just as much as the other employers did.[36]

Perhaps many of the employers in the experiment would likely not be conscious of the implicit bias that affected their decision making.[37] These employers would likely presume to be evaluating each resume objectively. Yet in reality, their brains were reviewing each resume through a highly personalized lens based upon their own life experiences and their own implicit biases.[38] Although the

31. *Id.* at 996.

32. *Id.* at 991–92. Throughout this article, I will generally use terms white and black to refer to race, or African American, Asian American, Caucasian American when referring to race. I am mindful, however, that many of these terms are not without controversy. *See, e.g.*, Shaila Dewan, *Has 'Caucasian' Lost Its Meaning?*, N.Y. TIMES (July 6, 2013), https://www.nytimes.com/2013/07/07/sunday-review/has-caucasian-lost-its-meaning.html [https://perma.cc/5HMA-R3GH]; Adelaide Lancaster, *Black Is Not a Bad Word: Why I Don't Talk in Code with My Children*, RAISING RACE CONSCIOUS CHILD. (May 8, 2015), https://www.raceconscious.org/2015/05/642/ [https://perma.cc/YN7F-G6TX].

33. Bertrand & Mullainathan, *supra* note 10, at 997 & tbl.1, 998.

34. *Id.*

35. *Id.* at 1005–06.

36. *Id.* at 1005.

37. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), https://www.nber.org/papers/w9873.pdf [https://perma.cc/C9WS-SJ8J] ("We find little evidence that our results are driven by employers inferring something other than race, such as social class, from the names. These results suggest that racial discrimination is still a prominent feature of the labor market.").

38. *Cf.* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50

employers might think they were reviewing everything with impartial eyes, it is more likely they were seeing things through a biased prism.

Similar studies to the resume experiment have been replicated in the legal realm and various other fields as well.[39] Additionally, experiments have been conducted to demonstrate implicit biases against all types of groups.[40]

In another context, United States Supreme Court Justice Ruth Bader Ginsburg, in a 2016 speech at Georgetown Law Center, addressed implicit gender bias:

> Discrimination didn't end with the explicit lines in the law. Some of it went underground but a lot of it was not even conscious—the term is unconscious bias. . . . So how do you get rid of that unconscious bias? I've told many the stories about how the symphony orchestra got rid of it. Someone had the simple but brilliant idea "let's drop a curtain between the people who are auditioning and the testers." Well . . . into the seventies you never saw women in symphony orchestras. When—

ARIZ. ST. L.J. 193, 196–97 (2018) (arguing that employers may have acted on explicit bias or implicit bias, in the resume experiment).

39. *See, e.g.*, Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [https://perma.cc/CX9Y-XC38] (discussing an experiment where legal memoranda given to partners for evaluation were skewed to favor white men).

40. Ali M. Ahmed et al., *Does Age Matter for Employability? A Field Experiment on Ageism in the Swedish Labour Market*, 19 APPLIED ECON. LETTERS 403, 403–05 (2012) (studying ageism in Sweden job market); Michael Ewens et al., *Statistical Discrimination or Prejudice? A Large Sample Field Experiment*, 96 REV. ECON. & STAT. 119, 119–20 (2014) (explaining email rental application experiment); Leo Kaas & Christian Manger, *Ethnic Discrimination in Germany's Labour Market: A Field Experiment*, 13 GER. ECON. REV. 1, 1–3 (2012) (describing implicit bias based on ethnicity in German labor market); Lois A. Moher & Steve W. Henson, *Impact of Employee Gender and Job Congruency on Customer Satisfaction*, 5 J. CONSUMER PSYCHOL. 161, 162 (1996) (discussing gender bias in employment); Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 21560, 2015) (describing an experiment testing implicit bias against the disabled); Magnus Carlsson et al., *Ethnic Discrimination in Hiring, Labour Market Tightness and the Business Cycle—Evidence from Field Experiments* 8 (IZA Inst. of Study of Labor, Discussion Paper No. 11285, 2018) (discussing how biases affect tight labor markets); Magnus Carlsson & Dan-Olof Rooth, *Evidence of Ethnic Discrimination in the Swedish Labor Market Using Experimental Data* 1–3 (IZA Inst. of Study of Labor, Discussion Paper No. 2281, 2006) (analyzing a Swedish equivalent to the classism experiment by Rivera and Tilcsik); Lauren Rivera & András Tilcsik, *Research: How Subtle Class Cues Can Backfire on Your Resume*, HARV. BUS. REV. (Dec. 21, 2016), https://hbr.org/2016/12/research-how-subtle-class-cues-can-backfire-on-your-resume [https://perma.cc/R3CX-L332] (explaining employer preference for wealthy class individuals when employers are determining class via hobby).

> in my growing up years there was perhaps a harp player but that was it. When the drop curtain [at the auditions] was used there was an almost overnight change. People who thought that they could tell the difference between a woman playing and a man, whether it was the violin or anything else, turned out they were all wrong. But we can't do that in every sphere of human activity—how good it would be if we could.[41]

Presumably, Justice Ginsburg is addressing the famous orchestra experiments conducted by researchers Goldin and Rouse about implicit bias.[42] Her observations, however, can be applied in a myriad of other scenarios.

Implicit bias testing research gained international notoriety at Harvard University with what is called Project Implicit and the Implicit Association Test ("IAT").[43] The IAT is typically computerized and tests various implicit biases by looking at split-second decisions one makes when one is not consciously deliberating or reflecting.[44] There are IATs for race, gender, age, ability, religion, and all types of identities.[45] Although the IAT and similar mechanisms for testing implicit bias have garnered criticism about whether or not they are valid instruments or

41. Justice Ruth Bader Ginsburg, Remarks at Georgetown Law School (Sept. 7, 2016), https://www.c-span.org/video/?414875-1/supreme-court-justice-ruth-bader-ginsburg-delivers-remarks-georgetown-law [https://perma.cc/Q786-Q3R7].

42. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

43. Nosek et al., *supra* note 4, at 112 (finding that IAT research indicates that all social groups hold implicit biases, regardless of age, gender, race, and political views); *Are You Prejudiced? Take the Implicit Association Test*, GUARDIAN (Mar. 6, 2009, 19:01 EST), https://www.theguardian.com/lifeandstyle/2009/mar/07/implicit-association-test [https://perma.cc/69Y6-665U].

44. Lee, *supra* note 4, at 484–85; *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/4FY8-3F7R] (last visited Apr. 1, 2019).

45. Lee, *supra* note 4, at 484–85; *see, e.g.*, Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence,* 59 HASTINGS L.J. 1285, 1298 (2008); David Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias,* 59 HASTINGS L.J. 1389, 1409 (2008); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 895 (1998) (examining gender stereotypes and their relation to differences in parental roles for women and men); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 78–79 (2003) (addressing the difficulties family caregivers experience at work, like the "glass ceiling" and "maternal wall," due to bias against caregiver status).

accurately test for implicit bias,[46] the IAT remains a robust tool in research and is utilized by many psychologists.[47]

At times, the IAT is used in conjunction with or within other experiments,[48] as it was used in one study to explore empathic responses to others.[49] In one such experiment, individuals of various races viewed pain stimuli in members of their same race.[50] Researchers then compared such responses to those observed when the subjects viewed pain stimuli in members of a different race.[51] Videos were shown to the sample members depicting a person's hand of the same race as that of the subjects being injected with a needle, and then the same action upon a person's hand of a different race than that of the subjects.[52] Just as humans have physiological reactions to feeling pain, not surprisingly, humans have physiological reactions to witnessing others' pain.[53] Thus, during the viewing of the videos, the sample group was measured physiologically for their reaction to the video stimuli of others in pain.[54] Thereafter, each viewer of the video was given the IAT.[55] The results of the physiological test and the IAT correlated for those individuals of one race having an increased sensitivity or

46. Beth Azar, *IAT: Fad or Fabulous? Psychologists Debate Whether the Implicit Association Test Needs More Solid Psychometric Footing Before It Enters the Public Sphere*, 39 AM. PSYCHOL. ASS'N 44, 46 (2008); *cf.* Selmi, *supra* note 38, at 215 ("By design, the IAT requires instantaneous decisions with response times measured in milliseconds. Very few real-world decisions, however, occur in that way. Most, but not all, are the product of deliberation and a number of scholars have emphasized that explicit bias measures likely provide more accurate predictors of deliberate behavior than implicit bias measures, which are more closely connected to spontaneous behavior.").

47. *See* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 4 (2009), https://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf [https://perma.cc/7U2N-4PU6]; *see also* Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?,"* 15 PSYCHOL. INQUIRY 257, 261–64, 266 (2004); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1031 (2006).

48. *See, e.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 427 (2011) (referencing a second primary method of measuring implicit bias, evaluative priming, in which "participants are briefly exposed to a subliminal or supraliminal prime (e.g., photographs of [faces of different races]), and then asked to make decisions about whether certain words are negative or positive").

49. Alessio Avenanti et al., *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1018–20 (2010).

50. *Id.* at 1018–19.

51. *Id.*

52. *Id.* at 1018.

53. *Id.* at 1018–20.

54. *Id.* at 1018–19.

55. *Id.* at 1019–20.

reaction to members of their same race, and having less so for members of a different race.[56]

It is important to note that the IAT and other experiments test the existence of implicit biases, not the likelihood of such individuals acting on those biases.[57] Thus, "the IAT 'do[es] not measure actions. The [IAT], for example, does not measure racism as much as a race bias.' Professor Banaji 'tells . . . volunteers who show biases [on the IAT] that it does not mean they will always act in biased ways—people can consciously override their biases.'"[58] Likewise, other experiments have found that participants' reactions did not necessarily correlate to their explicit attitudes once surveyed.[59] Thus, while the test results yield the realities of implicit biases, they also demonstrate that despite the apparent nature of biases, they are not necessarily determinative of behavior.

## II. IMPLICIT BIAS IN THE LEGAL SYSTEM

As noted, implicit bias is omnipresent. Every person who has grown up in any society has some implicit bias or biases, conscious or not. Thus, juries have biases, litigants in the courtroom have biases, and court personnel have biases.

Judges are not immune to implicit bias either,[60] even if trained to compartmentalize information and transcend their own biases.[61]

56. *Id.* Notably, I was unable to find a study that addressed experiments with multiracial testers or hands.

57. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System,* 46 U.C. DAVIS L. REV. 1563, 1571 (2013).

58. *Id.* (alterations in original) (footnote omitted) (quoting Shankar Vedantam, *See No Bias*, WASH. POST (Jan. 23, 2005), https://www.washingtonpost.com/archive/lifestyle/magazine/2005/01/23/see-no-bias/a548dee4-4047-4397-a253-f7f780fae575/ [https://perma.cc/CA9W-7QXN]).

59. *See, e.g.*, Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Racial Bias in the Courtroom*, 15 U. N.H. L. REV. 117, 125–26 (2016).

60. Bennett, *supra* note 1, at 397 ("In my recent national empirical study, I found that 92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial services officers ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias. Again, mathematically impossible." (footnote omitted)).

61. One study conducted by the National Center for State Courts, which looked at implicit bias within the judicial systems of forty-two states, found that judges in most jurisdictions "reached unfair decisions on the basis of personal characteristics such as

Therefore, the court system as a whole—an institution comprised of human beings—needs to address human characteristics, such as implicit biases.[62] Implicit bias "is the kind of bias that judges, caseworkers, or lawyers may employ, yet not even be aware that they are doing so. Regardless of intentions, however, implicit bias in the courtroom can be nonetheless harmful to litigants."[63] Studies have shown that implicit bias plays various roles in the legal system and the administration of justice on a number of levels.[64]

Benjamin Cardozo in his essay, *The Nature of the Judicial Process*,

> analyzed the ingredients of "that strange compound which is brewed daily in the cauldron of the courts . . . ." Among these ingredients, he distinguished between the judge's conscious and subconscious decision making. Whereas the conscious element comprises "guiding principles of conduct," the subconscious element is much more elusive, encompassing the judge's inherited instincts, traditional beliefs and acquired convictions. Like the conscious component, the judge's subconscious is inseparable from her decisions. Cardozo writes that, while "[w]e [as judges] may try to see things as objectively as we please . . . we can never see them with any eyes except our own."

gender." Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Biases*, 42 WILLIAMETTE L. REV. 1, 13 (2006). Following these results, thirty-four states released reports that contained recommendations to eradicate the effects of bias on judicial decisions. *Id.*

62. Some studies suggest that judges hold the same biases as everyone else and this can be mitigated if they are aware of such biases. *See, e.g.*, Rachlinski et al., *supra* note 10, at 1221; *cf.* Selmi, *supra* note 38, at 210–11 (discussing the reluctance of voters, when asked, to express views that would be identified as racist or sexist, also known as "the Bradley Effect").

63. Breger, *supra* note 17, at 565. The behaviors of implicit bias can range from minor, such as acts of courtesy, to more severe such as how one assesses an individual's work. *Id.* at 561. Either way, however, the effects of implicit bias can be harmful. For instance, a judge holding implicit bias about what a "bad" mother should be, could result in a mother having her child put in foster care or later having her rights terminated. *Id.* at 565–67. The judge may have an untenable standard of "mother" to live up to and "[c]ompound this with issues of poverty and lack of resources, along with race and age, and now you have a litigant facing a system that expects her to fail before she even walks into the courtroom." *Id.* at 572. In addition, "[i]f a judge believes the litigant in the courtroom has not mothered appropriately, it is much easier to agree with the child welfare agency that intervention or continued intervention is necessary." *Id.* at 567. Perhaps this is an explanation for why the majority of people accused of engaging in abuse or neglect are mothers. *Id.* at 571.

64. *See, e.g.*, Greenwald & Krieger, *supra* note 9, at 951, 966–67; *cf.* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.").

> Furthermore, "[i]t is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another."[65]

When one is a judge and a sole finder of fact, even if the decision maker is unaware that bias could be shaping the outcome, the consequences can be serious.[66] Thus, it follows that "[t]he existence of unconscious bias carries a potentially powerful impact in legal proceedings, where the public has put its trust in the judicial system to achieve a fair result."[67]

Ideally, the law should endeavor to avoid decisions based upon biases, because "[t]he law serves as a normalizing force in society, delineating what society will tolerate and what is permissible under the law. In this sense, the law informs and reflects society's culture."[68] Thus, the law can serve as a conduit of change within society.[69]

Professor Jerry Kang, one of the pioneers researching implicit bias in the law, has addressed how the nature of a courtroom and litigation poses unique issues with regard to bias. Kang emphasizes the critical importance of a judge's role in countering bias:

> Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done.[70]

Professor Kang highlights the importance of the players in the courtroom being aware of and educated about implicit bias.[71] As

65. Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229, 232 (2015) (alteration in original) (footnotes omitted) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10–13 (1921)).

66. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330–31 (1987).

67. Bassett, *supra* note 57, at 1576.

68. Breger, *supra* note 9, at 185.

69. *Id.* at 189.

70. KANG, *supra* note 47, at 6.

71. *Id.* at 5–6.

Kang notes: "[g]iven the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities."[72] Several other researchers highlight the concerns of judicial bias in the courtroom and suggest ways we might combat such bias, as will be discussed later in this article.[73]

Similarly, the American Bar Association ("ABA") has recognized that a judge's awareness of bias serves as a key factor in diminishing the role that bias will play in the courtroom.[74] In response to this finding, the ABA has initiated a program to expand judicial consciousness of implicit biases and has initiated three pilot judicial education programs in California, North Dakota, and Minnesota to address the issue.[75]

While jurors and juries have their own biases,[76] this article is operating from the presumption that six or twelve personal biases can diffuse and counter each other in ways that just cannot apply to a single fact finder.[77] Yet, while this article focuses specifically upon bench trials and single finders of fact, it certainly does not deny the problems and inevitability of jury bias.

Influential research about implicit bias and the judiciary was conducted by two Cornell University professors, a Vanderbilt law professor, and a federal judge (hereinafter "Rachlinski Study").[78] The researchers tried to test courtroom implicit bias over a span of years, specifically with regard to criminal court trial judges.[79] The researchers wrote an article entitled *Does Unconscious Racial Bias*

72. *Id.* at 2.

73. *See, e.g.*, Kang et al., *supra* note 3, at 1172–79.

74. Bassett, *supra* note 57, at 1580.

75. *Id.*

76. Michael B. Hyman, *Implicit Bias in the Courts*, ILL. B.J., Jan. 2014, at 41–42 [hereinafter Hyman, *Implicit Bias*]; Michael B. Hyman, *Reining In Implicit Bias*, ILL. B.J., July 2017, at 26, 28 [hereinafter Hyman, *Reining In*]; Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 180–81 (2015) (discussing racial bias in regards to jurors and how this affects jury selection); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 830–31 (2012).

77. *See* Breger, *supra* note 2, at 23–24. *See generally* Hyman, *Implicit Bias*, *supra* note 76, at 40 (discussing implicit bias in judges and juries); Hyman, *Reining In*, *supra* note 76, at 26, 28 (emphasizing implicit bias and its effects on lawyers and judges); Joy, *supra* note 76, at 180–81; Roberts, *supra* note 76, at 830–33.

78. Rachlinski et al., *supra* note 10, at 1195.

79. *Id*. at 1197.

*Affect Trial Judges?* and ultimately concluded that the answer was "Yes."[80]

These researchers conducted a multipart study involving a sample of trial judges drawn from around the country.[81] The results demonstrated that judges do harbor the same kinds of implicit biases as others, which can thereby influence their judgment.[82] Yet, the data also shows that given sufficient motivation, judges can compensate for the influence of these biases by remaining aware and vigilant about these biases.[83] As the researchers noted:

> First, implicit biases are widespread among judges. Second, these biases can influence their judgment. Finally, judges seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence. When they are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias.[84]

Implicit biases often present themselves as what some may call intuition rather than deliberation.[85] Intuition has been referred to as "the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system."[86] The ability of judges to overcome the overuse of intuition "may require years of 'effortful study' as well as accurate and reliable

80. *Id*. at 1221.

81. *Id.* at 1205–06.

82. *Id.* at 1197.

83. *Id.*

84. *Id.* at 1225.

85. DANIEL KAHNEMAN, THINKING, FAST AND SLOW *passim* (2011); Andrew J. Wistrich & Jeffery J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87, 90 (Sarah E. Redfield ed., 2017) ("Intuitive decision making consists of relying on one's first instinct. Intuition is emotional. It relies on close associations and rapid, shallow cognitive processing. Intuitively, if a choice sounds right and feels right, then it is the right choice. Psychologists sometimes refer to this style of decision making as System 1 reasoning. System 1 produces rapid, effortless, confident judgments and operates outside conscious awareness. When we go with our gut, we decide quickly and feel that we are right. But human beings did not develop advanced civilizations with System 1. Human beings, of course, have an enormous capacity for higher-order deliberative reasoning. Mathematics, deductive logic, and analogical reasoning require much more than simple intuition. Psychologists sometimes refer to higher-order reasoning as System 2. System 2 is slower and conscious. It requires effort, and if we are distracted, rushed, or tired, we use System 2 less. Oddly, when the two conflict, people have less faith in System 2 than in System 1. But System 2 is where logic—and hence most legal reasoning—lies." (footnote omitted)).

86. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31–32 (2007) (footnote omitted).

feedback on earlier judgments[,]" but conscious dedication to greater utilization of deliberation over intuition can limit bias in the courtroom as well.[87] As said by Benjamin Cardozo:

> There is in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions . . . .[88]

The Rachlinski Study investigated whether the IAT test could ascertain judicial implicit bias, and if those biases would impact judicial decisions.[89] The sample of judges completed an IAT around the issue of race and also decided mock-court scenarios, where an actor was prepared to act out what some might perceive as "stereotypical roles" associated with African American and Caucasian American individuals.[90] The results showed that the IAT did predict decisions when the actor was prepped to act in so-called stereotypical roles.[91] In fact, when the defendant actors were presenting in a so-called stereotypical African American individual's role, the judges who scored more towards racial implicit biases in the IAT test levied stricter sentences upon the defendants.[92]

Had these trials been real instead of mock trials, the results would have been devastating. In fact, these are real judges. Thus, the Rachlinski Study offers an example of how its research plays out in real judicial decisions: research showing that implicit bias by judges is one reason why African American[93] criminal defendants fare worse in the courtroom than similarly situated Caucasian American criminal defendants.[94]

87. *Id.*

88. Sagiv, *supra* note 65, at 230 (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921)).

89. *See* Rachlinski et al., *supra* note 10, at 1197, 1208.

90. *Id*. at 1208.

91. *Id*. at 1209, 1210 & tbl.2.

92. *Id*.; *see also* Justin D. Levinson et al., *Implicit Racial Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 22 (Justin D. Levinson & Robert J. Smith eds., 2012).

93. One researcher suggests that harsher sentences are often given to those defendants who either are of persons of color, or share facial and other appearance characteristics associated with being a person of color, regardless if the defendant is actually a person of color. Bennett, *supra* note 1, at 403.

94. Rachlinski et al., *supra* note 10, at 1196.

Another study conducted by researchers Matthew Clair and Alix Winter further reveals how judges' implicit biases can lead to a disproportionate impact on racial minorities in the courtroom.[95] The results show that judges, "despite well-intentioned judging,"[96] by "acknowledg[ing], and attempt[ing] to account for, their implicit biases," may still contribute to disparate treatment of minority litigants by failing to take into account, during the decision-making process, potential systematic disparities that the minority litigant likely encountered at earlier stages of litigation.[97] Thus, "racial inequality is reproduced in subtle, contextually specific ways."[98]

### A. *Remedies and Unique Aspect of Bench Trials*

As noted, recognition of implicit bias is a key factor to minimizing implicit biases;[99] if one is cognizant about implicit bias, then one can work to counter it.[100] Psychological data repeatedly supports the proposition that both being aware of one's own implicit bias and also being willing to change it actually lessens the effect of the bias.[101]

Yet, bias is also hard to alter and contextualize. When we talk about bias, it is essential to understand how potential bias may arise in a given situation or a given case. If facts are conveyed to a judge, such facts are absorbed through the lens of the judge's worldview.[102] Therefore, if we can have diversity in the context of

95. *See* Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 353 (2016).

96. *Id.*

97. *Id.* at 354.

98. *Id.*

99. Marouf, *supra* note 48, at 447–48 ("Judges must become aware of the impact of implicit bias in order to question the soundness of their decisions and make the effort to render more impartial judgments. Reforms such as 'exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices' could all help reduce implicit bias." (footnote omitted)).

100. Lawrence, *supra* note 66, at 331 ("[W]e must take cognizance of psychological theory in order to frame a legal theory that can address that affliction.").

101. Rachlinski et al., *supra* note 10, at 1221.

102. Levinson, *supra* note 4, at 353–54, 407 ("[J]urors . . . and . . . judges . . . misremember case facts in racially biased ways. These racially biased memory errors will distort case facts in ways that are completely unknown to the juror but prejudicial to the legal actor . . . . [D]ebiasing and cultural solutions . . . approaches hold promise that implicit memory bias may someday be significantly reduced or even eliminated.").

the judiciary, this awareness could ultimately promote fairer decision making and more productive court proceedings.[103]

There are various methods to raise awareness about bias, including the use of metrics to track case outcomes and employing "bias interrupters" to audit performance, as will be discussed further.[104]

As suggested by researchers John Irwin and Daniel Real:

> Judicial decisions could be reviewed by a diverse group of auditors to look for signs of implicit biases' influences. Jurisdictions could adopt a sort of peer-review process to evaluate decisions for effective impartiality and provide feedback. Even without utilizing diverse auditors or peer-review programs, providing judges with statistical data and breakdowns concerning past decisions will allow an individual assessment of trends and influences of implicit biases.[105]

In the judiciary, this methodology may yield positive results.[106] For example, a study completed by the National Center for State Courts demonstrated that teaching judges about both the source and the effects of bias are initial steps to ensuring courtrooms with a reduction in bias.[107]

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103. KATHERINE W. PHILLIPS, SCI. AM., HOW DIVERSITY WORKS 43 (2014), https://www.scientificamerican.com/index.cfm/_api/render/file/?method=inline&fileID=9F4FCDB9-A5B3-40AB-A9A525FDC71156AB [https://perma.cc/ZL6R-MCK7] ("Decades of research by organizational scientists, psychologists, sociologists, economists and demographers show that socially diverse groups (that is, those with a diversity of race, ethnicity, gender and sexual orientation) are more innovative, than homogeneous groups."); *see also* Elaine Martin, *Men and Women on the Bench: Vive la Difference?,* 73 JUDICATURE 204, 204 (1990). Differences have been found between male and female state supreme court justices with respect to age, localism, and career patterns. *See* Elaine Martin & Barry Pyle, *Gender and Racial Diversification of State Supreme Courts,* 24 WOMEN & POL. 35, 39–40 (2002).

