NOT ON MY WATCH: ONE JUDGE'S MANTRA TO ENSURE ACCESS TO JUSTICE

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ABSTRACT

The common thread throughout the varied work of our country's courts is allegiance to the principle of due process of law. It is the polestar in all cases, from small-claims to the most complex. Judges armed with constitutional purpose manage the angles of due process in cases before them every day. The focus that takes, and the pause it entails, are difficult to marshal in a courthouse dynamic in which efficiencies drive rapid results and the trial judge's attention is drawn in many directions. Judges must be oriented to the big-picture responsibilities they bear to deliver due process in the courts and to practice a discipline that makes justice real in each case, each day.

Similarly, lawyers would be well-served by broadened training on the seminal spot for fairness in all court proceedings and on the judiciary's obligation to ensure access to justice through enforcement of due process. In that manner, lawyers may better appreciate how their own roles relate to the overall mission of the courts and how they can reach a new level of confidence as an officer of the court.

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I. INTRODUCTION: A MATTER OF JUDGMENT

In modern culture, we acknowledge those "Aha!" moments—the Eureka Effect—when something that might have been obvious, all at once makes sense.[1] Many such epiphanies in the law have occurred for me as I explain the process of the courts to law students, courtroom visitors, and jurors. It's not that one is oblivious to the interplay of law and sociology that takes place in the courts. Rather, in the rush of the daily administration of justice—with crowded dockets, logistical challenges, wrenching issues, and emergency-room humanity—the legal triage narrows one's attention to the issues of the moment. In this emergency-room whirl, focus on the big picture is reserved for a quieter day.

It should be no surprise that being a teacher by instinct and training has made me a much better lawyer and judge.[2] Just as a classroom teacher imparts insight to a student, that very act of explaining a process or a purpose bestows broadened understanding and heightened reasoning to the teacher as well. So it has been both humbling and exhilarating to learn more every time I help others grasp the import of the United States' rule of law[3] and our treasured right to due process of law.[4] Like all trial judges, a lot happens on my watch.

The large concept of justice is delivered every day in our country's courtrooms. Most people take that for granted; they are lulled by the

1. *See* DAVID PERKINS, THE EUREKA EFFECT: THE ART AND LOGIC OF BREAKTHROUGH THINKING (2001).

2. The Author trained to be a teacher at Iowa Wesleyan College in Mt. Pleasant, Iowa, where she graduated with a major in English, and with minors in French, Mass Communications, and Theater Arts, and was certified to teach at the secondary level. As her law career developed, Judge Scieszinski put those teaching credentials to work and has, for years, been involved in leading lawyer and judicial education. *See District Eight: Judges and Magistrates*, IOWA JUD. BRANCH (2013), http://www.iowacourts.gov/District_Courts/District_Eight/Judges_and_Magistrates/. She is a frequent speaker on topics of legal and judicial ethics and routinely participates in judicial outreach to the statewide community, its schools, colleges, and law schools. *See id.*

3. *See* BLACK'S LAW DICTIONARY 1448 (9th ed. 2009) (defining the "rule of law" as "[t]he supremacy of regular as opposed to arbitrary power . . . . The doctrine that every person is subject to the ordinary law within the jurisdiction").

4. *See* U.S. CONST. amends. V, XIV, § 1; BLACK'S LAW DICTIONARY, *supra* note 3, at 575 (defining "due process" as "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case").

enduring nature of our nation's government, and they assume that fairness and justice are transactional—a transactional commodity, or a *quid pro quo* as lawyers would say in legalese.[5] If that were the case, of course, justice could be vended like a candy bar, or a sophisticated kiosk could flash a decision upon facts that a computerized questionnaire gathered. Complicated it is: resolving the conflicts that arise in the human dynamic requires an exercise of judgment, typically judge-rendered, regardless of whether the answer turns on a dispute of fact (i.e., what evidence is believable?), mixed questions of fact and law (i.e., what actually happened and what law applies in that situation?), or issues of law (i.e., the facts are established, but what is the operation of law?). Moreover, judges shoulder responsibility to ensure a fair process, so that those seeking justice can actually get it.

In the realm of accessing justice, much attention is appropriately focused on funding. The public's need for counsel in tending to legal problems is unquestioned, but with few resources, finding a way to pay for the services is daunting.[6] Similarly, the judiciary historically suffers difficulties in securing fiscal appropriations necessary for courts to keep pace with the burgeoning demand for services.[7] These are real problems

5. BLACK'S LAW DICTIONARY, *supra* note 3, at 1367 ("[Latin 'something for something'] . . . An action or thing exchanged for another . . . .").

