

Appendix A

Links to Judicial Discipline Information by State

ALABAMA

<http://judicial.alabama.gov/Appellate/JudiciaryArchive>

ALASKA

<http://www.acjc.alaska.gov/aksupcrtopin.html>

ARIZONA

<https://www.azcourts.gov/azcjc/Major-Case-Summaries>

ARKANSAS

<https://jddc.arkansas.gov/commission-final-actions>

CALIFORNIA

https://cjp.ca.gov/annual_reports/

2 Appendix A

COLORADO

http://www.coloradojudicialdiscipline.com/Annual_reports.html

CONNECTICUT

<https://portal.ct.gov/JRC/Common-Elements/Common-Elements/Annual-Reports>

DELAWARE

<https://courts.delaware.gov/coj/opinions.aspx>

FLORIDA

<https://www.floridasupremecourt.org/News-Media/Judicial-Discipline-JQC-Cases>

GEORGIA

<https://gajqc.com/recent-actions-1>

<https://gajqc.com/annual-reports>

HAWAII

https://www.courts.state.hi.us/courts/judicial_conduct/commission_on_judicial_conduct
Only statistical summaries are available.

IDAHO

https://judicialcouncil.idaho.gov/report_cov.htm

ILLINOIS

<https://www2.illinois.gov/sites/jib/Pages/summariescomplaints.aspx#qst93>

INDIANA

<https://www.in.gov/judiciary/jud-qual/2378.htm>

<https://www.in.gov/judiciary/jud-qual/2377.htm>

Only public admonishments are available.

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IOWA

http://www.iowajqc.gov/disciplinary_action/index.htm

KANSAS

<https://www.kscourts.org/Judges/Commission-on-Judicial-Conduct/Commission-on-Judicial-Conduct-Annual-Reports>

KENTUCKY

<https://kycourts.gov/Courts/Pages/Judicial-Conduct-Commission.aspx>

LOUISIANA

<https://www.lasc.org/JudiciaryCommission?p=Dispositions>

MAINE

<https://www.jrd.maine.gov/decisions.html>

MARYLAND

<https://www.courts.state.md.us/cjd/publicactions>
<https://www.courts.state.md.us/cjd/annualreport>

MASSACHUSETTS

<https://www.mass.gov/archive/public-dispositions-cjc>

MICHIGAN

http://jtc.courts.mi.gov/annual_report/

MINNESOTA

<http://www.bjs.state.mn.us/annual-reports>

4 Appendix A

MISSISSIPPI

<https://www.judicialperformance.ms.gov/annual-reports>

MISSOURI

No information is available.

MONTANA

No information is available.

NEBRASKA

<https://supremecourt.nebraska.gov/administration/professional-ethics/judicial-discipline-ethics/jqc-public-reprimands>

NEVADA

<http://judicial.nv.gov/Discipline/Reports/Reports/>

NEW HAMPSHIRE

https://www.courts.state.nh.us/committees/judconductcomm/annual_reports.htm

NEW JERSEY

<https://njcourts.gov/attorneys/acjc.html?lang=eng>

NEW MEXICO

<https://www.nmjsc.org/resources/annual-reports/>

NEW YORK

<http://www.scjc.state.ny.us/Determinations/DeterminationDatabase.html>
<http://www.scjc.state.ny.us/Public.Proceedings/PublicProceedings.html>

NORTH CAROLINA

<https://www.nccourts.gov/commissions/judicial-standards-commission/disciplinary-decisions-and-orders>

<https://www.nccourts.gov/documents/publications/judicial-standards-commission-annual-report>
Only statistical information is available.

NORTH DAKOTA

<https://www.ndcourts.gov/state-court-administration/annual-report>
Only statistical information is available.

OHIO

<http://supremecourt.ohio.gov/bpccm/>

OKLAHOMA

<http://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSJU&level=1>

OREGON

No information is available.

PENNSYLVANIA

<http://www.pacourts.us/courts/court-of-judicial-discipline/court-cases>

RHODE ISLAND

No information is available.

SOUTH CAROLINA

<https://www.sccourts.org/discCounsel/commissionJC.cfm#>
Click "Commission on Judicial Conduct" under the heading "Annual Reports." Only statistical information is available.

6 Appendix A

SOUTH DAKOTA

<https://ajs.sd.gov/uploads/jqc/Complaints-Dispositions.pdf>
Only statistical information is available.

TENNESSEE

<https://www.tncourts.gov/boards-commissions/court-judiciary/disciplinary-actions>
<https://www.tncourts.gov/boards-commissions/court-judiciary/statistical-reports>

TEXAS

<http://www.scjc.texas.gov/opinions/>
<http://www.scjc.texas.gov/disciplinary-actions/>

UTAH

<https://jcc.utah.gov/public-dispositions/>
<https://jcc.utah.gov/annual-reports/>

VERMONT

<https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/judicial-conduct>
Only statistical information is available.

VIRGINIA

<https://rga.lis.virginia.gov>
Only statistical information is available.

WASHINGTON

https://www.cjc.state.wa.us/materials/publications/annual_reports/2018_annual_report.pdf
<https://www.cjc.state.wa.us>

WEST VIRGINIA

<http://www.courtswv.gov/legal-community/judicial-investigaion-annual-reports.html>

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WISCONSIN

<https://www.wicourts.gov/courts/committees/judicialcommission/publishedcases.pdf>
<https://www.wicourts.gov/courts/committees/judicialcommission/annualreport2020.pdf>

WYOMING

<https://judicialconduct.wyo.gov/publications>
Only statistical information is available.

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Appendix B

Juror Compensation by State

ALABAMA: \$10 per day, plus jurors who are full-time employees must be paid their regular wages by their employers during their jury service.

<https://codes.findlaw.com/al/title-12-courts/al-code-sect-12-16-8.html>

ALASKA: \$25 per day, excluding the first day of jury service.

<https://public.courts.alaska.gov/web/forms/docs/j-180.pdf>

ARIZONA: \$12 per day; no pay for the first day if not selected as a juror.

<https://www.azcourts.gov/juryduty/Jury-Service-What-to-Expect>

ARKANSAS: \$50 per day if selected to serve; \$15 per day if not selected to serve.

<https://www.arcounties.org/faq/circuit-clerk-faqs/>

CALIFORNIA: \$15 per day starting on the second day of jury service.

<https://www.courts.ca.gov/juryservice.htm>

COLORADO: Jurors who are regular employees must be paid their regular wages by their employers for the first three days of jury service; thereafter, jurors are paid \$50 per day by the state.

<https://www.courts.state.co.us/Jury/Employer.cfm>

CONNECTICUT: Jurors who are full-time employees must be paid their regular wages by their employers for the first five days of jury service; thereafter, jurors are paid \$50 per day by the state.

<https://www.jud.ct.gov/jury/faq.htm#12>

DELAWARE: No pay for jurors; reimbursement limited to \$20 per day for expenses; no reimbursement if the trial lasts one day or if not selected to serve.

<https://delcode.delaware.gov/title10/c045/index.shtml>

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10 Appendix B

FLORIDA: \$15 per day for the first three days, unless the employer pays regular wages; if the employer does pay, then no juror compensation for the first three days; thereafter, \$30 per day starting on the fourth day.

http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0040/Sections/0040.24.html

GEORGIA: \$5–\$50 per day; the amount is set by the county commission in each of the state's 159 counties.

<https://law.justia.com/codes/georgia/2016/title-15/chapter-12/article-1/section-15-12-7/>

HAWAII: \$30 per day.

<https://law.justia.com/codes/hawaii/2013/title-32/chapter-612/section-612-8/>

IDAHO: \$10–\$50 per day, the amount set by the county commission in each of the state's forty-four counties; for trials exceeding five days, \$50 per day.

<https://legislature.idaho.gov/statutesrules/idstat/title2/t2ch2/sect2-215/>

ILLINOIS: \$25 for the first day; \$50 per day thereafter if selected to serve.

<https://www.iltla.com/legislative-alert-governor-quinn-signs-sb-2221-sb-3075-into-law/>

INDIANA: \$15 for first day; \$40 per day thereafter if selected to serve.

<https://www.indy.gov/activity/jury-duty>

IOWA: \$30 per day.

<https://www.legis.iowa.gov/docs/code/2018/607A.pdf>

KANSAS: \$10–\$50 per day; the amount is set by the county commission in each of the state's 105 counties.

https://www.ksrevisor.org/statutes/chapters/ch43/043_001_0071.html

KENTUCKY: \$5 per day, plus \$7.50 per day as reimbursement for expenses.

<https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=21134>

LOUISIANA: \$25 per day, plus one day of paid leave if employed full-time.

<http://legis.la.gov/legis/law.aspx?d=77422>

<https://law.justia.com/codes/louisiana/2011/rs/title23/rs23-965/>

MAINE: \$15 per day.

<https://legislature.maine.gov/legis/statutes/14/title14sec1215.html>

MARYLAND: \$15–\$30 per day, depending on the jurisdiction; \$50 per day in excess of five days of jury service in one trial.

<https://codes.findlaw.com/md/courts-and-judicial-proceedings/md-code-cts-and-jud-proc-sec-8-426.html>

MASSACHUSETTS: Full-time, part-time, temporary, and casual employees must be paid regular wages by employers for the first three days of jury service; thereafter, compensation by the state is \$50 per day.

<https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter234a/Section48>
<https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter234A/Section51>

MICHIGAN: \$30 for the first day of attendance; thereafter, \$45 per day of jury service.
<http://legislature.mi.gov/doc.aspx?mcl-600-1344>

MINNESOTA: \$20 per day.
<http://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=1327>

MISSISSIPPI: \$25–\$40 per day; amount is set by the county board of supervisors in each of the state's eighty-two counties.
<https://casetext.com/statute/mississippi-code-1972/title-25-public-officers-and-employees-public-records/chapter-7-fees/section-25-7-61-see-notejurors-lengthy-trial-find>

MISSOURI: \$18 per day; for jurors who live in counties with at least two hundred thousand residents, \$50 per day beginning with the third day of jury service and no compensation for the first two days.
<https://law.justia.com/codes/missouri/2012/titlxxxiv/chapter494/section494455/>

MONTANA: \$12 per day.
https://leg.mt.gov/bills/mca/title_0030/chapter_0150/part_0020/section_0010/0030-0150-0020-0010.html

NEBRASKA: \$35 per day; full-time employees must be paid regular wages by their employers.
<https://supremecourt.nebraska.gov/programs-services/jury-service>
<https://nebraskalegislature.gov/laws/statutes.php?statute=25-1674>

NEVADA: \$40 per day, starting the second day of jury selection; no pay for the first day.
<https://www.leg.state.nv.us/NRS/NRS-006.html#NRS006Sec160>

NEW HAMPSHIRE: \$10 for each half day of attendance.
<http://www.gencourt.state.nh.us/rsa/html/li/500-a/500-a-mrg.htm>

NEW JERSEY: \$5 per day; \$35 for each consecutive day in excess of three days.
<https://law.justia.com/codes/new-jersey/2013/title-22a/section-22a-1-1.1/>

NEW MEXICO: \$7.50 per day; must match the state's highest prevailing minimum wage.
<https://law.justia.com/codes/new-mexico/2011/chapter38/article5/section38-5-15/>

NEW YORK: \$40 per day; employers of ten or more employees must pay \$40 for each of the first three days of jury service.
<https://law.justia.com/codes/new-york/2015/jud/article-16/521>
<https://ag.ny.gov/labor/jury-duty-faqs>

NORTH CAROLINA: \$12 for the first day; thereafter, \$20 per day; \$40 for each day in excess of five days served during a twenty-four-month period.
https://www.ncleg.gov/enactedlegislation/statutes/pdf/bysection/chapter_7a/ga_7a-312.pdf

12 Appendix B

NORTH DAKOTA: \$50 per day.

<https://law.justia.com/codes/north-dakota/2013/title-27/chapter-27-09.1>

OHIO: After ten days of “actual” service, the per diem is fixed at an amount equal to the greater of \$15 or one and one-half the compensation set by the county board of commissioners in each of the state’s eighty-eight counties.

<http://codes.ohio.gov/orc/2313>

OKLAHOMA: \$20 per day.

<https://law.justia.com/codes/oklahoma/2014/title-28/section-28-86/>

OREGON: \$10 per day for the first two days of court attendance; \$25 per day for three or more days of attendance.

<https://www.oregonlaws.org/ors/10.061>

PENNSYLVANIA: \$9 per day for the first three days of attendance; thereafter, \$25 per day.

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ctl=42&div=0&chpt=45&scn=61&subscn=0>

RHODE ISLAND: \$35 per day.

<https://legiscan.com/RI/bill/S2153/2018>

SOUTH CAROLINA: \$0–\$12.50 per day, depending on the county.

<https://www.scstatehouse.gov/code/t14c007.php>

SOUTH DAKOTA: \$50 per day.

https://sdlegislature.gov/Statutes/Codified_Laws/2044729

TENNESSEE: \$10 per day; employers of five or more employees must pay regular wages for jury service.

<https://law.justia.com/codes/tennessee/2010/title-22/chapter-4/22-4-101/>

<https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2011/op11-072.pdf>

TEXAS: \$6–\$50 per day, fixed by the court commission in each of the state’s 254 counties.