104. *See* Joan C. Williams, N.Y. State Bar Ass'n, An Empirical Look at Implicit Bias and Bias Interrupters in the Legal Profession at the New York State Bar 2017 Annual Meeting, *in* NEW YORK STATE BAR ASSOCIATION 2017 ANNUAL MEETING (Jan. 26, 2017), https://www.nysba.org/AM2017IMPLICITBIAS/ [https://perma.cc/NA9Y-GD5J]; *Midyear 2016: Bias Interrupter Can Help Advance Legal Profession Diversity, Says Researcher*, (Feb. 2, 2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/midyear_2016_biasi/ [https://perma.cc/86DS-ZGHY].

105. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 9 (2010) (footnotes omitted).

106. Letter from John S. Kiernan to Judge Betty Weinberg Ellerin (Aug. 25, 2016), *in* NEW YORK STATE BAR ASSOCIATION 2017 ANNUAL MEETING, *supra* note 104.

107. RACHEL D. GODSIL ET AL., PERCEPTION INST., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE 47 (2014), https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Vol.-1-Perception-Institute-2014.pdf [https://perma.cc/ZH2K-25Q3].

The idea of judges contending with personal explicit biases is nothing new. There is an entire body of literature about how judges must face the challenges of their own biases as well as the overall biases that exist in the legal system.[108] One author even posits that "[j]udges have the most intractable bias of all: the bias of believing they are without bias."[109]

Yet, the study of implicit biases among judges is still developing. In fact, the Rachlinski Study showed that ninety-seven percent of judges asked in a survey believed that they were in the top twenty-five percent of judges avoiding racial prejudice in the courtroom as compared to the other thirty-six conference attendees.[110] There is clearly a disconnect here in terms of how these judges perceive their own freedom from biases as compared to others, and what is even numerically possible.[111] As Judge Bernard Shientag notes:

> by failing to appreciate [the universality of implicit bias], many judges are lulled into a false sense of security. . . . [P]rogress will be made only when judges recognize this condition as part of the weakness of human nature. Then, "[h]aving admitted the liability to prejudice, unconscious for the most part, subtle and nebulous at times, the next step is to determine what the judge, with his trained mind, can do to neutralize the incessant play of these obscure yet potent influences."[112]

Decision makers treating bias with intentionality may very well decrease the chance of bias affecting a decision. As Justice Hyman of Illinois notes, "[j]udges mindful of their ability to discriminate and determined to avoid it may be able to counteract their implicit bias."[113] Again, having judges be very deliberate about the work of implicit biases may help deter their biases from entering into the decision-making process.[114]

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108. *See* Bassett, *supra* note 57, at 1564; Breger, *supra* note 2, at 19; Kang et al., *supra* note 3, at 1181; Roberts, *supra* note 76, at 832; Selmi, *supra* note 38, at 228–29.

109. KENNETH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 13 (2001).

110. Rachlinski et al., *supra* note 10, at 1225.

111. Kang et al., *supra* note 3, at 1172.

112. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 510–11 (1990) (quoting Bernard L. Shientag, *The Virtue of Impartiality*, *in* HANDBOOK FOR JUDGES 58 (Glenn R. Winters ed., 1975)); *see also* Breger, *supra* note 2, at 23 (finding that some judges even prefer juries to insulate themselves against accusations of bias).

113. Hyman, *Implicit Bias*, *supra* note 76, at 40.

114. *Cf.* Selmi, *supra* note 38, at 230 ("Again, this is not a simple proposition. Increasing

As stated earlier, there are a multitude of ways in which implicit biases may play out in cases, such as what the Rachlinski Study and others note, in criminal sentencing matters.[115] Judges at all levels must address biases and preconceived notions of litigants who appear before them.[116] In an ideal world, countering bias would be an ongoing daily process, but as a practical matter, fighting bias may often fall lower on the priority list due to substantial dockets and the emotional toll of tough cases.[117] This is a salient aspect of most busy, urban trial courts, particularly criminal and family courts, where there are lengthy dockets, difficult issues, repeat players, and often quick decision making from the bench.[118]

As noted by now retired Judge Richard Neely: "[t]here is . . . always an element of human judgment that enters any complicated case, which is why the process traditionally calls upon the organized collective intelligence of a trial court judge, [a] trial

awareness is likely to have the strongest effect on those who are receptive to the notion that implicit bias is a real issue, and that discrimination remains a pervasive societal force. In contrast, increasing awareness is likely to have little effect on those who resist the very concept of implicit bias."). *But cf.* Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 640 (2018) ("To wit, if racism is so deeply ingrained as to constitute the unconscious, then why would we expect a program of rational consciousness-raising about implicit bias to effectuate changes in the unconscious?").

115. Rachlinski et al., *supra* note 10, at 1214–16.

116. Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 681, 696 (2015) ("[E]ven where there is a black judge/black litigant dynamic—the judge should consider the possibility of his or her own subconscious bias in deciding whether to recuse him- or herself.").

117. Bennett, *supra* note 1, at 394 ("[W]here courtroom participants are overwhelmed with more cases than proper resources, such conditions create a rich environment for systemic implicit racial biases to thrive and infect every aspect of courtroom criminal proceedings."); *see* Marouf, *supra* note 48, at 436 (regarding immigration courts) ("Lustig's survey of IJs reveals shockingly high levels of burnout and low motivation. Overall, the responses received from fifty-nine IJs demonstrated 'significant symptoms of secondary traumatic stress.' Many IJs 'reported that the work was emotionally draining.'" (quoting Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 57, 74 (2008))).

118. NAT'L CTR. FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 1–2 (2012), https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf [https://perma.cc/8BRY-EGZZ] (detailing research that suggests that when judges are in highly emotional states and forced to engage in low effort decision making there is an increased risk of a decision made under the influence of implicit bias). Although this article is focusing on implicit bias based upon characteristics or identify of litigants, this author has earlier suggested that the risk of judicial bias in another way can be seen if the same judge has presided over other parts of cases in that same family. Breger, *supra* note 2, at 18.

jury, and at least one appellate court."[119] The human judgment aspect can be even trickier and more problematic when the same trier of fact deals with the same family year after year, particularly as that family encounters multiple crises.[120] This is a situation that is not uncommon in family law cases, because many states have "One Family, One Judge" paradigms, which allows one judge to preside over a multitude of cases involving the same family members.[121] Furthermore, family court proceedings generally lack juries.[122] While having one finder of fact has multiple benefits, such as making decisions holistically and fully, and potentially increasing the speed of the process and reducing the expenditure of judicial resources, having one finder of fact may also create unique circumstances in which implicit biases can more readily manifest.[123] The judge may then have bias arising from both legal and factual knowledge of the cases that a different judge or a jury may lack.[124] A family court judge, for example, may be constantly

119. State v. Morgan Stanley, 459 S.E.2d 906, 914, 921 (W. Va. 1995).

120. *See* Breger, *supra* note 2, at 17–18; *e.g.*, *In re* Jamal S., 809 N.Y.S.2d 512, 513 (App. Div. 2006) (finding that the lower court committed reversible error when it refused to conduct a separate *Mapp* hearing prior to commencement of the fact-finding hearing). The court concluded that the error

> cannot be deemed harmless under the facts and circumstances of this case. Even though it is true that a judge, by reason of learning, experience, and judicial discipline, is uniquely capable of distinguishing the issues and making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision, in this case, the evidence adduced on the fact-finding and suppression issues was so intertwined that it cannot be determined what evidence the Family Court relied upon in making its determinations, and effective appellate review is therefore precluded.

*Id.* (citations omitted).

121. *See* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ONE FAMILY, ONE JUDGE: EVALUATING A RESOURCE GUIDELINE'S "BEST PRACTICE" (2013), https://www.ncjfcj.org/sites/default/files/One%20Family%20One%20Judge%20Snapshot.pdf [https://perma.cc/5VYX-WN5H].

122. Breger, *supra* note 2, at 2; Breger, *supra* note 17, at 571.

123. *See* Breger, *supra* note 2, at 30–33. Several researchers have proposed making jurors aware of their own implicit bias by educating in various proposed ways with the hope that it will lead to less bias in juries. *See* Roberts, *supra* note 76, at 830–31; Kang et al., *supra* note 3, at 1181–84.

124. *See* Breger, *supra* note 2, at 17–18; Sherilynn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444–45 (2000) ("Jurors, who serve only once a year or every two years at most, may be better able temporarily to suspend familiar stereotypes and judgments about facts than can judges. Judges, especially trial judges who face an overloaded docket of cases each day, may be more likely unconsciously to fall back on the stereotypes and stories, which we all use as a shorthand to categorize people and events in our lives." (footnotes omitted)).

exposed to the same family for multiple crises spanning across many years and possibly generations.[125] The litigants recount intimate details in front of the same judge.[126] Compare this to a jury, which would be unaware of the previous family law issues before the court without any preconceived notions about the litigants.[127]

Biases, including implicit biases, are not necessarily negative in every context, but can still be negative upon application in a trial court setting. In another example borrowed from family law, this author has previously written about the dangers of "implicit motherhood bias"—which, while on its face may seem positive (e.g., mothers as nurturing caregivers)—can then be damaging as applied in the courtroom (e.g., mothers as all-knowing, all-loving selfless creatures—anyone less is neglectful).[128] As Dr. Cameron Wedding notes, when training judges nationwide, implicit biases, even when not malicious, can impact judicial decision making in subtle ways, such as in "assessments of risk . . . [and] differential application of policies and procedures."[129]

Another issue that comes into play in busy, urban courts with emotionally laden facts is that such intense cases "may not resonate to the same degree to a factfinder who has heard 'the same story' before."[130] Judges are not immune from becoming jaded or skeptical after years of hearing traumatic stories.[131]

Furthermore, the issues that are often raised in many trial courts, such as in criminal and family courts, may fundamentally arise out of poverty or lack of resources on the part of litigants. This sets up a distinction between a litigant and a judge, in that a litigant may believe that a judge from a different cultural, racial, sexual, or socioeconomic background would be unprepared to grapple with certain issues that arise in the case, even if that were not actually true.[132] With regard to socioeconomic status, it is well-

125. *See* Breger, *supra* note 2, at 17.

126. *Id.* at 17–18, 23, 27.

127. *See id.* at 22–23.

128. Breger, *supra* note 17, at 573–74.

129. Wedding, *supra* note 14.

130. Breger, *supra* note 2, at 22.

131. *Id*.

132. *Id*. at 25. For instance, this can arise in domestic violence cases. *See* LINDA C. FENTIMAN, BLAMING MOTHERS 46 (2017) ("[S]ome judges may not believe female witnesses,

established that a judge's income is generally much higher than that of the average American's income, and "[l]ike all people, judges are influenced by their economic backgrounds."[133] Some researchers have argued that due to common economic disparities between judges and litigants, it often becomes difficult for a judge to fully understand the hardships faced by indigent litigants.[134]

> The difference in economic status between judges and litigants has not gone unnoticed, and the public is increasingly equating wealth with the ability to obtain fairness in American courts. A recent survey by the National Center for State Courts found that Californians believe the level of fairness in state courts is least for those with low incomes and non-English speakers. Nationally, 62% of Americans believe the courts favor the wealthy.[135]

Thus, even if it is not the case that many judges may, in fact, favor the wealthy, it is still a perception held by a wide swath of the population.

Some judges are already keenly aware of how personal experiences may impact how a judge views a particular case. For example, Judge Graffeo, a former judge on the New York State Court of Appeals, stated:

> I think many people underestimate to what extent people bring their personal philosophy and life experiences to cases, and I think that's true whether you're on the trial bench or whether you're on the appellate bench. Judges are still people. They have their own value systems, they have their own professional experiences, they have their own life experiences. That's the lens through which they examine the facts of a case. So, when you have people of different economic backgrounds, different ethnic, racial, gender, whatever, I think that it brings a different richness to the discussion.[136]

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especially victims of domestic violence, because they cannot conceive of themselves in that situation." (citing Diane P. Wood, *Sex Discrimination in Law and Life*, 1999 U. CHI. LEGAL F. 1, 5–6)); Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 252–53 (1993).

133. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013).

134. *Id.*; *see* FENTIMAN, *supra* note 132, at 45–46 (noting that most judges come from privileged backgrounds, often different from the litigants appearing before them); Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1229 (2006) ("[J]udges of different racial and ethnic backgrounds are likely to be more familiar with the reasoning and experiences underlying views commonly held within their particular communities.").

135. Neitz, *supra* note 133, at 143.

136. Interview by John Caher with Victoria A. Graffeo, Former Assoc. Judge, N.Y. State Court of Appeals, at Albany Law School (Oct. 27, 2016), https://ww2.nycourts.gov/sites/def

## B. *Litigant Perceptions About Bias in the Courtroom*

For the legal system to remain a respectable institution, a litigant's sense of justice should not be eroded, as addressed more fully in the next part. A litigant may perceive that a judge is biased, even when that bias does not exist.[137] "In the mindset of the litigants, it may be impossible for a single jurist to purge her mind of previously formed impressions of the litigants, witnesses, and their families, especially if they have appeared before this same trier of fact in other proceedings."[138]

As a result, litigants may prefer finders of fact who have lived experiences similar to their own.[139] In earlier research, I have addressed the subject of litigants and procedural justice and how litigants may feel more obliged to comport with court orders, believe that justice was fairly served, or feel their voices have been heard if they believe that the legal system has treated them fairly.[140] This could be especially applicable in cases of family law or criminal law, where so much is at stake.

In 2016, the New York State Bar Association ("NYSBA") more deeply explored litigants' perspectives of court systems. In doing so, the NYSBA examined litigants' perceptions of those who work in the justice system, such as judges and attorneys.[141] The study found some dissonance between the legal system and the litigants, particularly when these litigants felt "othered" by their identity or role in contrast to the majority of the decision makers in the courtroom, such as the lawyers and the judges.[142] Thus, it is

ault/files/document/files/2018-04/VGraffeo10-27-16.pdf [https://perma.cc/5BPS-D6XM].

137. Breger, *supra* note 2, at 19–26.

138. *Id.* at 23.

139. *See* Breger, *supra* note 17, at 577–78.

140. *Id.* at 577 ("[A] particular female litigant may construe bias from a court, child welfare agency, or lawyer, even if it is not consciously intended. This sense that bias exists is especially probable when a female litigant recognizes the power imbalance between herself and those who work in 'the system' and are deciding the ultimate fate of her family and whether her family will be able to stay together."); *see* Breger, *supra* note 2, at 19–21.

141. Letter from John S. Kiernan to Judge Betty Weinberg Ellerin, *supra* note 106.

142. *Id.*; *see* Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011); *see also* Wilson, *supra* note 112, at 512 ("[S]tudies confirm that male judges tend to adhere to traditional values and beliefs about the natures of men and women and their proper roles in society. The studies show overwhelming evidence that gender-based myths, biases, and stereotypes are deeply embedded in the attitudes of many male judges, as well as in the law itself. Researchers have concluded that gender difference has been a significant factor in judicial

important to keep in mind that litigants may be concerned about judicial implicit bias, whether or not it actually exists.

### C. *Exploring Ways to Minimize or Counter Implicit Bias in the Courtroom*

The promising news is that there are some fairly straightforward strategies to lessen implicit bias in the judiciary. As noted above, if one is committed to countering biases, then one can work to decrease them. Data has consistently replicated and validated that the first step in minimizing implicit biases is to be aware and cognizant of one's own biases.[143] As addressed earlier, this can be accomplished in a number of ways within any organization, such as IAT test taking.[144]

While some scholars would argue that judges may only reduce bias by explicitly announcing their biases and prejudices before appearing on a case,[145] other scholars believe that there are less drastic measures. For example, states such as New York, Minnesota, and California have required sitting judges and practicing lawyers to include credit hours of diversity and inclusion training to eliminate bias as part of continuing legal education, required to continue practicing law.[146] This issue was raised nationally at the ABA meeting in February 2016 in the form of Resolution 107, which was approved unanimously by the ABA House of Delegates.[147] The report on Resolution 107 in relevant part:

> encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require

decision-making, particularly in the areas of tort law, criminal law, and family law. Further, many have concluded that sexism is the unarticulated underlying premise of many judgments in these areas, and that this is not really surprising having regard to the nature of the society in which the judges themselves have been socialized." (citing N.J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980))); Rhode, *supra* note 39.

143. *See* Lee, *supra* note 15, at 291; Woods, *supra* note 114, at 635, 637.

144. *See* Williams, *supra* note 104.

145. LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING 22–23 (1999).

146. *See* EILEEN M. LETTS & DAVID B. WOLFE, AM. BAR ASS'N, RESOLUTION 107, at 1–2 (2016); Katherine Suchocki, *New CLE Requirement: Diversity & Inclusion and Elimination of Bias in Legal Profession*, N.Y. ST. B. ASS'N, http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=75350 [https://perma.cc/AVK7-RXDY] (last visited Apr. 1, 2019).

147. RESOLUTION 107 (AM. BAR ASS'N 2016).

> mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias ("D&I CLE").[148]

In 2017, New York State mandated diversity and inclusion continuing legal education for all attorneys.[149] The diversity and inclusion component to training could be included in judicial continuing legal education nationwide for all judges as well.[150]

The Brennan Center, housed at New York University Law School, likewise recommends implicit bias training for judges, as well as training for those who are tasked with selecting judges.[152]

In jurisdictions where judges are not elected, judges are selected by various nominating groups.[153] "Some states mandate or offer voluntary training for judicial nominating commissioners[,]" as data indicates that implicit biases can influence who receives an interview, how candidates are evaluated, and who is ultimately selected for the judgeship.[154]

Training for new judges, as well as for sitting judges, is an important step in decreasing the effects of implicit bias in the judiciary. This effort can be furthered by the use of IAT scores, as they can be useful in "[h]elp[ing] newly elected or appointed judges understand the extent to which they have implicit biases . . . ."[155] Specifically, as the Rachlinski Study notes:

> [K]nowing a judge's IAT score might serve two other purposes. First, it might help newly elected or appointed judges understand the extent to which they have implicit biases and alert them to the need to

148. LETTS & WOLFE, *supra* note 146, at 2.

149. *See* Suchocki, *supra* note 146.

150. Though some would argue a small amount of training may lead participants to be overconfident about overcoming bias.

152. *See* KATE BERRY, BUILDING A DIVERSE BENCH: A GUIDE FOR JUDICIAL NOMINATING COMMISSIONERS 7 (2016), https://www.brennancenter.org/sites/default/files/publications/Building_Diverse_Bench.pdf [https://perma.cc/MK5N-N8HH].

153. *See id.*

154. *Id*. at 2, 7. Judicial nomination commissioners must also be aware of possible implicit bias in application materials such as cover letters and resumes as observed in the previously mentioned "resume experiment." *See* Bertrand & Mullainathan, *supra* note 10, at 991–92.

155. Rachlinski et al., *supra* note 10, at 1228.

> correct for those biases on the job. Second, it might enable the system to provide targeted training about bias to new judges.[156]

Judicial education is common these days, but often requires more than just education standing alone, unaccompanied "by any testing of the individual judge's susceptibility to implicit bias or any analysis of the judge's own decisions . . . ."[157] Research demonstrates that "judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do."[158]

Judge Stewart of Ohio's Court of Appeals addresses the origins of implicit bias and posits that it can ultimately be decreased on the bench.[159] In a 2012 opinion, Judge Stewart describes implicit bias as the result of stereotype formation from one's upbringing, which implicitly becomes a part of one's judicial discretion.[160] Although she argues there is no "cure" to eliminating these deeply hidden ideas, an appreciation of education, as well as discussion and research on implicit bias, could aid in the awareness, and possible elimination, of these influences.[161]

As researcher Masua Sagiv notes: "[t]he Supreme Court [of Canada] held that, although 'neutrality does not require judges to discount their life experiences[,]' it does prohibit them from basing (or appearing to base) their judgments 'on generalizations or stereotypes' rather than on the particular evidence and witnesses that are in front of them."[162]

156. *Id*. (footnotes omitted).

157. *Id*.

158. *Id.*; *see* Sandgrund, *supra* note 6, at 49, 54 ("Studies have shown that implicit racial bias is muted by deep friendships across racial lines. Others propose that each of us employ a 'bias' protocol when we become aware of a personal bias: (1) identify the potential bias; (2) describe the facts of the situation to yourself; (3) consider alternative interpretations; and (4) choose the interpretation most in line with the facts. Cynthia Mares urges that, '[w]e don't have to—and we shouldn't—throw up our hands and say that if the bias is 'unconscious,' it cannot be addressed. Studies have shown that people who pay attention to the assumptions they are making and challenge them can start to change those assumptions.'" (footnotes omitted)).

159. *See* State v. Sherman, 8th Dist. Cuyahoga No. 97840, 2012-Ohio-3958, ¶45 (Stewart, P.J., concurring) (citing Rachlinski et al., *supra* note 10, at 1221).

160. *Id*.

161. *Id*. ¶ 50.

162. Sagiv, *supra* note 65, at 235 (alteration in original) (quoting R.D.S. v. The Queen, [1997] 3 S.C.R. 484, 487 (Can.)).

As important as it is to be conscious of one's own biases as a method of mitigating the effects of such bias, it is by no means the only step. As Professor Cynthia Lee noted, "[r]aising awareness of the possibility of racial bias is a critical first step, but the existing research suggests educating people about implicit bias is not sufficient in and of itself to get them to break the prejudice habit."[163] The ways to decrease bias in bench trials continue to encourage invention and scholarly studies in the area of implicit bias. For example, a group of researchers, in outlining seven strategies to reduce implicit bias in the courtroom, notes that judges should "[i]dentify distractions and sources of stress in the decision-making environment and remove or reduce them."[164]

Another possible method of decreasing judicial bias is exposure to stereotype-incongruent modeling, which consists of "taking affirmative steps to expose decision-makers to situations and examples that specifically contradict the impressions most suggested by their implicit biases."[165] For example, if a judge has negative preconceived notions surrounding a particular race, "increased exposure to positive examples of that race" may assist in diminishing the negative conceptions.[166]

One extremely innovative method to nullify bias in the judiciary and jury was proposed by Natalie Salmanowitz, a Stanford professor, who offers the idea of employing virtual reality training to de-bias finders of fact.[167] Professor Salmanowitz proposes the novel idea of neurointerventions to decrease implicit bias in the courtroom.[168]

163. Clair & Winter, *supra* note 95, at 355 ("As we have shown, a recognition of implicit bias alone is likely insufficient for countering American racial inequality."); Lee, *supra* note 15, at 295.

164. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 65–69 (2013) (listing strategy four of seven). The other strategies noted by the researchers were: "[r]aise awareness of implicit bias"; "[s]eek to identify and consciously acknowledge real group and individual differences"; "[r]outinely check thought processes and decisions for possible bias"; "[i]dentify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process"; "[i]nstitute feedback mechanisms"; and "[i]ncrease exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes." *Id.*

165. Irwin & Real, *supra* note 105, at 8–9.

166. *Id.* at 9.

167. Salmanowitz, *supra* note 59, at 120.

168. Natalie Salmanowitz, Unconventional Methods for a Traditional Setting: The Use of Neurointerventions to Reduce Implicit Racial Bias in the Courtroom 2 (2015)

There are also proven techniques that can be applied in the courtroom, such as hiring "bias interrupters."[169] Bias interrupters are "tweaks to basic business systems (hiring, performance evaluations, assignments, promotions, and compensation) that interrupt and correct . . . the constant transmission of bias in basic business systems. Bias [i]nterrupters change systems, not people."[170] Thus, rather than "rely[ing] on elaborate 'culture change' initiatives[,]" bias interrupters change the systematic *process* by which bias leads to discrimination rather than the *source* of the bias.[171] One organization suggests a three-step approach: (1) use metrics and data to identify potential bias; (2) implement bias interrupters to comb through the data to reach specific findings of bias and how to go about eradicating it; and (3) repeat as necessary.[172]

Another group of researchers outline in their law review article four distinct ways judges can be less biased, such as judges: (1) doubting their own objectivity; (2) increasing the motivation to decrease bias; (3) improving the condition of decision-making; and (4) increasing judicial accountability by counting.[173]

Professor Tamar Birckhead argues that in order for players in the legal system to remain ethical and true to their beliefs, judges should recognize if they are feeling biased and then actively transcend the bias.[174] Professor Birckhead goes further to assert that the presence of bias in the legal system stems from the fact that the bench and bar are not yet fully diversified.[175]

(unpublished M.A. Thesis, Duke University) (on file with Duke University Libraries).