6. *See, e.g.*, Brandi Grissom, *Supreme Court Justices Plead for Legal Aid Dollars*, TEX. TRIB. (June 2, 2011), http://www.texastribune.org/2011/06/02/supreme-court-justices-plead-legal-aid-dollars/ ("Texas Supreme Court [justices] sent lawmakers a letter Wednesday urging them to find $20 million during the special session to help needy people access civil courts. 'The civil justice system is where people can claim for themselves the benefits of the rule of law. It is where the promises of the rule of law become real,' they wrote in a letter to state Sen. Royce West, D-Dallas. A society that denies access to the courts for the least among us denigrates the law for us all." (quoting letters drafted by Texas Supreme Court Justice Wallace Jefferson and Justice Nathan Hecht) (internal quotation marks omitted)).

7. *See, e.g.*, Honorable Mark S. Cady, Chief Justice of the Iowa Supreme Court, State of the Judiciary 6 (Jan. 11, 2012), *available at* http://www.iowacourts.gov/wfdata/files/StateofJudiciary/2012/Webspeech.pdf ("Yet, while we have faced budget cuts year after year, resulting in a workforce smaller than we had 24 years ago, our workload has increased dramatically. During this 24-year period, the number of cases filed with our courts, excluding simple misdemeanors and traffic violations, has increased 50%. During this same time, the Code of Iowa has increased in size by 79%. A recent report of the Legislative Service Agency of this state revealed that we have cut our full-time workforce 16.5% since 2003, while the workforce in state government as a whole has grown 1.6%. . . . [T]he months and months of cuts have turned to years and years of cuts, and those years have now stretched into a decade."); Carrie Johnson, *Chief Justice John Roberts on Fiscal Woes: Don't Look at Us*, NPR (Dec. 31, 2012),

calling for people's attention through their elected leaders in the executive and legislative branches of government. Beyond the challenges of money, there is a hurdle in the level of awareness about the access-to-justice issues that pop up on the daily docket.

Then, there is the challenge of the lingo. Banter about "due process," even in the public lexicon, is commonplace.[8] People have the concept rightly elevated; they know, basically, that people in the United States have a constitutional right to fair application of the law. Beyond that notion, however, few can articulate how it works in real life. Due process is a term of art born long before the U.S. Constitution[9] that our country's founders saw as a polestar for the governmental model they birthed.[10] It is largely rooted in the Bill of Rights' Fifth Amendment, and later extended to the workings of state government in the 1868 addition of the Fourteenth Amendment and its often cited Equal Protection Clause.[11] Folks schooled in the law would recognize that these embodiments of due process basically proscribe unfair and arbitrary treatment of the people. Now, with more than 200 years of national life experience and bountiful study, due-process principles are recognized in legal circles as having both substantive and procedural dimensions.[12] Academic and judicial analyses of due-process protections are legion and profound, but not without spirited controversy that is sometimes laced into public-policy debates on the public square and in the Legislative and Executive Branches.

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http://www.npr.org/blogs/itsallpolitics/2012/12/31/168369010/chief-justice-john-roberts-on-fiscal-woes-dont-look-at-us (reporting Chief Justice of the United States Supreme Court John Roberts' concern that continued budget cuts will result in a reduction of the quality of federal judicial services).

8. *See, e.g.*, Frank James, *Death by Drone, and the Sliding Scale of Presidential Power*, NPR (Feb. 8, 2013), http://www.npr.org/blogs/itsallpolitics/2013/02/08/171467519/death-by-drone-and-the-sliding-scale-of-presidential-power (implicating "due process" in contemporary political discussion of drone use and American citizens).

9. *See generally* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law, Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009) (discussing the history of the Magna Carta and its roots in due process).

10. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 985–86 ("As the time for drafting a federal constitution approached, the question of fundamental law," and the idea of due process of law, "had become a live public issue." (footnotes omitted)).

11. U.S. CONST. amends. V & XIV; *see also* Riggs, *supra* note 10, at 984–87 (discussing the history of due process in the United States).

12. 16C C.J.S. *Constitutional Law* § 1505 (2012).

The concept of due process, both substantive and procedural, is the topic of reported legal decisions nationwide, which guide application and understanding of due-process principles in courtrooms across our country.[13] High-profile cases all start somewhere—being, as they are, situations as varied as the United States' terrain, as diverse as its people, and as unpredictable as its crises. The theater of these controversies is bred of a peculiar grievance, operation of a court forum of some type, and interplay of humans—be they the aggrieved, the accused, the advocates, the judge, the jurors, the witnesses, the observers, or the greater community of constituents. This is the context that I work in daily—the arena where rights are made real.

In a pragmatic way, the impact of due-process guarantees is on the shoulders of, and subject to, the sensibilities of the people in the moment. This set-up makes due process fundamentally situational, allowing it to turn on the specifics of the situation. It becomes a matter of judgment about what factors prevail upon the court function of the day because this assembly of variables has never before been precisely played out. That is the uniqueness of the trial court, where decisions must be made quickly. It stands to reason that we have trained, thinking human beings in the role of meting out justice rather than a kiosk of buttons to push for a vended result.