<https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas/>

UTAH: \$18.50 for the first day; thereafter, \$49 per day.

https://le.utah.gov/xcode/Ttitle78B/Chapter1/78B-1-S119.html?v=C78B-1-S119_2017050920170509

VERMONT: \$30 per day.

<https://legislature.vermont.gov/statutes/section/32/017/01511>

VIRGINIA: \$30 per day.

<https://law.lis.virginia.gov/vacode/title17.1/chapter6/section17.1-618/>

WASHINGTON: \$10–\$25 per day, determined by the county legislative authority.

<https://app.leg.wa.gov/RCW/default.aspx?cite=2.36.150>

WEST VIRGINIA: \$15–\$40 per day, set at the discretion of the circuit court or the chief judge of the circuit court.

<https://www.wvlegislature.gov/wvcode/ChapterEntire.cfm?chap=52&art=1§ion=17#1>

WISCONSIN: At least \$16 per day, determined by the county board in each of the seventy-two counties.

<https://docs.legis.wisconsin.gov/statutes/statutes/756>

WYOMING: \$30 per day; \$50 per day after five days of jury service.

<https://law.justia.com/codes/wyoming/2011/title1/chapter11/section1-11-303/>

DISTRICT OF COLUMBIA: \$30 per day; if the juror is employed full-time and serves for five days or less, employer is required to pay regular wages and no juror fee.

<https://code.dccouncil.us/dc/council/code/sections/15-718.html>

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BITTEN BY THE JUDGE BUG

- xiii (Today, the monetary limit has been raised to \$10,000. Corporations, however, are limited to \$5,000.) (Source: https://dca.ca.gov/publications/small_claims/file.shtml)
- xx For one thing, *The California Rules of Court* provide that judicial robes “must be black, must extend in front and back from the collar and shoulders to below the knees, and must have sleeves to the wrists.” (Source: *The California Rules of Court*, rule 10505.5, https://www.courts.ca.gov/cms/rules/index.cfm?title=ten&linkid=rule10_505)
- xxvi In 1971, his appeal of the convictions was finally denied. (Source: *Maurice H. Hardeman, Appellant v. People of the State of California*, 445 F.2d 258 [Ninth Circuit, 1971], <https://law.justia.com/cases/federal/appellate-courts/F2/445/258/16647/>)

LES ENFANTS TERRIBLES: CRIMINAL CASES

- 3 Punishment, the primary goal of our adult criminal courts, was until fairly recently nowhere to be found in the juvenile courts. (Source: *Juvenile Crime, Juvenile Justice*, <https://www.nap.edu/read/9747/chapter/7#157>)
- 4 No doubt, there would have been more executions had the U.S. Supreme Court not stepped in, in 2005, when it ruled in *Roper v. Simmons* that it is unconstitutional to execute anyone who was a juvenile when he or she committed the crime. (Source: 543 U.S. 541 [2005], <https://supreme.justia.com/cases/federal/us/543/551/#tab-opinion-1961712>)
- 4 Of those child lifers who were fourteen years and younger when they committed their crimes, 70 percent are children of color. (Source: <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>; <https://www.teenvogue.com/story/black-youth-are-disproportionately-sentenced-to-juvenile-life-without-parole>)
- 4 In 2010, in *Grabam v. Florida*, the U.S. Supreme Court banned sentences of life without parole

16 Notes

for juveniles who were convicted of nonhomicide offenses, and in 2012, in *Miller v. Alabama*, the court banned *mandatory* life-without-parole sentences for juveniles convicted of homicide. (Source: 560 U.S. 48 [2010], <https://supreme.justia.com/cases/federal/us/560/48/>; 567 U.S. 460 [2012], <https://supreme.justia.com/cases/federal/us/567/460/#tab-opinion-1970507>)

- 10 (In September 2020, California's governor signed Senate Bill 823, which eliminated youth prisons and replaced them with local facilities where juvenile offenders are provided rehabilitative services.) (Source: <https://www.prnewswire.com/news-releases/california-youth-justice-advocates-applaud-historic-step-towards-ending-youth-incarceration-301124690.html>)

MAKING A MURDERER: THE FELONY MURDER RULE

- 19 According to the Reporters Committee for Freedom of the Press, "As a policy matter, it was believed that youthful offenders should not be stigmatized forever because of one mistake. Another justification for secrecy was promoting rehabilitation of the youthful offender." (Source: <https://www.rcfp.org/wp-content/uploads/imported/ACCJUVCTS.pdf>)
- 19 Members of the public were permitted to observe Jessica T.'s murder trial, although they were not allowed to know her full name. (Source: *California Welfare and Institutions Code*, section 676, <https://codes.findlaw.com/ca/welfare-and-institutions-code/wic-sect-676.html>)
- 20 Because the United States Supreme Court said so in the case of *McKeiver v. Pennsylvania*. (Source: *McKeiver v. Pennsylvania*, 403 U.S.528 [1971], <https://supreme.justia.com/cases/federal/us/403/528/#tab-opinion-1949375>)
- 21 The commission recommended that "the system should operate with all the procedural formality necessary to safeguard adequately the rights that any person has when he is subject to the application of coercive power." (Source: *The Challenge of Crime in a Free Society*, <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>)
- 21 Eighteen states either require or allow jury trials for juveniles. *They are:* Alaska, Arkansas, Colorado, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Mexico, Ohio, Oklahoma, Texas, Virginia, West Virginia, and Wyoming. (Source: <https://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf>)
- 23 It was first enacted in America in the early 1800s, and by the time of the Civil War, half of the states had felony murder statutes. (Source: "The Origins of American Felony Murder Rules," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925048##)
- 24 In 2018, they finally did. (Source: "Can It Be Murder If You Didn't Kill Anyone?" <https://www.themarshallproject.org/2018/06/27/can-it-be-murder-if-you-didn-t-kill-anyone>)
- 26 Juveniles who break the law are "delinquents," not "criminals," whose best interests, welfare, and rehabilitation are, at least in principle, the courts' only concerns. (Source: "Juvenile Justice: History and Philosophy," <https://www.encyclopedia.com/law/legal-and-political-magazines/juvenile-justice-history-and-philosophy>)
- 27 Known as the Father of Probation, in 1878 Augustus persuaded the Massachusetts legislature to enact the country's first probation law. (Source: "The History of the Pre-sentence Investigation Report," http://www.cjcj.org/uploads/cjcj/documents/the_history.pdf)
- 28 The videos are mini-documentaries about the defendants' lives, designed to persuade judges to impose lenient sentences; according to their proponents, they do. (Source: "Use of Sentencing Mitigation Videos Grows," <https://www.criminallegalnews.org/news/2018/feb/16/use-sentencing-mitigation-videos-grows/>)
- 34 Steven Jon Bitz, Jeffrey Douglas Hall, Jessica Rene Richie, and Joseph Allen Franklin were convicted of the murder of Mark Berkey. Mr. Bitz is serving a life sentence. (Source: <https://www.indybay.org/newsitems/2007/12/16/18467346.php>)

- 34 Mr. Hall's life-without-parole sentence was commuted by Governor Jerry Brown in 2019, making him eligible for a parole hearing and possible release from prison. (Source: <https://clemency.com/outgoing-california-governor-issues-grants-clemency-farewell-gift>)
- 34 Ms. Richie is still incarcerated at the California Institution for Women. (Source: <https://www.facebook.com/CAPAROLESUITABILITYHEARINGSUPP/photos/thursday-1716ca-parole-suitability-hearingsavenalh68121-phan-phong-paul-chuhangt/1745701635658286/>)

FAMILY MATTERS: MARRIAGE AND DIVORCE

- 38 There are no federal marriage laws, although when constitutional issues arise, federal courts will weigh in, such as when the United States Supreme Court lifted the ban on interracial marriage in 1967. (Source: *Loving v. Virginia*, 388 U.S. 1 [1967], <https://supreme.justia.com/cases/federal/us/388/1/>)
- 38 “Common law” marriages—when unmarried couples live together and hold themselves out to the public as married—are exempt from the license requirement. However, only a handful of states recognize common law marriages. *They are:* Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. (Source: <https://www.legis.iowa.gov/DOCS/Central/Guides/marriage.pdf>)
- 38 In the Cotton State, governmental approval is no longer needed to wed. (Source: <https://blog.tenthamentendmentcenter.com/2019/06/signed-by-the-governor-alabama-eliminates-marriage-licenses-foundation-to-nullify-federal-control-in-practice/>)
- 38 The exceptions are Georgia, Idaho, Mississippi, New Mexico, South Carolina, and the District of Columbia, where marriage licenses have no expiration dates. (Source: <https://www.cdph.ca.gov/Programs/CHSI/Pages/California-Marriage-License-General-Information.aspx>; <https://www.weddingvendors.com/marriage-license-laws/united-states/mississippi/>; <https://statelaws.findlaw.com/tennessee-law/tennessee-marriage-license-and-blood-test-requirements.html>; <https://www.usmarriagelaws.com/marriage-license/ohio/probate-courts/office-requirements/>; https://www.sec.state.vt.us/media/770332/getting_married_in_vermont_faq.pdf; <https://www.usmarriagelaws.com/marriage-license/south-dakota/register-of-deeds/office-requirements/>; <https://www.usmarriagelaws.com/marriage-license/oklahoma/court-clerks/office-requirements/>; <https://www.usmarriagelaws.com/marriage-license-laws/state-marriage-laws/age-fee-id-requirements/>)
- 39 If, however, they reside in California or Michigan, the problem is solved with the “confidential” marriage license. (Source: http://www.easylawlookup.com/California-Law/Family-Code/par-446/_easylookup.blp?GO=Prepare&site=easy&print=&data=family&p_start=17&p_end=19&p_para=446&p_epara=499&par=446&display=YES; <http://legislature.mi.gov/doc.aspx?mcl-Act-180-of-1897>)
- 39 In 2012, one-fifth of all marriage licenses in the Golden State were confidential. Unless a judge issues a court order allowing the license to be viewed by someone other than the married couple, for all intents and purposes it's as if the marriage never happened. (Source: <https://www.mentalfloss.com/article/70252/what-confidential-marriage-license-and-why-does-california-offer-them>)
- 39 In 2006, Ms. Manser-LaMont was indicted for the double-dipping, pled guilty in federal court to theft of government property, was placed on five years' probation, and ordered to pay back the feloniously obtained \$130,000. (Source: https://www.govinfo.gov/content/pkg/USCOURTS-caed-2_06-cr-00388/pdf/USCOURTS-caed-2_06-cr-00388-12.pdf; <http://www.allgov.com/usa/ca/news/unusual-news/confidential-marriages-a-california-tradition-for-the-secretive-at-heart-130620?news=850339>)

18 Notes

- 40 What if the couple wants their yoga instructor or their best friend to marry them? In most states, including California, anyone eighteen years or older can perform weddings if she becomes an “authorized person of *any* religious denomination.” (Source: <https://law.justia.com/codes/california/2015/code-fam/division-3/part-3/chapter-1/section-400>)
- 40 Utilizing the ULC’s instant online ordination platform, anyone who feels so called can become a minister within seconds” (Source: www.themonastery.org)
- 40 “First Nation Church and Ministry offers free minister ordination, which permits you to perform marriage ceremonies and other basic rites throughout the United States” (Source: <https://firstnationchurch.com/free-online-ordination>)
- 40 “United National Ministry does not require any courses or classes to become an ordained minister and you can do it online. Our Minister’s Ordination License is Valid in all 50 States and Washington D.C.” (Source: <https://unministry.org>)
- 40 In 2016, 43 percent of couples wed in the United States had friends or family members officiate. (Source: <https://www.baltimoresun.com/features/bs-lt-wedding-officiant-20170219-story.html>)
- 40 The Universal Life Church boasts ordinations of twenty million people worldwide on its website. (Source: www.themonastery.org)
- 41 So, in the Keystone State, a couple married by their online-ordained yogi risks a do-over. (Source: <https://www.npr.org/2019/07/13/739043318/tennessee-lawmakers-aim-to-ban-weddings-by-internet-ordained-ministers>)
- 44 In May 2008, we had a brief glimpse of that day when the California Supreme Court overturned the state’s ban on same-sex marriages. (Source: *In re Marriage Cases*, 43 Cal. 4th 757)
- 44 But seven years later, on June 26, 2015, the United States Supreme Court, in the case of *Obergefell v. Hodges*, not only struck down all same-sex marriage bans, but also legalized these unions in all fifty states. (Source: 135 S. Ct. 2017, <https://supreme.justia.com/cases/federal/us/576/14-556/>)
- 45 Almost 50 percent of all marriages in the United States end in divorce or separation. (Source: <https://www.wf-lawyers.com/divorce-statistics-and-facts/>)
- 46 Aunt Gertrude prevailed in that one. (Source: <https://www.history.com/news/gloria-vanderbilt-custody-trial-great-depression>)
- 48 In nine states, people who want out of their misalliances must first establish grounds for their divorces. *They are:* Georgia, Illinois, Louisiana, Maine, Nevada, New York, North Carolina, Tennessee, and Texas. (Source: <https://www.siemonlawfirm.com/Divorce/Grounds-for-Divorce-in-Georgia.shtml>; https://www.divorcenet.com/states/illinois/ilfaq_04; <https://www.womenslaw.org/laws/la/divorce/what-are-grounds-divorce-louisiana>; <https://statelaws.findlaw.com/mainelaw/mainelaw-legal-requirements-for-divorce.html>; <https://resources.lawinfo.com/divorce/nevada/what-are-the-grounds-for-divorce-in-nevada.html>; <https://www.nycourts.gov/courthelp/Family/divorceRequirements.shtml>; <https://seiferflatowlaw.com/what-are-the-grounds-for-divorce-in-north-carolina/>; <https://law.justia.com/codes/tennessee/2010/title-36/chapter-4/36-4-10>; <https://statelaws.findlaw.com/texas-law/texas-legal-requirements-for-divorce.html>)
- 48 In other words, If I earned it, it’s mine, ’til death do us part. (Source: <https://communityproperty.uslegal.com/laws-governing-community-property/non-community-property-states/>)
- 48 There are nine community property states. *They are:* Louisiana, Arizona, California, Texas, Washington, Idaho, Nevada, New Mexico, and Wisconsin. (Source: <https://www.investopedia.com/personal-finance/which-states-are-community-property-states/>)
- 49 Under this new law, pet custody decisions must include consideration of such factors as to whom the pets are most closely bonded, who feeds Fido, who spends the most time with Duke, who takes Princess to the vet, and, well, you get the picture. (Source: <https://sacramento.cbslocal.com/2018/09/28/pet-divorce-custody/>)
- 51 “(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent[.]” (Source: *California Family Laws and Rules*, section 3011)

