

A Judge's Experiences and Reflections on Restoring Community

George Nicholson

*We cannot play ostrich. Democracy just cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. America must get to work. In the chill climate in which we live, we must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. . . . The legal system can force open doors and sometimes even knock down walls. But it cannot build bridges. That job belongs to you and me.*¹

PREFACE²

Our nation and our people are strongly but fairly evenly divided. Both sides claim the high ground. Too many of us irrationally despise and demonize one another, including those we have never met. Even for those of us with the mind, heart, and will to do so, the challenge of helping to mitigate the division and demonization looms large. It is a daunting, but consuming task.

Judges, especially appellate court and supreme court judges, are among those best able to help calm this social and cultural storm. Why is that so? Because judges are role models for those in and out of the legal profession, and they are our nation's neutrals, cloaked with community standing, credibility, prestige, and power. I humbly and respectfully suggest we judges share a duty, which we can pursue in ethical ways, to leverage our temporary, lofty circumstances to help rekindle good will, common sense, and common decency among our conflicted factions.³

AUTHOR'S NOTE: Associate Justice, Ret., Court of Appeal, Third Appellate District, State of California. I wish to thank Carol Benfell, a distinguished, veteran legal journalist, for editorial advice and assistance, and Annie Thomas, a Juris Doctorate candidate, Class of 2022, McGeorge School of Law, for additional editorial assistance.

Footnotes

1. Thurgood Marshall, Former J. of the Supreme Court of the U.S., Liberty Medal Acceptance Speech (July 4, 1992), in *Thurgood Marshall*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/liberty-medal/recipients/thurgood-marshall> (last visited July 11, 2021).
2. George Nicholson, *A Judicial Role in Calming our Divided Nation*, 21 J. APP. PRAC. & PROCESS 231–32 (2021) (selected from the themed special issue).
3. I also believe our shared duty requires us to publicly condemn mob

WHAT DIVIDES US AND WHAT CAN WE JUDGES DO?

The theme of the special issue of the *Journal of Appellate Practice and Process* (July 2021) was “what ails and divides our people and afflicts our nation, and what we in the law, especially state, tribal, and federal appellate and supreme court judges, may do to help to mitigate, better yet, ameliorate those ailments and afflictions?” While that theme targets the primary audiences of the *Journal*, I here respectfully add to the list all of you, the members of the American Judges Association. We all can help in large and small ways.

For 20 years, the *Journal for Appellate Practice and Process* was published by the William H. Bowen School of Law, University of Arkansas, Little Rock. It was distributed gratis to all our nation's state and federal appellate court and supreme judges. Through its first two decades, many subjects were discussed in the *Journal*, some in special, single-subject issues. Because, 20 years earlier, I worked with the *Journal* on a special, themed issue,⁴ I contacted editor in chief, Professor Nancy Bellhouse May, in the fall of 2019 to propose another, themed issue, this one addressing the positive role appellate court and supreme court judges may play in addressing contemporary division in our nation. Once the publication of the *Journal* was transferred in mid-2020 to the James E. Rogers College of Law, University of Arizona, the theme and special issue jelled into reality.

We recruited 13 distinguished scholars to write for our special issue of the *Journal*. We did not take sides or slant our recruitment of potential authors during a laborious, time-constrained and consuming process. Our authors are progressive, liberal, conservative, Jewish, Muslim, and Christian.

With the theme of the special issue of the *Journal* in mind and, perhaps, after at least a cursory scan of the issue itself, I respectfully suggest four questions for *Court Review* readers: (1) What is

violence, especially when it breaches our courthouses. See George Nicholson, *Courthouses Under Siege*, THE BENCH 1, 23 (Fall 2020). See *infra* note 43.

4. While working with Professor Coleen Barger, Editor in Chief, I was visiting an editor of an earlier special issue on the then nascent influx of technology in our nation's judiciaries. See George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. OF APP. PRAC. & PROCESS 229, 230 (2000), <https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss2/2>. A decade earlier, I wrote on the same subject for *Court Review* and began serving as a member of the executive committee of the Commission on the Future of the California Courts from 1990-1993. George Nicholson, *Judges, Technology, and the Future*, CT. REV. 1, 5 (1990). See generally *Justice in the Balance Report*, THE COMM'N ON THE FUTURE OF THE CAL. CTS. (2020) <https://www.courts.ca.gov/documents/2020.pdf>.

actually causing dissention and division among our people? (2) Is it possible to calm dissention and sooth division? (3) Do judges have a role to play in calming dissention and soothing division? (4) Do lawyers have a role to play in calming dissention and soothing division?

Judges do not engage in politics, but, as we ponder these four questions, it would be folly to ignore the impact of politics in causing or enhancing divisions among our people when pondering these four questions. Indeed, Harvard Professor Edward L. Glaeser suggests, “The supply of hatred depends on the degree to which hatred makes a particular politician’s policies more appealing.”⁵

Have you ever considered and discussed any of these questions? Do you know of other judges or judicial associations or organizations that have considered and discussed them? Should you? Should they?

For more than 30 years, my judicial colleagues in Sacramento and I have been driven by hope, a shared hope of capturing lightning in a bottle by identifying and pursuing practical ways and means on several fronts to educate and inspire a significant variety of academic, civic, and public audiences, and to engage them in helping to subdue festering hostility and to build bridges. We have succeeded, time and again, largely through court-community outreach.⁶ And, it may surprise at least some of you to learn, we have been similarly successful through court-clergy outreach.⁷

Among our most notable court-community outreach collaborations, we helped initiate annual Unity Bar Dinners in Sacramento in 1987, and annual Court-Clergy Conferences in 2014. Both annual events instilled sufficient confidence we could bring disparate people together, and we initiated a unique effort in November 2017 to begin trying to mitigate the immense, long simmering dispute between members of the various LGBT and faith-based communities. Judge James A. Mize, Superior Court,

County of Sacramento, and I planned and hosted the 5-hour gathering, including lunch, in the conference room of the Court of Appeal, Third Appellate District, directly across the street from our state capitol. Because it was born of experiences originating in Sacramento’s Court-Clergy Conferences, we informally called it the Court-Clergy Liberty Caucus.