To prepare lawyers for this reality, law schools teach an analytical rubric: a method of identifying and assessing issues to advocate for client interests and to persuade courts to rule in their favor. The goal is to teach students to "think like a lawyer." While such skill stands as an important building block for the problem-solving and adversary roles law schools envision for their graduates, the method has its bearings in black-letter law and case precedent that, by nature, are limiting on the perspective of lawyers. Lawyers who then become judges are at risk of thinking parochially about client desires and needs, with fewer resources left for viewing the big picture of access to justice. Add to that the pressures of time; lawyers and judges alike are often confronted with particularized circumstances popping up without lead time to permit studied thought, or to peg the issue as one of first impression to be fully briefed. In the real-

13. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 544–45 (1977) (outlining due process threshold requirements for attacks on legislation); McKinney v. Pate, 20 F.3d 1550, 1556–57 (11th Cir. 1994) (explaining the requirements for substantive due process protections); State v. Hernandez-Lopez, 639 N.W.2d 226, 241 (Iowa 2002) (explaining how specific procedural safeguards have been adopted to ensure procedural due process).

time work of the trial courts, lawyers often leave it up to judges to make sure the court process is fair.

Despite the fundamental importance of a fair process, surprisingly little training addresses the broad realm of access-to-justice issues. Even judges can sit without orientation to their responsibilities to be proactive to ensure access, astute to the role of proper judicial discretion, and committed to keeping the vigil on fairness. Tight court budgets drive staffing cutbacks on the front line, such as in availability of court attendants and others historically on the ground to assist judges in the process of the daily dockets.[14] It may be thought of as just the routine business of the courts, but the resource deficit is, arguably, most acute in the arena of assuring access to justice as it plays out in that routine.

II. PROCESS AS KEY TO ACCESS

The United States' sense of identity is peppered with concepts of justice. People use the phrase "day in court" as bespeaking a thousand words about the process that delivers atonement—a full chance at justice when someone is aggrieved.[15] More particularly, people see their day in court as encompassing a variety of functions: notice to appear, the opportunity to defend rights, a forum for relief, and a method to assert claims.[16] The layperson's "day in court" takes on stature as "due process" in constitutional jargon.

When judges do their work as operatives of the court, in searching for the truth, making findings of fact, and applying the law for a result, they necessarily employ the process entitled to the people. Indeed, much of the

14. *See, e.g.*, *Court Announces Further Services Cuts*, DAILY J., (Jan. 31, 2013), http://smdailyjournal.com/article_preview.php?type=lnews&title=Court%20announces%20further%20services%20cuts&id=1762425; Linda Deutsch, *Judges Say Courts Under Siege from Budget Cuts*, ORANGE COUNTY REG. (Jan. 20, 2013), http://www.ocregister.com/articles/court-388184-courts-budget.html; Maura Dolan & Victoria Kim, *Budget Cuts to Worsen California Court Delays, Officials Say*, L.A. TIMES (July 20, 2011), http://articles.latimes.com/2011/jul/20/local/la-me-0720-court-cuts-20110720; Ann McGlynn, *Iowa Courts to Close 10 Days to Cut Budget*, QUAD-CITY TIMES (Nov. 10, 2009), http://qctimes.com/news/local/crime-and-courts/iowa-courts-to-close-days-to-cut-budget/article_379b0bd6-ce1a-11de-b273-001cc4c002e0.html; Lynda Waddington, *Judicial Budget Cuts Continue to Negatively Impact Ordinary Iowans*, IOWA INDEP. (Jan. 12, 2011), http://iowaindependent.com/50571/judicial-budget-cuts-continue-to-negatively-impact-ordinary-iowans.

15. WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 144 (Brian Burton, ed., 4th ed. 2007).

16. 4 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 17 (1998).

activity of the court involves the logistics of notice, opportunity, forum, and hearing—procedural safeguards to make the court exercise one of integrity—both legal and fair. Governmental action without fairness in the process does not accord the people what is "due" them according to the Constitution.