- 60 In 2017, San Francisco County Superior Court judge Nancy Davis introduced a “comfort” dog in the San Francisco juvenile dependency courtroom to provide support and company to traumatized children while they waited to hear their fate. (Source: <https://newsroom.courts.ca.gov/news/court-gets-dog-to-help-child-witnesses>)
- 60–61 In a similar vein, after noticing an increasing number of veterans on his docket, New York judge Robert Russell created the first Veterans Treatment Court to meet the specialized mental health, drug, and alcohol needs of veterans. (Source: <https://www.economist.com/united-states/2011/06/02/leave-no-veteran-behind>)
- 61 . . . in 1990, I created the Supervised Visitation Program, the first in the nation that trained volunteer seniors to monitor visits between noncustodial parents and their children at seven senior community centers. (Source: *San Jose Post-Record*, “County Program Allows Children More Parental Visitation Rights,” Jennifer Pittman, August 22, 1991.)
- 62 Ultimately, the Supervised Visitation Network was formed, a nonprofit organization that established minimum practice standards for professional supervised visitations and serves as a resource for the courts and educators. (Source: <https://www.svnworldwide.org>).

WHERE THERE’S A WILL: COURT BATTLES OVER THE DEARLY DEPARTED

- 66 Forty years after Bob Marley’s death in 1981, the heirs are still battling over his estate. (Source: <https://www.usatoday.com/story/life/people/2018/08/22/legendary-stars-who-died-without-wills-aretha-franklin/83550424/>)
- 67 The rules of intestate succession vary from state to state, but generally, the first in line to inherit is the decedent’s spouse, then her children, followed by her parents, then her siblings, grandparents, cousins, and so on. (Source: <https://estate.findlaw.com/planning-an-estate/understanding-intestacy-if-you-die-without-an-estate-plan.html>)
- 73 Importantly, they are cautioned never to befriend the residents, never to accept gifts from them, and never to become personally involved with them. (Source: <https://senioradvocacyservices.org/volunteer/ombudsman-volunteer-opportunities/>)
- 75 Into her living trust she placed \$12 million for the care of her dog, Trouble, a Maltese. (Source: https://uniset.ca/misc/helmsley_will.html)
- 75 (The wealthiest canine was Gunther III, a German shepherd who inherited \$106 million in 1992 from Countess Karlotta Libenstein.) (Source: <https://trustcounsel.com/2019/10/leona-helmsley-and-her-millionaire-dog/>)
- 76 In 2011, Trouble passed away at the age of twelve; the remainder of his fortune was donated to charity. (Source: <https://trustcounsel.com/2019/10/leona-helmsley-and-her-millionaire-dog/>; <https://www.reuters.com/article/us-helmsley-dog/judge-trims-dogs-12-million-inheritance-idUSN1634773920080616>)

WOULD YOU BE MINE?: ADOPTIONS

- 78 Girls are adopted at a faster rate than boys and infants more quickly than older children. (Source: <https://adoption.org/what-is-the-adoption-rate>)
- 78 Approximately seven million Americans are adopted, the more famous of whom are celebrities such as actor Jamie Foxx, reality star Nicole Richie, country music singer Faith Hill, actor Ray Liotta, singer Anita Baker, football great Colin Kaepernick, singer/actress Keyshia Cole, and actor/comedian Keegan-Michael Key. (Source: <https://adoptionnetwork.com/adoption-statistics>)

20 Notes

- 80 In California, there are six appellate districts, each with a court of appeal that hears appeals from the decisions of trial judges in the counties within their districts. (Source: <https://www.courts.ca.gov/12430.htm?rdeLocaleAttr=en>)
- 81 When parents ran into financial or other difficulties, they'd simply send one or more of their children to live with relatives or, in some instances, to temporarily reside in orphanages. (Source: <https://adoptionnetwork.com/adoption/history-of-adoption>)
- 81–82 It was not until the mid-1800s that state legislatures began to take an interest in adoptions. England, for example, didn't pass adoption laws until 1926. (Source: "Adoption History in Brief," <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/adoption/>)
- 82 Massachusetts, in 1851, was the first state to regulate adoptions when it enacted the Adoption of Children Act giving probate judges the sole authority to adjudicate them. (Source: <https://pages.uoregon.edu/adoption/archive/MassACA.htm>)
- 82 In 1917, Minnesota became the first to require home studies and the first to mandate the confidentiality of adoption records. (Source: <https://pages.uoregon.edu/adoption/archive/MNadoptionlaw.htm>; <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/adoption/>)
- 82 (This was the third attempt to bring uniformity to state adoption laws; efforts in 1953 and 1971 went nowhere.) (Source: <https://www.jstor.org/stable/25740084?seq=1>)
- 82 To date, Vermont is the only state that adheres to the Uniform Adoption Act. (Source: <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/uniform-adoption-act-1994>; <https://www.plumsite.com/shea/uaa.html>)
- 83 Additionally, the Holts disapproved of race matching children with adoptive parents (except for children whose parents were African American). (Source: <https://www.holtinternational.org/pas/adoptee/korea-2-adoptees/background-historical-information-korea-all/>; <https://www.nytimes.com/2000/08/02/us/bertha-holt-96-a-leader-in-international-adoptions.html>)
- 83 According to an official of the International Social Service, in one instance, a woman from Texas "appeared to be drunk and she appeared to be over 50 years of age" when, in 1957, she first greeted the Greek baby adopted for her by proxy. (Source: <https://pages.uoregon.edu/adoption/topics/proxy.htm>)
- 84 In 2004, the peak year of international adoptions, 22,884 adopted children from more than ninety nations came to the United States. (Source: "The Last Babylift: Adopting a Child in Haiti," John Seabrook, May 10, 2010, <https://www.newyorker.com/magazine/2010/05/10/the-last-babylift>)
- 84 By 2011, due to restrictions imposed by several countries including China and Russia, international adoptions declined to 9,319. (Source: <https://adoptionnetwork.com/adoption-statistics>)
- 84 And by 2018, the number of these adoptions had dropped even more, to just 4,059. (Source: <https://adoption.org/international-adoption-statistics-know>)
- 86 Annually, of the more than 400,000 children in our foster care system, approximately 114,000 who cannot be returned to their families await adoption; annually, nearly 20,000 are never adopted. (Source: <https://adoptionnetwork.com/adoption-statistics>)
- 86 About 55 percent of these children have had three or more placements with foster care families, and 33 percent had changed elementary schools five or more times, losing relationships and falling behind educationally." (Source: <https://erlc.com/resource-library/articles/5-facts-about-adoption-in-america>)
- 86–87 In contrast, 62 percent of children (usually newborns) placed by private adoption agencies have their adoptive families within one month of their births. (Source: <https://pages.uoregon.edu/adoption/topics/fostering.htm>)

- 87 (Both laws were subsequently found unconstitutional—Texas in 1967, Louisiana in 1972.) (Source: In re Adoption of Gomez, 424 S.W.2d 656 [1967], <https://casetext.com/case/gomez-adoption-in-re>; *Compos v. McKeithen*, 341 F. Supp. 264 [E.D. La. 1972]; <https://law.justia.com/cases/federal/district-courts/FSupp/341/264/1456882/>)
- 87 “I feel the court should not fashion the child’s future in this manner.” (Source: In re Adoption of a Minor, 228 F.2d 446 [D.C. Cir. 1955], <https://law.justia.com/cases/federal/appellate-courts/F2/228/446/404375/>)
- 88 “They will have a much better opportunity to take their rightful place in society if they are brought up among their own people.” (Source: *Ward v. Ward*, 216 P. 2d 755 [1950], [https://scholar.google.com/scholar_case?case=15853806207858410677&q=Ward+v.+Ward,+216+P.2d+755+\(1950\)&hl=en&cas_sdt=2006&cas_vis=1](https://scholar.google.com/scholar_case?case=15853806207858410677&q=Ward+v.+Ward,+216+P.2d+755+(1950)&hl=en&cas_sdt=2006&cas_vis=1))
- 88 Incredibly, the organization’s president took the position that it was better for Black children to remain in foster care or in group homes than for them to live in permanent homes with white adoptive parents. (Source: “The Adoption History Project,” <https://pages.uoregon.edu/adoption/topics/transracialadoption.htm>)
- 89 “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.” (Source: *Palmore v. Sidoti*, 466 U.S. 429 [1984], <https://supreme.justia.com/cases/federal/us/466/429/>)
- 89 Still, MEPA requires the states to diligently recruit foster and adoptive parents who reflect the race or ethnicity of those children needing foster care and adoptive homes. (Source: <https://www.cwla.org/briefing-the-multiethnic-placement-act-minority-children-in-state-foster-care-and-adoption/>)
- 93 “While the adoptive parents have sometimes been overly protective at first, they have soon found out that the Indian youngsters slip easily into family and neighborhood patterns.” (Source: “Adoptions of Indian Children Increase,” <https://www.bia.gov/as-ia/opa/online-press-release/adoptions-indian-children-increase>)
- 94 “If you’re poor and you’re Indian, you lose your kid.” (Source: “How a White Evangelical Family Could Dismantle Adoption Protections for Native Children,” *Vox*, <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care>)
- 94 As reported in *The Chronicle of Social Change*, the legislation dramatically passed “at the 11th hour, just before the 95th Congress would come to a close, on October 24, 1978.” (Source: “The Nation’s First Family Separation Policy,” *The Chronicle of Social Change*, <https://chronicleofsocialchange.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431>)
- 97 The United States Supreme Court will almost certainly have the final say. (Source: “How a White Evangelical Family Could Dismantle Adoption Protections for Native Children,” *Vox*, <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care>)
- 98 With the exceptions of Michigan, Nebraska, Arizona, Alabama, and Ohio, in all states, an adult can be adopted by another adult. (Source: <http://www.francesbarrera.com/practice-areas/adoption/adult-adoption>)
- 98 Bottom line, their aunt was no longer their aunt, even though she really was. (Source: *Kummer v. Donak*, <https://law.justia.com/cases/virginia/supreme-court/2011/101232.html>)

THANK YOU FOR YOUR SERVICE: JURY DUTY

- 111 “No free man is to be arrested, or imprisoned, or disseised [removed from one’s property], or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against