169. Patricia Devine et al., *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268, 1271, 1276 (2013) (during a twelve-week longitudinal study, researchers found significant reduction in implicit bias after employing habit-breaking intervention strategies); Williams, *supra* note 104. *But cf.* Vivia Chen, *Diversity Efforts Are Basically Worthless*, AM. LAW. (Sept. 11, 2018, 5:46 PM), https://www.law.com/americanlawyer/2018/09/11/diversity-efforts-are-basically-worthless/ [https://perma.cc/DF9G-JS59] (displaying skepticism of the efficiency of bias interrupters in curbing the ill effects of bias).

170. *See Bias Interrupters Model*, BIAS INTERRUPTERS, https://biasinterrupters.org/about/ [https://perma.cc/9N33-WR6A] (last visited Apr. 1, 2019).

171. *See id.*

172. *See Tools for Organizations*, BIAS INTERRUPTERS, https://biasinterrupters.org/toolkits/orgtools/ [https://perma.cc/69ER-DA6L] (last visited Apr. 1, 2019).

173. Kang et al., *supra* note 3, at 1172–74, 1177–78.

174. *See* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 447 (2017).

175. *See id.* at 455.

In her article, Masua Sagiv suggests the use of cultural experts within the court.[176] Cultural experts are persons well-versed in the history of particular societies and cultures, most notably anthropologists and sociologists.[177] Sagiv states that such cultural experts may "temper the effect of bias by serving as translators and pushing back against the empirical assumptions that advocates and jurists make in the course of presenting and hearing evidence."[178] She goes on further to explain that:

> Cultural bias is intrinsic to human nature, and it cannot be completely eradicated. Therefore, judges must be aware of this bias even when relying on cultural experts and try as best as possible to minimize its effects on their decision making. Obtaining this awareness should start in law school and be reinforced through professional training programs for jurists and judges.[179]

Yet, as Sagiv also notes in her research, the use of such cultural experts—the very tool used to counter implicit bias—may also *create* a biased judgment, one even worse than before, due to it being "disguised as well-informed and objective."[180]

As Professor Evan Seamone emphasizes, judges are not the only professionals who are on "the quest for greater self-awareness."[181] Thus, "a reasonable course of action for judges would be to exchange ideas with, and borrow tactics from, other professionals who have a greater familiarity with resolving such problems. Even though these answers are not tailored specifically to legal problem-solving, they can enhance the process."[182] Professor Seamone urges judges to engage in the act of journaling to assist judges in increasing their awareness of such implicit biases.[183]

A question arises if diversifying the judiciary could reduce implicit bias. With such critical goals in mind, this article next

176. Sagiv, *supra* note 65, at 230.

177. *Id.* at 235.

178. *Id.*

179. *Id.* at 256.

180. *Id.* at 251. Sagiv states that judges may use these cultural experts to rationalize their preconceived notions and may even "hide the judge's preexisting cultural agenda." *Id.* at 251–52.

181. Seamone, *supra* note 61, at 30.

182. *Id.* at 30–31 ("Just as doctors use the wrong figures when making estimates, so do judges. Just as language limits doctors' diagnoses, it similarly limits judicial options. Just as doctors may see facts as pointing to one distinct answer only to realize that an alternative view was equally, if not more, permissible, so do judges." (footnote omitted)).

183. *Id*. at 68.

addresses the hypothesis about whether diversifying the judiciary would have any meaningful effect on minimizing implicit bias.

## III. WOULD A JUDGE WHO HAS FACED BIASES IN PERSONAL LIFE BE MORE AMENABLE TO RECOGNIZING AND MINIMIZING HIS OR HER OWN IMPLICIT BIASES?

In this next part, I posit a bold hypothesis to be tested: would a judge who has faced personal bias in his or her own life be more amenable to recognizing, and thereby decreasing, implicit biases during trials? Judges who have lived experiences of the reality of biases are acutely aware of the pernicious effects of bias. Feeling bias searing into one's body at an almost cellular, personal level can perhaps make one more attuned to the feeling of how others similarly situated may feel. Thus, would that person be more sensitive to, or at least more willing to minimize, his or her own biases?

I borrow from various strands of social science literature to introduce this idea worthy of further research. A judge of color, or a female judge, or a Muslim judge, or an LGBTQ judge might see bias in different ways. Intersectionally, taken all together as one person, a female, Muslim, African American, lesbian judge,[184] may also see bias differently. All of theses judges may be painfully aware of societal bias and may see implicit biases on a daily basis, whether in the form of microaggressions or subtle racism or sexism.[185] That judge could perhaps be more amenable to recognizing her own biases on the bench.

If the first step in reducing implicit biases is to recognize such biases, this step may come more readily if one has already faced bias personally. In no way am I suggesting that only particular types of judges experience bias. A Christian male, heterosexual, cisgender Caucasian judge may also have faced multiple biases for various reasons: by virtue of his family structure, his marital choice, the composition of his family, a disability, his social class,

184. Sagiv, *supra* note 65, at 231 ("For example, an African-American lesbian woman belongs to at least three cultural groups, each with its own unique cultural content and distinct manifestations in the woman's life.").

185. *Cf.* Parks, *supra* note 116, at 696 ("For instance, a black judge may be explicitly pro-black but implicitly pro-white, which may influence his or her judgments and behaviors to an even greater degree.").

or a whole host of other reasons. The point in diversifying the judiciary is just that—it should be diverse in every way—and no one judge can argue that another judge has never faced bias.[186] A diversified bench might lead to better and informed decision making as well as reducing bias.[187]

Yet overall, a richly diverse bench, however diversity is defined, could bring experiences and perspectives to the table in more robust ways than may be possible with a less diverse bench.

## A. *Diversifying the Judiciary*

Many who would argue for a more diverse judiciary would point to the benefits of a comparative, multifaceted understanding of the law, as opposed to a less diverse, uniform, and singular understanding of the law.[188]

At the trial level, diversity on the bench can be meaningful from a symbolic and substantive place to the litigants, to the public, and to the courtroom. Academics have written about the value of diversity at the appellate level, where there is already a process of group decision making not available in bench trials that may reduce implicit biases in the case outcome or decision.[189] Many

186. *See* American Judicature Society, Editorial, *Judicial Diversity—an Essential Component of a Fair Justice System*, 93 JUDICATURE 180, 180, 182 (2010) ("[Judges] exchange ideas on and off the bench. A judiciary that is comprised of judges from differing backgrounds and experiences leads to an interplay and exchange of divergent viewpoints, which in turn prevents bias, and leads to better, more informed decision making. Diversity of opinion among decision makers encourages debate and reflection and fosters a deliberative process that leads to an end product that is greater than the sum of its parts.").

187. *See id.*

188. *See id.*

189. *See* Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts,* 57 AM. J. POL. SCI. 167, 167 (2013) ("Because appellate courts are multimember courts, with cases decided by panels of judges, individual differences in voting may not necessarily lead to any differences in *case outcomes*, due to the fact that a minority judge is likely to be outnumbered on any given panel. Thus, whether judicial diversity has large-scale consequences depends on whether it leads to differences not just in individual voting by judges but also to differences in case outcomes, which is what litigants care about and what shapes the development of legal doctrine in a system of *stare decisis*." (emphasis omitted)); Milligan, *supra* note 134, at 1238 ("Within judicial panels, collegial deliberation allows alternative conceptions to be aired and passed from judge to judge. As judicial panels vary over time, this allows further diffusion. On a larger scale, the creation of new precedents upholding alternative conceptions of equality or fairness alters the legal framework itself and transmits new conceptions to other judges. At an informal level, judges may share their views on political morality via conversation at conferences and commentary in legal journals." (footnote omitted)). *See generally* Sherilynn A. Ifill, *Judicial Diversity*, 13

researchers have persuasively argued "why diversity matters" beyond the optics,[190] and why a diverse team of players increases the intelligence, the innovation, and the loyalty of the group.[191] Reasons garnered from various studies and surveys include:

> [A] judiciary that is representative of the population's diversity increases public confidence in the courts[, and] . . . a diverse bench provides decision-making power to formerly disenfranchised populations. . . . [T]he diversity of the bench is linked to broader issues of representation, as "some scholars assert that judicial legitimacy is increased with enhanced levels of nontraditional judges, as their decisions are more infused with 'traditionally excluded perspectives' and their presence enhances the appearance of impartiality for [both] litigants . . . and for the public at large."[192]

As observed in a NYSBA Report:

> Yet it is more than just the perception of fairness that impacts judicial efficacy. It is the actual quality of justice that suffers when judicial diversity is lacking. Although we know this intuitively, empirical studies have also confirmed that diverse judges decide certain types of cases differently than their white male colleagues and that minority and female judges on appellate benches can also influence the decisions of their colleagues and improve the collective decision-making process.
>
> In short, judicial diversity is essential because it provides equal opportunity to underrepresented groups, presents role models to encourage our youth, inspires confidence in our justice system and, most importantly, promotes justice.[193]

Judge Jenny Rivera, another New York Court of Appeals Judge, notes[194] the myriad reasons why diversity on the bench matters, including reasons such as: symbolism, role modeling, increase of public confidence in the administration of justice, and creation of

GREEN BAG 2D 45 (2009) (describing the importance of judicial diversity to public trust).

190. Marouf, *supra* note 48, at 446–47 ("[I]ncreasing the [Board of Immigration Appeals'] diversity by appointing more female members and people of color could help reduce implicit bias. The gender balance of the BIA, in particular, merits closer examination in exploring ways to reduce implicit bias, since female IJs grant asylum at a rate that is 44% higher than their male colleagues." (footnotes omitted)).

191. *See* Williams, *supra* note 104.

192. MALIA REDDICK ET AL., AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731012 [https://perma.cc/QFH3-GAM6].

193. N.Y. STATE BAR ASS'N, JUDICIAL DIVERSITY: A WORK IN PROGRESS 2 (2014), https://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html [https://perma.cc/8TC7-5NMF].

194. Jenny Rivera, *Diversity and the Law*, 44 HOFSTRA L. REV. 1271, 1271 (2016).

an environment supporting a popular belief that the system is fair.[195] She explains further that we need to recognize that some members of our population believe there can be no justice if they do not see someone like themselves in positions of power and influence.[196]

On the topic of symbolism, Judge Rivera cites a report that discusses the importance of having a diverse bench, because it creates increased levels of trust and perceived government legitimacy in the judiciary.[197] Goals of diversity in the judiciary are, as the report claims, important on the symbolic level, but also on the substantive level of legal decisions, because a more heterogeneous set of differences on the judiciary will yield more balance, access, and equal opportunity for individuals from any walk of life who come before a court.[198] As further supported by Professor Nancy Scherer, "the placement of black judges on the . . . bench is vital because it sends a message to black citizens that they, too, have access to positions of influence. . . . [T]hey provide *substantive* representation of black perspectives in the . . . courts."[199]

In terms of gender diversity, one area where researchers often see a disparity in substantive voting behavior between male and female judges is Title VII sexual harassment and sexual discrimination cases.[200] Judge Edward Chen, the first Asian Pacific American judge on the federal bench for the Northern District of California,[202] has also written on the topic of the need for diversity on the bench, writing:

195. *Id*. at 1274.

196. *Id*.

197. *Id*. at 1275 (quoting DINA REFKI ET AL., CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS 1 (2011)).

198. *Id.*

199. Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 656 (2004).

200. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005). Although research does vary on the topic, data collected by Jennifer Peresie shows that although plaintiffs lost in a majority of cases, such plaintiffs had a noticeably higher chance of succeeding where a female judge was on the bench. *Id.* at 1779. This finding is further supported by research conducted by Matthew Knepper and research by Christina Boyd, Lee Epstein, and Andrew Martin. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010); Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LAB. ECON. 623, 659 (2018).

202. Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CALIF. L. REV. 1109, 1110 (2003).

> Diversity can establish the credibility of an institution, build bridges to other communities, and increase sensitivity to and awareness of diverse clientele and constituents . . . .
>
> . . . .
>
> At the same time, diversity provides role models for those historically excluded. It can provide a source of hope and inspiration for those who would otherwise limit their horizons and aspirations.
>
> . . . .
>
> A diverse judiciary signals the public acknowledgment of historically excluded communities and sends an invaluable message of inclusion. It enhances courts' credibility among affected communities who would otherwise feel they have no voice within the institution. It helps dispel traditional stereotypes that Asian Pacific Americans and other minorities are not sufficiently intelligent, articulate, or decisive to be judges. And it assures students and young lawyers from historically underrepresented communities that they need not limit their aspirations.
>
> Of course, as with any other institution, diversity also enhances the quality of judicial decision making.[203]

Judge Bertha Wilson of Canada mentions yet another reason why diversity on the bench matters. Specifically, she found that having more women on the bench lessened sexist remarks and inappropriate language in the courtroom.[204] Judge Wilson bases her conclusions about professionalism in the courtroom, in part, upon data gathered by New York and New Jersey task forces on gender bias.[205] Furthermore, researcher Angela Melville addresses the importance of female inclusion into the judiciary.[206] Melville suggests that such gender diversity is necessary in order to bring a gendered perspective to judging (having different experiences and ways of understanding the law and other social constructs),[207] that it is a "basic tenet of democracy"[208] in that having more women on the bench better represents the demographics of those whom

203. *Id*. at 1116–17.

204. *See* Wilson, *supra* note 112, at 513.

205. *Id.* at 514 (citing REPORT OF THE NEW YORK TASK FORCE ON JUDICIAL DIVERSITY TO GOVERNOR CUOMO (1991), *reprinted in* Joaquin G. Avila, *The Future of Voting Rights Litigation: Judicial and Community College Board Elections*, 6 BERKELEY LA RAZA L.J. 127, 129–31 (1993)).

206. Angela Melville, *Evaluating Judicial Performance and Addressing Gender Bias,* 4 OÑATI SOCIO-LEGAL SERIES 880, 884 (2014).

207. *See id.*

208. *Id.* at 888.

judges serve and that it also provides a symbolic role in that female inclusion "ensure[s] public confidence in the judiciary."[209]

If a diverse bench could increase public confidence in the judicial system,[210] it may suggest to a litigant that decisions will reflect a diverse understanding of situations in society. As a service to the public, and theoretically a reflection of public opinion, the law reflects the ideal of fairness when exercised. In reality, however, the law's objectivity can become mired in various ways. This can give the perception of a monolithic institution of the law that only serves the interests of the majority or is not representative of minority groups. Ideally, the legal system and the law should reflect the entire society it represents.

### B. *Why Might a Diverse Judiciary Reduce Bias?*

Beginning with the assumption that the legal system ideally should reflect all of society,[211] this then leads to my next question, where I urge further empirical research on the topic of implicit bias. Would a judge who has lived the reality of bias be uniquely positioned to recognize bias more readily when seeing it in the courtroom? Or, put differently, would a judge who has faced bias be more prone to see bias exhibited in a court?

Regarding gender diversity in the judiciary, Sherilynn Ifill writes:

> [N]obody is just a woman or a man. Each of us is a person with experiences that affect our view of law and life and decision-making. Nevertheless, as "'outsiders' in the American legal system,' women judges are uniquely positioned to recognize, engage, and legitimate outsider narratives in the deliberative process.[212]

209. *Id.* at 889.

210. *See generally* Letter from John S. Kiernan to Judge Betty Weinberg Ellerin, *supra* note 106 ("Studies [of the legal field] have demonstrated that diversity in staffing promotes differences in perspective that enhance professional performance."); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 10 (2004).

211. MICHAEL E. MORRELL, EMPATHY AND DEMOCRACY: FEELING, THINKING, AND DELIBERATION 1 (2010) ("There is a promise inherent in democracy: before a society makes decisions that it will use its collective power to enforce, it will give equal consideration to everyone in the community. The development of collective decision-making institutions that take into consideration a wider range of interests did not begin with the rise of modern democracies.").

212. Ifill, *supra* note 124, at 448–49 (quoting Shirley S. Abrahamson, *The Woman Has*

Ultimately, race, gender, sexual preference, and other identity characteristics are not proxies for how one might view a case, and being of a particular race or gender does not automatically make one more sympathetic to those of the same race or gender. In other words, we can never assume that all women judges will see certain types of cases one way, or that all African American judges will decide uniformly.[213] There is no monolithic view of any particular judge. All judges need to be mindful of their own idiosyncratic biases, which is especially true when a judge believes he or she is not biased toward a particular group. Indeed, some would argue that female judges are less sympathetic to female litigants or issues regarding gender, as they may be judging such litigants as to how they themselves would have acted in a similar situation.[214] That said, the lived reality of a judge is often the view that ultimately shapes how that judge sees a case.

Diversity should be examined through the lens of intersectionality.[215] Many litigants and lawyers who appear before the judiciary have multiple aspects of their identity—a black lesbian woman, for example. Likewise, the judiciary itself may also include individuals who identify with more than one group, and therefore possess a unique perspective on the issues before them.[216] Intersectionality addresses how these various aspects of a person comprise a complex, nuanced individual not to be essentialized into a particular group, stereotype, or monolithic mold.[217] Thus, when addressing diversifying the judiciary in this

*Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 494 (1984)).

213. *Id.* at 409–10 ("In so doing, diversity advocates need not, and indeed should not, argue that the African American community is monolithic in its configuration, views, or values, or that only one 'black perspective' exists. Essentializing African American communities or judges denies the richness and complexity of African American political thought.").

214. *See* FENTIMAN, *supra* note 132, at 191; Breger, *supra* note 17, at 564–66; Czapanskiy, *supra* note 132, at 252–53.

215. Crenshaw, *supra* note 21, at 1244 (defining "intersectionality").

216. Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219, 225 (2008) (concluding that minority female judges are significantly more likely to support criminal defendants' claims than minority male, Caucasian female, and Caucasian male colleagues).

217. *See* James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 789 (2004) ("However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender.").

article, I am speaking about increasing diversity on a number of levels.

We also need to be mindful that diversity exists even within particular groups. As Justice Sonia Sotomayor once explained: "[n]o one person, judge or nominee will speak in a female or [a] people of color voice."[218] This is true for any culture, gender, ability, or religion. There are wide variations within any particular group. As Professor Sherilynn Ifill notes in her law review article: "[i]t must also be recognized that despite common cultural connections, great diversity exists within the African American community as well."[219] One can never assume a particular viewpoint on any topic just based upon a person's identity. That being said, Ifill goes on to explain, "[i]ndividual African Americans cannot help but be aware of the history that links all African Americans to one another. Nor can African Americans deny the reality that present day racism continues to connect the collective future of all African Americans."[220]

With that being said, diversity on the bench potentially opens up the range of perspectives.[221] It can be argued that reform towards a diverse judiciary would promote systematic reform on multiple grounds beyond simply eliminating ideological biases. Again, if the goal is to minimize implicit biases, then we need to look at bias more globally.

Notably, Professor Nicole Negowetti speculates that implicit bias may actually be one reason why the bench is not as diverse as it should be.[222] While some researchers have suggested that implicit biases are more evident when we have a non-diversified bench, others disagree.[223] Some have argued that the justice

218. Hon. Sonia Sotomayor, Judge, Fed. Court of Appeals, Judge Mario G. Olmos Memorial Lecture at UC Berkeley School of Law Symposium: Raising the Bar (Oct. 26, 2001), https://www.berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml [https://perma.cc/ZF9A-ERQH].

219. Ifill, *supra* note 124, at 420.

220. *Id.* at 422.

221. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 986 (2006) (discussing that elimination of implicit bias can create interdependence among all group members and create accountability for decision makers' decisions).

222. *See* Negowetti, *supra* note 22, at 951–52.

223. Rivera, *supra* note 194, at 1276 ("Some data supports the argument that judges of different races, ethnicities, and genders may reach different conclusions. Some data finds no support for such a conclusion.").

system rewards those who conform to acceptable norms before a judge.[224] Diversifying the bench gives the possibility of ascertaining multiple norms for any individual to be accounted for in the legal system.[225] Implicit bias can further permeate the court system without the input of a multitude of judicial viewpoints.[226]

Some researchers posit that judicial diversity can itself be a remedy to counter implicit bias; the creation of a diverse bench introduces ideas that were once viewed as foreign to becoming the norm in decision making.[227] For example, assembling a judiciary from a cross section of society will reflect a judicial approach that is representative of an entire nation's people.[228] As explained by researchers Pat Chew and Robert Kelley: "[a] more integrated judiciary that is representative of American society would expand judicial perspectives, prompt a more deliberative process, and help assure more accountable and responsive decision-making for 'citizens of all walks of life,' thus facilitating a more fully-functioning democracy."[229]

Indeed, this concept does not rest on the physical attributes of the judge, but instead pivots on the views of the individual judge and perhaps the bias an individual judge may have experienced.[230] A court may then approach the case before it from a broader set of experiences, as opposed to the commonly held perception of the law

224. Birckhead, *supra* note 174, at 413.

225. Rivera, *supra* note 194, at 1280.

226. Birckhead, *supra* note 174, at 419; *see* Rivera, *supra* note 194, at 1274 ("Justice cannot be blind if it is imparted by a group that overwhelmingly shares a common experience and appearance to the exclusion of others.").

227. MILLS, *supra* note 145, at 23; N.Y. STATE BAR ASS'N, *supra* note 193, at 6; Johnson & Fuentes-Rohwer, *supra* note 210, at 10; Wynn & Mazur, *supra* note 217, at 783 ("Thus, judicial impartiality is not the absence of experience[,] but rather the presence of human experience coupled with an open mind. Accordingly, in our pursuit to attain an independent and impartial judiciary, we cannot escape the reality—and consequences—that each judge brings to the bench a sum of life experience.").

228. *See* Jerome McCristal Cuip, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 63–64 (1992). For insight into how critical race theory is defined and how it manifests in an academic setting, see *id*. *See also* Anthony Paul Farley, *Lacan & Voting Rights*, 13 YALE J.L. & HUMAN., 283, 290–91 (2001) (discussing the immersive impact of judicial opinions through the lens of critical race theory).

229. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 115 (2012).

230. *See id.*

that is ruled upon by a narrow section of the population. As one researcher has noted:

> Implicit social cognition research indicates that implicit bias in decision makers can be reduced through exposure to individuals who are different from us. In other words, diversity is not only a result of a less biased workplace, profession, and legal system, but it is also a means of deactivating and countering stereotypes and implicit biases.[231]

Thus, perhaps diversifying the judiciary has an additional benefit: increasing the number of individuals who may readily embrace the idea of openly addressing and decreasing implicit biases in judging. This is, in fact, the genesis for my urging of actual quantitative research in this area.

Additionally, would a litigant of color or a litigant oppressed in any number of ways hold a perception that like-minded or similarly situated judges may be more empathetic to him/herself, and thus more empathetic to his or her case more broadly? Would such a litigant be more comfortable in the courtroom or be more apt to comply with any resulting court order?[232]

Of course, it must be noted that there exist minority group judges making legal claims contrary to minority interests, such as many commentators might say of United States Supreme Court Justice Clarence Thomas.[233] Some have argued that Thomas' judicial decisions are in fact antithetical to minority interests, as could also be the case for other judges of color or who are otherwise diverse.[234] Such voices and experiences as minority representatives are nonetheless imperative regardless of court

231. Negowetti, *supra* note 22, at 951–52 (footnote omitted).

232. Breger, *supra* note 2, at 3; Johnson & Fuentes-Rohwer, *supra* note 210, at 29 (demonstrating that it is in the interests of the judiciary to compel community respect, as opposed to being viewed as an illegitimate "kangaroo court").

233. Johnson & Fuentes-Rohwer, *supra* note 210, at 14–15, 47. In Johnson and Fuentes-Rohwer's reference to Justice Thomas, they also cite the decision of *Grutter v. Bollinger*, the landmark Supreme Court decision providing the use of affirmative action in student admissions as a compelling state interest in furthering educational goals. Grutter v. Bollinger, 539 U.S. 306, 308 (2003). Justice Thomas was among the four votes cast in dissent. *Id*. at 349 (Thomas, J., dissenting).

234. *See* Mary Kate Kearney, *Justice Thomas in* Grutter v. Bollinger*: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15, 32–34 (2004) (explaining that Justice Thomas did not vote in favor of affirmative action in *Bollinger*; however, his own experiences with affirmative action "strengthen[] his voice in the debate").

outcomes. Again, there is a wide range of possibilities here, which deserves further empirical research.