Presiding Justice Vance W. Raye, Third Appellate District, and Presiding Judge Kevin Culhane, Superior Court, County of Sacramento, made opening remarks and met with participants, all whom were the leaders of several organizations Judge Mize and I invited, including the LGBT Judicial Officers of California and SacLEGAL, the LGBT bar association of Sacramento.

We also invited the founders and leaders of Sacramento’s Court-Clergy Lawyers Auxiliary, an organization conceived and cobbled in 2017 by Misha Igra, president, Leonard M. Friedman Bar Association (Jewish); Minha Javed, president, Sacramento Area Muslim Bar Association (Muslim; Tawfiq Morrar, Esq., has now replaced Ms. Javed as president); Angela Lai, St. president, Thomas More Society (Catholic); and Paul Hoybjerg, president, J. Reuben Clark Law Society (Mormon).⁸

The purpose of the meeting was to get to know one another, informally lunch together, and brainstorm ideas on how we, individually and collectively, may act more effectively and with wider impact as role models to help mitigate the broader disarray in the nation, in particular, that between members of the various LGBT and faith-based communities.⁹

“Judges do not engage in politics, but . . . it would be folly to ignore the impact of politics in causing or enhancing divisions among our people . . .”

5. Edward L. Glaeser, *The Political Economy of Hatred* No. 9171, NATL. BUREAU OF ECON. RESEARCH WORKING PAPER SERIES, 4 (2002), https://www.nber.org/system/files/working_papers/w9171/w9171.pdf. See generally Michael Barone, *Both Parties Fail to Respond to Signals in the Political Marketplace*, JEWISH WORLD REV. (July 9, 2021), <http://jewishworldreview.com/michael/barone070921.php3>; and Angelo Codevilla, *The Scarlet ‘E’*, AMERICAN GREATNESS (July 8, 2021), <https://amgreatness.com/2021/07/08/the-scarlet-e>. See *infra* notes 18 and 37.

6. Beginning in 1999, California’s judiciary established court-community outreach as an official duty of judging. CAL. ST. J. ADMIN. STANDARDS Standard 10.5. See *Judicial Outreach*, JUDGES’ J. (Dec. 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/fall (containing several related articles, including one by Judge Richard L. Fruin, Jr., Superior Court, County of Los Angeles, State of California, who is honored in the issue as “a pioneer of judicial outreach for decades”). See generally Kari C. Kelso & J. Clark Kelso, *Civic Education and Civil Discourse: A Role for Courts, Judges and Lawyers*, 21 J. OF APP. PRAC. & PROCESS 1, 475 (2021), <https://journals.librarypublishing.arizona.edu/appellate/issues>; George Nicholson, *Appendix B: A Judicial Role in Calming our Divided Nation*, 21 J. OF APP. PRAC. & PROCESS 1, 231 (2021), <https://journals.librarypublishing.arizona.edu/appellate/issues> (describing a history and a virtual “how-to” outline for court-community outreach).

7. Court-clergy outreach is a promising form of court-community outreach and includes Court-Clergy Conferences. These conferences are conducted in six California counties, including our largest, Los

Angeles. All these conferences are sponsored by their respective local trial courts and by the California Judges Association. In Sacramento, we usually offer State Bar and Judicial Council continuing education credits for those lawyers and judges who participate and attend. Religious leaders, lawyers active in their faiths, including prosecutors and defenders, interfaith service councils, law enforcement and military chaplaincies, seminary instructors, and law school and university professors who teach religious subjects, comprise a community as surely as any other. See George Nicholson, *Appendix A: A Judicial Role in Calming our Divided Nation*, 21 J. OF APP. PRAC. & PROCESS (ISSUE 2) 1, 231 (forthcoming 2021), <https://journals.librarypublishing.arizona.edu/appellate/issues> (describing a history and a virtual “how-to” outline for court-clergy outreach).

8. They also help document the history of court-clergy outreach. See, e.g., Paul Hoybjerg et al., *Judicial, Civic, and Religious Leaders Meet in Sacramento to Celebrate Differences and Develop Solutions*, SACRAMENTO LAW. 1, 20 (Spring 2020), https://issuu.com/milenkovlairs/docs/sacramento_lawyer_magazine_spring_2020_web?fr=sYzk1NTI2ODMzNw.

9. Douglas Potts, *Leading Us Out of the Cultural Divide: Can Court Outreach Inspire the Public to Dialogue with Opposing Factions on Contentious Social Issues? It Did Just That with a Group of Judges and Lawyers in Sacramento*, L.A. DAILY J. (Dec. 13, 2017), <https://www.dailyjournal.com/articles/345198-leading-us-out-of-the-cultural-divide>. See, *infra* notes 33 and 34; see, generally, Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARVARD J. OF L. & PUB. POLY 633, 642–643 (2020), [Court Review - Volume 57 173](https://www.harvard-jlpp.com/wp-</p></div><div data-bbox=)

“Judges must be mindful . . . of their limitations – as generalists, as lawyers, and as outsiders trying to understand intricate business relationships.”