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22 Notes

- him, except by the lawful judgment of his peers or by the law of the land.” (Source: https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39)
- 111 (3) Trial by compurgation, where eleven or twelve men, known as compurgators or oath-helpers, swore to the credibility of the accused and by doing so, secured his acquittal. (Source: James J. Gobert and Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury*, 2nd ed., Trial Practice Series [Colorado Springs, Colo.: Shepard’s/McGraw-Hill, Inc., 1990.], 8–9.)
- 111 The seeds of the independent jury in America’s legal system were planted in the 1670 landmark decision in *Bushell’s Case*, in which William Penn and William Mead, two Quaker activists, were tried before an English jury for the crime of unlawful assembly. (Source: 124 Eng. Rep 1006 [CP 167])
- 111 The jailed jurors successfully appealed to the Court of Common Pleas, which freed them, declaring that jurors cannot be punished for their verdicts. (Source: <https://www.constitution.org/trials/bushell/bushell.htm>)
- 111–112 Inspired by the *Bushell* ruling, the authors of the Declaration of Independence included the principle of an independent jury in their twenty-seven grievances against King George III who insisted on “depriving us in many cases, of the benefits of Trial by Jury.” (Source: <https://allthingsliberty.com/2019/07/the-declaration-of-independence-the-twenty-seven-grievances/>)
- 113 Websites abound with advice about how to avoid jury service, some of which are: “Want to Get Out of Jury Duty? Here’s How.” Two “tricks” addressed juror attitudes—the good and the bad. (Source: <https://www.cheatsheet.com/culture/these-tricks-will-give-you-the-best-chance-of-getting-out-of-jury-duty.html/>; <https://www.goodfinancialcents.com/getting-out-of-jury-service/>)
- 113 If you are going to be negative and difficult the whole time, the judge and/or attorneys might decide to send you on your way.” (Source: <https://www.marketwatch.com/story/want-to-get-out-of-jury-duty-heres-how-2011-05-09>)
- 113 For example, in the 1994 O. J. Simpson double-murder trial, potential jurors filled out a mammoth seventy-five-page questionnaire that had 302 questions. (Source: *The People of the State of California v. Orenthal James Simpson*, No. BA097211, 1994 WL 564388, at *1 [Cal. Super. Ct. Oct 3, 1994]; <https://medium.com/@rexsorgatz/document-the-jury-selection-questionnaire-from-the-oj-simpson-trial-7483d3b89955>)
- 114 “If you seem overly interested in being on the jury, there might be some question about whether or not you are biased or have an agenda.” (Source: <https://www.goodfinancialcents.com/getting-out-of-jury-service/>)
- 114 So, his firm cautions lawyers to avoid the especially enthusiastic. (Source: <https://www.nytimes.com/2017/07/28/magazine/how-to-be-selected-for-a-jury.html>)
- 115 Juror fees range from a high of \$50 per day (Arkansas, North and South Dakota, and federal trials) to \$5 a day (New Jersey, Kentucky) to nothing (Delaware and South Carolina), and everything in between. (Source: Appendix to *Her Honor: Juror Compensation by State*)
- 115 When full-time employees are called for jury duty, only eight states and the District of Columbia require employers to pay their regular wages during jury service. *These are:* Alabama, Colorado, Connecticut, Louisiana, Massachusetts, Nebraska, New York, and Tennessee) (Source: Appendix to *Her Honor: Juror Compensation by State*)
- 116 California also permits names to be utilized from state tax returns, customer mailing lists, telephone directories, and utility company lists. (Source: *California Code of Civil Procedure*, Section 197; http://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&ctitle=3.&part=1.&chapter=1.&article=; <https://www.natlawreview.com/article/california-expands-jury-rolls>)

- 116 “Participation in jury service teaches the skills required for democratic self-government.” (Source: “The Joy of Jury Duty,” Andrew Guthrie Ferguson, <https://www.theatlantic.com/national/archive/2013/05/the-joy-of-jury-duty/275444/>)
- 116 “Jury duty is an important civic duty I should meet even if it is inconvenient.” (Source: Harris Interactive, *Jury Service: Is Fulfilling Your Civic Duty a Trial*, prepared by Harris Interactive for the American Bar Association, July 2004, 9, https://abanow.org/wordpress/wp-content/files_flutter/1272052715_20_1_1_7_Upload_File.pdf)
- 116 In one instance, a judge was disciplined for causing prospective jurors to wait in the hallway for several hours and, in another, for accusing two prospective jurors, in front of the other jurors, of lying to get out of jury duty. (Source: *State of California Commission on Judicial Performance 2010 Annual Report*, p. 23–24, https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/2010_Annual_Report1.pdf; *Commission on Judicial Performance, 2008 Annual Report*, p. 26, Advisory Letter 2, https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/2008_Annual_Report1.pdf)
- 118 Voir dire provides jurors with a general understanding of the nature of the job for which they are being interviewed, allows them and their employers the opportunity to learn something about each other, and provides sufficient background information to enable the identification of those who are unsuited for the job.” (Source: James J. Gobert and Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury*, 2nd ed., Trial Practice Series [Colorado Springs, Colo.: Shepard’s/McGraw-Hill, Inc., 1990].)
- 118 Since 1961, federal court judges have been allowed to conduct voir dire entirely on their own, with the option of permitting attorneys to participate. (Source: *Federal Rules of Civil Procedure*, rule 47[a])
- 118 In California, it’s a mix of both: judges are required to question potential jurors orally and/or by written questionnaires, after which they must allow lawyers to conduct their own voir dire. (Source: *The California Rules of Court*, rule 3.1540 [a])
- 118 Voir dire dragged on for six weeks in the trial of Albert Greenwood Brown, Jr., accused of the rape and murder of a California teenager. (Source: *Press-Enterprise Co. v. Superior Court*, 464 US 501 [1984])
- 118 In ordering the release of the voir dire transcript, the court held that the constitutional guarantee of open public proceedings in criminal trials includes the voir dire of potential jurors. (Source: *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505–510 [1984])
- 119 “We note, however, that, in response to questions, counsel stated that *it is not unknown in California courts for jury selection to extend six months.*” (Emphasis added.) (Source: *Press-Enterprise Co. v. Superior Court*, 464 US 501, 510, fn 9 [1984]; <https://supreme.justia.com/cases/federal/us/464/501/>)
- 119 A year before the *Press-Enterprise* decision, the New York Governor’s Commission on the Administration of Justice analyzed 462 felony jury trials and found that in 20 percent of those cases, voir dire took longer than the trials and, on average, consumed 40 percent of total trial time. (Source: <https://www.nytimes.com/1983/06/13/nyregion/issue-and-debate-who-should-pick-jurors-attorneys-or-the-judge.html>)
- 119 It is also my belief—after teaching judicial bias and ethics for more than a decade at California’s Judicial College in Berkeley with retired judge David Rothman, author of *the* book on the subjects—that judges alone cannot competently ferret out juror bias. (Source: *California Judicial Conduct Handbook*, Rothman, 4th ed., 2017)
- 121 Over the years, the number of defense “peremptories” in England steadily decreased, going from thirty-five to twenty in 1530, to seven in 1948, to three in 1977, until they were entirely abolished in 1989. (Source: “Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective,” [1997], Morris B. Hoffman; <https://pdfs.semanticscholar.org/0c59/e34e702a6>)

24 Notes

- 99ac6c93d23d649cbcd186b6efe.pdf; also, *The Criminal Justice Act 1988*, chap. 33 § 118 [1] [Eng])
- 121 In federal courts, defendants charged with felonies have ten peremptory challenges; prosecutors get six. (Source: *Federal Rules of Criminal Procedure*, rule 24[b])
- 121 The number of peremptories in the states vary. For example, in California, in felony trials, each side gets ten challenges; Idaho allows six peremptory challenges for each side; in Michigan, the defense and prosecution in felony cases are permitted five challenges each; and Hawaii allows just three apiece. (Source: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB213; Idaho Criminal Rule 24, <https://isc.idaho.gov/icr24>; [http://www.legislature.mi.gov/\(S\(t5rq3e1yozd1a10aobj42pww\)\)/mileg.aspx?page=GetObject&objectname=mcl-768-12](http://www.legislature.mi.gov/(S(t5rq3e1yozd1a10aobj42pww))/mileg.aspx?page=GetObject&objectname=mcl-768-12); https://www.capitol.hawaii.gov/hrscurrent/Vol13_Ch0601-0676/HRS0635/HRS_0635-0030.htm)
- 122 Since 2015, misdemeanor trials in California limit each side to six peremptory challenges; but when the Otis trial was before me, each side had ten opportunities to excuse the jurors. (Source: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB213)
- 122 “We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” (Source: <https://supreme.justia.com/cases/federal/us/476/79/#tab-opinion-1956654>)
- 123 The trial judge found the explanation to be race neutral. (Source: *Purkett v. Elem*, 514 U.S. 765 [1995])
- 123 “There is one man of the black race, according to my observation, on the jury panel, and only one, and, of course, he is not in controversy here, so I think [the prosecutor’s] explanation is sufficient, so we need not make any other inquiry.” (Source: *United States v. Clemmons*, 892 F.2d 1153, 1160 [3d Cir. 1989] <https://casetext.com/case/us-v-clemmons>)
- 124 “Carlos Davis I kicked because he acquitted in a case just a couple of weeks ago.” (Source: <https://openjurist.org/827/f2d/1254/united-states-v-thompson>)
- 125 This was during voir dire in a death penalty case. (Source: <https://www.courtlistener.com/opinion/145823/snyder-v-louisiana/>)
- 125 In June 2019, the U.S. Supreme Court reversed Curtis Flowers’s conviction in his sixth trial (7–2) and, in a superbly reasoned opinion by Associate Justice Brett Kavanaugh, strongly criticized the prosecutor’s abuse of peremptory challenges. (Source: https://www.supremecourt.gov/opinions/18pdf/17-9572_k536.pdf)
- 126 Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.” (Emphasis added.) (Source: *Batson v. Kentucky*, 476 U.S. at 105, 106, S. Ct. 1712 [Marshall, J., concurring])
- 126 Similarly, Associate Justice Kavanaugh cautioned in the *Flowers* decision that trial judges “must not allow the spirit of *Batson* to be diminished by misguided allegiance to the peremptory challenge.” (Source: https://www.supremecourt.gov/opinions/18pdf/17-9572_k536.pdf)
- 126 They contend that since lawyers know their cases better than anyone, it is they who have a better sense of which prospective jurors can fairly evaluate the evidence. (Source: <https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html>)
- 126 Those who condemn the peremptory challenge (mostly legal scholars) label it “a charade whose protections are illusory,” “a cloak for discrimination,” a “weapon of prejudice,” and “probably the single most significant means by which . . . prejudice and bias [are] injected into the jury selection system.” (Source: *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*” by Antony Page, https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1375&context=faculty_publications; and “Taking the High Road: Why Prose-

- cutors Should Voluntarily Waive Peremptory Challenges,” by Maureen A. Howard, <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1374&context=faculty-articles>)
- 126 Some academics and judges, including Thurgood Marshall (in his concurring opinion in *Batson*), have called for its abolition. (Source: Charles J. Ogletree, “Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges,” 31 *AM.Crim.L.Rev.* 1099, 1105 [1994], [https://heinonline.org/HOL/LandingPage?handle=hein.journals/amcrimlr31&div=49&id=&page=](https://heinonline.org/HOL/LandingPage?handle=hein.journals/amcrimlr31&div=49&id=&page=;); <https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html>; Vivien Toomy Montz and Craig Lee Montz, “The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law.” *Univ. of Miami Law Review* 54 [April], <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1602&context=umlr>)
- 126 In 2001, the Supreme Court of Florida’s *Report of Jury Innovations Committee* went so far as to recommend that a comprehensive study of the peremptory challenge include whether it should be eliminated. (Source: “Final Report of Jury, Innovations Committee, Judicial Management Council, Supreme Court of Florida,” https://www.flcourts.org/content/download/219268/1981554/11_JuryInnovationsFinalReport.pdf)
- 129 I was particularly aware of this because in 1985, I had coauthored a groundbreaking study with Peter Blanck and Robert Rosenthal entitled *The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Jury Trials*. (Source: Peter David Blanck, Robert Rosenthal, and LaDoris Hazzard Cordell, “The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Jury Trials,” 38 *Stanford Law Review* [1985]; <https://www.jstor.org/stable/1228603?seq=1>)
- 130 Several studies have since confirmed our findings that subtle nonverbal behaviors can be interpreted by jurors as signals for how they should consider the testimony of witnesses. (Source: https://www.researchgate.net/publication/227744940_Judge_Nonverbal_Communication_on_Trial_Do_Mock_Trial_Jurors_Notice)
- 130 The American Bar Association’s Model Code of Judicial Conduct even includes a warning that “facial expressions and body language . . . can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias.” (Source: Comment 2 for Rule 2.3, ABA Model Code of Judicial Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/commentonrule2_3/)
- 130 That’s what happened when a Missouri trial judge placed his hands to the sides of his head, shook his head, and leaned back, swiveling his chair 180 degrees during the testimony of a defendant’s alibi witness. (Source: *State v. Barron*, 465 S.W.2d 523, 527–528 [Mo. 1971])
- 130 In another trial, when a prosecution witness testified, a judge in Iowa smiled approvingly, nodded his head in agreement, and muttered, “Uh-hum.” During the testimony of another defense witness, the judge shook his head and uttered negative-sounding words such as “hump” and “no.” (Source: *Brown v. Walter*, 62 F.2d 798, 799–800 2d Cir. 1933; cited in “Off the Record: Nonverbal Communication in the Courtroom,” Peter Blanck, *Stanford Lawyer*, Spring [1987], https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford_Lawyer_issue-37_1987-SPRING-VOL21-NO2_front.pdf)
- 132 In California, criminal jury instructions, approved by the Judicial Council of California, are contained in volumes titled *California Criminal Jury Instructions* (CALCRIM). (Source: <https://www.courts.ca.gov/partners/documents/calcrim.pdf>)
- 133 Oddly, in some states, jurors are not permitted to have physical copies of their instructions. (Source: John P. Cronan, “Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension,” 39 *American Criminal Law Review* 1187, note 13, at 1243 [2002])
- 133–134 It was first penned in a decision authored by Chief Justice Shaw of the Massachusetts