It may be said that the process is everything—both a foundation for a court's discovery of truth and an application of the law to it. Traditionally, judges and lawyers organize and analyze rulings as findings of fact and conclusions of law.[17] The important process of getting there is often an unspoken assumption. Perhaps that is less of an oversight and more of a symptom of the premise that the process due to the people is a "central promise" of the Constitution, "an assurance that all levels of American government [will] operate within the law . . . and provide fair procedures."[18]

Key to delivery of due process is the inherent right of the people to access the justice system. While many shoulder responsibility to ensure that justice reaches the people—the legislators who hold the public purse strings and pass the laws; the Executive Branch charged with public protection through regulations, law enforcement, and prosecution; and the public who vote for leaders—judges stand front and center in preserving the peoples' rights in the Judicial Branch. That reality falls victim to a number of forces at play in the daily travails of the jurist. The press of emergent business on the bench leaves little time to catch access barriers in real time, and it interrupts the focus necessary to appreciate justice impediments for what they are. The inertia of routine business can desensitize judicial officers to mundane circumstances that sometimes implicate weighty questions about denial of access to judicial services. Moreover, initiatives to proactively confront these issues may be discouraged by institutional worries that direct or indirect financial costs will be triggered.[19] Many judges fret that by insisting on accommodations to yield a fair process, they will be deemed "activist" by the public for making unpopular rulings. And, frankly, many judges just see the role of

17. *See, e.g.*, IOWA R. CIV. P. 1.904(1) (requiring a court deciding an issue of fact without a jury to provide a written ruling organized into findings of fact and conclusions of the law).

18. Peter Strauss, *Due Process*, CORNELL U. L. SCH. LEGAL INFO. INST., www.law.cornell.edu/wex/due_process (last visited Apr. 5, 2013) (noting that "[a] commitment to legality is at the heart of all advanced legal systems, and the Due Process Clause [is] often thought to embody that commitment").

19. *See supra* notes 6–7 and accompanying text.

advocating for access to justice as more properly in the professional domain of lawyers; often judges relegate their job description as one of an umpire, calling the pitches.[20]

Insistence on fair process comes at a cost that often exceeds the human resources allocated to the courts. Budget-strapped courts increasingly rely on advocates (i.e., the lawyers) to drive the progress of cases, to not only bring forward the law that applies and present issues requiring judicial ruling, but to be the gatekeeper on the fairness of the process. Despite the professional obligations of lawyers to be candid with the tribunal,[21] the court trades the integrity of its standard for what the lawyers notice, what they decide they must raise, and what they believe fits best within client strategies. It is questionable, too, whether lawyers are even cognizant of the reliance some courts place upon them to voice complaint, or to sound an alert, about gaps in the due process being afforded to the people in the case they are working.

The legal culture also discourages judges from raising issues that clients or their representatives do not otherwise bring forward. Lawyers, in particular, develop litigation theories, plans, and strategies, and they prefer to control those aspects of their cases. While judges would agree that counsel should be accorded discretion in framing the legal issues and articulating the basis for their clients' claims, the line between that advocacy function and the fair-process responsibility incumbent upon the court can be indistinct, and subject to debate.[22] For example, some attorneys who are conscientious about the importance of fair process for a durable result on appeal will welcome a judge's identification of a due-process question and the judge's act of raising it. That same judicial action, though, could prompt criticism from other lawyers who place priority on their control of the issues in the trial stage and their calculated push to a desired outcome.

20. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf ("[I]t's my job to call balls and strikes, and not to pitch or bat.").

21. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009); IOWA R. OF PROF'L CONDUCT R. 32:3.3 (2005).

22. *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 853 (2004) ("Lawyers seek to frame issues in a manner helpful to their case," but "the Court determines how to define the issue it addresses in its opinion." (footnotes omitted)).

Attorney disgruntlement with the scope of authority that a judge exercises rarely surfaces in a courtroom record. Rather, this type of feedback takes its charge in informal anecdotal reviews that, in the end, appear in local legal culture. Absent perspective about the judge's call to be independent and ensure due process, lawyers may characterize judicial protection of the fairness of the forum as an overstepping of the bounds of judicial authority. Thus, judges who introduce fairness issues may suffer pushback from a legal culture that prefers a passive judiciary that will speak on issues of due process only when spoken to about them first.

Particularly in cases that feature self-represented litigants, a judge's inquiry into fairness matters may breed consternation in the lawyer-advocates on the other side. Pro se litigants are typically unschooled in the process of bringing forward evidence, examining witnesses, or articulating which procedure or substantive law applies.[23] It is understandable that folks with legal representation see their heightened preparation, insight into court process, and knowledge of the law as a rightful advantage. The evolving bench-bar debate over legal, procedural, and professional dynamics in these cases highlights the ethical and political perils confronting judges who work files with self-represented parties. While judicial officers are duty-bound to ensure people the right to be heard, judges are likewise duty-driven to show no favoritism.[24] Recognizing the need for clear guidance on what judges may properly broach in these situations, the Iowa Supreme Court inserted commentary on the topic in its 2010 revision to the Iowa Code of Judicial Conduct.[25]

23. *See, e.g.*, Irvin v. City of Clarksville, 767 S.W.2d 649, 651–52 (Tenn. Ct. App. 1988) ("Conducting a trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice can be difficult. On one hand, a trial judge must accommodate the pro se litigant's legal naivete, and, on the other hand, [the judge] must not allow the pro se litigant an unfair advantage . . . ."); *see also* Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, JUDICATURE, July 1998, at 13 (discussing the phenomenon of pro se litigants and detailing the response of the judiciary).