Another current Supreme Court Justice, then a federal circuit court judge, Sonia Sotomayor, addressed the issue of judges drawing from their life experiences when speaking with Berkeley Law students—thereafter catapulting to fame the phrase "a wise Latina woman."[235] Quoting our great Justice, who contends that the gender and ethnicity of a judge can alter judicial decision making:

> Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.
>
> . . . .
>
> Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences[,] but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.[236]

### C. *How Could Experiencing Personal Prejudice Be Relevant to Reducing Implicit Bias in the Courtroom?*

The effects of bias are lasting and pernicious. Those who have experienced prejudice personally "might experience shame, anger, sadness, withdrawal or an increase in motivation to make changes," notes sociology professor Laurie Mulvey.[237] Researcher Michael Inzlicht notes in a psychological study:

235. Sotomayor, *supra* note 218.

236. *Id*.

237. Lucie Couillard, *The Impact of Prejudice on Society,* DAILY COLLEGIAN (Sept. 27, 2013), https://www.collegian.psu.edu/news/crime_courts/article_a86ea0dc-270a-11e3-ad90-0019bb30f31a.html [https://perma.cc/Y4EP-WKHC].

> People who felt they were discriminated against[—]whether based on gender, age, race or religion[—]all experienced significant impacts even after they were removed from the situation.
>
> . . . .
>
> These lingering effects hurt people in a very real way, leaving them at a disadvantage[.] [E]ven many steps removed from a prejudicial situation, people are carrying around this baggage that negatively impacts their lives.[238]

If an individual has been subject to personal bias, will that individual be more motivated or more amenable to curbing bias in general? Would that individual be more cognizant of his or her own biases personally or professionally? Would that individual be more sensitive to the pernicious effects of bias upon decision making? If the answers to these questions are "yes" and that individual is in fact a judge, would that not mean that diversifying the judiciary might reduce implicit biases?

There is no conclusive answer yet about whether or not one who has suffered in the context of certain prejudices may be a better evaluator of individuals who have suffered similar prejudices. Many would argue, however, that a judge who clearly expresses "empathy" or "understanding" with a cause is more suitable to take a more exacting stance to claims where a prejudice is involved, as opposed to a judge who is not equipped with such emotional capacity.[239] The concept of empathy in the legal discourse comes with the benefit of enlarging one's understanding and hearing issues differently, which can ultimately reshape how legal problems are addressed.[240] A judge should be able to listen to stories and guide application of the law from a holistic standpoint.[241]

238. April Kemick, *Stereotyping Has Lasting Negative Impact,* U.S. NEWS (Aug. 12, 2010), https://www.usnews.com/science/articles/2010/08/12/stereotyping-has-lasting-negative-impact [https://perma.cc/NNM2-AJ9A].

239. *See, e.g.*, Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1562, 1564–65 (2012) (discussing President Obama's observation that "empathy" is an essential facet of a judge's understanding and identifying with individuals).

240. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1577 (1987). *But cf.* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, JUDGES' J., Fall 2015, at 20, 21. Marks' own experiences of facing prejudice did not necessarily help eradicate her own implicit biases in the courtroom, "I remember thinking that, as a victim of bias myself, I would be particularly sensitive and skilled at detecting my own implicit bias and knowing how to neutralize it." *Id.*

241. *See* Note, *Being Atticus Finch: The Professional Role of Empathy*, *in* To Kill a Mockingbird, 117 HARV. L. REV. 1682, 1684–85 (2004).

The hypothesis of whether those judges who maintain empathy to litigants who appear before them are more capable of sound rulings than those judges who lack empathy must be tested by interdisciplinary quantitative or qualitative research. It is worth exploring further if the presence in the judiciary of those who believe that they have faced bias—any kind of bias—might help decrease bias in the overall legal system.

This article ends with the hope and challenge that these questions be explored scientifically. If the conclusion, after study and data, is that those judges who have experienced bias in life are more amenable to interrupting their own biases on the bench is "yes," then that is yet one more additional reason why diversifying the judiciary can benefit our larger society and the legal system.

## CONCLUSION

In sum, judges must be mindful of the inevitable implicit biases they harbor, as every human admittedly does. If judges could be made aware of their particularized implicit biases, they may be successful in minimizing these biases from seeping into their own decision making. Furthermore, as this article outlines, there are a whole host of other strategies for judges to try to reduce their implicit biases. Thinking even beyond such strategies, perhaps judges who have faced personal biases in their own lived experiences would more readily or more honestly embrace the exercise of reducing implicit bias and seek more insight into the effect that implicit bias has upon their case decisions. There are numerous reasons why diversifying the judiciary is a benefit to society as a whole. Reducing bias may be yet one additional and invaluable benefit to strive toward. Research awaits.

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# Courts & Elections: Incompatible Values? Issues affecting the independence of the judiciary

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# Courts & Elections: Incompatible Values?

*Issues affecting the independence of the judiciary*

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*Abstract*

This document collects notes and resources on the impact of politics, specifically elections, on the judiciary.

The first part focuses on a 2018 contested judicial election in San Francisco (involving the author) and outlines a series of ethical and related issues which that election and other judicial elections pose. It is presented in outline and abbreviated form. This part distinguishes elections which do not challenge an incumbent from elections (and recalls) which do; and while the focus is on the second type, many of the comments relate to both.

This first part questions the extent to which values of an independent judiciary are furthered or undermined by elections. It suggests a variety of meanings for the term "independent judiciary," recognizes the value of accountability, which some contend is furthered by elections. It briefly summarizes the history of California's election of trial judges, contrasting the process applicable to members of the appellate and supreme courts. It outlines some solutions including actions judges and lawyers may take.

The second part of this document (at pages 22 *ff*.) collects background materials such as quotes, studies, and articles on judicial independence as a function of elections, the impact of elections on perceptions of judicial independence, the relationship between independence and funding of judicial elections, and discussions of alternatives to elections (such as the federal model under Article III of the US Constitution).

## ***Introduction***

In 2018 four incumbent judges on the Superior Court in San Francisco including myself were challenged by four assistant public defenders who practiced in that court. While we will never be certain of the true motives for the challenges, they appeared to be opportunistic and "political," in that the challengers' mantra was that the incumbents were appointed by Republican governors (which was true), implying we were Republicans (which was false) such that our "values" were inconsistent with those of San Francisco (also false: for example, see San Francisco Chronicle noted my 'progressive' actions[1]); and that voters should elect the challengers to state court in order to protest against Republican federal judges appointed by the wildly unpopular (in San Francisco) Republican President Trump (which makes no sense at all).

[1] Editorial: "Reject this assault on an independent judiciary," *Chronicle Editorial Board* March 19, 2018 Updated: March 19, 2018 12:02 p.m. https://www.sfchronicle.com/opinion/editorials/article/Editorial-Reject-this-assault-on-an-independent-12761846.php

No one caught up in an ordinary political campaign—say, for state Assembly, Mayor, or member of Congress—would have been surprised by any aspect of the 2018 judicial election. They would not have been shocked at its half-truths, false implications, bizarre false rumors on social media, appeals to party loyalty and partisanship, the time we spent with political consultants, fund raising, and seeking endorsements from political figures. They would not have been surprised at the sheer cost of running the campaigns. It was, in all aspects, an ordinary election. To note, as did a justice of the state supreme court (echoing comments from a justice of the appellate court and other observers) that the challenges were "crass political opportunism"[2] seems, in a way, gratuitous—of course they were.

This was politics.

What happens when the values of politics—including the politics of "hyperbole, distortion, invective and tirades"—meet the values of the judiciary? Politics triumphs. As a chart in the materials below notes (p.14), while judges must not take money from those who may appear in their courts, we can when it comes to elections. Although judges must not comment on pending cases, they may when it's about a case at issue in the election. While judges must be nonpartisan, and not show affiliation with party politics or elected officials, during an election it is permissible to seek endorsements from the Governor, Senators, and any other politician in or outside the state. If a law firm were to throw a big birthday bash for a judge and hand her a check at the end of the evening, the judge would likely lose her job: this would likely violate judicial canons on fostering the perception that others have a position of special influence with a judge, on accepting gifts; and so on. But during an election, if the money to is help save a judge's job—it's fine.

The materials below do not suggest an issue with the way politics works in this state-- that's not my business here. Nor is it to criticize our opponents: as they justly said, they had every right to make the challenges. My focus is the result when sitting judges are subject to electoral politics. The people of the state decide how they want to pick their judges, and there have been strong reasons for the system we have in California: in particular, ensuring some sort of accountability to the people. But there is a steep price, understood generally as one of judicial independence, or at least the perception of judicial independence, which is just as important. The tension between accountability and independence has a long history, and no system has ever been proposed which entirely resolves it. Yet it is worth questioning if the current system for trial judges in California is the best we can do. Some options are provided at § 9 on p.18 *ff*.

✠

The following materials were provided, in various forms, at a number of events relating to the independence of the judiciary such as bench-bar presentations, a December 2019 Commonwealth Club event, presentations to the California Judges Association, and other judicial organizations.[3]

[2] Unattributed quotations in this introduction are recited with attribution in the materials below.

[3] Commonwealth Club links: https://www.commonwealthclub.org/events/2019-12-10/judicial-independence-and-public-good; https://www.iheart.com/podcast/256-commonwealth-club-of-calif-30981602/episode/judicial-independence-and-the-public-good-53932013/. The Commonwealth Club event was reported at: https://www.sfchronicle.com/bayarea/article/Judicial-elections-again-raise-issue-of-keeping-14906029.php. See https://www.courthousenews.com/legal-experts-debate-judicial-independence-in-california/; https://www.sacbee.com/opinion/california-forum/article211093334.html; https://www.ebar.com/news/news//257168

**Part One**
**An Outline of Issues: The 2018 Judicial Election**

1. *Summary on elections - California*
    a. How it works in California
        i. Trial judges in California: 6 yr. terms, Governor fills vacancies [so most judges are first appointed], subject to reelection challenge at next election [which could be as little as 2 months after appointment]. If there is no challenger, the incumbent automatically obtains a further 6-year term
            1. Recalls at any time – for judges, need 20% of votes cast at last election to put the issue on the ballot.
            2. The role of "open seats." I.e., retirements close enough to election that governor does not fill the seat and a contested election may result.
        ii. Appellate/Supreme courts: gubernatorial appointment & retention elections only--for succeeding 12-year terms
        iii. *The accidents of history*: 1934 Amendments to Constitution. "A separate proposal to adopt retention elections for trial courts also appeared on the 1934 ballot. This proposal was not adopted, however, in part because of the trial court proposal's placement on the ballot. The appellate retention proposal was associated with three other initiatives at the front of the ballot which were part of an anti-crime package of reforms. The trial court retention proposal appeared near the end of the ballot immediately following an unpopular prohibition initiative. *See* California Commission on Campaign Financing, *The Price of Justice*, p. 24 (1995). The appellate retention proposal passed, but the trial court retention proposal failed. As a result, we have different election systems for our trial and appellate judges."[4]
    b. *Outline of states' judicial selection.* "Initially, as of 1790, all of the original American states selected their judges either by gubernatorial or legislative appointment, with most states appointing judges for life terms during good behavior. The first major shift, often attributed to the rise of Jacksonian Democracy, started in the 1830s when states increasingly began to replace their appointive systems with partisan elections for judicial office. By the 1860s, partisan election was the most commonly used method of judicial selection. However, with the coming of the twentieth century, states increasingly adopted nonpartisan elections to replace partisan elections. Subsequently, many states again shifted direction in mid-century, in favor of the Missouri Plan." "The Missouri Plan method for judicial selection typically involves nomination of a candidate by a judicial nominating committee and appointment by the governor, followed by a retention election that is usually uncontested and nonpartisan in which voters decide whether the judge should continue to hold office or the governor should appoint a new person for that office."
    c. 2018. The 4 judges in San Francisco (including Karnow) were challenged by 4 public defenders (PDs) [see below § 3 for details].
        i. All politics are local, so this story in all its detail could only have happened in San Francisco. But it has lessons for the broader issues.

[4] The Judicial Council's Working Group on Judicial Selection, *ACA 1 Working Group Report* 7-8 (June 7, 2001), https://www.courts.ca.gov/documents/aca1wgr.pdf

d. Judge Persky recall of 2018.
    i. Persky imposed a lawful sentence for sexual assault. But this was widely criticized as far too lenient.
    ii. "Recall organizer Michele Dauber indicated that voting is now a potent tool to advocate for victims of sexual assault and violence. [¶] "This campaign and this election will have no impact on judicial independence," said Dauber. "Judge Persky is an elected official, and there is no such thing as an elected official who is independent of the voters.""[5] (Dauber is a *law professor.* She was also a personal friend of the victim in the sexual assault case.)
    iii. The recall proponents won with 61.6% (202,849 votes). In the same election, Persky's judicial replacement got 68% of those voting for a replacement, obtaining only 174, 045 votes, which was far fewer than Persky secured in the same election. https://ballotpedia.org/Aaron_Persky_recall,_Santa_Clara_County,_California_(2018). Of the registered voters in Santa Clara county, 0.229% decided to oust Persky, which was equal to 0.32% of those voting in the election (fewer voted in the recall than voted more generally that year). Overall turn-out in Santa Clara county that year was 71%. https://sccvote.sccgov.org/sites/g/files/exjcpb1106/files/Post-Election%20Report.pdf
    iv. Persky was ousted. He lost his pension. Later, he was fired from his part-time job a tennis coach a few days in, after the employer found out he was the former judge Persky.[6]
e. Family judges recall efforts (Bay Area)- inspired by Persky recall
    i. "Persky's ouster inspires recall [¶] …. last week, a San Francisco mother filed a notice of intent to collect signatures to oust three judges in Contra Costa County. Michelle Chan, the founder and president of Parents Against CPS Corruption, said her recall effort was "definitely inspired by the Persky recall." …. Chan wants to recall Contra Costa County Superior Court judges Rebecca Hardie, Jill Fannin and Lois Haight in response to what she claims are widespread injustices. She also wants to target San Francisco Superior Court Judge Susan Breall."[7]
f. *Effects: Target on judge's back for every decision*
    i. Comment from a judge: How about the sentencing next Monday? "The Defendant is African American- I'll be accused of being racist."
    ii. Every decision can be used, whether the report about it is true or (as in my case) is not true.
    iii. President of California Judges Association to Karnow: 'If this can happen to you, it can happen to anyone'

*2. Independence of judiciary*
a. Distinguish: (A) how judges get the job *v.* (B) how they are retained or stay on the job.

[5] https://abc7news.com/whats-next-after-judge-persky-recall/3570377/
[6] https://kcbsradio.radio.com/articles/news/aaron-persky-loses-job-girls-tennis-coach#targetText=Aaron%20Persky%2C%20the%20former%20judge,a%20San%20Jose%20high%20school.
[7] https://padailypost.com/2018/08/21/group-aims-to-make-it-harder-to-recall-judges/. It does not appear these recall petitions collected sufficient signatures.
https://ballotpedia.org/Contra_Costa_County_Superior_Court_recall,_California_(2019)

i. Selecting judges is "political" in a lot of ways. What does 'political' mean? The issue isn't exactly whether politics plays a role when judges get <u>on</u> a court. With elections, or with gubernatorial appointments, there's always 'politics' in some way.
ii. But once they are on the bench, we want judges free of politics, not concerned with the popularity of his or her decisions.
iii. Many great judges in state court would never have been appointed. E.g., out gay, lesbian, and defense attorneys during the tenure of conservative governors (of both parties) in the late 20th century. Frequently governors have favored members of their political party for appointment.
iv. However, most of the issues outlined below obtain in any judicial election, whether an initial or subsequent election.

b. Perhaps we want judges who are not "political"—but what does "political" mean?[8]
   i. Under some of the definitions below, all judges are political; under others, none is; under others, clearly some judges are, and some are not; or reasonable minds may differ if some judges are or are not 'political'
   ii. Different sorts of cases and decisions at different levels of the hierarchy may call for more or less discretion on the part of the judge, and may afford more or less room for a judge's view of what is possible, practical, wise, or good policy given the various and usually competing values presented by the parties
   iii. "Political" may mean the judge is:
      1. In its rawest form, "authoritarian" in the sense of following, in specific cases, the dictates of a strong executive[9]
      2. Partisan: expressly favoring position of political party; or of a candidate
      3. Subject to elections, either initially or retention
      4. Appointed by party member (e.g. Governor or President)
      5. Subject to ultimate control by politicians (e.g., can be fired by the Executive or by a legislature (e.g. impeachment))
      6. Judge obtains or maintains job via influence (such as with money, perhaps in the form of campaign contributions) of those motivated by 'ideology' or 'political' stances
      7. Policy creator (such as the interstitial development of the law within the constraints of statutes, as Posner notes) [more or less, depending on where judges are in the hierarchy]
      8. In effect legislates in response to the wishes of the electorate (and/or other supporters) without neutral review of statutes
      9. Decides according to "ideology" or according to 'liberal' and 'conservative' or other apparently political labels
      10. Political affiliation as decisive in some cases[10]

[8] See e.g., Brian Z. Tamanaha, "The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship", 61 EMORY L.J. 759, 767 (2012) ("The Five Meanings of "Politics" in Judging")
[9] My conversations with judges from the People's Republic of China suggested that when they have a difficult issue, they confer with the executive branch for guidance. Similar issue have been reported with Russian judges. E.g., https://www.icj.org/cijlcountryprofiles/russian-federation/russian-federation-judges/russian-federation-independence-and-impartiality-judicial-integrity-and-accountability-2/
[10] C. Sunstein et al., ARE JUDGES POLITICAL: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) [Democratic and Republican appointed judges differ in outcome on certain hot button issues].

11. Etc.

c. What does "independent" mean?

*i. Backdrop: no civics knowledge & the use of proxies*

1. Public has little idea what judges do, their powers or constraints. Voters with a deep understanding of or commitment to a candidate or issue will be affected only by relatively deep attacks on the candidates or issue, and will in that way tend to rely on their own views. Where the candidate or issue is remote, or not understood, relatively weak influences will tip the scales at time of the vote. Thus we have proxies, as noted below.
    a. Examples. Most voters will have fairly strong views in the next Presidential election, and are unlikely to change their minds because of the views of a friend. But the same friend may be decisive in other elections, such as for the local hospital board, or school district, where one has no understanding of the candidates and what they do. This likely includes trial judges.
2. Infected by partisan politics at national level and perception of e.g., ideologically split US Supreme court {see more on this below}
3. Voters are understandably confused: they see state judicial candidates in *exactly* same setting as candidates for mayor, board of supervisors, etc., i.e. during election season these candidates present at the same panels, meetings, etc.
4. Because it is difficult (or impossible) for voters to appraise judicial candidates, they use *proxies* instead, such as partisan endorsements, slogans, social media, or a single high-profile decision.[11] E.g., party, slogans, and endorsements:
    a. Political party- vote for the Democrat or the Republican
        i. Our opponents insinuated the contest was one between Democrats and Republicans (but no candidate was a Republican). See below § 3.
    b. Slogan- who is:
        i. "progressive"[12]
        ii. who is for "reform"
        iii. "law and order"

[11] "Chemerinsky, who also found the apparent partisanship concerning, said, "We should be evaluating their conduct on the bench, not on the party of the governor that appointed them. The question is, is this person performing well?" [¶] That can be a hard question to answer, he said, since most of us go to the polls knowing very little about judicial candidates or incumbent judicial conduct, and high-profile cases like Persky's can influence opinions and votes. [¶] Davis voiced a similar view. "It's really hard for the electorate to get really well-informed about a particular judge," he said, calling challenges to judges based on the appointing governor's political party "really troubling." <https://www.courthousenews.com/california-judge-warns-against-rise-of-partisanship-in-judicial-elections/>

[12] I interviewed a union spokesperson after the election. That union had endorsed my opponent. When I asked why, he said the opponent was not an incumbent and was thus a "progressive." It is not clear, therefore, if my opponent had won, whether she would have then lost the endorsement in the *next* election.

iv. "status quo" v. "change"
v. In the SF campaign, "restorative justice"

c. Endorsements, as our consultants instructed us, are key. These are needed from:
i. The political bosses - exactly what the '34 reforms were meant to obviate
ii. Well-known figures – generally politicians - and those with power and influence

ii. Checks and balances verses other branches
iii. Adhering to state and federal constitutions, including supremacy and preemption issues
iv. *Impartial* in following the law, which means not deciding per
1. passion
2. partisan
3. local power brokers
4. personal views
5. moneyed interests
6. special interest groups and others with some political power
7. unions, chambers of commerce, other lobbying groups
8. 'plaintiffs' bar, 'defense' bar, asbestos bar [plaintiff or defendant], or other specialty bars

v. The opposite of independence is to follow "local/popular" values. Indeed this was actually the theme of our opponents in the SF race who accused the incumbent judges of not having "our values." See:
1. Kline quote[13]
2. Justice O'Connor[14]
3. The issue is actually nuanced. See next.

vi. If you arrange matters so that judges will reflect the will of the voters, the problem is that you may get judges who just reflect the will of the voters.
1. But the problem is more nuanced than this suggests.
2. Judges are, in an important way, *always* adhering to the will of the voters—just not those in the moment. Consider the House of Representatives- elections every 2 years—very close to the current will of the voters- can be flipped in and out of office rapidly. And the Senate- with 6-year terms- more distance from the passions of the moment, but of course still ultimately accountable to the people of their state.
3. Think of judges as farther along that spectrum. Every time we enforce a law or follow a constitution—which is the central job description—we abide by the will of the people. We do so at a further remove, with respect to the "people" more generally speaking; and their 'will' in its most considered, thoughtful, and reflective form.

[13] See appended Materials & Resources.

