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Why Judges Should Not Mistake the Norm for the Neutral

Justice Debra Stephens & Judge Veronica Galván

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

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

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

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

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

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

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

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

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

Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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



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

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

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

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



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

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

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

The Supreme Court
State of Washington



June 4, 2020

Dear Members of the Judiciary and the Legal Community:

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

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

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

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

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

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

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

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

Sincerely,

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