24. *See generally* Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants*, 28 JUST. SYS. J. 324 (2007) (highlighting the dilemma facing courts of providing a fair proceeding to pro se litigants without appearing partial); Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2007) (discussing how, despite procedures in place to make courts more accessible to pro se litigants, it is the trial court judge who must figure out how to handle the pro se litigant's lack of representation).

25. Drafters of the Model Code of Judicial Conduct's Rule 2.2 acknowledged the issue of a judge's attention to fairness when dealing with unrepresented parties by

III. RESPONSIBILITY VESTED IN COURTS

It is clear that judges bear the responsibility to ensure the fairness of the court process, sua sponte.[26] They take an oath to support the constitution, the genesis of the fair process due to the people.[27] It is an ethical maxim for judges to deliver a forum of integrity aligned with the law, and with impartiality and independence.[28] Virtually all planks of due process rely on judicial implementation or enforcement.

A judge presides by conducting a proceeding; therefore, in

including Comment 4, which states that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2010).

The Iowa Supreme Court, in delineating the ethical parameters for Iowa judges, expanded upon the Model Code of Judicial Conduct's guidance in Comment 4 to its Rule 51:2.2 on Impartiality and Fairness:

> It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. By way of illustration, a judge may: (1) provide brief information about the proceeding; (2) provide information about evidentiary and foundational requirements; (3) modify the traditional order of taking evidence; (4) refrain from using legal jargon; (5) explain the basis for a ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case.

IOWA CODE OF JUDICIAL CONDUCT R. 51:2.2 cmt. 4 (2010).

26. BLACK'S LAW DICTIONARY, *supra* note 3, at 1560 (meaning without providing prompting or a suggestion).

27. Iowa judges, for example, qualify for office by subscribing to an oath that they will "[s]upport the Constitution of the United States and the Constitution of the State of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor." IOWA CODE § 63.6 (2011).

28. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.1, 1.2 (requiring judges to comply with law and promote public confidence through independence, integrity, and impartiality, and to avoid impropriety and appearance of impropriety). The Iowa Supreme Court adopted these tenets, as have many other jurisdictions. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:1.1, 51:1.2; AM. BAR ASS'N, CPR POLICY IMPLEMENTATION COMMITTEE: COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS, RULE 1.1 COMPLIANCE WITH THE LAW (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1_1.authcheckdam.pdf; AM. BAR ASS'N, CPR POLICY IMPLEMENTATION COMMITTEE: COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS, RULE 1.2 IMPARTIALITY AND FAIRNESS PROMOTING CONFIDENCE IN THE JUDICIARY (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1_2.authcheckdam.pdf.

guaranteeing a person's right to be heard, the judge must make sure notice of the proceeding was provided, reasonable opportunity to appear and communicate a position was afforded, and that participation was meaningful.[29] Judges are expected to confront barriers and to sponsor a forum assuring justice for all. Notably, difficult situations confront a judge, such as reining in behaviors that implicate bias, prejudice, or harassment,[30] acknowledging evidence of colleague disability and impairment, or

29. The Model Code of Judicial Conduct instructs on the judge's duty to uphold and apply the law, and to perform fairly and impartially, allowing every person with a legal interest, the "right to be heard according to law." MODEL CODE OF JUDICIAL CONDUCT R. 2.2, 2.6(A). Iowa rules mirror these provisions. IOWA CODE OF JUDICIAL CONDUCT R. 51:2.2, 51:2.6(A).

30. Under the Model Code of Judicial Conduct, judges must not only perform without bias or prejudice, and without engaging in harassment, but they must also "require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment." MODEL CODE OF JUDICIAL CONDUCT R. 2.3. Iowa adopted the ABA's full recommendation:

> Rule 51:2.3. Bias, prejudice, and harassment
>
> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3. Rule 51:2.12, modeled after the American Bar Association's model rules as well, spells out the judge's unmistakable responsibility to supervise and act without invitation:

> Rule 51:2.12. Supervisory duties.
>
> (A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under the Iowa Code of Judicial Conduct.