[14] "Unfortunately, more than three-fourths of Americans believe that state judges should represent the views of the people of their state." Justice Sandra Day O'Connor, "The Importance of Judicial Independence" (May 15, 2008), <https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence/>

4. The Ulysses technique: constraining our future selves. We arrange things so as not to tempt our future selves into bad actions: we get rid of the candy and cigarettes, so we don't reach for them; we have a pension plan that automatically deducts money from the paycheck, not trusting ourselves in the moment, every month, to set the money aside. We lock in long term preferences, we seek to bind our 'future collective selves.'[15] So it was that Ulysses bound himself to the mast before passing by the island of the Sirens, in order to resist the irresistible temptation that he knew was coming.
    a. The very creation of a government and its necessarily coercive power is a form of binding our future selves.
    b. So it is that we have constitutions and judges, and bind ourselves to follow their decisions
    c. Because we *know* we're going to want the short-term answer - to string up the accused, to fire the Communist from her job, to encroach on our neighbor's property or breach our contract when it seems advantageous in the moment
5. So it's never really about enforcing the will of the people. It's about how considered and *long term* we want to be, enforcing the *long term* will of the people.
6. If you want independence in the long term you need to be OK with some decisions in the short-term w/ which you do not agree. Even 'wrong' decisions have to be tolerated. Countries in which it is not permissible to have an 'incorrect' judicial decision (as defined by the then current political power) may be termed *authoritarian*
7. And if you believe that this is the role of judges- to bind Ulysses against the Sirens - then that should affect your thoughts about how they are retained and the role of electoral politics

vii. Courts are anti-majoritarian in these ways
    1. "tyranny of the majority" (James Madison)
    2. "A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism . . ." (Cal. Code of Judicial Ethics, Canon 3B (2))

*3. 2018 SF Election: Partisanship*

a. Judges cannot be partisan. (See under **Ethics** §5 below)
b. Trying to catch anti-Trump wave, the opponents ran highly partisan campaign: This was a fundamental premise of the challengers.
    i. Contrast canon 3(B)(2)

[15] See e.g., Kelly Levin, et al., "Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change," 45 *Policy Sci* 45:123–152 (2012), https://pdfs.semanticscholar.org/ca78/13ff5568d7b197630c7b3cc6c9d8428d87fb.pdf; Hal E. Hershfield, "Future self-continuity: how conceptions of the future self transform intertemporal choice," https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3764505/; Todd Rogers, "Future lock-in: Future implementation increases selection of 'should' choices," 106 Organizational Behavior and Human Decision Processes 1-20 (2008), https://scholar.harvard.edu/files/todd_rogers/files/future_lock-in._future_implementation_increases_selection.pdf

ii. From virtually the first day of the campaign, their message was: 'defeat incumbent judges appointed by Republican governor, to send message to Trump'
iii. Our opponents said, 'what kind of democrat is appointed by a republican?'
iv. Opponent as reported by SF Chronicle: "If you believe our current system is working fine for all San Franciscans, then vote for the status quo and the Republican-appointed judges."
v. 'Democratic judges' = opponents' website name. Opponent public defenders were 'democrats for judges' until the DCCC {see below for more on DCCC} and most democratic clubs had finished their endorsement process; *then* the public defenders changed their tune to be 'anti-crime' (and *then* tried to get Republican party endorsement)
vi. The dog whistle: SF should elect judges that reflect the "values of our community"[16]

c. Ironically,
i. We were endorsed by (this may have been a first) the [Democratic] Governor, as well as by virtually every other Democratic politician (Senators, member of Congress, all 4 major candidates for mayor, assembly members, etc.)
ii. 3 of us were long-time Democrats, the 4th "No Party" (registered later as Democrat)

*4. 2018 SF Election: The Endorsement Problem*

a. Specialty bars, e.g.,
i. La Raza – Latino and Latinas
ii. African American bar group
iii. BALIF (gay / lesbian)
iv. Queen's bench- focus on women in the law
v. Etc.

b. Endorsements- rarely on the merits. I lost and benefitted from this. In one case, I got a key endorsement from X because a union endorsed my opponent, the union also backed X's opponent (in X's race), so X endorsed me against my opponent. I also obtained an important endorsement from Z who was involved in a city-wide race because some a key interest group, whose support Z wanted, told Z to endorse me. I didn't get an endorsement from Y (who was also running for a county-wide post) until it was almost too late because Y didn't want to offend perceived progressive players.
i. As we were told, *this is politics*.

c. They need to see the personal *ask.* [Begging] Our consultants told us to make sure we personally met with and offered respect to those whose endorsements we sought.

d. The process takes much time.

e. They want to know we will decide for them, & if we're on their side:
i. Potential endorsers wanted to know what we had done, or would do, specifically for them, or the causes they represented.
ii. Animal Rights "Have you ever donated to any animal welfare organizations? , Will you commit to taking a tour of a local animal shelter? ), Tell us about how you have cared for your pets (if applicable); Have you ever donated to any animal welfare organizations?; will you commit to taking a tour of a local animal shelter?; About 2.4 million healthy, adoptable cats and dogs are put down each year. Do you

[16] https://www.courthousenews.com/california-judge-warns-against-rise-of-partisanship-in-judicial-elections/

support transforming animal shelters into no-kill facilities? "In our statement of support can we say that each candidate is committed to enforcing the laws that protect animals and will hold those found guilty of animal abuse fully accountable?"

iii. Other groups: have you come to our Galas, our dinners, are you member? Etc.
iv. SF Women in Action: "What specific experience do you have in serving, promoting, advancing, and protecting the interests of women, children, and families?"
v. Union questionnaires: "ever decide a union question? Please explain. How did you rule on an issue affecting unions…?"
vi. [For detailed examples of questions on candidate questionnaires, see Part 2: **Materials & Resources** below]
vii. Results orientation: The key issue for these organizations is: Which way did you decide, for or against my interests? What have you done to show you are aligned with our interests?
viii. No one wants to hear you're fair, impartial, neutral. It does not make for a sound bite, & it seems placid and weak. Organizations are suspicious if you do not expressly endorse their views and goals

f. S.F. Bar Association. in 2018: possible conflicts; they failed to follow own procedures; in an unprecedented move, the Bar committee interviewed *no judges* (I speculate: for fear of getting negative comments on candidates?). But nevertheless the committee issued recommendations as putatively objective merits decisions without disclosing their potential conflicts or their departure from past practices[17]
g. Political Clubs
    i. The sound bite problem. We had literally 2 minutes to make presentation: to bring audience up to speed on what courts do—and what they don't; plus the background and worthiness of the candidate; etc. Can't be done.
    ii. We were alongside not just our opponents but candidates for political offices- mayor, supervisor, etc., which contributed to the impression that the judges were running essentially the same sort of campaign and that voters should look to us for the same sort of platforms and promises.
    iii. Not always "fair": Dist. 3 - getting snookered: our opponents came in the week before [as well as the day we appeared], without our being told.
    iv. Chaos. Being shouted down by supporters of our opponents—well, "that's politics" we were [accurately] told.
h. DCCC
    i. San Francisco Democratic County Central Committee: DCCC endorsement is important in S.F. The very definition of partisan politics entering race.
    ii. DCCC only endorses Democrats
    iii. "Currying favor with party bosses" – exactly what the law reform of 1934[18] was meant to get rid of
    iv. We had to track every one of the members[19] down, getting other people to put in a good word for us. Enormous amount of time spent on this.

[17] I have no complaint about my personal rating. For about a year after the election, in writing I asked the Bar Association to explain what had happened. I had no success.
[18] Enactment in 1934 of Article VI, Section 26, of the California Constitution.
[19] There are 24 members, plus 9 ex officio members who are local elected politicians such as senators, a member of Congress, etc.

v. Most members had made up their mind long before they met us, and most endorsed us or our opponents based on political calculations and where they stood on the liberal-progressive spectrum (which should *not* be unanticipated—they are *politicians* after all)
    1. As incumbent judges we were by *definition* not 'progressive,' an irony the SF Chronicle noted in an editorial, as I had been highly 'progressive' in my work on bail reform, implicit bias, etc.[20]
    2. One of the leading members of the DCCC advised us that as incumbent judges we risked appearing "elitist" and so undemocratic and not "progressive"
    3. A different member of the DCCC informed me that my past educational, judicial, and other work and achievements were irrelevant to her endorsement: she only wanted to know what I would do in the future for the progressive agenda of the DCCC
        a. See more on this, and what other candidates have done in response to this pressure, below, § 5 (f)(v) (Canon 5)

vi. The terror of a too-early endorsement by Republicans. In San Francisco, no one wanted to be endorsed by the Republican party until *after* the DCCC had voted; thereafter, both we *and* our challengers sought Republican endorsement.

i. *The Infection of Politics: The Art of Reciprocal Obligations*
    i. Normal for politics. Politicians who can't manage this usually fail
    ii. But this is antithetical to judicial values
    iii. Making judges beg. We were to show "respect" (term used by consultants, see above) re: most of the DCCC. The members needed to see the personal *ask.*
    iv. To get signed endorsements from various people, we had to, e.g.:
        1. Travel to outlying areas of town
        2. Intercept them at a 7 a.m. political rally
        3. Ambush them at various dinners and events, being told they would endorse, only to be repeatedly put off.
        4. The implicit message: we were to show how much we valued them and their endorsement; which, in fact, was entirely true: we did value it highly.

5. *Ethics:* Were we compromised?
    a. Justice Anthony Kennedy: "I just don't see how a judge can mount an election campaign without frightening conflicts of interest."[21]
    b. Canons - improper to suggest or allow it to be suggested that someone is in a position of special influence.
        i. So why *do* people want their picture taken with us? Why do we show up at their public family/clan dinners? Why do we paste their pictures on our web sites? Why do they paste our pictures on their websites, and have us stand on the stage with them?

[20] Editorial: "Reject this assault on an independent judiciary," *Chronicle Editorial Board* March 19, 2018 Updated: March 19, 2018 12:02 p.m. https://www.sfchronicle.com/opinion/editorials/article/Editorial-Reject-this-assault-on-an-independent-12761846.php

[21] Dan Freedman, "Kennedy Slams Judicial Elections," *The San Francisco Examiner*, A13 (Oct. 13, 1995).

ii. What does it look like when the big tenants' union celebrates us and features us in *their* publicity? (Yes, to endorse us. What else comes to mind?)
iii. Why did a prominent law firm host a fund raising party for us? (Yes, to endorse us. What else comes to mind?)

c. Canon 5B(1)(b) prohibits knowingly making false or misleading statements during an election campaign because doing so would violate Canons 1 and 2A and may violate other canons.
   i. This had little apparent effect.
   ii. In any event any candidate can quietly work through proxies and cut-outs to spread stories, true and false and –even more difficult to combat--misleading. Especially on social media
d. Money. No gifts rule. But with elections: it is *all about money.* See separate treatment below.
e. 2020 amendment to the judicial canons: 3(B)(9) allows comment in election context, but in 2018 a judge could *not* comment on pending cases.
   i. New rule allows a judge [*any* judge] to comment publicly about a pending case that's the basis of criticism of a judge during an election or recall campaign.
   ii. Can comment on the procedural, factual or "legal basis" of the decision.
   iii. Drafters suggest it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with the allegations concerning the decision
   iv. New rule was apparently prompted by the 2018 Persky recall. A proponent contends the amendment is needed "in light of the increase in attacks on judges' judicial independence" often based on a single unpopular but lawful decision by the judge.
f. Partisanship & Rothman:[22] some background
   i. Rothman 10:30: "Although judges are permitted to be involved in community affairs, they must "not engage in political activity that may create the appearance of political bias or impropriety." Definitions of the word "political" encompass so much that it is often difficult to determine what sorts of activities would transgress the canon. Partisan or nonpartisan political activity concerned with electing persons to nonjudicial public office is clearly within the definition."
   ii. Rothman 11:40: "" Judges ... shall not ... publicly endorse or publicly oppose a candidate for nonjudicial office." If a candidate is running for a nonjudicial office, endorsement by a judge is prohibited regardless of whether the office is partisan or nonpartisan. Endorsement of a partisan or nonpartisan office is prohibited …."
   iii. Contested judicial elections increase the need for judges to engage in more aggressive campaigning. There is concern that the need for judges to defend against real or potential electoral challenge has caused a drift toward political partisanship and, in the process, has chilled judicial independence.
   iv. Rothman 11:46: reporting on a case that makes it clear we can't easily escape the partisanship: "The court held that "as a matter of law, the purported state interest in preventing voters from being unduly influenced by political party endorsements

[22] David M. Rothman, et al., CALIFORNIA JUDICIAL CONDUCT HANDBOOK (4th ed. 2017). This is the 'bible' for judicial ethics in this state.

cannot meet strict scrutiny. Under any set of facts, that goal is not a compelling state interest; on the contrary, it is a wholly illegitimate one." The court noted "[t]he choice that California can make is between permitting voters to elect judges, with all the partisan political activity that such campaigns entail, and appointing the state's judiciary in order to insulate judicial officers from political pressures."

v. Canon 5: "Judges and candidates for judicial office …. shall, however, not engage in political activity that may create the appearance of political bias or impropriety."
    1. Compare: actions of two lawyers, each running for separate judicial seats in San Francisco (March 2020 election), each of whom sought the endorsement of the San Francisco Democratic Congressional Campaign Committee (DCCC). Below are excerpts of the San Francisco Chronicle's endorsements of the *opponents* of the two named candidates:
        a. "tenant attorney Carolyn Gold, was rated 'qualified,' two notches down on the scale. In a questionnaire from the Democratic County Central Committee, Gold answered an unqualified 'yes' to whether she would fight for the party platform's implementation in policies. That in itself should be a nonstarter for a judge, whose fidelity should be to the law as written, as spelled out in Canon 5 of the state's code of judicial ethics."[23]
        b. "[The opponent] knew exactly what to answer when San Francisco's Democratic County Central Committee asked her in a questionnaire whether she would fight for the party platform's 'implementation in policies': no, emphatically. She rightly cited Canon 5 of the state's code of judicial ethics that neither judges nor candidates for the bench should 'engage in political activity that may create the appearance of political bias or impropriety.' Her opponent, public defender Michelle Tong, circled 'yes' on that question."[24]
        c. Gold and Tong got the DCCC endorsement,[25] and were elected judges of the Superior Court to be sworn in January 2021.

g. Corrosion of judicial ethics to accommodate politics and elections.
    i. As we set up our judicial systems, we create rules which are designed to preserve the independence of the courts, and – at least as important-- the *appearance* of that independence. But as we confront the realities of judicial elections, we *change* these rules, & sometimes destroy them, to account for the fact of politics. E.g.,

| ***Default rule*** | ***What we are willing to allow in elections*** |
|---|---|
| No money to judges- no gifts- Especially from those likely to appear before the judge | Money OK from those likely to appear in front of the judge [There are disclosure and disqualification (over $1500) rules]. Most money comes from those *most* likely to appear |

[23] https://www.sfchronicle.com/opinion/editorials/article/Editorial-Singh-for-SF-judge-in-Seat-21-15024227.php
[24] https://www.sfchronicle.com/opinion/editorials/article/Editorial-Chronicle-recommends-Dorothy-Chou-15024232.php
[25] https://www.sfdemocrats.org/voting/endorsements/march2020

| | |
|---|---|
| | before the judge- local lawyers |
| No suggestion one is in a special position to influence the judge | -Required to post name *and amount* of money the lawyers have donated<br>-Politicians and unions and groups etc. who endorse us can post our pictures on their web sites and in their materials |
| Cannot ask for money | Donors want to hear the personal ask –and they get it |
| No partisan politics | -Engage directly in partisan politics; seek endorsements from the most powerful politicians possible<br>-Seek out and beg the most powerful in the community for their endorsements |
| Don't discuss pending cases | Ok to discuss pending cases (new rule as of 2020) |
| Operate without fear or favor | -Every California judge knows Persky lost his job, and his pension, as a result of a single lawful decision- he was even fired from his part time job as a tennis coach when they found out who he was<br>-Justice Klaus quote: describing the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.[26] |

6. *Political rhetoric*
    a. The premium on negative messaging
    b. Sound bite: no room for nuance
    c. *Social media*:
        i. NextDoor; Facebook; blogs [both by opponents and 3d parties]; campaign websites
        ii. Confirmation bias: users of social media tend to read materials only which confirm their own preconceived views (the echo chamber effect); they are not exposed to a variety of stories as they might with newspapers and radio[27]
        iii. One false story- iterated and moves @ speed of light, repeated and becomes the story. Then surfaces at debates. Does one respond and make it worse, or hope it dies out? (This is never clear. There is evidence that responding makes it worse.[28]) But for some voters, that becomes *the* story.
        iv. Real time. Rapid and broad dissemination
        v. "Social media favors the bitty over the meaty, the cutting over the considered. It also prizes emotionalism over reason. The more visceral the message, the more

[26] "The late Honorable Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." Gerald F. Uelmen, "Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization," 72 Notre Dame L. Rev. 1133 (1997). Available at: http://scholarship.law.nd.edu/ndlr/vol72/iss4/8

[27] E.g., https://sysomos.com/2016/10/05/social-media-affects-politics/

[28] B. Nyhan, et al., "When Corrections Fail: The Persistence of Political Misperceptions," *Polit Behav* 32, 303–330 (2010), available at https://doi.org/10.1007/s11109-010-9112-2

quickly it circulates and the longer it holds the darting public eye."[29]

vi. Social media as a central *source* for news stories. So, although social media is not used by all demographics, its stories are picked up by *other* media and is in effect rebroadcast. {There are fewer traditional media outlets than ever, most newspapers have died,[30] and for those outlets that remain, funding for independent research and investigation is severely constrained.[31] Thus reporters use press releases[32] and lift stories from social media[33]}

vii. By buying into elections we're buying into social media. Social media is un-curated and direct; see e.g., vast instant spread of conspiracy theories etc. The usual editing processes of TV and newspapers editors have disappeared. So: conspiracy theories (Clinton pizza parlor pedophile ring, deep state, birtherism, Clinton's assassination

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[29] https://www.politico.com/magazine/story/2015/09/2016-election-social-media-ruining-politics-213104

[30] https://www.theatlantic.com/technology/archive/2019/03/local-news-is-dying-and-americans-have-no-idea/585772/; https://www.thenewamerican.com/reviews/opinion/item/29682-newspapers-are-dying; https://www.niemanlab.org/2019/08/why-the-new-york-times-is-covering-newspaper-closures-as-a-national-story-and-how-local-outlets-can-collaborate/; "As Reporters Lose Jobs, Vital Stories Go Untold," *The New York Times* (Dec.22, 2019) at 26; "When A Newspaper Folds: 'Our Community Doses Not Know Itself,'" *The New York Times* (Dec.22, 2019) at 29.

[31] https://reason.com/2017/02/22/where-did-all-the-investigativ/ (review of James T. Hamilton, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE REPORTING (Harvard 2017); https://www.hks.harvard.edu/faculty-research/policy-topics/media/goldsmith-award-finalists-talk-about-state-investigative ("investigative journalism had its heyday starting with the Watergate scandal, but has suffered in recent years as the declining fiscal fortunes of the news industry have resulted in cuts, downsizing, and the closure of some news outlets").

[32] https://groundfloormedia.com/blog/2012/07/18/who-wins-when-reporters-cut-and-paste-press-releases/ ("The suit adds that it's a regular practice for reporters to crib from press releases. The situation raises interesting issues. Having been on both sides of this argument—in the newsroom and in the PR world—I can tell you that reporters regularly cut and paste information from press releases. And that's exactly what PR practitioners hope they will do. [¶] Is it a good practice on the part of reporters? No, but it certainly does help, particularly as newsroom staffs continue to dwindle.")

[33] https://www.poynter.org/reporting-editing/2012/most-journalists-now-get-story-ideas-from-social-media-sources-survey-says/ ("An annual global survey of journalists by public relations firm Oriella finds that more than half now use social media as a source of story ideas, and nearly half use blogs to find angles and ideas. [¶] Among journalists in North America, the rates were even higher — 62 percent said they draw news from trusted sources on Twitter or Facebook, while 64 percent rely on well-known blogs as a source of story ideas. However, journalists said they were much less inclined to use information from an unfamiliar social media user or blog. [¶] The study's findings are significant, but so is its margin of error: It's based on an online survey of 613 journalists in 16 countries, with likely fewer than 100 respondents in the U.S. and Canada. Another survey in 2010 reached similar conclusions about reporters' reliance on blogs and social media: [¶] 89 percent [of journalists] said they look to blogs for story research, 65 percent go to social networking sites such as Facebook and LinkedIn, while 52 percent check out what's happening on Twitter and other microblogging sites.");
https://www.mynewsdesk.com/us/blog/how-journalists-use-social-media/ ("So far, our research shows that journalists still use the mainstream social media channels like Facebook and Twitter to research and source their stories. Until now at least, we don't see any other channel in this category superseding Facebook. [¶] But, because of the past fake news dilemma, we may see journalists relying less and less on Facebook. And they may very well shift towards the more traditional channels. [¶] Facebook's and Twitter's role as a source of information has decreased compared to last year. In 2016, 66% cited social media as a critical source of information, whereas in 2017 only 53% mention it – a 13% drop. We expect this trend to continue. [¶] There are, of course, other channels journalists use: Blogs (33%), Google alerts (28%), YouTube(26%), LinkedIn(24%). But, nothing sticks out as much as Facebook and Twitter, with over half those surveyed using it.")

squad, etc.)[34]

viii. Instant flash point: A blog said I was responsible for the death of tenant. The false story asserted that I had evicted a tenant who then died, showing I was the worst judge on these issues and was anti-tenant. In fact I hadn't evicted anyone, never even conducted a trial in the case but rather ruled on a pretrial motion; the issue was state/local preemption, and the tenant died many years after my one-day contact with his case.
    1. We sent in corrections; letters from a tenant-rights lawyer who supported me; all this was met with silence from the blogger
    2. My opponent cited the blog, although she had researched what happened in the case

7. *Money: Deeply compromising*
    a. 'Money is the mother's milk of politics' - Jesse M. Unruh
    b. "The candidate who spends the most money usually wins"[35]
    c. Why politicians spend so much time asking for money: "We do it because we'd like to win"[36]
    d. "I never felt so much like a hooker down by the bus station... as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote."[37]
    e. Monetization all one's past relationships.
        i. Everyone you know is asked for money
        ii. The former partner who sends in $25. The top tier partner at major firm who sends in $100. The friends who send in nothing.
            1. It's horrible that they do this (like decaffeinated coffee: it's a "why bother" donation) and –what's far, far worse-- it's horrible that *we think it's horrible* that they don't send in significant sums.
    f. Donors want the *candidate* to call. The personal touch. Both for $ and endorsements. Why is that? They want to hear that you, personally, really want their money. Create personal relationship…. To make clear the obligation?
        i. In the SF election we had others making calls for money, but we were often told that we personally had to call, as a "closer."
    g. Taking money from attorneys. About 80% of people who gave to the campaign were lawyers. The only people motivated to give are the *last* people who should be giving.
    h. Lawyers, and sometimes a whole firm, held fund raisers and solicited money on our behalf.
    i. Spending *all* our spare time on raising funds.
    j. Dark money: not in our race. But why not next time?
    k. Outside money/PACs: Perhaps two in our race (including one from the judges' association). But why not substantial PAC money the next time?[38]

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[34] For more on the possible relationship between the rise of conspiracy theories and increasing political divide, see <https://news.uchicago.edu/podcasts/big-brains/science-conspiracy-theories-and-political-polarization-eric-oliver>

[35] <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/>

[36] Senator Mitch McConnell <https://www.npr.org/2019/08/01/747368694/mitch-mcconnell-has-long-argued-for-more-money-in-politics>

[37] American Constitution Society, "Justice At Risk: An empirical analysis of campaign contributions and judicial decisions - Key Findings," June 2013 <https://www.acslaw.org/analysis/reports/justice-at-risk/>

[38]

l. A waste of money? Over $600,000 spent in our race.[39] A shocking amount (not counting whatever our opponents spent)
    i. = 15,000 kids treated for malaria[40]
    ii. = 1,200,000 children fed for a day[41]

*8. Impact on Lawyers*

a. What does the lawyer for a large corporation think, a few weeks before the election, who is pressing a position which is very unpopular in the City?
b. The list of lawyer contributions outside the courtroom [per mandatory disclosure rules[42]] -- what are the signals those disclosures send to (a) someone who has not contributed; (b) the public?
c. From a colleague: "Just took the bench in my second jury trial since returning from the election and disclosed that Mr. XYZ and his firm members had donated to our campaign. I could see the opposing counsel / party immediately cringe. They are conferring whether I should continue on the case"

9. Remedies?

a. The notion that we can keep judicial elections separate from the infirmities of politics generally is not supportable.
    i. At least these days. Politics has been taken over by short term tribalism; instantaneous social media; transitory party politics superseding the long-term needs of the nation or community.

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- "San Francisco voters are beginning to get inundated with mail and TV ads seeking to sway their vote in November. For residents in Districts Four and Six, some of those campaign ads for the supervisor races have been funded by donors that include a Silicon Valley angel investor, the CEO of a San Francisco real estate company and a big contributor to the Democratic and Republican parties." https://www.sfchronicle.com/bayarea/article/Progress-San-Francisco-collects-and-spends-big-in-13279890.php.
- "more than $4.6 million has been spent on next month's San Francisco Board of Supervisors elections, with most of the money in critical races coming not from the candidates but from an independent expenditure committee called "Progress San Francisco," which is funded by real estate companies, tech companies, and corporate CEOs." https://www.sunlightondarkmoney.com/report_dark_money_floods_sf_elections; "
- more than half the contributions to sitting council members came from less than 1% of Berkeley households, and that one-third of the contributions came from outside the city." https://www.berkeleyside.com/2016/10/27/public-campaign-finance-advocates-find-outsized-role-of-money-in-past-berkeley-elections
- "California Justice & Public Safety PAC, which is funded by George Soros, the liberal billionaire investor who has already funneled $1.5 million into the PAC and has spent more than $400,000 in the San Diego district attorney's race." https://www.eastbaytimes.com/2018/05/10/candidate-calls-out-big-money-in-contra-costa-district-attorney-race/; see also, https://www.mercurynews.com/2018/05/28/liberal-billionaire-george-soros-spending-big-money-in-local-district-attorney-races/

[39] 2011-2012 spending on "lower court" elections, California: $4,436,461 <https://www.motherjones.com/politics/2014/10/judicial-elections-dark-money/>

[40] <https://www.sciencedirect.com/science/article/pii/S0264410X16311033>

[41] US$ 0.50 to feed one child for a day. <https://sharethemeal.org/en/faq.html>

[42] California Supreme Court Committee On Judicial Ethics Opinions, Formal Opinion, "Disclosure Of Campaign Contributions In Trial Court Elections" (March 14, 2019), http://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Formal-Opinion-2019-013.pdf

ii. Impact of events concerning USSCt:
    1. "Since Kagan replaced Stevens in 2010, the justices' ideologies for the first time in history have aligned precisely with the party of the president who appointed them."[43]
    2. "A 26-point gap [in approval ratings for the U.S. Supreme Court] between the parties is jarring — this seems like a fairly unprecedented situation," said Michael Salamone, a political science professor at Washington State University who studies public responses to the Supreme Court. "If entrenched partisan views of the court persist, it could have a longer-term impact on the court's legitimacy," he added.[44]
    3. For more on the relationship between political polarization and the courts, in particular the supreme court, and its impact on the public's view of courts as "political," see e.g., the studies noted here.[45]

b. Federal model: lifetime tenure. Nothing else does as much to ensure independence of the judiciary.
    i. This is unlikely in California with its history of populism, manifest in its election of judges and its mechanism to pass laws and amend the constitution though ballot measures.

c. Have only retention elections for all judges as we currently do for appellate judges (as proposed in 1934)
    i. A central problem with the current arrangement (which is to allow challengers to trial judges every 6 years) is that is deeply confuses the process of how judges get their job with how they can lose it. Getting the job—whether through appointment, or being elected—is always "political" in some way. In elections against incumbents, challengers plausibly say that politics is always implicated when judges get the job. But for the incumbent, politics may be used to unseat him or her, which profoundly affects judicial independence.
        1. This conflation is a central reason why it was almost impossible to explain how judicial independence was at stake in the 2018 S.F. election.
    ii. "Of all the methods he looks at, Shugerman claims that merit selection, which involves vetting by a panel of professionals and executive appointment to a first term, followed by retention elections, has yielded the most judicial independence. It is currently employed in about 20 states. But he warns that it, too, may be adversely affected by the excessive campaign spending that preceded and may now be accelerated indirectly by *Citizens United*."[46]

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[43] David Cole, "Keeping Up Appearances," *The New York Review* 18, 19 (August 15, 2019).