- Supreme Judicial Court in the 1850 murder case of *Commonwealth v. John W. Webster*. (Source: 5 Cush. 295, 59 Mass. 295, <http://masscases.com/cases/sjc/59/59mass295.html>)
- 134 “This we take to be proof beyond reasonable doubt.” (Source: <http://masscases.com/cases/sjc/59/59mass295.html>)
- 135 In 1994, the reasonable doubt instruction was questioned in *Victor v. Nebraska*, a case that went all the way to the United States Supreme Court. (Source: 511 U.S. 1 [1994], <https://supreme.justia.com/cases/federal/us/511/1/#tab-opinion-1959471>)
- 135 For example, Associate Justice Ruth Bader Ginsburg wrote: “Jury comprehension is scarcely advanced when a court ‘defines’ reasonable doubt as ‘doubt . . . that is reasonable.’” (Source: *Victor v. Nebraska*, 511 U.S. 1, 25 [1994], <https://supreme.justia.com/cases/federal/us/511/1/#tab-opinion-1959471>)
- 135 “And at the end of the case, [jurors] are finally read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began.” (Source: <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20O%27Connor.pdf>)
- 135 Consider this: forty-five million Americans are functionally illiterate and cannot read above the fifth-grade level; 50 percent of adults cannot read a book written at an eighth-grade level; and “nearly 50 percent of the Americans surveyed cannot read well enough to find a single piece of information in a short publication, nor can they make low-level inferences based on what they read.” (Source: <https://www.literacyprojectfoundation.org>; <https://www.floridabar.org/the-florida-bar-journal/plain-english-jury-instructions-why-theyre-still-needed-and-what-the-appellate-community-can-do-to-help/>, citing, *The Informatics Review*, e-Journal of the Assoc. of Med. Directors of Info. Sys., at www.informatics-review.com/FAQ/reading.html; see also, Erica Medina, “Jury Instructions and Trial Judge Discretion,” <http://sociallaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system-spring-2015/jury-instructions-and-trial-judge-discretion.pdf?sfvrsn=4>)
- 136 “In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.” (Source: <https://www.justia.com/criminal/docs/calcrim/100/103/>)
- 136 In 2004, a New Zealand jury began deliberating at 3:28 P.M. and had their verdict one minute later, acquitting the defendant of cultivating twenty-three cannabis plants. (Source: https://www.guinnessworldrecords.com/world-records/shortest-jury-deliberation?fb_comment_id=667476116703717_1210570199060970)
- 137 A record \$22.5 million awarded to the plaintiffs who, no doubt, felt that it was well worth the wait. (Source: <http://www.kkcomcon.com/doc/McClure%20v%20Long%20Beach.P1.pdf>; <https://lawandcrime.com/uncategorized/i-need-to-have-my-life-back-percoco-federal-corruption-jurors-learn-jury-duty-is-no-picnic/>)
- 137 Jury misconduct is typically defined as behavior that is so prejudicial that “a fair and due consideration of the case has been prevented.” (Source: California Penal Code Section 1181 [3]; <https://codes.findlaw.com/ca/penal-code/pen-sect-1181.html>)
- 138 “You must not talk about these things with other jurors either, until you begin deliberating.” (Source: CALCRIM, Rule 101, <https://www.courts.ca.gov/partners/documents/calcrim.pdf>)
- 138 Ms. Ellis got a well-deserved earful from the judge, who found her in contempt of court and imposed a fine of \$1,000; the defendant got a new trial. (Source: <https://www.nydailynews.com/new-york/queens/exclusive-queens-juror-fined-facebook-blabbing-article-1.2421830>)
- 138 Mr. Aronovitz’s self-described “horrible mistake” left him with a contempt conviction and an order to perform two hundred hours of community service at a homeless shelter. (Source:

- <https://www.tampabay.com/news/courts/criminal/misconduct-inquiry-didnt-stop-buju-banton-juror-from-serving-in-another/2238811/>)
- 138 Betts eventually pled guilty to murder and was sentenced to twenty years in prison in 2017. (Source: <https://www.pressreader.com/usa/tampa-bay-times/20170523/281968902628909>)
- 139 Ms. Lorraine never faced any civil or criminal repercussions. (Source: <https://www.nytimes.com/2019/10/31/nyregion/robert-neulander-wife-murdered.html>)
- 139 Los Angeles-based jury consultant Philip K. Anthony claims that between 15 percent and 18 percent of potential jurors conceal their biased mindsets and seek out jury service as a way to comment on or influence trial. (Source: “Rogue Jurors,” Molly McDonough, https://www.abajournal.com/magazine/article/rogue_jurors)
- 139 According to the jurors, H.C. further explained that, in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” (Source: *Peña-Rodriguez v. Colorado*, 580 U.S. __ (2017); <https://supreme.justia.com/cases/federal/us/580/15-606/#tab-opinion-3700196>)
- 140 “After studying the Bible, I have wondered if black people even have souls.” (Source: petition for writ of certiorari in *Tharpe v. Warden*, https://drive.google.com/file/d/10tpwf-Yd7rHlc6bHa-ZHdHxMQL_MWt2Q/view)
- 140 Even though Gattie’s belated and blatant disclosure of racial animus tainted the verdict, in 2019, a unanimous U.S. Supreme Court refused to hear the case for procedural reasons, thereby letting his execution date stand. (Source: https://www.supremecourt.gov/opinions/18pdf/18-6819_bq7c.pdf)
- 140 Tharpe died in January 2020 from natural causes at the age of sixty-one. (Source: <https://apnews.com/7622700f39b12593907206c945f038f5>)
- 140 “If you happen to pass by the scene, do not stop or investigate.” (Source: Rule 101, CAL-CRIM; <https://www.courts.ca.gov/partners/documents/calcrim.pdf>)
- 140 The trial judge found Wright to be in contempt of court, placed her on five months’ probation, ordered her to perform forty hours of community service, and, fittingly, directed her to research and write a report about the cost of the high-profile jury trial that she had nearly upended. (Source: <https://www.browardpalmbeach.com/news/buju-banton-juror-may-have-violated-court-orders-grounds-for-a-mistrial-6440139>; https://en.wikipedia.org/wiki/Buju_Banton)
- 141 (In 2020, the U.S. Supreme Court made it official, ruling that jury verdicts in state court criminal trials must be unanimous.) (Source: *Ramos v. Louisiana*, 520 U.S. (2020); https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf)

JUDGES FOR SALE: JUDICIAL ELECTIONS

- 142 California judge Dzintra Janavs, who lost her seat to a bagel-shop owner. (Source: https://www.cpmlegal.com/news-publications-Show_Me_The_Money_Money_and_Partisan_Politics_in_the_Judiciary.html)
- 143 But in 1988, the two-tier trial court system was the status quo. (Source: <https://www.courts.ca.gov/documents/tcunif.pdf>)
- 144 He also named the nation’s first openly gay and lesbian judges to the trial courts. (Source: <https://www.sfchronicle.com/news/article/Jerry-Brown-s-legacy-diversifying-the-judicial-13507344.php>)
- 145 In the rest of the states, governors appointed judges to lifetime terms “during good behavior.” (Source: Jed Handelsman Shugerman, *The People’s Courts* [Cambridge, Mass.: Harvard University Press, 2012], 57–58.)
- 145 Spawned in large part by “the partisan patronage politics of appointments,” over the next two

- decades (1840s–1850s), judicial elections spread throughout the country. (Source: Jed Handelsman Shugerman, *The People's Courts* [Cambridge, Mass.: Harvard University Press, 2012], 6.)
- 145 Between 1846 and 1851, twelve states elected all of their judges, five states opted to elect some of them, and by 1860, eighteen of the thirty-three states required all of their judges to undergo contested elections. (Source: Jed Handelsman Shugerman, *The People's Courts* [Cambridge, Mass.: Harvard University Press, 2012], 105.)
- 145 Today, twenty-two states utilize contested judicial elections. In the other twenty-eight states, judicial selection methods range from merit selection (independent nominating commissions), to retention elections (yes or no votes on whether judges should remain in office), to gubernatorial appointments, to legislative appointments. (Source: https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf)
- 146 “I don’t know what I’m finally going to do,” he said. “I’m in the mulling stage.” (Source: “Fundamental Things Apply,” *The Insider*, *The San Jose Mercury News*, Sunday, January 31, 1988.)
- 147 In response, nearly eight hundred lawyers stepped up, donating \$70,000 to my campaign (\$155,000 in today’s dollars). (Source: <https://www.dollartimes.com/inflation/inflation.php?amount=70000&year=1988>)
- 147 Unsurprisingly, 56 percent of that money was contributed by lawyers, lobbyists, and corporate interests. (Source: https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf)
- 148 By 2004, candidates backed by the biggest spenders—the business community—won seats in twelve of thirteen state supreme court races. (Source: Roger K. Warren, “Justice for Sale,” *California Courts Review*, Winter [2007], https://www.courts.ca.gov/documents/CCR_07WINTER.pdf)
- 148 And after the 2010 U.S. Supreme Court decision in *Citizens United v. FEC* allowed an unlimited flood of money into political campaigns, the floodgates to state judges’ campaigns opened as well. (Source: *Citizens United v. Federal Election Commission*, 558 US 310 [2010])
- 148 In a close race that topped \$5 million, Judge Genovese won with 51 percent of the vote. (Source: <https://www.dailyworld.com/story/news/local/2016/11/09/genovese-wins-la-3rd-district-supreme-court-seat/93439888/>)
- 148 (3) trial judges in Alabama imposed death sentences more often in election years, sometimes overriding life sentence verdicts handed down by juries. (Source: Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice, [2015], <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases>)
- 149 Known as “merit selection,” this system has been frequently proposed as an alternative to judicial elections; in all but fourteen states it has been ignored. (Source: <https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform>)
- 150 “I have judicial experience and he doesn’t. I have sentenced thousands of people and he hasn’t sentenced anyone.” (Source: “Superior Court Fight: Judge vs. Prosecutor,” *The San Jose Mercury News*, Sunday, June 5, 1988.)
- 150 That’s like a deputy district attorney filing a death penalty case before it’s the law.” Seriously? (Source: “Campaign Barbs Fly in Santa Clara County Judge’s Race,” *Times Tribune*, Saturday, June 4, 1988.)
- 151 Justice Jim Kitchens, who sat on that supreme court, wanted to go a step further by granting Wilson a new trial. (Source: <https://casetext.com/case/wilson-v-state-2644>)
- 151 He accused Justice Kitchens of “siding with child predators” in the Wilson case and found support from the Center for Individual Freedom, which spent \$270,000 on a television ad declaring: “On our Supreme Court, Jim Kitchens is putting criminals ahead of victims.” (Source: https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf)

- 152 “I hope this will prove to the people who spent nearly \$1 million in the last three weeks on negative ads that the people of Mississippi aren’t going to stand for it.” (Source: <https://www.clarionledger.com/story/news/2016/11/08/kitchens-and-griffis-close-battle/93442776/>)
- 152 In 2015, three justices on the Wisconsin Court of Appeals ruled unanimously that Daniel Fierro, a convicted sex offender, was entitled to a hearing on his claim that he had not fully understood the crime to which he had pled guilty. (Source: <https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=136507>)
- 152 She lost that race to the sitting supreme court justice who proudly proclaimed to a gathering of corporate and political insiders: “I am your public servant.” (Source: <https://www.politifact.com/factchecks/2016/mar/23/wisconsin-alliance-reform/groups-tv-ad-criticizing-joanne-kloppenborg-leaves/>; https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf)
- 153 His white male opponent, a trial judge with no appellate experience, won the seat with 51 percent of the vote. (Source: <https://www.wpr.org/contentious-supreme-court-race-stage-was-set-decade-ago>; https://en.wikipedia.org/wiki/Michael_Gableman)
- 153 And in a murder trial that resulted in a partial reversal, the appellate court wrote that Mr. Popolizio had improperly told the jury that the defendant had not been insane when he killed his girlfriend but rather that he had reacted violently to women, a tendency of Italian males. (Source: “Campaign Barbs Fly in Santa Clara County Judge’s Race,” *Peninsula Times Tribune*, Saturday, June 4, 1988.)
- 153 He maintained that those instances of misconduct reflected his zeal in the courtroom not a lack of proper temperament. (Source: “Campaign Barbs Fly in Santa Clara County Judge’s Race,” *Peninsula Times Tribune*, Saturday, June 4, 1988.)
- 154 I had become the very first African American on the Santa Clara County Superior Court and the first African American woman to sit on a superior court in all of Northern California. (Source: <https://www.sccgov.org/sites/rov/Statistics/Documents/sov/1988/Consolidated%20Primary%20Election%20%20June%207%201988%201.pdf>)
- 154 Funded by business interests who were upset with the court’s proconsumer decisions, the three justices were attacked as liberal, anti-death penalty proponents, an issue of little concern to the business community but brilliantly exploited to outrage voters. (Source: “The Rise and Fall of Rose Bird,” Patrick K. Brown, http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf)
- 155 “A spokesman for the governor said no action had been taken on the request as of Monday.” (Source: “The Judge: Cordell Hoping that She’ll Get an Early Start,” *Peninsula Times Tribune*, Tuesday, June 14, 1988.)
- 155 “The only light I can shed on that is that the two judges in Sacramento were very strongly supported by the law enforcement community and those are the kinds of endorsements the governor is looking for.” (Source: “Governor Accused of Stalling Elevation of Liberal Judge,” *The San Francisco Recorder*, Thursday, July 7, 1988.)
- 156 “If he doesn’t make the appointment, the only loser will be the public. I would hope to get quick action on this.” (Source: “Governor Accused of Stalling Elevation of Liberal Judge,” *The San Francisco Recorder*, Thursday, July 7, 1988.)
- 157 “I don’t want them at some point in the future to say they were appointed by George Deukmejian.” (Source: “Judge Gets a Boost,” *The San Jose Mercury News*, Saturday, July 23, 1988.)
- 157 “It would be a source of great embarrassment for both of us, if I were to be known as a Deukmejian appointee.” (Source: “Cordell Still May Get an Early Appointment,” *Peninsula Times Tribune*, Monday, July 25, 1988.)
- 157 “That means we have lost about twenty percent of our civil trial capabilities,” he told a reporter. (Source: *The San Jose Post-Record*, Thursday, July 21, 1988.)