Although very congenial, our gathering produced no immediate, practical solutions beyond one very important one, that of establishing new and ongoing friendships.¹⁰ So, the question lingers, are there any practical solutions? I suspect that question is best answered by paraphrasing Justice Kennedy’s penultimate paragraph in his opinion for the court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,

“The outcome of matters such as this must await further exploration and elaboration in courts and communities throughout the nation, all in the context of recognizing that these disputes must be resolved with tolerance, without *undue* disrespect to *sincere* religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”¹¹

Exploration and elaboration were not long in coming. Responding to *Fulton v. Philadelphia*,¹² decided on June 17, 2021, two scholars, perhaps a little over-eagerly, declared the case to be “an important win for religious liberty. Philadelphia may not terminate its foster-care services contract with Catholic Social Services on the ground that CSS declines, because of its religious beliefs, to certify same-sex couples as foster parents. Teachings about sex and marriage are central to many religions; so are works of service. If religions lose the ability to serve because they act on their central teachings, the harm to free exercise is severe. The court prevented that here — and the result was unani-

mous.”¹³ The high court itself spoke with simple clarity, “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.”¹⁴

What states of mind or modes of thinking might judges bring to deciding incendiary controversies such as this? Although addressing a different, highly divisive subject, the United States Supreme Court generally answered that question:

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to “set sail on a sea of doubt.” *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.¹⁵

content/uploads/sites/21/2020/05/Griffith-FINAL.pdf; *Religious Liberty & the Culture War Over LGBT Rights: Can University Students Make a Difference?* AMERICAN CONSTITUTION SOCIETY (Mar. 27, 2019) <https://www.acslaw.org/event/religious-liberty-the-culture-war-over-lgbt-rights-can-university-students-make-a-difference> (on file with Case Western Reserve University School of Law).

10. See *infra* notes 33 and 34.

11. What is to be made of the meaning of the paragraph, given the two italicized words? To be entirely balanced, should the court have also inserted the word, “undue,” before “indignities”? On the other hand, should the court have simply deleted the word, “undue,” from its single use before disrespect? And, as to the word, “sincere,” how are lay citizens to deal with it after this case? How are the courts? Of course, judges purport to address “sincere” beliefs quite sincerely from time to time in their opinions, but in trying to do so, how fully and faithfully can judges enter the hearts and souls of others as individual human beings? *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Com’n*, 138 S.Ct. 1719, 1732 (2018). See generally *United States v. Seeger*, 380 U.S. 163 (1965); *Brnovich v. Democratic National Committee*, 141 S.Ct. 222 (2020); Sanford Levinson, *What Are “Sincerely Held Religious Beliefs?” Nobody Really Knows*, TEXAS PERSPECTIVES: UNIVERSITY OF TEXAS NEWS (June 9, 2017), <https://news.utexas.edu/2017/06/09/what-are-sincerely-held-religious-beliefs>.

12. 141 S.Ct. 1868 (2021).

13. Thomas Berg and Douglas Laycock, *Symposium on Protecting Free Exercise under Smith and after Smith*, SCOTUS BLOG: INDEP. NEWS & ANALYSIS ON THE U.S. SUP. CT. (June 19, 2021), <https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith>.

14. 141 S.Ct. 1868, 1877 (2021). High court decisions on controversial subjects may be and often are criticized by either or both the left and the right as being partisan, some going so far as to suggest court packing. Might there be a coping mechanism for all this? Compare Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CAL. L. REV. (forthcoming 2021) (defining a “harm-avoider approach” the high court might consider) with Jonathan Turley, *Unpacked and Undivided: Is the Court Sending a Message with a Litany of 9-0 Decisions?*, JONATHAN TURLEY: RES IPSA LOQUITUR BLOG (June 1, 2021), <https://jonathanturley.org/2021/06/01/unpacked-and-unanimous-is-the-court-sending-a-message-with-a-litany-of-9-0-decisions> (describing how there may be no need for a coping mechanism whether by court-packing or “harm-avoidance”). How do such high court decisions since Professor Turley’s blog post impact his and Professor Tang’s differing theories? Are they really differing theories?

15. *NCAA v. Alston*, Nos. 20-512 and 20-520, 2021 U.S. LEXIS 3123, 59-60 (2021).

CRIME, COMMUNITY, AND JUDGING

Cardozo, long ago, wisely suggested a timeless, complementary perspective: “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”¹⁶

While addressing the “primordial necessity for order in the social life,” we must not overlook the spirit and resolve with which we approach criminal justice amid festering, contemporary dissension and division. Despite political, academic, media, and public contention and confusion, we must resolve fact from fiction without fear or favor. And we must, as a matter of law, consider crime victims, fully and faithfully, when relevant to court proceedings. This is vital because crime victims are rarely factored into public or political discourse, or into news media stories or opinions, even though all our nation’s people are or may become crime victims, regardless of race, creed, color, gender, or sexual preference. In particular, our largely voiceless inner-city citizens and their families are all too often victims of crime, all too commonly violent crime. They are our nation’s forgotten victims.¹⁷ They deserve better. Car-

dozo, long ago once again, defined the spirit with which we should ponder and pursue delivering better to them, “But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”¹⁸

That balance began to fray severely during the 1960s when I became a prosecutor. After almost a decade in the criminal trial courts of Alameda County (across the bay from San Francisco), I uprooted my family in 1976 and moved to Sacramento to serve as executive director of the California District Attorneys Association, determined to respond to Cardozo’s challenge.¹⁹ Eventually, I drafted an initiative and, with several colleagues, helped gather enough voters’ signatures to qualify it as Proposition 8, the Victims’ Bill of Rights, for the statewide primary election ballot in June 1982.²⁰ It passed overwhelming. Before the election, the California Supreme Court rejected an attempt to remove it.²¹ After the election, the California Supreme Court upheld it.²² Voters, 26 years later, retained and extended its various provisions, and added new ones, by adopting Proposition 9, the Victims’ Bill of Rights of 2008, Marsy’s Law.²³

“Despite political, academic, media, and public contention and confusion, we must resolve fact from fiction without fear or favor.”

16. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (Yale University Press 1921), this little book is 100 this year; Joel K. Goldstein, *The Nature of the Judicial Process: The Enduring Significance of a Legal Classic*, 34 *TOURO L. REV.* 159 (2018).

17. We and our nation’s people, all of them, must no longer allow ourselves to be cowed by name calling, finger pointing, blaming one another, and obfuscating reality by accusations of “blaming victims”; we must dispassionately and empirically assess what is wrong and how to fix it; to answer those two questions with any hope of mitigating this long metastasizing dilemma, we all must read patiently and relevantly, ponder seriously, and do something meaningful, and encourage others to do the same. See Daniel Patrick Moynihan, *The Moynihan Report: The Negro Family, The Case for National Action*, OFF. OF POL’Y PLAN. AND RSCH. U. S. DEP’T LAB. (March 1965), <https://www.dol.gov/general/aboutdol/history/webid-moynihan>; Harvey C. Mansfield, *The Rolling Revolution, Family Life Today is Threatened by a Theoretical Proposition*, CLAREMONT REV. OF BOOKS (Spring Edition) (2021), <https://claremontreviewofbooks.com/the-rolling-revolution> (discussing the “hidden problem”), a book review of Scott Yenor, *THE RECOVERY OF FAMILY LIFE: EXPOSING THE LIMITS OF MODERN IDEOLOGIES* (2020); and J.D. Vance, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2018). See *supra* notes 5 and 6 and *infra* note 37.

18. *Snyder v. Com. of Mass.*, 291 U.S. 97, 122 (1934).

19. One member of the California Supreme Court wrote a timely law review article in which he correctly noted a search for crime victims’ rights in our state and federal constitutions would fail. He accurately observed only criminals have constitutional rights, not their victims. Stanley Mosk, *Mask of Reform*, 10 *S.W. U.L. REV.* 885, 889–890 (1978). Compare *Ballard v. Superior Ct. of San Diego Cnty.*, 64 Cal. 2d 159 (1966) (providing for involuntary psychiatric examinations of rape victims before their testimony in criminal trials, since abolished by California Penal Code, Section 1112, which I helped draft) with *Bullen v.*

Superior Ct. 204 Cal. App. 3d 22 (1988) (providing relief to a crime victim, while noting impropriety of prosecutor representing her).

20. Paul Gann, *Justice for the Accuser: Proposition 8, The Victims’ Bill of Rights*, 4 *BENCHMARK: A QUARTERLY REVIEW OF THE CONSTITUTION AND THE COURTS* 1, 69 (Winter 1988).

21. I was one of several amici. *Brosnahan v. Eu*, 31 Cal. 3d 1 (Cal. 1982).

22. I was co-counsel on two amici briefs, one representing scores of prosecutors and public officials, and one representing two dozen parents of murdered children. The grieving parents cried when I informed them the high court heard them. *Brosnahan v. Brown* 32 Cal. 3d 236 (Cal. 1982).

23. CAL. CONST. art. 1, § 28. See also *Victims’ Bill of Rights*, CAL. DEP’T JUST.: ATT’Y GEN., https://oag.ca.gov/victimservices/content/bill_of_rights (last visited July 11, 2021); *Marsy’s Law*, MARSY’S L., https://www.marsyslaw.us/about_marsys_law (last visited July 11, 2021); *The Victims of Crime Resource Center*, MCGEORGE SCH. OF L., <https://1800victims.org/wp-content/uploads/2016/07/A-Guide-to-Services-for-Crime-Victims-in-California.pdf> (last visited July 11, 2021). See generally George Nicholson, *Victims’ Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 *PAC. L.J.* 815 (1992); J. Clark Kelso and Brigitte Bass, *The Victims’ Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 *PAC. L.J.* 843 (1992); Frank Carrington and George Nicholson, *The Victims’ Rights Movement: An Idea Whose Time Has Come—Five Years Later: The Maturing of An Idea*, 17 *PEPP. L. REV.* 1 (1989); Frank Carrington and George Nicholson, *The Victims’ Rights Movement: An Idea Whose Time Has Come*, 11 *PEPP. L. REV.* 1 (1984); George Nicholson, ET AL., *Forgotten Victims: An Advocate’s Anthology*, CAL. DIST. ATT’YS ASS’N (1977); Thomas Condit and George Nicholson, *The Ultimate Human Right: Governmental Protection from Crime and Violence*, 52 *L.A. BARJ.* 314 (1977); Los Angeles Mayor Tom Bradley, *The Forgotten Victim*, 3 *CRIME PREVENTION REV.* 1 (1975); CARRINGTON, *THE VICTIM* (1975); George Nicholson and Tom Condit, *Prosecutor Homicide*

“We all know there is more to judging than ‘how to do its’ The spirit, culture, ethos, ethics, and morality of judging are vital, too.”

I learned early here is no quicker way to lose the faith and fealty of our people than to fail to protect them, their children, and their elders, from crime and violence, or to disregard and disrespect them anywhere within the administration of criminal justice. A great judge told us why, “The rule of law relies on a fragile consensus, which remarkably has endured and allowed us, uniquely among the nations of the world, to live as free people for more

than 200 years. It is the guarantor of our freedoms. It emits the glow that illuminates the shining city on the hill, the glow that is never so brilliant as when contrasted to the ominous shadows cast by the brutal tyrannies which have threatened our national existence in this century. More than anything else, the rule of law is at the heart of American exceptionalism. That is the unique place that America occupies among the community of nations.”²⁴

That fragile consensus is fraying because too many people are frightened or victimized by escalating crime, especially violent crime, in too many of our nation’s major urban areas, lost among political, academic, and media discourse on virtually everything else.