IOWA CODE OF JUDICIAL CONDUCT R. 51:2.12; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.12.

confronting episodes of lawyer or judge misconduct.[31]

Similarly, when an obstruction to justice is the absence of public resources required to deliver proper court processes, judges bear responsibility to diligently pursue necessary support.[32] Protecting the sanctity of the courts as a place and method for achieving justice requires that judges proactively reach out to the public for support by aiding in forming an accurate understanding of the work of the court system and inspiring trust and confidence in its mission.[33]

IV. JUDICIAL LEADERSHIP AND THE LAY OF THE LAND

While the ethical principles requiring judicial leadership for access to justice are clear, the devil is in the details of daily judicial work. Clogged dockets and the overbooking of judges—a contemporary par for many courts—presents a double-edged sword.[34] A consistent crush of work pushes court systems to streamline procedures, abbreviate functions, and cut out unproductive habits. Granted, the innovations yield assembly-line efficiency in the handling of large numbers of files, but it comes at a price that fails to respect the peculiarities of individuals' legal claims. Funneling cases rapidly with a robotic process largely involves conforming them to formatted results, with little margin of time or focus to spot gaps in due

31. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.14, 2.15. Iowa rules mirror these provisions, although the Iowa Supreme Court added guidance to accommodate participation in approved assistance programs for judges or lawyers. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.14, 51:2.15.

32. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmt. 2 (requiring judges to seek "necessary docket time, court staff, expertise, and resources to discharge" responsibilities). Iowa rules mirror this objective. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.5 cmt. 2.

33. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 6 ("A judge should initiate and participate in community outreach . . . ."); *id.* at R. 2.1 cmt. 2 ("[J]udges are encouraged to participate in activities that promote public understanding of and confidence in the judicial system."). Iowa rules contain these provisions. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:1.2 cmt. 6, 51:2.1 cmt. 2.

34. *See* Stephanie Taylor, *Court System Backlog Can Cause 3-Year Delay for Trials*, TUSCALOOSA NEWS (June 12, 2010), http://www.tuscaloosanews.com/article/20100612/news/100619922?p=1&tc=pg; Amanda Terkel, *Liberty and Justice for Some: State Budget Cuts Imperil Americans' Access to Courts*, HUFFINGTON POST (Oct. 2, 2011), http://www.huffingtonpost.com/2011/08/02/state-budget-cuts-access-courts_n_898190.html; Karen Weise, *U.S. Courts Face Backlogs and Layoffs*, BLOOMBERG BUSINESSWEEK (Apr. 28, 2011), http://www.businessweek.com/magazine/content/11_19/b4227024878939.htm.

process.[35] While it is difficult to criticize promptness and efficacy in government, when court volume substantially outpaces resources,[36] fairness is imperiled as the system tries to adapt by pushing it all through outgrown human infrastructure.

The very judicial culture is affected as well. Judges swamped with unmanageable caseloads are molded to a new normal. There is an attitudinal shift in the balance that threatens to transfer administrative and adjudicative priorities from the merits of individual claims, to broad case-closed numbers. "Get 'er done" becomes the theme of the day in addressing seemingly routine matters on docket calls. Pressure to make expedition the goal is not only institutional in the procedures adopted, but customer-driven through widespread acquiescence. Lawyers develop work styles that incorporate shortcuts that are seen as benign in the context of the moment, and a complicity of silence overtakes unrepresented parties who do not know the toll of the trade-off or realize that any due-process sacrifice is being exacted. Production-line resolutions usher in a lowered level of attention, indeed a lowered expectation, making justice for a case that does not fit neatly in the line's machinery difficult, if not unreachable. Judges walk a fine line in keeping large numbers of cases moving, while still attempting to minister to the specifics each presents and to the need to ensure a fair and due process.[37]

On another front, the high volume of cases being filed produces yet a different kind of threat to courts inadequately equipped to handle the demand. Limited space on trial calendars fosters postponements and rescheduling, driving up costs for the aggrieved seeking relief in the courts.[38] Delay in justice is, in some measure, a denial of justice.[39]

35. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmt. 1 (stating that judicial competence includes "legal knowledge, skill, thoroughness, and preparation"). Iowa rules mirror these provisions. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.5.

36. *See* Kyle Cheney, *Work Backlog Causes Courts to Cut Hours: Gives Staff Time for Pending Cases*, BOSTON.COM (Sept. 7, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/09/07/courts_plan_to_reduce_office_hours_to_catch_up_on_publics_business/; Joseph Ax, *Budget Cuts Causing Delays, Crowding in NY Courts, Witnesses Say*, THOMSON REUTERS NEWS & INSIGHT (Dec. 2, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Budget_cuts_causing_delays,_crowding_in_NY_courts,_witnesses_say/.

37. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmt. 4 ("In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay."). Iowa rules are the same. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.5 cmt. 4.

38. *See* Terkel, *supra* note 34.

With the dichotomy of assembly-line dockets' inattentiveness to detail, and delay-plagued trial lists, there is little political support for judges to slow things down to confront access-to-justice problems. Prevailing legal culture reflects a preference for the model in which trained legal counsel represent disputants in court.[40] So it is understandable that in that ethos, the practicing bar may experience frustration in dealing with parties who choose not to have a lawyer or are shuttled into a pro se status through inability to pay attorney fees.