[44] Amelia Thomson-DeVeaux, "Can The Supreme Court Stay Above The Partisan Fray?: Democrats and Republicans are historically divided on the Supreme Court," (August 12, 2019) <https://fivethirtyeight.com/features/can-the-supreme-court-stay-above-the-partisan-fray/>

[45] Richard L. Hasen, "Polarization and the Judiciary," *Annu. Rev. Political Sci*. 2019. 22:X–X, https://doi.org/10.1146/annurev-polisci-051317-125141; Jamieson, K. H., & Hennessy, M., "Public Understanding of and Support for the Courts: Survey Results, " *The Georgetown Law Journal*, 95 (4), 899-902, retrieved from https://repository.upenn.edu/asc_papers/352 (2007).

[46] Review of Shugerman, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (Harvard, 2012), *Harvard Law Bulletin* (Summer 2012), https://today.law.harvard.edu/book-review/in-new-book-shugerman-explores-the-history-of-judicial-selection-in-the-u-s/

d. We hope certain measures will ameliorate the corrosive impact of politics:
    i. increased civics education[47]
    ii. rapid response groups from the bar
    iii. ethical requirements for all candidates to be truthful and correct misleading statements from their campaigns
        1. This exists but is usually ineffective
    iv. Very rapid responses from watchdog agency or group:
        1. Must be fast enough to make a difference in the election. Seems unlikely.
    v. limits on donations
        1. Currently donations over $1500 result in disqualification
    vi. Disclosure of contributions (general & deep disclosure reform, including those who contribute to PACs, and social welfare organizations who contribute to campaigns, designed to get to the identity of the ultimate donor)
        1. Disclosure is currently required, but this can have the unintended consequence of pressuring parties who have not yet contributed

e. What courts can do
    i. The law is [by and large] entirely impenetrable to the lay public, and that's the responsibility of the courts. Many of the issues below are a function of the contrast between the (i) formalism (both substantive and stylistic) of legal writing and (ii) the practicality and realism that actually guides much of judicial decision making. This contrast, which may be intuitively understood by the public, undermines the legitimacy of the courts.
    ii. Problems and fixes:
        1. Endless open-ended multi-factor tests which obscure the reasoning of the judge
        2. Complex conflicting vague canons of statutory interpretation
        3. Use of legal fictions contrary to plain English meaning (e.g., "person" in the constitutional context; "consent" in the contract context; "conclusive presumption;" anytime we use the term "deemed;" etc.)[48]
        4. Use of formulae and Latinism to gird opinions with the air of inevitability and authority, but which are both incoherent to the public and engender suspicion
        5. "In countless judicial opinions the reader will encounter a superfluity of legal jargon, numbing detail, overstatement, superfluous notes, throat clearing, repetition, irrelevance, excessive citation, and needless section headings." Richard Posner, DIVERGENT PATHS 121-22 (2016)[49]

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[47] See efforts by California's Chief Justice, e.g., https://www.courts.ca.gov/20902.htm#targetText=Chief%20Justice%20Tani%20G.,access%20to%20justice%20in%20California.

[48] E.g., C. Karnow "Dangerous Fictions," *The Daily Journal* (2020), available at https://works.bepress.com/curtis_karnow/44/

[49] Posner has written a lot on this. See generally his REFLECTIONS ON JUDGING (2013). See also, William Domnarskimay, "Judges Should Write Their Own Opinions," *New York Times* (May 31, 2012) <https://www.nytimes.com/2012/06/01/opinion/judges-should-write-their-own-opinions.html> ("I know that only

6. We need shorter, plain English opinions which resist the urge to make law more complex and ramified
7. Unlike criminal litigation which focusses on guilt and innocence, much of civil litigation does not focus on the merits, but on discovery, motions, and other procedures, all of which drives up the cost of litigation making it too expensive for most people, thusly alienating the population
8. That is, more generally, simplifying the law, reducing costly discovery, etc. See e.g. materials "The Law, Otherwise: Notes on Access to Justice," https://works.bepress.com/curtis_karnow/54/

iii. Public relations
1. 'Law Day' – open house at the court for all media and public to understand the workings of the court
2. Well-staffed PR department issuing statements on interesting cases of the week

f. Community & schools reach out
i. E.g., appellate arguments at schools: "Court of Appeal Invites Fresno Students to Oral Argument Session: Students will watch the Oct. 22 arguments at Fresno's Bullard High School"[50]

g. Improving processes & expanded access to courts
i. Expedited jury trials
ii. Civil Gideon
iii. Expanding small claims
iv. Increasing limit of Limited Jurisdiction
v. Getting courts out into the community: Collaborative courts e.g., veterans court; drug court, etc.[51]

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a few of the readers of my opinions are not lawyers, but the exercise of trying to write judicial opinions in a way that makes them accessible to intelligent lay persons contributes to keeping the law in tune with human and social needs and understandings and avoiding the legal professional's natural tendency to mandarin obscurity and preciosity.")

[50] https://newsroom.courts.ca.gov/news/court-of-appeal-invites-fresno-students-to-oral-argument-session

[51] S.F. Superior Courts:

• Behavioral Health Court (BHC): Works with individuals who have serious and persistent mental illness in their efforts toward community re-integration and greater self-sufficiency.

• Community Justice Center (CJC): Bridges the gap between communities and the Court and addresses issues that have led to a participant's criminal justice involvement through the use of restorative justice and treatment services for substance use, mental health, and other primary health issues; adjudicates clients' criminal cases from the Tenderloin, Civic Center, Union Square, and South of Market neighborhoods.

• Drug Court (DC): Links non-violent offenders who have substance use disorders to outpatient and/or residential treatment intended to support a life free from substance use.

• Family Treatment Court (FTC): Provides comprehensive, highly coordinated services to families impacted by parental substance use to help them establish stability and prevent children's re-entry into foster care.

• Intensive Supervision Court (ISC): Provides high-risk high-needs probationers with a "last chance" at community supervision as an alternative to State prison.

• Juvenile Reentry Court (JRC): Enhances public safety and reduces recidivism of youth returning from long-term commitments by providing comprehensive case planning and aftercare services for high needs youth returning from out-of-home placement and Log Cabin Ranch.

vi. More judges and staff to reduce judicial bottleneck

h. While we should pursue these strategies, there is little reason to think these will make much difference. Finally, it's not just the horror of what politics has mutated into today. As the Federalist #78 tells us, there is a fundamental distinction between (i) the operations of electoral, popular politics and (ii) the work we ask of our judges.

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• Veterans Justice Court (VJC): Addresses the specialized needs of veterans facing criminal charges by providing the social service, educational and vocational support they need to lead productive and independent lives.
• Young Adult Court (YAC)

**Part Two**
**Materials and Resources**

*Politics*

> "I felt I was living in an alternate reality that was in some way insane, unable to recognize hypocrisy or the separate fact from politics. The world around me seemed to have come unmoored. The truth had become irrelevant."
>
> -Ben Rhodes, THE WORLD AS IT IS 282 (2018) (reporting on the rhetoric surrounding the Republican investigation of the "Benghazi" attack on the US consulate)

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"Hyperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies and distributing bumper stickers and pot holders. Political mischief has been part of the American political scene since, at least, 1800.
"In any election, public calumny of candidates is all too common. 'Once an individual decides to enter the political wars, he subjects himself to this kind of treatment.... [D]eeply ingrained in our political history is a tradition of free-wheeling, irresponsible, bare knuckled, Pier 6, political brawls.' [Citations] To endure the animadversion, brickbats and skullduggery of a given campaign, a politician must be possessed with the skin of a rhinoceros. [Citations] Harry Truman cautioned would-be solons with sage advice about the heat in the kitchen.
….
Although, as the Beilenson court lamented, "many political campaigns are mean-spirited affairs that shower the voters with invective instead of insight," it nevertheless remains beyond question that in order "to ensure the preservation of a citizen's right of free expression, we must allow wide latitude." (Beilenson, supra, 44 Cal.App.4th at p. 955, 52 Cal.Rptr.2d 357.)

> -*Issa v. Applegate*, 31 Cal. App. 5th 689, 704–05 (2019)

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That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be *fatal to their necessary independence*. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

> -THE FEDERALIST PAPERS No. 78 (Hamilton) (emphasis supplied)

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"…. the very practice of electing judges undermines this interest [in an impartial judiciary]."

- *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring)

But if judges are subject to regular elections, they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L.Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is " 'like ignoring a crocodile in your bathtub' "); Bright & Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U.L.Rev. 759, 793–794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

-*Republican Party of Minnesota v. White*, 536 U.S. 765, 788–89 (2002) (O'Connor, J., concurring)

The judiciary "requires independence from the political branches….. I have great respect for our public officials. After all, they speak for the people, and that commands a certain degree of humility from those of us in the judicial branch who do not," he said. "But we speak for the Constitution -- our role is very clear. We are to interpret the laws and Constitution of the United States and ensure that the political branches act within them."

-Chief Justice Roberts, University of Minnesota Law School (Oct. 16, 2018)

"A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism …."

-California Code of Judicial Ethics, Canon 3B(2)

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- voters in twenty-two states elect their appellate judges- partisan and non-partisan.
- Two states leave the selection of their appellate judges to the legislature
- In the other twenty-six states, the governor appoints members of the appellate courts.

Diane M. Johnsen, "Building A Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection," 53 San Diego L. Rev. 829, 831–32 (2016)

For a full review of the different mechanisms by which states select judges, see "Evaluating Judicial Selection In Texas: A Comparative Study of State Judicial Selection Methods," at 15 *ff*. Texans For Lawsuit Reform Foundation (2019) http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation_JudicialSelection_FinalWebVersion_2019-09-17.pdf

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*The San Francisco Election*

From one of the opponents: "a Schwarzenegger appointee doesn't reflect the values of our community. It's that simple."

Presiding Justice J. Anthony Kline of the First Appellate District: "the statement is transparently ridiculous…. The effort to defeat four of the most able, compassionate, and experienced judges in Northern California simply because they were appointed by a Republican governor in an overwhelmingly Democratic county is an unmitigated act of political opportunism."

President of California Judges' Association: "There is no claim that any of the aforementioned sitting judges is incompetent, has engaged in lawless or unprincipled decision-making, or corruption of any kind …. The partisanship and single-issue politics motivating these challenges has no place in the selection of our state's judicial officers."

California Supreme Court Justice Cuellar: "Challenging dedicated and highly qualified judges solely because of which governor appointed them or what party the governor belongs to is crass political opportunism."

https://www.law.com/therecorder/2018/03/26/letter-to-the-editor-an-attack-on-the-integrity-and-independence-of-california-curts/

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**Extracts from 2018 Questionnaires of organizations offering to endorse judicial candidates in San Francisco**

- Please describe what support you have provided to the Asian American community during your career.

*Asian American Bar Assn.*

- What specific experience do you have in serving, promoting, advancing, and protecting the interests of women, children, and families?

*SF Women In Action*

- Have you ever evicted or bought out a tenant (including Owner Move Ins)
- Do you, your spouse/partner or any others in your immediate household own any real estate?
- If Yes, please describe property (e.g. vacant lot, commercial rental, residential rental, vacation home, etc.)
- Do you own any stock in Real Estate Investment Trusts (REIT) and/or are you a partner (full, limited or of any nature) in any venture, corporation, partnership or other structure which owns real estate of any nature?
- Are you or your spouse/partner a real estate broker and /or licensed to sell real estate?
- Do you believe we are in a housing crisis right now?
- Have you or have your friends who have personally been involved in landlord/ tenant litigation in San Francisco? If so, describe any "take away" they described to you about the experience:
- Do you consider the Rent Ordinance to be a remedial statute? As such, do you believe it should be interpreted broadly? What does this mean to you?

- Do you support the Right to Counsel measure for tenants facing eviction which will be on the June ballot?

*SF Tenants Union*

- "What are the three most important political or community-based activities that you have participated in during the last four years that have benefited the African American communities San Francisco?"

*San Francisco Black Community Matters*

- "1) Please describe your position on the Death Penalty. 2) Please describe your position on Reproductive Rights. 3) What constitutional rights, if any, should corporations have? E.g., do you have a position on corporate free speech, or on the constitutionality of corporate spending limits in elections?"

*Green Party*

- Are you a registered member of the Democratic Party?
- Please describe your contributions to the Democratic Party and/or increasing civic engagement in the democratic process at the local, state and or/national level in recent years.

*Democratic Congressional Campaign Committee (DCCC)*

- Will you appoint and elect women to public office and positions of political leadership?
- Do you believe in a political process that is transparent, accessible, and responsive to better serve the needs and interests of women?
- Do you support legislation that supports more safe, livable, and green communities?
- Will you support and advocate for legislation that addresses livable wages and pay equity for equal work?
- Do you support accessible, quality public services, including education, health care, senior services, and child-care?
- Do you support reproductive freedom?
- Do you support the elimination of violence against women?
- Do you support the eradication of all forms of discrimination against women and girls?
- Please outline your commitment and work toward the following SFWPC's priorities.
- Priority I: Electing, appointing, mentoring, and empowering women to positions of leadership in San Francisco.
- Describe your history with SFWPC and what actions you would take if elected to connect with and understand the needs of our members.
- Do you pledge to hire, mentor, and promote women and women of color to your campaign team, legislative staff and as "kitchen cabinet" advisors to your team?

*San Francisco Women's Political Committee (SFWPC)*

- Please describe your philosophy on the criminal justice system and how you view Deputy Sheriff's role within this system?
- What are your thoughts on replacing the 850 Bryant Street Property? [Criminal courthouse where Sheriffs work]
- Do you believe the City Charter Sec 6.105 Sheriff should be updated to present responsibilities? Currently it is outdated and does not include our current responsibilities and it does not conform to state law. Would you support a San Francisco Deputy Sheriffs' Association effort in updating the Sheriff Section of the City Charter?
- Do you support inmates being sent and housed at out of county jails (excluding San Bruno County Jail in San Mateo County) now or in the future?

- How do you think that deputy sheriffs can enhance the level of service they provide the city & county beyond their current functions?
- Do you share our view that the deputy sheriffs are currently an underutilized city employee group relative to possible professional opportunities currently available, but not being actively explored?

*San Francisco Deputy Sheriffs' Association*

- Are you now or have you ever been a member of a union? If so, which one and when?
- Have you ever taken a public position on a union issue? Please explain.
- Have you ever requested (or ruled) that a court employee be held in contempt? If so, why?
- What is your position on the use of non-stenographic means of making the record in court proceedings?
- Under what circumstances do public employees not have the right to strike?
- Do you support repeal of Costa-Hawkins [limits rent control policies cities are able to impose]?
- Do you support or oppose San Francisco Measure H on the June, 2018 ballot?
- **CANDIDATE PLEDGE –** As a candidate and elected official I hereby pledge:
    - To publicly support and actively encourage workers who are organizing a union with the Service Employees International Union (SEIU).
    - To publicly support and actively encourage the position that workers should be able to freely choose for themselves whether they want to gain a voice on the job by unionizing without the intimidating effects of any employer interference. This includes publicly supporting and encouraging employers to remain neutral on the question of unionization.
    - To publicly support and actively encourage the position that no taxpayer money should be spent interfering with the right of workers to freely choose a union.
    - To publicly support and actively encourage a fair and fast process for determining worker support for unionization including secret ballot election or card check recognition.
    - To publicly support and actively encourage employers to negotiate an agreement with the union within 90 days after the majority of workers express their choice in favor of forming a union.
    - To publicly support and actively encourage employers to negotiate good faith collective bargaining agreements with their workers and to abide by the terms of those agreements.

*Service Employees International Union (SEIU)*

- How have you acquired your pets (if applicable)?
- Tell us about how you have cared for your pets (if applicable).
- Have you ever donated to any animal welfare organizations?
- Will you commit to taking a tour of a local animal shelter?
- About 2.4 million healthy, adoptable cats and dogs are put down each year. Do you support transforming animal shelters into no-kill facilities?
- With the goal of eliminating unnecessary euthanasia, which philosophy is closest to your own beliefs on how we should run municipal animal care services?
- Large-scale commercial breeders are a major source of inhumane treatment of companion animals, and they contribute to the senseless destruction of animals by directly competing with

animals in need of rescue and adoption. Do you support limiting commercial breeding businesses and prohibiting the sale of the animals they breed at local pet stores?

- Do you support laws that protect animals from inhumane treatment?
- Would you support a ban on fur sales in a city within your jurisdiction?

*AnimalPAC.org*

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"We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not these contributions actually tilt the scales of justice, three out of every four Americans believe that campaign contributions affect courtroom decisions. . . ." -U.S. Supreme Court Justice Sandra Day O'Connor
Found at https://www.brennancenter.org/analysis/new-politics-judicial-elections-all-reports
(October 28, 2015)

Alicia Bannon, "Choosing State Judges: A Plan for Reform," October 10, 2018
https://www.brennancenter.org/publication/choosing-state-judges-plan-reform#Introduction

> "results … suggest that donors do in fact have distorting influence on judicial decision making, make a substantial contribution to the literature on the relationship between contributions and judicial behavior", discussing Morgan L. W. Hazelton, et al., "Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court"
> https://journals.sagepub.com/doi/pdf/10.1177/1532673X15599839

Denise-Marie Ordway, "Judges: How election financing affects judicial behavior," January 17, 2017
https://journalistsresource.org/studies/politics/elections/judges-elections-finance-campaign/

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> "This study demonstrates that state supreme court justices are influenced by their specific electoral backgrounds and experiences, as well as general electoral conditions, when voting to uphold or overturn death sentences in the capital murder cases before their courts. Although previous research has established that electoral forces affect justices' decisions not to dissent, this article suggests that electoral variables also influence justices' decisions about who actually wins or loses the cases. On the basis of a probit analysis of death penalty votes in four supreme courts (Kentucky, Louisiana, North Carolina, and Texas) from 1983 through 1988, this study finds that single-member districts, narrow vote margins, being at the end of a term, and experience with electoral politics are associated with support for the death penalty, the position favored by the voters in these states. In addition, the model reveals that prosecutorial experience, term length, and murder rates within states also affect support for the death penalty. Most basically, the goals of judicial actors include personal as well as policy considerations, and the pursuit of these goals is promoted or inhibited by particular types of institutional arrangements."

Melinda Gann Hall, "Justices as Representatives: Elections and Judicial Politics in the American States," October 1, 1995, https://doi.org/10.1177/1532673X9502300407

The extant literature on the impact of judicial elections, or more properly, the impact of how judges are selected and retained, shows that method of retention does have some effect, particularly in the context of criminal cases. At the trial level, certain types of retention methods work to the detriment of criminal defendants, particularly in states with a death penalty process that allows trial judges to impose death even after a jury fails to recommend death. There is also evidence of election cycle effects in criminal cases, and possibly in some other types of cases as well. The impact of state-level public opinion on state supreme court justices is conditioned by the retention system in both death penalty cases and abortion cases, although the results of analyses of this issue are inconsistent. Importantly, it is not just elections that lead judges to be attentive to their retention constituencies: State supreme court justices facing retention by the governor or by the legislature show a tendency to defer to the preferences of those actors. Overall, however, the effects of these types tend to be fairly modest, with the exception of the death penalty override phenomenon, particularly in one state--Alabama.

Herbert M. Kritzer, Impact of Judicial Elections on Judicial Decisions, 12 *Ann. Rev. L. & Soc. Sci*. 353, 367 (2016)

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More NJC [National Judicial College] alumni than not say they have felt pressure to decide a case a certain way. But all say they have resisted the pressure.

Our emailed Question of the Month for January asked judges, “Have you ever felt political pressure in connection with one of your decisions?” A total of 517 judges replied and the majority, 54 percent, said they had.

“Everyone has, otherwise they’re not being truthful,” wrote one judge anonymously, as was most often the case with comments on this sensitive issue.

Among the more than 150 judges who commented, a small number said they had never felt pressured. That included a judge who reported having served 33 years on the bench. But the overwhelming majority of commenters felt otherwise.

All said that they had honored their oath and decided cases based only on the law and evidence.

“Felt (pressure), yes. Let it affect my decision, no,” wrote one judge, echoing many others.

The sources of pressure mentioned by NJC alumni included police, prosecutors, legislators, mayors, campaign donors, their superiors within the judiciary, and the public at large.

Elected judges wrote of sometimes being reminded that a decision could cost them votes.

“Certain segments of the Bar place enormous pressure on Florida trial judges subject to election,” one unnamed judge wrote. “These are lawyers who have something personally to gain or lose by the judge’s decision.”

More than one judge acknowledged that doing the right thing could be costly.

An unnamed elected judge described a situation several years ago in which an elected official wanted the judge to dismiss a traffic ticket for a wealthy, influential person. The judge refused.

“The family (of the person) had supported me for me years until then. The official and the family successfully campaigned against me in a subsequent election and I lost.”

Minnesota senior judge James Dehn said that in small towns, especially, many decisions generate pressure from law enforcement or the community, and they can “carry a price.”

A judge in one small rural community said the local sheriff has sometimes visited asking for "special consideration" in domestic/custody cases involving his deputies. Another time a local officer was charged with injuring a mentally ill individual, and the full police force came to court to "watch" the trial, the judge wrote.

"None of these attempts worked," wrote the judge, who added that after 15 years on the bench he or she is seeing fewer and fewer of these types of "visits."

Several other judges also mentioned attempted intimidation by gallery packing.

An unnamed judge who described serving in the "Deep South fundamentalist Bible Belt" recalled facing a courtroom packed with public and religious figures when about to rule in a custody case between a Baptist father and a lesbian mother. "Mother won."

An administrative law judge wrote of being "constantly" pressured by the executive branch to adopt interpretations of law that the judge and colleagues considered "contrary to plain meaning, legislative intent, canon and public interest." The ALJ pointed out that, unlike judges in the judicial branch, refusing to go along with your agency's preferences can run the risk of being fired.

An appointed judge in a small city in Washington state who wished to remain nameless described what happened after the city installed photo-traffic cameras. Revenue started pouring in from uncontested traffic citations. The city then began monitoring the judge's dismissals and mitigation decisions related to ticket appeals.

"They subtly pressured me about them, including the city attorney coming into my court and arguing on behalf of the city that I had no authority to dismiss tickets," the judge wrote.

In a later meeting with the mayor around the time of the judge's reappointment, the mayor complained that the judge was reducing tickets too much. The mayor said it appeared that the judge believed people when they said they had no jobs. The judge did believe them, the judge said.

"This kind of subtle and not-so-subtle pressure had never been there before, and I was furious! Of course I did not change how I handle traffic tickets in the least!!!"