30 Notes

- 157 A raft of newspaper articles and op-eds followed: “Deukmejian Won’t Elevate Judge Cordell,” “No Early Seat for Judge Cordell,” “Superior Court Needs Cordell Now, Judge Says,” and my favorite, “Let the Judge Be Seated.” (Source: *The San Francisco Recorder*, Thursday, July 21, 1988; *The San Jose Mercury News*, Friday, July 22, 1988; *The San Jose Mercury News*, July 23, 1988; *The San Jose Mercury News*, July 25, 1988.)
- 157 At that time, the chief justice was Malcolm Lucas, a former law partner of Governor Deukmejian. (Source: “Judicial Council Being Asked to Elevate Cordell,” *The San Francisco Recorder*, Friday, July 22, 1988.)
- 158 “It is now a question of whether our court is in a position to do this and still meet our calendar needs.” (Source: “Cordell Elevation Stymied,” *The San Francisco Recorder*, Thursday, July 28, 1988.)
- 158 “His staff said this was to put the issue to rest and for administrative convenience.” (Source: “Cordell’s Superior Court Assignment Creates Stir,” *The San Jose Post-Record*, Thursday, July 28, 1988.)
- 158 We high-fived and then, with a big hug, he welcomed me to the superior court, where I would preside, *unchallenged*, for the next eleven years. (Source: “Judge Cordell’s Swearing in Marked by High-Five and Impassioned Speech,” *The San Jose Recorder*, January 9, 1989; “Cordell Investiture Far From Somber,” *San Francisco Banner Daily Journal*, January 9, 1989.)

BAD JUDGES: JUDICIAL MISCONDUCT

- 161 State court judges and judges in the District of Columbia, are subject to oversight and discipline by state agencies known by a variety of names—Judicial Inquiry Commission (Alabama and Virginia), Court on the Judiciary (Delaware and Oklahoma), Judicial Retirement and Removal Commission (Kentucky), and Commission (or Board) on Judicial Conduct (Alaska, Arizona, Hawaii, Kansas, Massachusetts, New York, North Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming). (Source: Cynthia Gray, “A Study of State Judicial Discipline Sanctions,” State Justice Institute of the American Judicature Society, https://www.ncsc.org/_data/assets/pdf_file/0026/18881/study-of-state-judicial-discipline-sanctions.pdf)
- 161 By the 1980s, all state courts were regulated by independent judicial oversight agencies. (Source: National Center for State Courts, Center for Judicial Ethics, <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Composition.ashx>)
- 161 In 1957, Ohio established a Board of Professional Conduct, the nation’s first judicial oversight body. (Source: Edward J. Schoenbaum, “A Historical Look at Judicial Discipline,” *Chicago-Kent Law Review*, Volume 54, Issue 1, Article 2 [1997], <https://core.ac.uk/download/pdf/217425419.pdf>)
- 162 In California, the Commission on Judicial Performance is comprised of three judges, two lawyers, and six members of the public. (Source: Center for Judicial Ethics, https://www.ncsc.org/_data/assets/pdf_file/0027/14877/composition.pdf)
- 162 If the judge has been found to have engaged in misconduct, the judicial council has the authority to impose discipline. (Source: https://en.m.wikipedia.org/wiki/United_States_federal_judge)
- 162 The following year, Justice Chase was tried by the Senate and acquitted. (Source: The Samuel Chase Impeachment Trial, <https://law.jrank.org/pages/5152/Chase-Samuel.html>)
- 162 In the wake of accusations that Fortas had used his influence to seek a presidential pardon for a former client, he resigned before his impeachment hearing got underway. (Source:

- “The Spectacular Fall of Abe Fortas,” <https://www.abajournal.com/magazine/article/the-spectacular-fall-of-abe-fortas>)
- 167 Judge Russo, who humiliated a female sexual assault victim and joked with his staff about her, received a three-month suspension without pay and was ordered by the New Jersey Supreme Court to undergo training on proper courtroom demeanor. (Source: Supreme Court of New Jersey Advisory Committee on Judicial Conduct, Presentment in the Matter of John F. Russo, Jr., Judge of the Superior Court, <https://www.njcourts.gov/attorneys/assets/acjc/Russopresentment.pdf>)
- 167 The Alabama Judicial Inquiry Commission publicly censured Judge Wiggins for requiring jail or blood donations from indigent defendants who were unable to pay their court fines. (Source: <https://www.prisonlegalnews.org/news/2017/apr/3/two-alabama-state-court-judges-disciplined/>)
- 168 On November 3, 2020, Judge Hawkins lost her reelection bid to her challenger. (Source: <https://www.law.com/dailybusinessreview/2020/08/19/these-3-miami-dade-judges-just-lost-their-seats-florida-2020-primary-election-results/?sreturn=20201005151633>)
- 168 And Edmund Clarke, the California judge who demeaned and humiliated jurors in his courtroom, was publicly admonished by the state’s Commission on Judicial Performance. (Source: https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Clarke_DO_9-29-16.pdf)
- 168 “The matter is now closed.” (Source: https://cjp.ca.gov/complaint_process/)
- 170 I noticed, with amusement, that advisory letter number nineteen had gone to a judge who “appeared to be sleeping during court proceedings,” the very conduct that I had lampooned in one of my cartoons. (Source: https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/2000_Annual_Report.pdf)
- 170 He later explained that he was caught up in “waves of feeling” and not thinking when he bit the nose that jailed him. (Source: *US v. Troisi*, 13 F Supp. 2nd 595; <https://law.justia.com/cases/federal/district-courts/FSupp2/13/595/2311858/>)
- 171 Following a federal investigation, the judges having pled guilty to fraud, racketeering, and tax evasion, were disbarred; each was sentenced to more than seven years in prison. (Source: <https://allthatsinteresting.com/kids-for-cash>)
- 171 A 2009 study, the first to explore implicit racial bias of state trial court judges, determined that judges possess implicit racial biases that influence their decision-making. (Source: “Does Unconscious Racial Bias Affect Trial Judges?” <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>)
- 171 As far back as 1994, a bail-setting study revealed that when Connecticut judges used their discretion, the bail for blacks was 25 percent higher than for whites accused of committing similar crimes. (Source: “A Market Test for Race Discrimination in Bail Setting,” <https://ianayres.yale.edu/sites/default/files/files/A%20Market%20Test%20for%20Race%20Discrimination%20in%20Bail%20Setting.pdf>)
- 171 Similarly, a 1995 review of bail-setting decisions of New York trial court judges revealed that in some parts of the state, African Americans were 33 percent more likely to be held in custody awaiting felony trial than were whites facing felony trials. (Source: https://www.huffpost.com/entry/fourteen-examples-of-raci_b_658947?guccounter=1)
- 171 One of the conclusions of a 2018 study conducted in courts in Miami and Philadelphia was that both Black and White judges demonstrated bias against Black defendants in their bail decisions. (Source: “Racial Bias in Bail Decisions,” <https://academic.oup.com/qje/advance-article-abstract/doi/10.1093/qje/qjy012/5025665?redirectedFrom=fulltext>; <https://journalistsresource.org/studies/government/criminal-justice/bail-judges-racial-bias-research/>)
- 172 “Black and Latino offenders sentenced in state and federal courts face significantly greater

- odds of incarceration than similarly situated white offenders and receive longer sentences than their white counterparts in some jurisdictions.” (Source: https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf)
- 172 “And even when judges *do* reduce black offenders’ sentences, they do so by smaller amounts than for white offenders.” (Source: <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/>)
- 172 “The significant expertise that judges possess doesn’t inoculate them against decision-making biases, and we can’t expect much change until we see policy reforms that address decision-making procedures in the courtroom.” (Source: <https://www.sciencedaily.com/releases/2018/04/180403085049.htm>)
- 173 “Judge Stafford responded, ‘It came out of your client’s mouth, out of her brain onto a piece of paper, didn’t it?’” (Source: https://cjp.ca.gov/wp-content/uploads/sites/40/2019/04/2018_Annual_Report.pdf)
- 174 One conclusion of the 2009 study that looked at implicit racial bias of trial judges was that judges who are “internally driven or otherwise motivated to suppress their own biases” are able to make judgments “free from bias, even implicit ones.” (Source: “Does Unconscious Racial Bias Affect Trial Judges?” <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>)

J'ACCUSE!: JUDGES UNDER ATTACK

- 177 The California Constitution, Article 2, Section 13, provides: “Recall is the power of electors to remove elective officers.” Nineteen states and the District of Columbia permit recalls of elective officers. *These are:* Alaska, Arizona, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin. (Source: “Recall of Local Officials,” <http://www.ncsl.org/research/elections-and-campaigns/recall-of-local-officials.aspx>)
- 177 Ten of the nineteen states include judges in the category of elective officers. *These are:* Arizona, California, Colorado, Georgia, Minnesota, Montana, Nevada, North Dakota, Oregon, and Wisconsin (Source: “Methods of Judicial Selection,” http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state)
- 177 Seven of those ten states do not require any legal grounds to recall judges. *These are:* Arizona, California, Colorado, Nevada, North Dakota, Oregon, and Wisconsin. (Source: “Laws Governing Recall,” https://ballotpedia.org/Laws_governing_recall)
- 177 More importantly, Georgia and Montana specifically exclude a judge’s discretionary performance of a lawful act or mandatory duty as the basis for a recall. (Source: “Recall Elections Equal More Politicization of the Judiciary,” <https://www.jurist.org/commentary/2018/02/steve-koslovsky-politicization-of-the-judiciary/>)
- 178 (That same year, a reconvened Arizona constitutional convention reinstated the recall of judges in its constitution; no Arizona judge has ever been the subject of a recall—yet.) (Source: “Recalling Judge, a Sticking Point for Arizona’s Statehood,” <http://www.sonorannews.com/archives/2012/120215/frontpage-recalling.html>)
- 178 Because recall supporters failed to gather the required number of signatures to qualify these recalls for the ballot, none have succeeded. (Source: “What Does California’s Experience with Recall of Judges Teach Us?” <http://scocablog.com/what-does-californias-experience-with-recall-of-judges-teach-us/>)

- 179 “The report found 23 American Mortgage receiverships handled by the same pair of co-receivers.” (Source: “1932: County Bar Mounts Campaign to Recall Three Judges,” <http://www.metnews.com/articles/2005/perspectives062105.htm>)
- 179 Fleming returned to his law practice only to be suspended some twenty years later for persuading an elderly female client to sign over her entire estate to him. Guerin resumed practicing law. And Stafford, in 1934, unsuccessfully ran against a sitting judge who was up for reelection. (Source: “1932: County Bar Mounts Campaign to Recall Three Judges,” <http://www.metnews.com/articles/2005/perspectives062105.htm>)
- 180 His studying aside, a proposal is pending in Congress that would apply the federal courts’ judicial code of conduct to the high court. (Source: “Supreme Court Justices Tell Congress They Are Not Considering Televising Hearings,” https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html)
- 182 “Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.” (Source: Bruce Fein and Burt Neuborne, “Why Should We Care About Independent and Accountable Judges” [2000] 84 *Judicature* 58, 64, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica84&div=19&id=&page=>)
- 183 In July 2020, the California Code of Judicial Ethics was revised, allowing judges targeted for a recall or facing a contested election to respond directly to false and biased information concerning an unpopular decision. (Source: <https://newsroom.courts.ca.gov/news/california-supreme-court-amends-code-of-judicial-ethics>)
- 187 The law requires that the person seeking to remove the judge must provide specific facts, in writing, and must do so “at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.” (Source: California Code of Civil Procedure, Section 170.3(c)(1), http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=170.3)

BACCHUS UNBOUND: THE DRUNK DRIVING DILEMMA

- 194 *The California Rules of Court* lists almost forty aggravating and mitigating factors, among them whether the person used a firearm (an aggravator) or if the defendant was a passive participant who provoked but didn’t participate in the crime (a mitigator). (Source: *The California Rules of Court*, rule 4.421, https://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_421; *The California Rules of Court*, rule 4.423, https://www.courts.ca.gov/cms/rules/index.cfm?linkid=rule4_423&title=four)
- 195 In California, whether to allow cameras in the courtroom is left entirely to the judge’s discretion but is guided by eighteen factors that include “the security and dignity of the court,” “the parties’ support of or opposition to the request,” and “any other factor the judge deems relevant,” whatever that means. (Source: *The California Rules of Court*, rule 1.150, https://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_150)
- 195 The 1994 double-murder case of O. J. Simpson was the first trial in the country to be televised from beginning to end. (Source: “How the O. J. Simpson Trial Changed Media Coverage in the Courtroom,” <https://www.boydlawsandiego.com/oj-simpson-trial-changed-media-coverage-courtroom/>)
- 195 In a vain attempt to rein them in, Judge Ito fined them—the highest total ever ordered by a