Pro se adversaries present a challenge for a variety of reasons. Attorneys have grown leery of practical pitfalls in communicating with people who are unschooled in the law and its services. Sometimes self-represented parties are unresponsive or present as hostile and unpredictable, and professional ethics issues are implicated.[41] It is with this backdrop then, that the bar may bristle when a judge intervenes to examine aspects of fairness in a pro se case, such as raising questions about adequacy of notice of the hearing. Perhaps the lawyer for the adverse party misinterprets the court's motivation. For, while the judge is taking steps to comply with the expectations of the oath of office and ethical mandates, it may appear that the effort is to aid the advocacy of the underdog. Quality-control for the forum through a judge's independent monitor is not universally appreciated.

Clearly, judges must observe the line between reasonable accommodations to ensure opportunity for the fair hearing of matters, and offering legal assistance for parties who come to court unprepared, ignorant of procedural requisites, armed with poor strategy, or without

39. The legal maxim, "justice delayed is justice denied" is often attributed to William Gladstone (1809–1898), a British statesman and prime minister. *See* Geo. Walter Brewing Co. v. Henseleit, 132 N.W. 631, 632 (Wis. 1911) ("Gladstone has truly said: When the case is proved, and the hour is come, justice delayed is justice denied." (quoting William Gladstone) (internal quotation marks omitted)); ROBERTO ARON ET AL., TRIAL COMMUNICATIONS SKILLS § 24:8 (2d ed. 2012). *But see* Martel v. Cnty. of L.A., 56 F.3d 993, 1003 (9th Cir. 1995) (en banc) (Kleinfeld, J., dissenting) (attributing the quote to Roscoe Pound).

40. *See, e.g.*, Kay v. Ehrler, 499 U.S. 432, 437–48 (1991) (discussing preference for fee-shifting rules that incentivize pro se litigants to obtain counsel); Fritzsche v. Scott Cnty., No. 09-0860, 2010 WL 2383913, at *3 (Iowa Ct. App. June 16, 2010) (denying right to attorney's fees to pro se litigants in favor of represented parties).

41. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(2), 4.3 (2002); IOWA R. OF PROF'L CONDUCT R. 32:1.8(h)(2), 4.3 (2005) (addressing the responsibilities of a lawyer when dealing with an unrepresented person).

representation. Modern ethical expectations for judges place the duty to be the standard bearer directly on the bench. To the extent that judicial assertiveness about fairness parameters is unaccepted by lawyers, judges must also step up to educate the legal community about the calling of the court to ensure access to justice, and they must address the types of steps inside the courthouse that are necessary to bring that premise to life.

V. ROLE STUDIES FOR THE JUDGE

On a daily basis, trial courts are confronted with due-process issues requiring a conscientious, proactive approach. Making the accommodations necessary to deliver due process often requires a judge to do something that may take time, be inconvenient for the judge or others, generate expense for the court system or others, or be controversial among people involved in political and policy debates. Judges must be prepared to play a pivotal role in supporting the constitution even when faced with inadequate resources, a reluctant legal culture, potential for public clamor, or risk of political reprisal.

A. *Confronting a Fear Factor*

A judge who insists on language assistance for parties or witnesses in court proceedings, sometimes must do that when others—the lawyers involved and even the party needing assistance—are willing to skip the step for expediency (not having to slow the proceedings down to go through the steps of interpretation), convenience (not having to delay a hearing to allow an interpreter to be located), cost containment (averting the public outlay of funding, or a party's personal desire not to be assigned to reimburse the government for such service), or staying under the radar (averting notice by special-interest groups who may criticize judicial officers for constitutional accommodations they do not like).[42]

The need for judicial fortitude is illustrated in a modern scenario in which judges are called upon to act with objectivity to ensure language aid to non-English-speaking, undocumented, indigent criminal defendants.[43]

42. *See generally* Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 272–74 (1996) (explaining the necessity of judicial examination before the waiver of a court interpreter should be accepted).

43. *See, e.g.*, IOWA CODE §§ 622A.2–.3 (2011) (requiring an interpreter for every person who cannot speak or understand English, and without up-front expense to an indigent person); *see also* IOWA CT. R. 47.2 (noting that "[w]henever the court learns the services of an interpreter are reasonably necessary," the "court shall enter an

Public rebuke may well be in the balance when these decisions are made due to the heightened political posture of immigration issues, lack of civic information about the constitutional foundation for court workings, or sheer misinformation about the judge's role in making sure that court participants know what is going on.