Ed Cohen, "Poll shows most judges have felt outside pressure to rule a certain way," The National Judicial College (January 21, 2021)[52]

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In the words of one commentator, judicial campaigns have become "'nastier, nosier, and costlier."' Spending doubled between 1990 and 2004. One recent study found that, since 1993, winners in state supreme court races raised $91 million compared to $53 million raised by losers. Another found that "judicial candidates for state high courts between 1999 and 2006 raised over $157 million, more than twice the amount raised by candidates in the four election cycles prior combined." The increased competitiveness of judicial elections has led to changes in how campaigns are conducted, including an added pressure to raise more funds. [¶] Why is this a bad thing? A great quotation from a member of Ohio's state supreme court encapsulates the problem: "'I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. . . . Everyone interested in contributing has very specific interests. . . . They

[52] https://www.judges.org/news-and-info/poll-shows-most-judges-have-felt-outside-pressure-to-rule-a-certain-way/?utm_source=Judicial+Edge&utm_campaign=b8c40ce1b0-EMAIL_CAMPAIGN_2019_1_31_2019_COPY_01&utm_medium=email&utm_term=0_245b20c264-b8c40ce1b0-253800297&mc_cid=b8c40ce1b0&mc_eid=6083b799e0

mean to be buying a vote."' Of course, this is just one state judge's perspective, but there's evidence to back up his subjective perception. The problem can be broken down into three parts: (1) the effect on campaigns and election results; (2) the effect on judicial decisionmaking; and (3) the effect on the legitimacy of state courts.

Contemporary judicial campaigns more closely resemble campaigns for other elected offices than used to be the case. Candidates solicit contributions, use attack ads, and make promises about what they'll do if elected. It's hard to deny that money makes a difference in campaigns, allowing candidates to publicize their candidacies. What's less clear is how much the ability to raise money affects who can become or remain a state judge. Candidates certainly chase campaign money because they know, or at least think, it makes a difference. If you can't raise money, you can't expect to compete-and you'll probably choose not to run and perhaps not to seek retention. While it's difficult to pinpoint the precise effect of money on election results, it appears to be more important for challengers than for incumbents. This is probably because judicial candidates lacking name recognition depend more on advertising. There's also some evidence, albeit indirect, that money from wealthy business interests helps. From 2000 to 2004, "voters elected 36 of 40 judges supported by the U.S. Chamber of Commerce," which spent about $100 million over this period of time.

Even more worrisome than the impact on election results is the effect on judicial decisionmaking. Campaign contributors often appeared in court before judges to whom they contributed. Judges may favor those who have supported their campaigns, or whom they hope will do so in the future. Even if the particular litigant before them hasn't spent money on their campaign, appellate judges may be aware that the law they make will affect potential donors or spenders. This problem is equally severe for judges who face retention elections as it is for those who face a contested re-election campaign. Just how much does money affect judicial decisionmaking? It's hard to draw definitive conclusions from the empirical research, but the best recent evidence provides convincing evidence that some judges do in fact adjust their decisions to attract votes and campaign money. Professors Kang and Shepherd recently examined a dataset that included decisions by over four hundred state supreme court judges in more than twenty-one thousand cases over a four-year period. They focused on the contributions from business *505 groups, which accounted "for almost half of all donations to judicial campaigns." Judges who received campaign contributions from business groups were more likely to decide cases in favor of business interests. They even made a rough attempt to quantify the relationship between money and decisionmaking, finding that a $1,000 contribution increased the average probability that a judge would vote for a business litigant by 0.03%, while a $1,000,000 contribution increased that probability by 30%.

The third way in which money affects the judiciary is legitimacy. Should we trust a system in which judges depend on money from the very interests if not the very parties who are affected by their decisions? Many people think not, and with good reason. Seventy-six percent of voters think that campaign contributions affect judges' decisions. The number is even higher here in the state of Ohio. Even judges themselves agree. While few judges would admit that they are biased, many do express concerns about the impact that campaign money has on judicial decisionmaking generally. A 2001 survey found that 50% agreed that campaign donations influenced courtroom decisions by some judges. Most state judges believed that the tone and conduct of judicial campaigns had gotten worse over the past five years, and most elected high court justices cited immense pressure to raise campaign money during

> their election years. There is a conflict of interest between the judicial obligation to interpret and apply the law impartially, and their personal interest in seeking reelection or retention-an interest that, as a practical matter, requires them to take money from people and entities with a stake in their decisions. Such a system presents serious legitimacy concerns.

Matthew W. Green Jr. et. al., "The Politicization of Judicial Elections and Its Effect on Judicial Independence," 60 CLEV. ST. L. REV. 461, 503–05 (2012) (notes omitted).

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> Empirical Studies Reveal That Political Pressures Impact Judges' Sentencing Decisions to the Detriment of Criminal Defendants [¶] "Given the extraordinary power state court judges exercise over the liberty, and the lives, of defendants, it is vital that they remain impartial." However, increasing amounts of evidence suggest that providing citizens with the ability to recall judges based upon lawful, albeit unpopular decisions jeopardizes judges' ability to remain impartial in criminal cases. [¶] … empirical studies conclude that judges' sentencing decisions are affected by political pressures. This supports the notion that recall has a chilling effect on an independent judiciary.

Alexander S. Williams, "Winning The Fight But Losing The War: Why California Should Remove Judges From The List Of Local Officials Who Are Subject To Recall," 59 SANTA CLARA LAW REVIEW 425 (2019) (notes omitted).

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> Thirty-nine US states authorize recall elections, but the incentives they create are not well understood. We examine how changes in the perceived threat of recall alter the behavior of one set of officials: judges. In 2016, outrage over the sentence imposed on a Stanford athlete following his sexual assault conviction sparked a drive to recall the presiding judge. Using disposition data from six California counties and arrest records for a subset of defendants, we find a large, discontinuous increase in sentencing severity associated with the recall campaign's announcement. Additional tests suggest that the observed shift may be attributed to changes in judicial preferences over sentencing and not strategic adjustment by prosecutors. We also demonstrate that the heterogeneous effects of the announcement did not mitigate preexisting racial disparities. Our findings are the first to document the incentive effects of recall and suggest that targeted political campaigns may have far-reaching, unintended consequences.

Sanford C. Gordon, et al., "Incentive Effects of Recall Elections: Evidence from Criminal Sentencing in California Courts," *The Journal of Politics*, volume 84, number 4, October 2022

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> • Narrow vote margins promote responsiveness to constituents.
> • Being in the latter years of a term promotes responsiveness to constituents.
> • Experience in representational roles promotes responsiveness to constituents.
> • Experience in seeking re-election promotes responsiveness to constituents. To the extent that the circumstances identified in these hypotheses shape judicial voting behavior, one can expect that an individual "minority" judge--such as, a judge whose views are at odds with the majority

> of the court on which she sits, as well as with those of the voters--will refrain from dissenting in cases raising controversial, highly salient public policy issues.

James C. Foster, "The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon's Appellate Courts," 39 Willamette L. Rev. 1313, 1328 (2003) (notes omitted).

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> Do campaign contributions affect judicial decisions by elected judges in favor of their contributors' interests? Although the Supreme Court's recent decision in Caperton v. A.T. Massey Coal Co. relies on this intuition for its logic, that intuition has largely gone empirically untested. No longer. Using a dataset of every state supreme court case in all fifty states over a four-year period, we find that elected judges are more likely to decide in favor of business interests as the amount of campaign contributions received from those interests increases. In other words, every dollar of direct contributions from business groups is associated with an increase in the probability that the judge in question will vote for business litigants. Surprisingly, though, when we disaggregate partisan and nonpartisan elections, we find that a statistically significant relationship between campaign contributions and judicial decisions in favor of contributors' interests exists only for judges elected in partisan elections, and not for judges elected in nonpartisan ones. Our findings therefore suggest that political parties play an important causal role in creating this connection between campaign contributions and favorable judicial decisions. In the flurry of reform activity responding to Caperton, our findings support judicial reforms that propose the replacement of partisan elections with nonpartisan methods of judicial selection and retention.

Michael S. Kang & Joanna M. Shepherd, "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions," 86 N.Y.U. L. REV. 69 (2011)

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> analysis of the Wisconsin Supreme Court suggests that justices are less likely to protect defendant and prisoner rights once justices have experienced elective politics compared to the time period following a gubernatorial appointment.[26] In looking at Wisconsin Supreme Court criminal cases from 1986-2001, justices appointed by the governor were fifty percent more likely to vote for a criminal defendant's claim than they would be in later elected terms, or if they had been elected to their first term.[27] On the other hand, those justices who immediately faced electoral pressures and were elected in the first term are sixty percent more likely to vote against a defendant's claim in the first term.[28] These findings complement research done on other state courts suggesting that judges vote strategically by conforming with public opinion and refraining from dissent if they have to run for election or if they have won election by a narrow vote margin in the past.[29]

Jason J. Czarnezki, "A Call for Change: Improving Judicial Selection Methods," 89 MARQ. L. REV. 169, 174 (2005)

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> California has the largest death row of any state in the nation. In 1986, Governor George Deukmejian publicly warned two justices of the state's supreme court that he would oppose

them in their retention elections unless they voted to uphold more death sentences. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty. Deukmejian appointed their replacements in 1987.

Stephen B. Bright & Patrick J. Keenan, "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases," 75 B.U. L. REV. 759, 760–61 (1995) (notes omitted)

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*Justice at Risk* demonstrates that:

- There is a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters.
- The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court.
- A justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.
- The empirical relationship between business contributions and justices' voting for business interests exists only in partisan and nonpartisan systems; there is no statistically significant relationship between money and voting in retention election systems.
- There is a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among justices affiliated with the Republican Party.

Summary from Joanna Shepherd, "Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions" <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Justice%20at%20Risk%20One-Pager%20Final.pdf>

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"Today's state court elections are more intensely politicized than ever, and rising campaign spending increases pressures on elected judges to promote their parties' interests in state court. It is no surprise then that party favoritism and party campaign finance plays a major factor in how state judges decide the growing number of election disputes litigated in state court. This study provides the first systematic evidence of the hidden influence of raw partisanship and party campaign finance on judicial decisionmaking in these election disputes. Even more troubling, there is little reason to believe that partisanship influences judges only in election cases. If judges are influenced, consciously or not, by party loyalty in election cases, they are likely tempted to do so in other types of cases as well, even if it is methodologically difficult to prove the role partisanship plays. This study likely exposes just the tip of the proverbial iceberg. [¶] In response to this fundamental threat to fair and impartial courts, reformers have advocated, among other things, public financing of state judicial campaigns; term limits for state judges; and various merit selection, judicial evaluation, and disciplinary systems. This study empirically confirms the underlying suspicions about judicial partisanship and bolster the case for judicial selection reform."

-Joanna Shepherd and Michael S. Kangcial, "Partisan Justice How Campaign Money Politicizes Judicial Decisionmaking in Election Cases," <https://www.acslaw.org/analysis/reports/partisan-justice/>

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*See* John Oliver's entertaining and disturbing (if somewhat off color) monologue, "Elected Judges". https://www.youtube.com/watch?v=poL7l-Uk3I8 (touching on the historical reasons in the early 19th century for electing judges, the fact that virtually no other country does so, judges taking money from lawyers, judges influenced by donors, modified judicial behavior (longer sentences[53]) in election years, the impact of PACs, demeaning ads, and so on).

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*Parties and lawyers' concern regarding elected state judges, seen susceptible to local pressures, and so encouraging some litigants to seek removal to federal court*

Neal Miller, "An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction," 41 Am. U. L. Rev. 369, 375 (1992); see also Kristin Bumiller, "Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform," 15 Law & Soc'y Rev. 749, 759-62 (1981) ("The bias influencing attorneys' decisions...is apparently neither regional bias nor particular hostility due to 'state' residence, but fear of favoritism to local interests.").

♦

> Willie Gary himself, the plaintiffs' lawyer … has said he generally brings his cases in state court and prefers that venue; he vigorously tries to defeat defendants' efforts to remove cases to federal court.[120]
>
> [Note 120:] "Mr. Gary said he prefers state courts and no wonder: With their local judges and juries, a state courtroom can be more familiar ground for lawyers used to pursuing compensation for injured workers or other similar plaintiffs. And it is decidedly unfriendly terrain for a large corporation." McKay, supra note 20, at B1 (emphasis added); see also Coca-Cola Files to Have Second Race-Bias Suit Moved to Federal Court, Wall St. J., July 17, 2000, at B7 (describing Coca-Cola's efforts to remove a $1.5 billion suit filed by Willie Gary to federal court and Mr. Gary's intention to fight removal)."

Rene Lettow Lerner, "International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade" 2001 B.Y.U. L. Rev. 229, 254 (2001) (n.120

♦

[53] See e.g., as reported in the New York Times: "A study in Pennsylvania by Gregory A. Huber and Sanford C. Gordon found that 'all judges, even the most punitive, increase their sentences as re-election nears,' resulting in some 2,700 years of additional prison time, or 6 percent of total prison time, in aggravated assault, rape and robbery sentences over a 10-year period."
<https://www.nytimes.com/2008/05/25/us/25exception.html?_r=3&hp=&adxnnlx=1211666537-vbcSV1I8LyrHme86GFnA9g&pagewanted=all>

> Since the early 1990s, however, a series of studies exploring attorney preferences has consistently found that plaintiffs' attorneys prefer to litigate in state court and institutional defendants in federal court. Already in 1992, Neal Miller of the Institute for Law and Justice found that in a large sample of removal cases (which suffer from selection problems): "Plaintiff attorneys reported that favorable bias ... with respect to their clients in state court is relatively common" and "[d]efense attorneys' forum preference for federal court is based on expectations of lesser hostility there toward business litigants."

Diego A. Zambrano, "Federal Expansion and the Decay of State Courts," 86 U. Chi. L. Rev. 2101, 2162–2163 (2019) (notes omitted)

> Professors Michael Kang and Joanna Shepherd, for example, have argued that there is a correlation between electoral donations in state supreme court races--which are higher than they have ever been--and certain state-court decisions. These and other studies supported the idea that since at least the 1980s, state-court elections have become more competitive and decisions may be increasingly influenced by donors, worsening the quality of state courts relative to the appointed federal judiciary.

Diego A. Zambrano, "Federal Expansion and the Decay of State Courts," 86 U. Chi. L. Rev. 2101, 2146 (2019) (notes omitted)

> As Professor William Landes and Judge Richard Posner have previously outlined, courts can be analyzed as suppliers in a litigation market shaped by the demands of litigants. Within this market for litigation, judges can be seen as laborers who seek to maximize their popularity, prestige, and reputation, among other values in their utility function. This is especially true for state judges who are subject to elections in a majority of states. Not only does economic theory and political science predict this, social psychology theory also compellingly predicts that state judges should care deeply about the preferences of legal and social elites.

Diego A. Zambrano, "Federal Expansion and the Decay of State Courts," 86 U. Chi. L. Rev. 2101, 2159–2160 (2019) (notes omitted)

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> In other cases, however, judges are needed to protect unpopular litigants and unpopular rights, and it is in these cases that federal courts must step in to supervise and guide elected judges.

Amanda Frost & Stefanie A. Lindquist, "Countering the Majoritarian Difficulty," 96 Va. L. Rev. 719, 795 (2010)

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> The daily practice of many lawyers indicates that local bias is a problem in certain areas. Empirical studies surveying lawyers confirm anecdotal evidence. One study found that over fifty percent of defense lawyers reported bias against out-of-staters in their state cases. Over a quarter of plaintiffs' lawyers admitted this bias. Lawyers for out-of-state defendants readily acknowledge that suits brought in certain areas of particular states command a "settlement premium" because of the native bias of judges and juries in these areas. To collect this premium or a higher verdict, plaintiffs' lawyers take elaborate care to lay venue in one of these areas. The plaintiffs' bar also acknowledges that it often prefers to bring claims in state rather than federal

court. Willie Gary himself, the plaintiffs' lawyer in the Loewen case, has said he generally brings his cases in state court and prefers that venue; he vigorously tries to defeat defendants' efforts to remove cases to federal court.

A few elected state judges have been remarkably candid about the pressures they face. Formerly chief justice of the West Virginia Supreme Court of Appeals and currently a plaintiffs' lawyer, Richard Neely--who gave an affidavit for Loewen submitted with its notice of claim--wrote several books while he was still a judge that described the incentives of state judges faced with out-of-state defendants.

Based on many years' experience as a state elected judge and on discussions with numerous elected judges from other states, he described how elected judges depend on local support to win and keep a seat on the bench. Neely put it this way:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

While he was a judge, Neely was rather careful in his books to avoid the topic of campaign contributions by lawyers. His Loewen affidavit, written since he has become a plaintiffs' lawyer, is more explicit on the subject. (Of course, Neely most likely did not write the affidavit for free.) Neely said, because of his experience and numerous discussions over the years with elected judges from other states, that the judicial campaign contributions of plaintiffs' lawyers are typically generous. “[T]he lawyers who regularly represent plaintiffs in personal injury, class action and toxic tort cases contribute handsomely to judicial campaigns.” This is so because contingency fees give plaintiffs' lawyers a direct personal stake in the outcome of trials. “A judge can allow a plaintiffs' lawyer to retire early in life on a handsome income with one discretionary ruling! When multi-million dollar judgments are involved, a judge's decision not to set aside a punitive damage award may make a plaintiff's lawyer millions of dollars after taxes.”

Rene Lettow Lerner,” International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade,” 2001 B.Y.U. L. Rev. 229, 254–256 (2001) (notes omitted)

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Recent studies by Eric Helland and Alexander Tabarrok show that where judges are elected in partisan contests the average tort award in a case involving an in-state plaintiff and an out-of-state defendant is 42% higher than in states that do not use partisan judicial elections.

Rene Lettow Lerner, “International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade,” 2001 B.Y.U. L. Rev. 229, 257–258 (2001) (note omitted)

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Given the increasingly expensive nature of elections generally, judges must seek substantial campaign contributions, often from litigants and lawyers with business before the judge at

issue.

Scott D. Wiener, Popular Justice: State Judicial Elections and Procedural Due Process (1996) 31 Harv. C.R.-C.L. L. Rev. 187, 196 (note omitted)

> Whether the issue is utility rate hikes, the death penalty, crime in general, or some other question important to the electorate, elected judges who decide the particular issue will feel pressure to conform their decisionmaking to public opinion. Judges who ignore the pressure do so at their own risk.

Scott D. Wiener, Popular Justice: State Judicial Elections and Procedural Due Process (1996) 31 Harv. C.R.-C.L. L. Rev. 187, 202

♦

> As scores upon scores of commentators have observed--and, almost to a person, lamented--we are in a new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; salience is at an all-time high. Campaign rhetoric has changed dramatically, becoming more substantive in content and negative in tone. Following the Supreme Court's ruling in the 2002 case Republican Party of Minnesota v. White, all judicial candidates must be allowed to announce their views on disputed legal and political issues. White's direct legal impact was limited to the nine states that still maintained an "Announce Clause," but the decision was widely interpreted as "open[ing] the door, as both a practical and jurisprudential matter, to forces seeking to benefit from highly politicized courts"--as a tipping point toward increasingly politicized elections beyond which there would be no return. Lawsuits around the country are currently challenging many of the other canons that have traditionally constrained judicial campaign conduct. With remarkable speed, the distinctive rules, norms, and politics of judicial elections have begun to disappear.

David E. Pozen, The Irony of Judicial Elections (2008) 108 Colum. L. Rev. 265, 267–268 (notes omitted)

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THANK THE GOOD LORD FOR *MAPP V. OHIO*

On June 16, 1961, in *Mapp v. Ohio*, the U.S. Supreme Court applied its exclusionary rule – that is, the ban on use at trial of evidence acquired via violation of a defendant's constitutional rights – to the states. It was a big step in a long-running exercise in balancing two public interests: catching law breakers and deterring law-breaking by law enforcers. .... [This is a memo from Justice William O. Douglas] to Justice Tom Clark (the author of the opinion for the Court in *Mapp*). The memo is cc'd to the other Justices, including Frankfurter, who wrote the opinion for the Court in *Wolf v. Colorado* (1949), the precedent that was overruled in *Mapp*….[The memo refers to the California Supreme court's opinion in *People v. Cahan*, 44 Cal.2d 434 (1955) which endorsed the exclusionary rule six years before *Mapp*.]

> Dear Tom:
>
> This last weekend at a social occasion I saw Attorney General Stanley Mosk of California and his wife. He said out of the blue "Thank the good Lord for *Mapp v. Ohio*." I asked him what he meant and he went on to give an interesting account, most of which you probably know, which I thought I would pass on to you. He said that the California Supreme Court decision in the *Cahan*

> case was four to three and since it was decided there had been two vacancies on the Court and two new appointments. He said that Phil Gibson and the others who were for the *Cahan* opinion held their breath until the nominees took office and until they could find out where these nominees stood on *Cahan*. It so happened that one of the two nominees was for the *Cahan* decision and one was against it. So far as the Supreme Court of California went, Mosk said that it was barely holding its own. The newspaper campaign, however, against the *Cahan* decision, continued unabated. Mosk said that with the system of elective judges they have in California, pressure on the trial courts was very, very great not to apply the *Cahan* case or to find there were more exceptions to it, or in other words, try to get around it. He said that in practical effect, the *Cahan* decision, while on the books, was not really given much life or vitality in practice. He mentioned in addition to the newspaper pressure, the pressure of the head of the police in Los Angeles, a man named Parker who, I understand is a lawyer and very vocal. The result of *Mapp v. Ohio*, according to Mosk, is to take the pressure off the local judge to create exceptions and to follow the exclusionary rule and all its ramifications.

21 *Green Bag 2d* 155 (Winter 2018).

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Brennan Center. "Who Pays for Judicial Races":

In 2018, as of January 31, legislatures in at least 14 states are considering legislation that would diminish the role or independence of the courts:
• Twenty-three bills in eight states would inject greater politics into how judges are selected
• Four bills in four states would increase the likelihood of judges facing discipline or retribution for unpopular decisions or would politicize court rules or processes
• Four bills in three states would manipulate judicial terms, either immediately removing sitting judges or subjecting judges to more frequent political pressures
• Four bills in four states would restrict courts' power to find state legislative acts unconstitutional

2015-2016 Election cycle identified:
• Surge in dark money
• Record-breaking outside spending
• Attacks on judicial decisions in television ads
• More million-dollar races

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*Other citations*

Chief Justice J. Roberts, "2019 Year-End Report on the Federal Judiciary," https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf ("…. we have come to take democracy for granted, and civic education has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital. The judiciary has an important role to play in civic education, and I am pleased to report that the judges and staff of our federal courts are taking up the challenge.")

Joanna Berendt, “In Poland, A Defender Of Judicial Independence," NYT (Jan. 11, 2020), p. A5

Alicia Bannon, “The rise of dark money is a threat to judicial independence” (July 5, 2018)
http://www.abajournal.com/news/article/the_rise_of_dark_money_is_a_threat_to_judicial_independence

“Who Pays for Judicial Races? The Politics of Judicial Elections 2015-16”
https://www.brennancenter.org/publication/politics-judicial-elections (Dark money)

ABA, “Rethinking Judicial Selection,” June 14, 2017,
https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/

Adam Liptak, “Judges Who Are Elected Like Politicians Tend to Act Like Them,” The New York Times Oct. 3, 2016, https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html (review of various studies)

“A Judge Refused to Hire a Party Boss’s Aide. A Demotion Followed. He said the Bronx Democratic chairman punished him for bucking the patronage system.”[54]
https://www.nytimes.com/2019/09/07/nyregion/judge-armando-montano.html?searchResultPosition=1

Lincoln Caplan, “The Political War Against the Kansas Supreme Court,” (February 5, 2016)
https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court

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*U.S. voting for judges perplexes other nations*
By Adam Liptak
The New York Times (May 25, 2008)
<https://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html>
<https://www.nytimes.com/2008/05/25/us/25exception.html?_r=3&hp=&adxnnlx=1211666537-vbcSV1I8LyrHme86GFnA9g&pagewanted=all>

Last month, Wisconsin voters did something that is routine in the United States but virtually unknown in the rest of the world: They elected a judge.

The vote came after a bitter $5-million campaign in which a small-town trial judge with thin credentials ran a television advertisement falsely suggesting that the only black justice on the state Supreme Court had helped free a black rapist. The challenger unseated the justice with 51 percent of the vote, and will join the court in August.

The election was unusually hard-fought, with caustic advertisements on both sides, many from independent groups. Contrast that distinctively American method of selecting judges with the path to

[54] New York state trial judges are usually picked by the political parties, and then put on the ballot. https://www.amny.com/news/elections/new-york-judges-ballots-1.22942985

the bench of Jean-Marc Baissus, a judge on the Tribunal de Grand Instance, a district court, in Toulouse, France. He still recalls the four-day written test he had to pass in 1984 to enter the 27-month training program at the École Nationale de la Magistrature, the elite academy in Bordeaux that trains judges in France.

"It gives you nightmares for years afterwards," Baissus said of the test, which is open to people who already have a law degree, and the oral examinations that followed it. In some years, as few as 5 percent of the applicants survive. "You come out of this completely shattered," Baissus said.