JUDICIAL MENTORING

California Gov. Gavin Newsom, on July 1, 2021, officially announced the creation of a judicial mentoring project to encourage more lawyers to apply for positions on California’s trial and appellate benches.

Judge Paul A. Bacigalupo, Superior Court, County of Los Angeles, and a former president of the California Judges Association, co-chairs the executive committee of the governor’s judicial mentoring project with Luis Céspedes, the governor’s Judicial Appointments Secretary.

Justice Martin Jenkins, California Supreme Court, Presiding Justice Lee Smalley Edmon, Court of Appeal, Second Appellate District (Los Angeles), and Justice Teri Jackson, Court of Appeal, First Appellate District (San Francisco), serve as appellate court

representatives on the committee. Judge Erica Yew, Superior Court, County of Santa Clara, represents medium and large counties, and Judge Todd Bottke, Superior Court, County of Tehama, represents small and rural counties.

Some courts will work together on regional mentorship programs, including those in Sacramento, Yolo, and El Dorado counties.²⁵

Judge Bacigalupo and his court launched their precursor judicial mentoring project in 2020.²⁶ It has already linked 95 judges with approximately 140 lawyers interested in joining the bench. Another 81 attorneys are awaiting a judge assignment.

Céspedes suggests allowing judges to be more accessible than in the past, while providing opportunities for interested lawyers to learn why they should apply, how they may be qualified, and what matters related to lawyering and potential judging they may need to improve. More importantly, this judicial mentoring program, Céspedes concludes, teaches aspiring lawyers that judges are essentially public servants.²⁷

Neither Céspedes nor I have heard of any similar, governor-initiated, judicial mentoring project in the nation. To whatever extent we may be correct, the people in other states may be well served if their governors and judges contemplate or extend similar judicial mentoring projects.

My fervent hope is that these judicial mentoring projects, and any that emulate them, are more than “how to do it” projects and introduce the spirit and specifics of this article and the theme and contents of *Journal of Appellate Practice and Process*, volume 21, issue 2, our special issue discussed above. I also hope judicial mentors introduce judicial care and caution, such as that discussed by the United States Supreme Court in *National Collegiate Athletic Association v. Alston*,²⁸ Justice Cardozo’s definition of judging in his little book, *The Nature of the Judicial Process*, and judicial humility.²⁹

We all know there is more to judging than “how to do its,” jots and titles, nuts and bolts, or macros, analog or digital. The spirit, culture, ethos, ethics, and morality of judging are vital, too. Whether judicial mentees ever become judges, all of them will be immensely enriched to have been exposed to these indispensable intangibles of judging.³⁰

Duty: Court Use of Its Fruits, THE PROSECUTOR, Vol. 2, No. 5 (1975); and George Nicholson, *Prosecutor’s Homicide Duty: A Successful Working Model in California*, THE PROSECUTOR, Vol. 2, No. 4 (1975). Campus crime victims’ rights are sometimes forgotten, too. See George Nicholson, *Campus Crime and Violence, and the Right to Safe School*, DEF. COMMENT MAG. 5 (Summer 2018); see also *Did the Law Cause Columbine* (National Press Club Telecast on C-SPAN Aug. 1999).

24. Robert K. Puglia, *Freedom Is Not Free*, 36 MCGEORGE L.J. 751, 754 (2010); see also Charles J. Chaput, *STRANGERS IN A STRANGE LAND* (Henry Holt 2017).

25. *California Judicial Mentor Program*, SUPERIOR CT. CAL.: CNTY. SACRAMENTO, <https://www.saccourt.ca.gov/outreach/california-judicial-mentor-program.aspx> (last visited July 11, 2021).

26. *Judicial Mentor Program*, SUPERIOR CT. CAL.: CNTY. L.A., http://www.lacourt.org/generalinfo/communityoutreach/GL_CO020.aspx. (last visited July 11, 2021). See also *Pathways to Judicial Diversity: A Judicial Council Initiative to Promote Diversity on the Bench*, CAL. JUD. BRANCH, [https://www.courts.ca.gov/partners/judicial-officer-](https://www.courts.ca.gov/partners/judicial-officer-mentorship-program.htm)

[mentorship-program.htm](https://www.courts.ca.gov/partners/judicial-officer-mentorship-program.htm) (last visited July 11, 2021).

27. Cheryl Miller, *Governor Launches Mentorship Program for Would-Be Trial Court and Appellate Judges*, THE RECORDER (July 2, 2021), <https://www.law.com/therecorder/2021/07/01/governor-launches-mentorship-program-for-would-be-trial-court-and-appellate-judges>. See generally Emmanuel Salazar, *Unity Bar Celebrates 30 Years*, SACRAMENTO LAW 27 (Spring 2018), https://issuu.com/milenkovlais/docs/saclaw_janfeb_2018_web (providing historical context); George Nicholson, *Visionary Becomes State’s New Judicial Appointments Secretary*, L.A. DAILY J. 1 (Jan. 11, 2021), <https://www.dailyjournal.com/articles/361034-visionary-becomes-state-s-new-judicial-appointments-secretary> (providing an extraordinary, other worldly derivative). See *infra* notes 33 and 34.

28. Nos. 20-512 and 20-520, 2021 U.S. LEXIS 3123, 59-60 (2021).

29. CARDOZO, *supra* note 16.

30. There is an immense price to pay when we fail at this. See *Spruance v. Comm’n* 13 Cal. 3d. 778 (1975).

LGBTQ

Are there any practical solutions to the dispute between LGBT and faith-based communities that we judges may pursue while the high court further explores and elaborates as it suggested it must in *Masterpiece Cakeshop*? A relatively new book, *Free to Believe: The Battle Over Religious Liberty in America*, may be helpful to contemplate that question. Luke Goodrich, a prominent religious liberty litigator before the United States Supreme Court, wrote the book. Most pertinent are chapter 7, “Will Gay Rights Trump Religious Freedom (The Problem)” and chapter 8, “Will Gay Rights Trump Religious Freedom (The Solution).”