34 Notes

- judge against attorneys in a criminal trial in California. (Source: “Lessons from O. J. Trial,” <https://www.scp.org/news/2009/07/01/1330/lessons-oj-trial/>)
- 197 Because the Highway 85 median strip was forty-six to fifty feet wide, no barrier had been erected. In the twelve months after Carol Klamm’s death, six more motorists died as a result of vehicles that crossed the Highway 85 median, ultimately leading the state legislature to revise the law. (Source: <https://www.sfgate.com/news/article/Fatal-Crash-Prodging-Caltrans-Highway-85-likely-2972722.php>; <https://www.sfgate.com/bayarea/article/Some-of-Highway-85-To-Get-Median-Wall-Lawmaker-2970433.php?jwsourc=cl>)
- 197 Today, barriers must be installed on any high-volume freeways with medians up to seventy-five feet wide—nearly double the previous standard. (Source: <https://www.mercurynews.com/2020/05/21/remembering-those-killed-before-median-barrier-installed-on-highway-85-roadshow/>)
- 197 According to the National Highway Traffic Safety Administration (NHTSA), every day thirty Americans die in drunk driving crashes. (Source: <https://www.nhtsa.gov/risky-driving/drunk-driving>)
- 197–198 The NHTSA also reports that 1.5 million people are arrested for driving under the influence of alcohol and/or drugs in any given year, and one-third of them are repeat offenders. (Source: <http://www.drunkdrivingprevention.com/drunkdrivingarreststatistics.html>)
- 198 Over the last decade, California saw an average of more than 130,000 drunken driving arrests and more than 25,000 victims of alcohol-involved crash injuries. (Source: *2019 Annual Report of the California Information System*, <https://www.dmv.ca.gov/portal/uploads/2020/06/S5-260-1.pdf>)
- 203–204 Thirty-four states and the District of Columbia have “all-offender” laws where every convicted drunk driver, first timer and repeat offender, alike, must utilize the device. (Source: <https://www.intoxalock.com/blog/post/what-are-all-offender-ignition-interlock-laws/>)
- 204 Unfortunately, while California law requires all repeat drunk driving offenders to install the devices, only those first-time offenders who cause injury must do so. (Source: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1046)
- 204 According to the *American Journal of Preventive Medicine*, five out of six studies found that participants in the interlock programs were 15 percent to 69 percent less likely than other offenders to be rearrested for drunk driving. (Source: “Effectiveness of Ignition Interlock Devices in Reducing Drunk Driving Recidivism,” [https://www.ajpmonline.org/article/S0749-3797\(98\)00117-2/fulltext](https://www.ajpmonline.org/article/S0749-3797(98)00117-2/fulltext))
- 204 A 2017 study that found ignition interlock devices reduced alcohol-involved fatal crashes concluded that the devices were a “significant public health benefit.” (Source: “Ignition Interlock Laws: Effects on Fatal Motor Vehicle Crashes, 1982–2013,” [https://www.ajpmonline.org/article/S0749-3797\(16\)30587-6/abstract](https://www.ajpmonline.org/article/S0749-3797(16)30587-6/abstract))

IT’S ALL IN YOUR HEAD: MENTAL HEALTH CASES

- 205 The Greek physician Hippocrates (460–370 BCE) may have been the first to recognize the need for involuntary civil commitment of the mentally ill when he suggested that these patients “be confined in the wholesome atmosphere of a comfortable, sanitary, well-lighted place.” (Source: “Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice,” <https://www.samhsa.gov/ebp-resource-center>)
- 205–206 Dubbed “Bedlam,” it was so notorious for its inhumane treatment of patients with mental illnesses and developmental disabilities that its very name became synonymous with chaos

- and madness. (Source: “How Bedlam Became a ‘Palace for Lunatics,’” <http://www.bbc.com/culture/story/20161213-how-bedlam-became-a-palace-for-lunatics>)
- 206 In the United States, until the late 1700s, those with serious mental illnesses were relegated to jails, prison, and poorhouses. (Source: “Civil Commitment and the Mental Health Care Continuum: “Historical Trends and Principles for Law and Practice,” <https://www.samhsa.gov/ebp-resource-center>)
- 206 Instead, with the assistance of one of his slaves, he opted to care for his wife at home until her death at the age of thirty-seven. (Source: “Patrick and Sarah Henry: Mental Illness in 18th Century America,” <https://americanhistory.si.edu/blog/patrick-and-sarah-henry-mental-illness-18th-century-america>)
- 206 “Her unflagging efforts directly affected the building of 32 institutions in the United States.” (Source: “Dorothea Dix: American Social Reformer,” <https://www.britannica.com/biography/Dorothea-Dix>)
- 206 As early as 1845, the right to challenge an involuntary confinement and treatment was put to the test in the courtroom in the landmark case of *Matter of Josiah Oakes*. (Source: *Matter of Josiah Oakes*, 8 Law Rep. 123 (Mass. 1845), <https://repository.jmls.edu/cgi/viewcontent.cgi?article=2298&context=lawreview>)
- 207 “The restraint can continue as long as the necessity continues.” (Source: “Habeas Corpus in the States: 1776–1865,” by Dallin H. Oaks, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3429&context=ucprev>)
- 207 To that end, the act requires judicial oversight of a series of steps that must be followed whenever a person is held for an evaluation and confined for treatment. (Source: Rael Jean Isaac and Virginia C. Armat, *Madness in the Streets*; https://en.wikipedia.org/wiki/Lanterman-Petris-Short_Act)
- 208 If I were to make that finding, Isabel would be administered a course of ECT against her will. (Source: <https://www.disabilityrightsca.org/system/files/file-attachments/539801.pdf>)
- 208 “Cerletti wondered whether electricity applied to the heads of human patients would similarly produce anesthesia before provoking convulsions.” (Source: “A Brief History of Electroconvulsive Therapy,” <https://www.psychologytoday.com/us/blog/freud-fluoxetine/201811/brief-history-electroconvulsive-therapy>)
- 208 The downside of this insulin therapy, however, was that it had the unfortunate property of occasionally killing a patient. (Source: https://en.wikipedia.org/wiki/Insulin_shock_therapy)
- 208 The apparent efficacy of ECT was so great and so popular that Cerletti was nominated for a Nobel Prize in Physiology or Medicine. (Source: <https://www.nobelprize.org/prizes/medicine/1952/waksman/nominations/>)
- 208–209 Today, it is estimated that, worldwide, one million people a year receive ECT treatments. (Source: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3381633/>)
- 215 Today, the *DSM* has been translated into over twenty languages and is utilized as a mental health resource in Europe and Asia. (Source: “A Brief Historicity of the *DSM*,” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3282636/>; also see Susannah Cahalan, *The Great Pretender*, for a history of the *DSM*.)
- 215 In 1995, my second year in the mental health court, the rate of tuberculosis cases in Santa Clara County had increased 27 percent over the previous two years, ranking our county fifth among California’s largest counties in the number of reported cases per population. (Source: “Homeless TB Patient Won’t Be Released,” *The San Francisco Daily Journal*, February 1, 1995.)
- 216 And in 1917, nearly thirty thousand American women known to frequent military camps were forcibly quarantined, pursuant to a federal order that allowed for their incarceration until mandatory testing deemed them free of sexually transmitted diseases. (Source: “A History of

- Quarantines, from Bubonic Plague to Typhoid Mary,” Eleanor Klibanoff, <https://www.npr.org/sections/goatsandsoda/2020/01/26/799324436/a-history-of-quarantines-from-bubonic-plague-to-typhoid-mary>)
- 216 But the exercise of police power is not unlimited; it is always subordinate to state constitutions and to the U.S. Constitution and can never be used to deprive an individual of life, liberty, or property without *due process of law*. (Source: http://changelabsolutions.org/sites/default/files/tb_law_paper.pdf)
- 217 “No evidence has been offered to support this claim, and it is not known to be a fact.” (Source: *Wong Wai v. Williamson*, 103 F. 10 [C.C. Cal. 1900], <http://libraryweb.uchastings.edu/library/research/special-collections/wong-kim-ark/103%20F.%201.pdf>)
- 217 The justices ended Mr. Greene’s commitment and ordered the trial judge to conduct another hearing at which Mr. Greene would be provided the same due process rights as those afforded to people facing involuntary commitments to mental hospitals. (Source: *Greene v. Edwards*, 263 S.E.2d 661 [W. Va. 1980], <https://www.courtlistener.com/opinion/1323449/greene-v-edwards/>)
- 220 “Therefore, I have no choice but to grant the county’s petition and order that you be detained at this hospital for treatment for a period of time not to exceed ninety days.” (Source: “TB Patient Denied Request to Leave Hospital,” *San Francisco Chronicle*, February 1, 1995.)
- 222 According to *Trends in State Courts*, a project of the National Center for State Courts, “Violent acts surrounding court cases have been steadily rising despite the presence of increased courthouse security,” such that “all court proceedings have an associated inherent risk and potential for violence escalation.” (Source: “Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today,” <https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/1-1-Courthouse-Security-Incidents.aspx>)
- 223 And then there is *Court Cam*, a popular television show that debuted on network television in 2019 (renewed in 2020 for another season) that shamelessly promotes itself as “a behind-the-scenes look into some of the most wild, unruly and dramatic moments caught on tape in courtrooms across the country; witnesses, judges and victims share their perspectives of the emotional outbursts and chaotic moments.” (Source: <https://www.aetv.com/shows/court-cam>)
- 223 Even more upsetting was the fact that Dan had been seated only a few feet away from me when he testified, while the paramedics casually sat in the rear of the courtroom. Had Dan lunged at me then, I would have been an easy target. (Source: “Court Personnel Assist in Restraining Patient,” *San Jose Post-Record*, May 12, 1995.)

PARSING SENTENCES: JUDICIAL DISCRETION

- 225 Today, the largest Hmong urban population in the world, some sixty thousand, reside in the Minneapolis–Saint Paul area. (Source: “Hmong Immigrants,” <http://immigrationtounitedstates.org/551-hmong-immigrants.html>)
- 226 In California, on any given day, approximately seventy thousand women and men reside in the state’s 110 jails. (Source: “California’s County Jails,” <https://www.ppic.org/publication/californias-county-jails/>)
- 226 Prisons are state-run institutions, deliberately situated in remote areas where inmates convicted of felonies are housed for terms ranging from more than one year to life. (Source: “California’s Prison Statistics: How the Golden State Stacks Up”; <https://patch.com/california/gilroy/californias-prison-statistics-how-golden-state-stacks>)
- 226 Annually, our nation’s jails and prisons—1,719 state prisons, 109 federal prisons, 3,263 jails,

- 1,772 juvenile correctional facilities, and 80 Indian Country jails—are filled with more than two million men, women, and children. (Source: “Mass Incarceration: The Whole Pie 2019”; <https://www.prisonpolicy.org/reports/pie2019.html>)
- 227 “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms [minimum, mid, and maximum], the choice of the appropriate term shall rest within the *sound discretion* of the court . . . the court shall select the term which, in *the court’s discretion*, best serves the interests of justice.” (Emphasis added.) (Source: <https://codes.findlaw.com/ca/penal-code/pen-sect-1170.html>)
- 229 In 2012, California voters brought the three-strikes law more in line with other similar laws in other states by eliminating a majority of the nonserious and nonviolent crimes that could qualify as third strikes. (Source: [https://ballotpedia.org/California_Proposition_36,_Changes_in_the_%22Three_Strikes%22_Law_\(2012\)](https://ballotpedia.org/California_Proposition_36,_Changes_in_the_%22Three_Strikes%22_Law_(2012)))
- 230 The problem, though, is that only a minority of inmates convicted of strikes are violent offenders; the majority of Americans incarcerated for strike crimes are in prison for nonviolent drug offenses and property crimes, such as burglary, car theft, vandalism, and shoplifting. (Source: “Mass Incarceration: The Whole Pie 2019” <https://www.prisonpolicy.org/reports/pie2019.html>)
- 230 Only two years after Californians voted for the three-strikes law, African Americans made up 43 percent of third-strike defendants, imprisoned at more than thirteen times that of whites—a huge disparity when you consider that African Americans were just 7 percent of California’s population. (Source: https://www.ppic.org/content/pubs/report/R_201BRR.pdf)
- 230 “It can truly be said that ‘three strikes’ is California’s apartheid.” (Source: <https://occupyoakland.org/event/occupy-forum-legacy-three-strikes-youre-advancement-prison-industrial-complex-mass-incarceration-california/>; <https://www.latimes.com/archives/la-xpm-1996-03-05-mn-43270-story.html>)
- 230 After examining 171,000 individual data records on inmates in the California prison system, she concluded that African American offenders were significantly more likely than whites and Latinx offenders to receive third-strike sentences, regardless of the nature of their offenses. (Source: “Examining Racial and Ethnic Disparities in California’s Three Strikes Law,” <https://crimeandjusticeresearchalliance.org/rsrch/examining-racial-and-ethnic-disparities-in-californias-three-strikes-law/>)
- 230 Indeed, its use of the three-strikes law was the toughest among the San Francisco Bay Area’s nine counties. (Source: “Many More Third Strikes in Some Counties,” <https://www.sfgate.com/crime/article/Many-more-3rd-strikes-in-some-counties-4230780.php#photo-4101782>)
- 231 “While 2.7% of the county was African American, 27% of its striker population was African American or 10 times greater.” (Source: “An Examination of the Impact of California’s Three Strikes Law on African Americans and Latinos,” http://www.justicepolicy.org/uploads/justicepolicy/documents/04-10_tac_caracialdivide_ac-rd.pdf)
- 234 Today, twenty-nine states and the federal government have these laws. *They are:* Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. (Source: “Three Strikes Laws in Different States,” <https://www.legalmatch.com/law-library/article/three-strikes-laws-in-different-states.html>)
- 234 Three states (New Mexico, Connecticut, and Alaska) had 1, and three (Montana, Utah, and Virginia) had none at all. (Source: “Assessing the Impact of ‘Three Strikes’ Laws on Crime Rates and Prison Populations in California and Washington”; <http://www.inquiriesjournal>)