The question of how best to select judges has baffled lawyers and political scientists for centuries, but in the United States, most states have made their choice in favor of popular election. The tradition goes back to Jacksonian populism, and supporters say it has the advantage of making judges accountable to the will of the people.

A judge who makes a series of unpopular decisions can be challenged in an election and removed from the bench.

"If you want judges to be responsive to public opinion, then having elected judges is the way to do that," said Sean Parnell, president of the Center for Competitive Politics, an advocacy group that opposes most campaign finance regulation.

Across the United States, 87 percent of all state court judges face elections and 39 states elect at least some of their judges, according to the National Center for State Courts.

In the rest of the world, the usual selection methods emphasize technical skill and insulate judges from the popular will, tilting in the direction of independence. The most common methods of judicial selection abroad are appointment by an executive branch official, which is how federal judges in the United States are chosen, and a sort of civil service made up of career professionals.

Outside of the United States, experts in comparative judicial selection say, there are only two nations that have judicial elections, and then only in limited fashion. Smaller Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality.

"To the rest of the world," Hans Linde, a justice of the Oregon Supreme Court, since retired, said at a 1988 symposium on judicial selection, "American adherence to judicial elections is as incomprehensible as our rejection of the metric system."

Sandra Day O'Connor, the former Supreme Court justice, has condemned the practice of electing judges. "No other nation in the world does that," she said at a conference on judicial independence at Fordham Law School in April, "because they realize you're not going to get fair and impartial judges that way."

The new justice on the Wisconsin Supreme Court is Michael Gableman, who has been the only judge on the Burnett County Circuit Court in Siren, a job he got in 2002 when he was appointed to fill a vacancy by Governor Scott McCallum, a Republican.

The governor, who received two $1,250 campaign contributions from Gableman, chose him over the two candidates proposed by his advisory council on judicial selection. Gableman, a graduate of Hamline

University School of Law in St. Paul, Minnesota, went on to be elected to the circuit court position in 2003.

The much more rigorous French model, in which aspiring judges are subjected to a battery of tests and years at a special school, has its benefits, said Mitchel Lasser, a law professor at Cornell University in New York and the author of "Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy."

"You have people who actually know what the hell they're doing," Lasser said. "They've spent years in school taking practical and theoretical courses on how to be a judge. These are professionals."

"The rest of the world," he added, "is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American."

But some American law professors and political scientists say their counterparts abroad should not be so quick to dismiss judicial elections.

"I'm not uncritical of the American system and we obviously have excesses in terms of politicization and the campaign finance system," said David O'Brien, a professor of judicial politics at the University of Virginia and an editor of "Judicial Independence in the Age of Democracy: Critical Perspectives From Around the World."

"But these other systems are also problematic," O'Brien continued. "There's greater transparency in the American system." The selection of appointed judges, he said, can be influenced by political considerations that are hidden from public view.

Baissus said France had once considered electing its judiciary. "It's an argument that was largely debated after the French Revolution," he said. "It was thought not to be a good idea."

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Jeffrey Rosen, “America Is Living James Madison’s Nightmare,” *The Atlantic* (Oct. 2018) <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>:

James Madison traveled to Philadelphia in 1787 with Athens on his mind. He had spent the year before the Constitutional Convention reading two trunkfuls of books on the history of failed democracies, sent to him from Paris by Thomas Jefferson. Madison was determined, in drafting the Constitution, to avoid the fate of those “ancient and modern confederacies,” which he believed had succumbed to rule by demagogues and mobs.

Madison’s reading convinced him that direct democracies—such as the assembly in Athens, where 6,000 citizens were required for a quorum—unleashed populist passions that overcame the cool, deliberative reason prized above all by Enlightenment thinkers. “In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason,” he argued in *The Federalist Papers,* the essays he wrote (along with Alexander Hamilton and John Jay) to build support for the ratification of the Constitution. “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”

Madison and Hamilton believed that Athenian citizens had been swayed by crude and ambitious politicians who had played on their emotions. The demagogue Cleon was said to have seduced the assembly into being more hawkish toward Athens's opponents in the Peloponnesian War, and even the reformer Solon canceled debts and debased the currency. In Madison's view, history seemed to be repeating itself in America. After the Revolutionary War, he had observed in Massachusetts "a rage for paper money, for abolition of debts, for an equal division of property." That populist rage had led to Shays's Rebellion, which pitted a band of debtors against their creditors.

Madison referred to impetuous mobs as factions, which he defined in "Federalist No. 10" as a group "united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." Factions arise, he believed, when public opinion forms and spreads quickly. But they can dissolve if the public is given time and space to consider long-term interests rather than short-term gratification.

To prevent factions from distorting public policy and threatening liberty, Madison resolved to exclude the people from a direct role in government. "A pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction," Madison wrote in "Federalist No. 10." The Framers designed the American constitutional system not as a direct democracy but as a representative republic, where enlightened delegates of the people would serve the public good. They also built into the Constitution a series of cooling mechanisms intended to inhibit the formulation of passionate factions, to ensure that reasonable majorities would prevail.

The people would directly elect the members of the House of Representatives, but the popular passions of the House would cool in the "Senatorial saucer," as George Washington purportedly called it: The Senate would comprise natural aristocrats chosen by state legislators rather than elected by the people. And rather than directly electing the chief executive, the people would vote for wise electors—that is, propertied white men—who would ultimately choose a president of the highest character and most discerning judgment. The separation of powers, meanwhile, would prevent any one branch of government from acquiring too much authority. The further division of power between the federal and state governments would ensure that none of the three branches of government could claim that it alone represented the people.

According to classical theory, republics could exist only in relatively small territories, where citizens knew one another personally and could assemble face-to-face. Plato would have capped the number of citizens capable of self-government at 5,040. Madison, however, thought Plato's small-republic thesis was wrong. He believed that the ease of communication in small republics was precisely what had allowed hastily formed majorities to oppress minorities. "Extend the sphere" of a territory, Madison wrote, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other." Madison predicted that America's vast geography and large population would prevent passionate mobs from mobilizing. Their dangerous energy would burn out before it could inflame others.

Of course, at the time of the country's founding, new media technologies, including what Madison called "a circulation of newspapers through the entire body of the people," were already closing the

communication gaps among the dispersed citizens of America. The popular press of the 18th and early 19th centuries was highly partisan—the National Gazette, where Madison himself published his thoughts on the media, was, since its founding in 1791, an organ of the Democratic-Republican Party and often viciously attacked the Federalists.

But newspapers of the time were also platforms for elites to make thoughtful arguments at length, and Madison believed that the enlightened journalists he called the "literati" would ultimately promote the "commerce of ideas." He had faith that citizens would take the time to read complicated arguments (including the essays that became The Federalist Papers), allowing levelheaded reason to spread slowly across the new republic.

James Madison died at Montpelier, his Virginia estate, in 1836, one of the few Founding Fathers to survive into the democratic age of Andrew Jackson. Madison supported Jackson's efforts to preserve the Union against nullification efforts in the South but was alarmed by his populist appeal in the West. What would Madison make of American democracy today, an era in which Jacksonian populism looks restrained by comparison? Madison's worst fears of mob rule have been realized—and the cooling mechanisms he designed to slow down the formation of impetuous majorities have broken.

The polarization of Congress, reflecting an electorate that has not been this divided since about the time of the Civil War, has led to ideological warfare between parties that directly channels the passions of their most extreme constituents and donors—precisely the type of factionalism the Founders abhorred.

The executive branch, meanwhile, has been transformed by the spectacle of tweeting presidents, though the presidency had broken from its constitutional restraints long before the advent of social media. During the election of 1912, the progressive populists Theodore Roosevelt and Woodrow Wilson insisted that the president derived his authority directly from the people. Since then, the office has moved in precisely the direction the Founders had hoped to avoid: Presidents now make emotional appeals, communicate directly with voters, and pander to the mob.

Twitter, Facebook, and other platforms have accelerated public discourse to warp speed, creating virtual versions of the mob. Inflammatory posts based on passion travel farther and faster than arguments based on reason. Rather than encouraging deliberation, mass media undermine it by creating bubbles and echo chambers in which citizens see only those opinions they already embrace.

We are living, in short, in a Madisonian nightmare. How did we get here, and how can we escape?

From the very beginning, the devices that the Founders hoped would prevent the rapid mobilization of passionate majorities didn't work in all the ways they expected. After the election of 1800, the Electoral College, envisioned as a group of independent sages, became little more than a rubber stamp for the presidential nominees of the newly emergent political parties.

The Founders' greatest failure of imagination was in not anticipating the rise of mass political parties. The first parties played an unexpected cooling function, uniting diverse economic and regional interests through shared constitutional visions. After the presidential election of 1824, Martin Van Buren reconceived the Democratic Party as a coalition that would defend strict construction of the Constitution and states' rights in the name of the people, in contrast to the Federalist Party, which had controlled the federal courts, represented the monied classes, and sought to consolidate national power. As the historian Sean Wilentz has noted, the great movements for constitutional and social

change in the 19th century—from the abolition of slavery to the Progressive movement—were the product of strong and diverse political parties.

Whatever benefits the parties offered in the 19th and early 20th centuries, however, have long since disappeared. The moderating effects of parties were undermined by a series of populist reforms, including the direct election of senators, the popular-ballot initiative, and direct primaries in presidential elections, which became widespread in the 1970s.

More recently, geographical and political self-sorting has produced voters and representatives who are willing to support the party line at all costs. After the Republicans took both chambers of Congress in 1994, the House of Representatives, under Speaker Newt Gingrich, adjusted its rules to enforce party discipline, taking power away from committee chairs and making it easier for leadership to push bills into law with little debate or support from across the aisle. The defining congressional achievements of Barack Obama's presidency and, thus far, Donald Trump's presidency—the Affordable Care Act of 2010 and the Tax Cuts and Jobs Act of 2017, respectively—were passed with no votes from members of the minority party.

Madison feared that Congress would be the most dangerous branch of the federal government, sucking power into its "impetuous vortex." But today he would shudder at the power of the executive branch. The rise of what the presidential historian Arthur M. Schlesinger Jr. called the "imperial presidency" has unbalanced the equilibrium among the three branches. Modern presidents rule by executive order rather than consulting with Congress. They direct a massive administrative state, with jurisdiction over everything from environmental policy to the regulation of the airwaves. Trump's populist promise—"I alone can fix it"—is only the most dramatic in a long history of hyperbolic promises, made by presidents from Wilson to Obama, in order to mobilize their most ideologically extreme voters.

During the 20th century, the Supreme Court also became both more powerful and more divided. The Court struck down federal laws two times in the first 70 years of American history, just over 50 times in the next 75 years, and more than 125 times since 1934. Beginning with the appointment of Anthony Kennedy, in 1987, the Court became increasingly polarized between justices appointed by Republican presidents and justices appointed by Democratic presidents. Kennedy's retirement raises the likelihood of more constitutional rulings split between five Republican appointees and four Democratic ones.

Exacerbating all this political antagonism is the development that might distress Madison the most: media polarization, which has allowed geographically dispersed citizens to isolate themselves into virtual factions, communicating only with like-minded individuals and reinforcing shared beliefs. Far from being a conduit for considered opinions by an educated elite, social-media platforms spread misinformation and inflame partisan differences. Indeed, people on Facebook and Twitter are more likely to share inflammatory posts that appeal to emotion than intricate arguments based on reason. The passions, hyper-partisanship, and split-second decision making that Madison feared from large, concentrated groups meeting face-to-face have proved to be even more dangerous from exponentially larger, dispersed groups that meet online.

Is there any hope of resurrecting Madison's vision of majority rule based on reason rather than passion? Unless the Supreme Court reinterprets the First Amendment, allowing the government to require sites like Twitter and Facebook to suppress polarizing speech that falls short of intentional incitement to violence—an ill-advised and, at the moment, thankfully unlikely prospect—any efforts to encourage deliberation on those platforms will have to come from the platforms themselves. For the moment, they

have adopted an unsatisfying mash-up of American and European approaches to free speech: Mark Zuckerberg provoked controversy recently when he said Facebook wouldn't remove posts denying the existence of the Holocaust, because determining the intent of the poster was impossible, but would continue to ban hate speech that the First Amendment protects.

Still, some promising, if modest, fixes are on the horizon. Nathaniel Persily, a professor at Stanford Law School who leads an independent commission that will examine the impact of Facebook on democracy, notes one step the company has taken to address the problem of "clickbait," which lures users with sensational headlines. Articles that persuade many users to click previously appeared high on Facebook's News Feed. The company now prioritizes those articles users have actually taken the time to read.

But these and other solutions could have First Amendment implications. "The democratic character of the internet is itself posing a threat to democracy, and there's no clear solution to the problem," Persily told me. "Censorship, delay, demotion of information online, deterrence, and dilution of bad content—all pose classic free-speech problems, and everyone should be concerned at every step of the government regulatory parade."

Of course, the internet can empower democratic deliberation as well as threaten it, allowing dissenters to criticize the government in ways the Founders desired. The internet has also made American democracy more inclusive than it was in the Founders' day, amplifying the voices of women, minorities, and other disadvantaged groups they excluded. And although our national politics is deadlocked by partisanship, compromise remains possible at the local level, where activism—often organized online—can lead to real change.

Federalism remains the most robust and vibrant Madisonian cooling mechanism, and continues to promote ideological diversity. At the moment, the combination of low voter turnout and ideological extremism has tended to favor very liberal or very conservative candidates in primaries. Thanks to safe districts created by geographic self-sorting and partisan gerrymandering, many of these extremists go on to win the general election. Today, all congressional Republicans fall to the right of the most conservative Democrat, and all congressional Democrats fall to the left of the most liberal Republican. In the 1960s, at times, 50 percent of the lawmakers overlapped ideologically.

Voters in several states are experimenting with alternative primary systems that might elect more moderate representatives. California and Washington State have adopted a "top two" system, in which candidates from both parties compete in a nonpartisan primary, and the two candidates who get the most votes run against each other in the general election—even if they're from the same party. States, which Louis Brandeis called "laboratories of democracy," are proving to be the most effective way to encourage deliberation at a time when Congress acts only along party lines.

The best way of promoting a return to Madisonian principles, however, may be one Madison himself identified: constitutional education. In recent years, calls for more civic education have become something of a national refrain. But the Framers themselves believed that the fate of the republic depended on an educated citizenry. Drawing again on his studies of ancient republics, which taught that broad education of citizens was the best security against "crafty and dangerous encroachments on the public liberty," Madison insisted that the rich should subsidize the education of the poor.

To combat the power of factions, the Founders believed the people had to be educated about the

structures of government in particular. “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both,” Madison wrote in 1822, supporting the Kentucky legislature’s “Plan of Education embracing every class of Citizens.” In urging Congress to create a national university in 1796, George Washington said: “A primary object of such a national institution should be the education of our youth in the science of government.”

The civics half of the educational equation is crucial. Recent studies have suggested that higher education can polarize citizens rather than ensuring the rule of reason: Highly educated liberals become more liberal, and highly educated conservatives more conservative. At the same time, the National Assessment of Educational Progress has found that citizens, whether liberal or conservative, who are educated about constitutional checks on direct democracy, such as an independent judiciary, are more likely to express trust in the courts and less likely to call for judicial impeachment or for overturning unpopular Supreme Court decisions.

These are dangerous times: The percentage of people who say it is “essential” to live in a liberal democracy is plummeting, everywhere from the United States to the Netherlands. Support for autocratic alternatives to democracy is especially high among young people. In 1788, Madison wrote that the best argument for adopting a Bill of Rights would be its influence on public opinion. As “the political truths” declared in the Bill of Rights “become incorporated with the national sentiment,” he concluded, they would “counteract the impulses of interest and passion.” Today, passion has gotten the better of us. The preservation of the republic urgently requires imparting constitutional principles to a new generation and reviving Madisonian reason in an impetuous world.

See also e.g., https://www.politico.com/magazine/story/2019/09/08/shawn-rosenberg-democracy-228045

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ABA, “Judges raise alarm as personal threats intensify, amplified by social media” (August 10, 2019) https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/judges-raise-alarm-as-personal-threats-intensify--amplified-by-s/

Judge James Robart discovered the power of social media in a very frightening and very personal way.

On Feb. 3, 2017, the Seattle federal judge issued a temporary restraining order, blocking President Donald Trump’s first “travel ban.” That’s when the threats began. Before Robart had even left the courthouse, critics had posted his name, photo, address and phone number on the internet, along with his wife’s name, phone number and business address. [¶] Angry callers flooded the judge’s chamber. Most asked the same two questions: Who are you to defy the president? How many votes did you get in the last election? [¶] That was just the start. [¶] The next day, Trump slammed the judge on Twitter, calling his ruling “ridiculous” and Robart a “so-called judge.” A day later, Trump tweeted again, more angrily: "Just cannot believe a judge would put our country in such peril. If something happens, blame him and court system. People pouring in. Bad!" [¶] That’s when the threats grew frightening. By the time it was over, Robart had received more than 42,000 calls, letters and emails. Marshals determined that 1,100 were “serious threats,” including more than 100 death threats. [¶] “Here’s the president of the United States saying this person is not a judge,” Robart recalled, “implying you can disregard his ruling, and saying these people are flooding into the country to rape your wife, rape your children and it’s all his fault. I think that crosses a line from legitimate criticism of a ruling and goes into a whole

different area." [¶] Robart told his story Aug. 9 at the American Bar Association Annual Meeting in San Francisco, at a panel discussion titled "Undermining the Courts: The Consequences for American Democracy." The ninth annual Symposium on the Independence of the Judiciary was sponsored by the ABA Standing Committee on the American Judicial System and the National Judicial College. [¶] The panelists – six judges, including the chief justices of California, Kansas and Ohio – agreed on one point: Attacks on the judiciary are becoming more common. They urged fellow judges and lawyers to speak up. [¶] Retired U.S. District Judge Shira A. Scheindlin of New York said it does not violate the ABA Model Code of Judicial Conduct for judges to speak out in defense of themselves or the judiciary. She quoted the rules: "A judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." [¶] California Chief Justice Tani Cantil-Sakauye said, "The judiciary has to speak up for itself. We need to be part of the solution, but before you can be part of the solution, you have to raise the alarm." [¶] Ohio Chief Justice Maureen O'Connor noted that attacks on the judiciary are not new, that they date back to the nation's founding. "We are not as wed to the rule of law as we would like to think we are," she said. "The consequence of that is what we are seeing now." [¶] She added, "Judges who are under attack have to speak up, and their fellow judges and the bar associations, and they have to do it continuously. We have the duty to speak up to protect the institution and thereby protect ourselves…. Your duty to speak up and protect the institution should not be blanketed and smothered by the concept of you're doing something that is against your ethics if you speak up. It is your duty to do so." [¶] Washington Supreme Court Justice Debra Stephens said the erosion of public trust is seen across all branches of government, but the judiciary is unique. "In many ways," she said, "what we experience in the courts is the result of the fact that we are the place where the littlest dog gets to lift his leg against the biggest tree." [¶] Several judges recounted recent threats and attacks on the judiciary from high-level officials, including governors, legislators, mayors and police chiefs. Such attacks are chilling the desire of younger lawyers to become judges, Stephens said. [¶] "These very personal and sometimes terrifying attacks are having an effect," she added. "You can't do things the way we've always done, with our lips sealed and just talking in platitudes. We have to take more aggressive action." [¶] Kansas Chief Justice Lawton Nuss concurred, quoting the old saying that fortune helps the brave. "We must take steps for the judiciary," he said.

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*Following the law, and not the passions of the times….*

> **Roper**: So now you'd give the Devil benefit of law?
> **More**: Yes. What would you do? Cut a great road through the law to get after the Devil?
> **Roper**: I'd cut down every law in England to do that!
> **More**: Oh? And, when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and, if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.
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> -Robert Bolt, *A Man for All Seasons* (1960)

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**Thinking about applying to be a judge?**

**Interested in learning more about the judicial appointments process?**

**We encourage you to apply to become a mentee with the Bay Area Coordinated Judicial Mentor Programs of Alameda, Contra Costa, Monterey, San Benito, San Francisco, San Mateo, Santa Cruz, and Santa Clara County Superior Courts.**

**The primary objective of the Judicial Mentor Program is to demystify the application and vetting processes for attorneys considering a judicial career. If you are a practicing attorney and have any interest in becoming a state court judge (either now or down the road), please consider applying.**

**Alameda**
judicialmentors@alameda.courts.ca.gov

**Contra Costa**
judicialmentors@contracosta.courts.ca.gov

**Monterey**
judicialmentorprogram@monterey.courts.ca.gov

**San Benito**
admin@sanbenito.courts.ca.gov

**San Francisco**
judicialmentors@sftc.org

**San Mateo**
judicialmentorprogram@sanmateocourt.org

**Santa Cruz**
judicialmentor@santacruzcourt.org

**Santa Clara**
judicialmentorprogram@scscourt.org

**Thinking about applying to be a judge?**

**Interested in learning more about the judicial appointments process?**

**The San Francisco Superior Court has launched a Judicial Mentorship Program to help recruit and develop a qualified, inclusive, and diverse judicial applicant pool for the San Francisco Superior Court (and surrounding superior courts). This program was designed by San Francisco Superior Court judges in collaboration with the Office of Governor Gavin Newsom, Judicial Appointments Secretary Luis Cespedes, and the California Judicial Mentorship Program (CJMP).**

**The primary objective of the Judicial Mentor Program is to demystify the application and vetting processes for attorneys considering a judicial career. If you are a practicing attorney and have any interest in becoming a state court judge in San Francisco County (either now or down the road), please consider applying. More information on the Program can be found here: https://sf.courts.ca.gov/general-information/judicial-mentor-program.**

# Judicial Mentor Program
# Frequently Asked Questions

## Why has the California Judicial Mentor Program been created in partnership with the Governor's Office?

The Governor's Office wants to expand the pool of qualified judicial applicants from diverse legal backgrounds and diverse communities. It believes that this program may help encourage prospective applicants to complete the application process, particularly those who may self-select out of the application process.

## How does the program work?

The Court will pair the mentee with a mentor judge. The mentor judge will help demystify the judicial appointment process, answer questions about the judicial application and vetting process, and suggest new skills and experiences to improve the mentee's eligibility for appointment.

## How do I become a mentee?

You must apply. You may download the application on California Superior Court County of San Francisco website and fill it out online.

## Is there a deadline to apply to be a mentor?

No. Applications are accepted on a rolling basis.

## What are the qualifications for a mentee?

A mentee must: (1) have at least 8 years of experience as a lawyer in California and be licensed in California for at least 8 years; (2) be in good standing with the Bar and the community; and (3) be committed to public service. Those from legal backgrounds and communities underrepresented in the judiciary are particularly encouraged to apply.

## How are mentees paired with mentors?

Pairings will be based on common areas of legal practice, affinity bar memberships, and other factors. There is no guarantee that a particular mentee will be assigned a mentor judge whose interests closely align with theirs.

## Will all mentee applicants get a mentor?

Not necessarily. Mentees will be evaluated for their eligibility for the program and assigned based on the availability of judicial mentors.

**If I have already applied for judicial appointment, may I still apply to be a mentee?**

No. The Program is designed for lawyers who have not yet submitted their Judicial Appointment application.

**What if I am already working with a bar association or judge on my judicial application?**

The program is not intended to supplant any existing program or previous relationship but, instead, should complement those efforts.

**When will I find out if I've been selected as a mentee in the program?**

You will receive an email from the San Francisco Judicial Mentor Program Committee.

**Are mentees who participate in the California Judicial Mentor Program given preference in judicial appointments?**

No. The program is designed to help you in your career development and in preparing an application. It is not designed to give certain applicants an inside track. Applicants who do not participate in this program are not disadvantaged.

**Are there any judges who will not participate as a judicial mentor?**

Yes. Members of the Governor's Judicial Selection Advisory Committee (JSAC) will not serve as mentors.

**Whom should I contact if I have a question?**

Email: judicialmentors@sftc.org


# Rising to the Challenge: Overcoming Obstacles and Challenges on the Path to the Bench

## *Materials Links:*

Here's the press release from the Governor's Office:

https://www.gov.ca.gov/2024/03/01/governor-newsom-releases-2023-judicial-appointment-data/#:~:text=More%20than%20half%20of%20the,Hawaiian%20or%20other%20Pacific%20Islander

And the underlying data published by the Judicial Council:

https://www.courts.ca.gov/13418.htm

https://www.courts.ca.gov/documents/2024-JO-Demographic-Data.pdf

***Conference Reference Materials***