Whether readers are adherents of a faith tradition or LGBT or both, the two chapters contain pro and con arguments, along with several down-to-earth ideas and suggestions for civil discourse. Goodrich proposes a new constitutional equilibrium, one that provides justice to both sides of what now seems akin to nothing quite so much as a broken marriage, i.e., one apparently suffering from irreconcilable differences leading to an irremediable breakup. The key word is “apparently,” implying the situation may not be firmly fixed. You may disagree with Goodrich, but his are the analytical approaches seemingly suggested explicitly and implicitly by Justice Kennedy in *Masterpiece Cakeshop* and by Chief Justice Roberts in *Fulton v. City of Philadelphia*.

We in Sacramento have proven ourselves good at bringing people together, including LGBT and faith-based, for purposes of getting to know one another, having lunch together, reasoning together, and trying to find common ground. We do very well at process. Although proximity works in many ways, in many places,³¹ it does not always produce immediate results, but we must be patient and content with making sure progress is made, albeit slow at times. We must persist.³²

Near the end of his book, Pages 233–236, Goodrich makes several suggestions for his present and future Christian clientele to consider.³³ Moreover, his suggestions are salutary for any present or future clientele, whether of any faith tradition or none, in any kind of litigation.

Goodrich writes, in part:

We need to abandon the idea that just because we’re Christians in America, we deserve a privileged place in society and will never suffer for our faith

As our mind-set changes, we’ll respond to religious freedom conflicts in different ways. First, we’ll reject fear and gloom

Second . . . we should reject anger and hostility toward our opponents.

When was the last time we prayed for a gay couple in a religious freedom dispute? When was the last time we tried to do something good for someone who was hostile to us? When was the last time we went out of our way on social media to say something kind to someone we sharply disagreed with? The primary characteristic of our tone toward our opponents, both in person and online, should be kindness, gentleness, humility, and love. Of course, we also speak the truth, but we do it with gentleness and respect.

“The primary characteristic of our tone toward our opponents, both in person and online, should be kindness, gentleness, humility, and love.”

Third, when we engage in conflict—whether a religious lawsuit or an online debate—we should check our motives. Are we driven by a desire to ‘win’ – to prove our point and preserve our rights? . . . When we’re [thus] driven . . . we should confess, apologize, and change our approach.

Fourth, we should stand up for religious freedom for non-Christians. If we really believe religious freedom is a matter of justice, rooted in how God created us and interacts with us, then we should care about religious freedom for everyone.

There is more.

Whatever our faith traditions or lack of them, if we can be patient and thoughtful enough to read Goodrich’s book carefully, especially chapters 7 and 8, and then think deeply about all he proposes, a light may go on for each of us. Whether or not we agree with Goodrich, his work may provide a basis for our own individual and collective efforts at conceiving practical ideas for tangible substance, as well as visualizing ways and means to foster bridge-building between LGBT and faith-based folks and between many

31. David Prince, *Race, Baseball, and the Church: Proximity*, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION (Feb. 27, 2015), <https://erlc.com/resource-library/articles/race-baseball-and-the-church-proximity>. See also George Nicholson, *Kindred Spirits, Humble Heroes: Branch Rickey and William Wilberforce*, INDEPENDENT INST. (Apr. 1, 2007).

32. In the special issue of the *Journal of Appellate Practice and Process*, we invited several eloquent voices as a result of the November 2017 gathering in the conference room of the Third Appellate District. Those voices include, Hon. Therese M. Stewart, *Judicial Words Matter*, 21 J. OF APP. PRAC. & PROCESS 435 (forthcoming 2021); Hon. Joshua D. Wayser, *An LGBTQ Jurist’s Perspective on the Crisis in the Justice System*, 21 J. OF APP. PRAC. & PROCESS 457 (forthcoming 2021); Elder Lance B. Wickman, *Lawyers as Peacemakers*, 21 J. OF

APP. PRAC. & PROCESS (ISSUE 2) 385 (forthcoming 2021). The two judges are co-chairs of the California LGBT Judicial Officers Association. Elder Wickman is Emeritus General Authority and General Counsel, Church of Jesus Christ of Latter-day Saints.

33. A friend and former judicial colleague recently referred me to a little book that may also help as you read and ponder Goodrich’s work and contemplate the necessity sometimes to take risks. See KENT M. KEITH, *THE PARADOXICAL COMMANDMENTS: FINDING PERSONAL MEANING IN A CRAZY WORLD* (2021), <http://www.kentmkeith.com/commandments.html>. See also Kent M. Keith, *The Mother Teresa Connection*, KENT M. KEITH, http://www.kentmkeith.com/mother_teresa.html (illustrating Mother Teresa’s connection to the Paradoxical Commandments through her wall mural of Shishu Bhavan in her children’s home in Calcutta).

“. . . ‘A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities.’”

others who cannot seem to get along.³⁴ Given the turbulence that occurred in 2020, these ideas have even broader application and importance now.