38 Notes

- .com/articles/696/assessing-the-impact-of-three-strikes-laws-on-crime-rates-and-prison-populations-in-california-and-washington)
- 235 A federal judge sentenced Rudolph to prison for two consecutive life terms. (Source: Department of Justice, https://www.justice.gov/archive/opa/pr/2005/July/05_crm_380.htm)
- 235 The next year, in 1997, Ali Hassan Abu Kamal shot seven visitors at the Empire State Building, killing one, after which, Mr. Kamal fatally shot himself. (Source: <https://www.apnews.com/5755085f43906a826e0774acc90356f4>)
- 235 From 1995 to 2016, there were 620 acts of domestic terrorism in the United States, resulting in 3,393 deaths. (Source: National Consortium for the Study of Terrorism and Responses to Terrorism; https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Nov2017.pdf)
- 235 Instead, the rate of decline remained constant. (Source: “Three Strikes Laws: A Real or Imagined Deterrent to Crime,” https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello/)
- 235 “States which have implemented three strikes laws have not experienced reductions in violent crime rates to any greater extent than those with no such legislation.” (Source: Chen, E. Y. [2008]. “Impacts of ‘Three Strikes and You’re Out’ on Crime trends in California and throughout the United States,” *Journal of Contemporary Criminal Justice*, Volume 24, Number 4, pg. 345–370, <https://core.ac.uk/download/pdf/72852348.pdf>; Kovandzic V., T. Sloan III, J. J., and Vieraitis, L. M. [2004], “‘Striking out’ as crime reduction policy: The impact of ‘three strikes’ laws on crime rates in U.S. cities,” *Justice Quarterly*, 21 (2), 207–239, <https://www.tandfonline.com/doi/abs/10.1080/07418820400095791>)
- 237 Missouri, on the other hand, requires lifetime registration for all sex offenders—no exceptions for anyone. (Source: Fifty State Survey of Adult Sex Offender Registration Requirements, <https://www.csom.org/pubs/50%20state%20survey%20adult%20registries.pdf>)
- 237 Three months before Mr. Lopez and Mr. Saenz entered my courtroom, the California Supreme Court decided the case of *People v. Franklin*. (Source: 20 Cal. 4th 249 [1999], <https://law.justia.com/cases/california/supreme-court/4th/20/249.html>)
- 238–239 After the California Supreme Court issued its *Franklin* decision, the state legislature quickly rewrote Section (f) to make it clear to convicted sex offenders that they must notify California authorities when they depart the state. (Source: <https://csumb.edu/police/registration-sex-offenders-penal-code-290>)
- 239 In 2018, California’s appellate courts ruled on 15,343 civil and criminal appeals. (Source: 2018 Court Statistics Report, <https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf>)
- 240 “Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.” (Source: California Penal Code, Section 203)
- 243 It wouldn’t have changed me the way the class did.” (Source: “Judges Stress Reform in Setting Creative Sentences,” *The Peninsula Times Tribune*, March 13, 1983.)
- 244 After pleading guilty, he walked out of the courtroom, having received no jail time. (Source: “Should Rape Victims Have to Spend Time in Jail for Not Testifying?” <https://www.motherjones.com/crime-justice/2019/04/should-rape-victims-have-to-spend-time-in-jail-for-not-testifying/>)

THE ART OF THE PLEA DEAL: THE PLEA BARGAIN DILEMMA

- 247 “So, too, overworked judges of the last quarter of the century turned to plea bargaining for relief from their out-of-control civil caseloads, because they had far greater power to coerce pleas on the criminal side than to induce settlements on the civil side.” (Source: George Fisher, *Plea Bargaining’s Triumph*, Redwood City, Calif.: Stanford University Press [2003], p. 123)
- 248 But it was not until 1970, in the case of *Brady v. United States*, that the U.S. Supreme Court officially sanctioned the practice. (Source: 397 US 742 [1970], <https://supreme.justia.com/cases/federal/us/397/742/#tab-opinion-1948533>)
- 248 “In the case before us, nothing in the record impeaches Brady’s plea or suggests that his admissions in open court were anything but the truth.” (Source: *Brady v. United States*, *supra* at 785–759.)
- 248 Today, defendants accept plea bargains and plead guilty in nearly 98 percent of criminal cases in federal and state courts, leaving just 2 percent of defendants whose fates are determined by jury verdicts. (Source: “Trial by Jury, a Hallowed American Right, Is Vanishing,” <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html>)
- 249 In 1970, the Supreme Court gave us its answer in the case of *North Carolina v. Alford*. (Source: *North Carolina v. Alford* [400 US 25 (1970)], <https://supreme.justia.com/cases/federal/us/400/25/#tab-opinion-1949071>)
- 249 A majority of the justices upheld Alford’s plea of guilty, finding that “an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence *even if he is unwilling or unable to admit his participation in the acts constituting the crime.*” (Emphasis added.) (Source: *North Carolina v. Alford* [400 US 25 (1970)], <https://supreme.justia.com/cases/federal/us/400/25/#tab-opinion-1949071>)
- 249 The U.S. Department of Justice, in 2000, noted that 17 percent of the 1.3 million women and men in our state prisons are there because of *Alford* pleas—that’s 221,000 people serving time for crimes they say they did not commit. (Source: https://en.wikipedia.org/wiki/List_of_U.S._states_by_Alford_plea_usage; “Mass Incarceration: The Whole Pie 2019,” <https://www.prisonpolicy.org/reports/pie2019.html>)
- 250 According to the National Registry of Exonerations, since 1989 there have been two thousand exonerations of defendants wrongfully convicted of serious crimes, including murder; *three hundred (15 percent) of them pled guilty to crimes they did not commit.* (Source: National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>)
- 250 But even if the percentage were just one percent of the 2.3 million inmates in state and federal prisons, that would mean more than twenty thousand defendants pled guilty when they were factually innocent. (Source: Jed S. Rakoff, “Why Innocent People Plead Guilty,” *The New York Review*, [11/20/2014 issue], <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>)
- 250 “The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.” (Source: *Missouri v. Frye*, 132 S. Ct.1399, 1407–08 [2012], <https://supreme.justia.com/cases/federal/us/566/134/#tab-opinion-1970401>)
- 250 But what is not in dispute is that for better or worse, “plea bargaining has not merely endured, but has grown to be the dominant institution of American criminal justice.” (Source: George Fisher, *Plea Bargaining’s Triumph*, 11.)
- 261 In June 1999, fifteen months before I sentenced Mr. Hill, the California Supreme Court had ruled in the case of *People v. Garcia* that a trial judge lawfully dismissed a strike in a case that

- was eerily similar to the facts of Mr. Hill's case. (Source: 21 Cal. 4th 1 [1999], <https://law.justia.com/cases/california/supreme-court/4th/20/490.html>)
- 263 Since 1989, 2,507 men and women who served a combined twenty-two thousand years in prison have been exonerated. One hundred fifty-six of those exonerees were sentenced to death. (Source: <https://www.law.umich.edu/special/exoneration/Pages/recentcases.aspx>)
- 263 To date, municipalities have forked out \$2.5 billion to settle claims brought by the wrongfully convicted, forcing some to consider bankruptcy. (Source: <https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html>)
- 263 In an email, a former prosecutor wrote that if all four did not accept the plea bargain, the state could “face exposure of tens of millions of dollars.” (Source: <https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html>)
- 264 However, in response, the city of Philadelphia successfully argued that because the plea bargain included a no contest plea, there was no affirmative finding of Mr. Dennis's innocence, and without that finding, his lawsuit could not proceed. (Source: <https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html>)

THE FIX: TEN SUGGESTIONS FOR REFORM

- 269 “These cases are very important to the parties who bring them, and it helps us to get some of our work done with no cost to the court.” (Source: “Class Offers Hands-On Approach to Judge Training—From the Bench,” by Michelle Guido, *The San Jose Mercury News*, February 9, 2001.)
- 271 “Outside spending by special interest groups—most of which do not disclose their donors—also shattered previous records.” (Source: <https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform>)
- 271 The nominating process should be open and transparent, with publicly available data about the diversity of applicants and nominees.” (Source: <https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform>)
- 274 Utilized in twenty-four states and the District of Columbia, initiatives allow citizens to place legislation and/or amendments to state constitutions on the ballot, allowing them to vote directly for their passage. (Source: <https://ballot.org/why-were-here/state-map/>)
- 276 As I noted in “Making a Murderer,” these eighteen states already require or allow jury trials for juveniles. *They are:* Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. (Source: “Juvenile Right to Jury Trial Chart,” National Juvenile Defender Center, <https://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf>)
- 277 However, in twenty-nine states trial judges still have the discretion to impose sentences of life without the possibility of parole on juvenile killers. (Source: <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>)
- 278 According to The Sentencing Project, “a 50-year sentence for a 16-year-old will cost approximately \$2.25 million.” (Source: <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>)
- 278 As U.S. Supreme Court associate justice Kennedy acknowledged in 2016, “allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sen-

- tence in violation of the 8th Amendment.” (Source: *Montgomery v. Louisiana*, 136 S. Ct. 718 [2016], <https://supreme.justia.com/cases/federal/us/577/14-280/#tab-opinion-3520320>)
- 279 In 1989, Justice Thurgood Marshall decried racial bias in peremptory challenges, writing that peremptories are “perhaps the greatest embarrassment in the administration of our criminal justice system[.]” (Source: *Wilkinson v. Texas*, 493 U.S. 924, 928 [1989], cited in “Peremptory Challenges at the Turn of the 19th Century,” by April J. Anderson, https://law.stanford.edu/wp-content/uploads/2020/02/Anderson_Final.pdf)
- 279 (*Batson v. Kentucky* was the 1986 landmark case in which the United States Supreme Court ruled that peremptory challenges must not be based on race.) (Source: <https://www.oyez.org/cases/1985/84-6263>)
- 279 Among the list of “race-neutral” excuses on which prosecutors could base their racially motivated peremptory challenges were “attire may show lack of respect for the system; rebelliousness,” “hairstyle may mean resistance to authority,” and “arms folded, air of defiance, lack of eye contact with Prosecutor, and obvious boredom.” (Source: <https://www.themarshallproject.org/documents/6245301-Batson-Robinson-Brief>)
- 280 In June 2020, the Supreme Court of North Carolina unanimously ruled that because one hundred death row inmates had filed their claims for review of their sentences *before* the act had been repealed, they can have their day in court to demonstrate why they should be re-sentenced to life without the possibility of parole. (Source: <https://time.com/5849203/north-carolina-death-row-surpeme-court-racism/>; <https://www.themarshallproject.org/2019/08/07/racism-tainted-their-trials-should-they-still-be-executed>)
- 281 Sure. But that’s why there are appellate justices to review and, when appropriate, correct improper rulings. Racial Justice Acts, like that one authored by Assemblyman Kalra and signed into law by California’s governor on September 30, 2020, have a chance to restore the peremptory challenge to a legitimate place in our criminal justice system. (Source: <https://deathpenaltyinfo.org/news/california-legislature-passes-racial-justice-package-affecting-death-penalty-practices>)
- 281 “It is not some adjunct to the criminal justice system; it is the criminal justice system.” (Source: “Innocence Is Irrelevant,” Emily Yoffe, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>)
- 282 If it became evident that plea bargaining was being used more broadly to create incentives for questionably guilty defendants to “falsely condemn themselves,” the entire institution of plea bargaining and its constitutionality would require reexamination. (Source: “<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1000&context=jclc>; *North Carolina v. Alford*, 400 U.S. 25 [1970])
- 282 Today, *Alford* pleas—utilized in every state, with the exceptions of Indiana, Michigan, and New Jersey—play a major role in plea bargains. They allow defendants to plead guilty while, at the same time, declaring their innocence. (Source: <https://www.hg.org/legal-articles/alford-plea-what-is-it-and-which-states-use-it-49755>)
- 283 This study, published in 2013, strongly suggests that plea bargaining’s innocence problem is not an exaggeration. (Source: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1000&context=jclc>)

IN MY END IS MY BEGINNING

- 289 “Is it any wonder why they have taken to the streets to demand that it does?” (Source: https://www.lasc.org/press_room/press_releases/2020/2020-18_Justice_for_All_in_Louisiana.pdf)

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