EPILOGUE

As we make this effort, keeping in mind our own human frailties, we might overlay and reflect on an observation by Aleksandr Isayevich Solzhenitsyn: “A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have

a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man’s noblest impulses.”³⁵

Whether or not we agree with him, we must seriously ponder Solzhenitsyn’s words, because, as Justice Lewis Powell suggested during the Prayer Breakfast at the annual meeting of the American Bar Association in 1978, “These are indeed melancholy thoughts. I repeat them here without endorsement. But they represent the views of perhaps the wisest philosopher and social historian of [the 20th] century. It would be imprudent to reject them out of hand.”³⁶

Justice Powell concluded by admonishing us to remember, “We occupy a place of influence that is unique. But we have no divine right to enjoy that place. We must continue constantly to merit it by effective leadership both in *making our system of justice serve our people* and in *providing responsible leadership as citizens*.”³⁷

Abraham Lincoln suggested what might be our guiding spirit during his second inaugural address. We are fortunate he was able to do so. Frederic Douglass suggested why, “I felt then that there was murder in the air, and I kept close to [Lincoln’s] carriage on the way to the Capitol, for I felt that I might see him fall that day. It was a vague presentiment.”³⁸

Douglass was right, but just a little early. “As events later revealed, Lincoln’s assassin was in the inaugural throng and boasted of being within shooting range; six weeks later he killed Lincoln in a Washington theatre.”

Lincoln’s second inaugural address was very brief. And, despite his sense of foreboding and that of Douglass, his speech was humble, reverent, and so eloquent it has been described as his greatest speech.³⁹

His concluding paragraph is as relevant today as it was in 1865: “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”⁴⁰

34. During a panel session at Sacramento’s fifth annual Court-Clergy Conference, panelists discussed *Masterpiece Cakeshop* and its implications for the future, and much more. *Building Bridges in Polarizing Times: Religious Freedom, LGBT Rights, and Finding Common Ground*, 5TH ANNUAL CT.-CLERGY CONF. (Oct. 11, 2018), <https://robinfretwell-wilson.com/new-events/2018/10/11/roseville-california-5th-annual-sacramento-court-clergy-conference>. See also *Court-Clergy Conference: Justice for All*, THE SUPERIOR CT. OF CAL.: COUNTY OF L.A., http://www.lacourt.org/generalinfo/communityoutreach/GI_CO002.aspx. See also WILLIAM N. ESKRIDGE, JR. & ROBIN FRETWELL WILSON, RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (2018). See generally Douglas Potts, *Scholars Promote Bridging the Culture Wars at Court/Clergy Conference*, SACRAMENTO LAW., 8 (2019), https://issuu.com/milenkovlairs/docs/saclaw_jan_feb_2019-v4_web?e=13404642/66846535; William N. Eskridge, Jr. & Robin Fretwell Wilson, *Anthony Kennedy Opens New Chapter in American Pluralism*, REAL CLEAR RELIGION (July 18, 2018), https://www.realclearreligion.org/articles/2018/07/18/anthony_kennedy_opens_new_chapter_in_american_pluralism.html.

35. Alexander Solzhenitsyn, *A World Split Apart: Solzhenitsyn’s Commencement Address at Harvard University* (June 8, 1978), <https://www.solzhenitsyncenter.org/a-world-split-apart>. See also Elder Dallin H. Oaks, *Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, Canterbury Medal Speech at the Becket Fund for Religious Liberty Dinner* (2013), <https://www.youtube.com/watch?v=etGWZOnHhZU> (delivering a similar message).

36. Justice Lewis Powell, *Annual Prayer Breakfast Speech at American Bar Association* (1978), <https://scholarlycommons.law.wlu.edu/powellspeeches/76>. See also Solzhenitsyn *May Be Right: Powell*, 64 AM. BAR ASS’N J. NO. 9 1344 (1978); Lewis F. Powell, Jr., *Duty to Serve the Common Good*, 24 CATHOLIC LAW. 295 (1979); Os Guinness, *LEADERSHIP QUALITIES IN WASHINGTON, WILBERFORCE, LINCOLN, AND SOLZHENITSYN* (1999) (suggesting how Solzhenitsyn fits into our

national identity).

37. Italics added; to help reflect on Justice Powell’s admonition. See generally DAVID J. BOBB, *HUMILITY: AN UNLIKELY BIOGRAPHY OF AMERICA’S GREATEST VIRTUE* (Thomas Nelson 2013); ROBERT CURRY, *RECLAIMING COMMON SENSE: FINDING TRUTH IN A POST-TRUTH WORLD* (Encounter Books 2019); STEPHEN CARTER, *CIVILITY: MANNERS, MORALS, AND ETIQUETTE OF DEMOCRACY* (Basic Books 1998); Russell G. Pearce and Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1 (2011), <https://lawrepository.uarl.edu/lawreview/vol34/iss1/1> (directing their article to lawyers, but has instructional value for judges, too).

38. See *infra*, note 42.

39. Abraham Lincoln, *Second Inaugural Address* (1865), <http://www.abrahamlincolnonline.org/lincoln/education/inaugural2.htm>. See also RONALD C. WHITE, *LINCOLN’S GREATEST SPEECH, THE SECOND INAUGURAL* (2006); RONALD STAUFFER, *PREFACE, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS AND ABRAHAM LINCOLN* (2009).

40. Peace officers, those serving and those fallen, bear most of the brunt of today’s battle for constitutional governance, peace, and unity in our nation. They are in the eye of the storm. Just as many of our nation’s courthouses came under fire in 2020, *supra* note 2, so did another core element of American justice, our nation’s law enforcement agencies and our peace officers. Both phenomena are irrational, fostered by demagoguery and demonization, and attended by contrived, unconscionable demands for defunding and disbanding law enforcement agencies. It is elementary to observe, peace officers protect our courthouses and all the other facilities that house local, state, tribal, and federal governance. Peace officers also protect judges and, when we are threatened, our families, and our homes. More fundamentally, they protect our people and their homes. Peace officers, whatever the race, creed, color, gender, or sexual preference, in every community in America, are prepared to die and may well die at any given moment while doing their duty for the citizens

To emulate the spirit of Lincoln's words is a daunting challenge in any age, particularly now, in our hyper-partisan, crime-ravaged age. Even so, I believe there is so much to think about, to say, and to do, that I sense no respite for those of us who are willing and able, through our chosen professions, to help restore public recognition and respect for the practical utility of living by the Golden Rule⁴¹ and for the continued vitality of *E Pluribus Unum*.⁴²

I believe we can ethically work toward propagating the spirit of Lincoln's words through court-community outreach and court-clergy outreach. Goodrich's analysis and the special issue of the *Journal of Appellate Practice and Process*, volume 21, number 2, present additional resources for helping us to find for ourselves collective and collaborative ideas on ways and means to address the dissensions that divide our people. We need no administrative or educational mandates. We have it within ourselves to see the good, and just do it.

As we increase our efforts to provide the responsible leadership as judges and as citizens suggested by Justice Powell, and to build bridges suggested by Justice Marshall, we must renew touch with our better angels, foster malice toward none, with charity for all, in our own minds and hearts, as we try, ethically and responsibly, to inspire a similar renewal in the minds and hearts of everyone in our respective jurisdictions.⁴³



George Nicholson is retired. Until late 2018, he sat on the Court of Appeal, Third Appellate District, State of California, for 28 years. Previously, he was a trial judge in Sacramento for three years; a senior assistant attorney general for five years, State of California; executive director, California District Attorneys Association for five years; and a senior trial deputy district attorney

when he left the Alameda County District Attorney's Office after serving there for ten years.

of their communities. This selfless willingness is inculcated in every cadet in every law enforcement academy. It is part of the mind and heart of our peace officers. The lyrics of a country song, "American Soldier," apply to soldiers, to be sure, but those solemn lyrics also apply to peace officers, whatever their race, creed, or color, whatever their gender or sexual preference. The song was written and sung by Toby Keith (2003) and captures an eternal verity in simple, plain language:

"And I will always do my duty,
No matter what the price,
I've counted up the cost,
I know the sacrifice.
Oh, and I don't want to die for you,
But if dyin's asked of me,
I'll bear that cross with honor,
'Cause freedom don't come free."

And, don't forget, peace officers have families, too, just as did Union Army officers during Lincoln's day. See John Kass, *Police Families, How Do They Bear It?*, JEWISH WORLD REV. (July 31, 2020), <http://www.jewishworldreview.com/0720/kass073120.php3>.

41. See *Norman Rockwell: Golden Rule 1961*, NORMAN ROCKWELL MUSEUM, <https://www.nrm.org/images/mobile-app/gr/gr.html> (last visited July 11, 2021).
42. Chief Justice Joseph E. Weisberger of Rhode Island, *E Pluribus Unum, The American Miracle*, JUDGES' J. 30 (1995). See also Congresswoman Barbara Jordan, Democratic National Convention Speech (1992), <https://www.americanrhetoric.com/speeches/barbarajordan1992dnc.html> (addressing, in part, *e pluribus unum*); Illinois State Senator Barack Obama, Democratic National Convention Speech (2004), <http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm> (addressing, in part, *e pluribus unum* during his keynote address); President Barack Obama, Presidential Speech (2016), <https://www.youtube.com/watch?v=0eKUIWnhNIA> (addressing, in part, *e pluribus unum* for a second time); but see ARTHUR SCHLESINGER, *THE DISUNITING OF AMERICA, REFLECTIONS ON A MULTICULTURAL SOCIETY* (1998); Charles Murray, *The Fractured Republic: Exploring the Divide between the Right and the Left*, NAT'L. REV. (2016); YUVAL LEVIN, *THE FRACTURED REPUBLIC: RENEWING AMERICA'S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM* (2016).

43. I suspect Lincoln would agree, because he closed his first inaugural address in 1861 with this:

We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearth-stone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

Abraham Lincoln, *First Inaugural Address at U.S. Capitol in Washington, D.C.*, THE ABRAHAM LINCOLN ASSOCIATION (March 4, 1861), <http://www.abrahamlincolnonline.org/lincoln/speeches/Linaug.htm>. Members of our court sense the mystic chords of memory because Norton Parker Chipman, our first Presiding Justice, was an aide and confidante of Lincoln. Indeed, he was with the president at Gettysburg. See generally NORTON PARKER CHIPMAN, *THE TRAGEDY OF ANDERSONVILLE: TRIAL OF CAPTAIN HENRY WIRZ, THE PRISON KEEPER* (1911) JEFFERY HOGGE, *NORTON PARKER CHIPMAN: A BIOGRAPHY OF THE ANDERSONVILLE WAR CRIMES PROSECUTOR* (2006); ANDERSONVILLE (John Frankenheimer dir., 1996); Jeffery Hogge, *The Civil War Roots of the Third District Court of Appeal*, SACRAMENTO LAW. 18 (Spring 2014); Scott Cameron, *The Third District Court of Appeal Holds Its Inaugural Judicial Conference and Reception*, SACRAMENTO LAW. 22 (Spring 2014); Fran Jones, *Creating a Chronology of Freedom*, CAL. SUP. CT. HIST. SOC'Y NEWSLETTER 10-12 (2014), <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Creating-Chronology-of-Freedom.pdf>; *Let Freedom Ring!*, CAL. SUP. CT. HIST. SOC'Y NEWSLETTER 1-9, (2014), <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Let-Freedom-Ring.pdf>; George Nicholson & William J. Murray, Jr., *A Conversation with Abraham Lincoln*, CAL. SUP. CT. HIST. SOC'Y NEWSLETTER 22-24 (2013), <http://www.cschs.org/wp-content/uploads/2014/07/Abraham-Lincoln-Presentation-2013-Newsletter-Fall-Winter.pdf>.