Statutory and rule-made law grounded in due-process mandates the language accommodation so that a party or witness can communicate and understand what transpires in a court proceeding.[44] Judges must insist upon interpreter competency, require more than one interpreter for complex matters, and pass over volunteers from the defendant's family or social circle because they fail to meet all the criteria—especially the element of independence.[45] Public furor over the cost or policy involved in providing interpreters shall not trump operation of a fair process. When judges are called upon to act on matters with roiling public debate, they must be prepared to weather unpopularity as they deliver on their oath to support the constitution[46] and act without fear of reprisal.[47] A judge cannot discourage use of interpreter services when they are needed, refrain from handling the case, overlook the duty to appoint to garner financial savings to the government, exercise a philosophical aversion to the accommodation, or act out of personal desire to please the public.[48]

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order appointing the interpreter").

44. *See* Grabau & Gibbons, *supra* note 42, at 239–65 (discussing the constitutional right to an interpreter).

45. *See id.* at 255–60, 296.

46. *See, e.g.*, IOWA CONST. art. XI, § 5 ("Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of [Iowa], and also an oath of office.").

47. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (2010). Comment 1 of this Rule illustrates what is at stake:

> An independent judiciary requires that judges decide [issues] according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Id. at cmt. 1.

Iowa rules require the same performance from its judges as demanded in the Model Code of Judicial Conduct. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.4 & cmt. 1 (2010).

48. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.7. Comment 1 presents the problem:

B. *Taking a Stand for Fairness*

Trial judges working general-jurisdiction dockets are often confronted with unrepresented parties, who are in need of legal counsel, but do not have it. While people enjoy a constitutional right to represent themselves[49] and they readily wield a free will, what was once a phenomenon of isolated pro se parties appearing in court, is now common.[50] People often show up without lawyers for reasons as diverse as the individuals themselves: lack of money to hire a lawyer; refusal to expend the funds required for professional help; procrastination in making arrangements; strategy to stall case progress; and holding a belief that they can handle it themselves.[51] The occurrence of self-represented litigants introduces a new level of responsibility for the judge in assessing the bounds of a due and fair process.

The trial judge must approach the self-represented litigant with a

> The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Id. at cmt. 1.

The Iowa rule on a judge's duty to handle cases is the same. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.7 & cmt. 1.

49. *See* Faretta v. California, 422 U.S. 806, 819–20 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." (footnote omitted)); State v. Martin, 608 N.W.2d 445, 450 (Iowa 2000) (recognizing a litigant's right to self-represent, but noting that, in criminal cases, a judge must first obtain a valid waiver before the litigant proceeds pro se).

50. *See* Goldschmidt, *supra* note 23, at 14 (showing significant statistical increases in pro se litigation in both state and federal courts); Beverly W. Snukals & Glen H. Sturtevant, Jr., Essay, *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 U. RICH. L. REV. 93, 93, 100–05 (2007) (discussing the rise in pro se litigants and detailing the judge's role in addressing the special challenges created by the increase); *see generally* Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821 (1997) (providing a case study on the makeup of pro se litigants in one California court).

51. *See* Snukals & Sturtevant, *supra* note 50, at 99–100.

careful eye toward compliance with due-process requirements, whether or not that litigant requests help, and without regard to whether an adverse party likes it or public political support would endorse it.[52] The exercise of this judicial duty pits the judge against momentum present in many prosecutions of pro se parties. While the judge implements a constitutional mandate of fairness, to the uninformed observer, it might appear that the judge is acting in the interest of defending the accused.[53]

For example, contempt targets—those litigants summoned into court in a quasi-criminal contempt proceeding under an allegation that they willfully failed to comply with a court order—are generally entitled to have an attorney appointed at state expense if they cannot afford to hire one.[54] The judge bears a due-process responsibility to make certain that the respondent knows of the right to counsel, has had a reasonable opportunity to secure aid, and is informed that if unable to afford one, an attorney will be made available at public expense.[55] Judges are often invited to overlook this responsibility on the prosecutorial promise that no jail time will be sought, or upon a casual waiver of the protection by folks in a hurry to get out of the courthouse. Nevertheless, it remains incumbent upon the judge to recognize the true character of the contempt action—one in which a defendant's liberty is in the balance—and to independently exercise judgment and impartially deliver on the duty to order mobilization of the resources necessary for representation.[56] The responsibility, however, is to afford an opportunity for representation; therefore, the judge is not in a position to force any litigant to have an attorney who makes a knowing and intelligent waiver of that constitutional right.[57]

52. *See supra* Part III.

53. *Cf.* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 625 (2011) (stating judges are often aware of the appearance of unfair assistance as perceived by an opposing party when determining how to assist pro se litigants).

54. *See, e.g.*, United States v. Anderson, 553 F.2d 1154, 1155–56 (8th Cir. 1977) (recognizing three other Circuits' findings that the constitutional right to counsel applies in contempt proceedings and adopting the same conclusion); McNabb v. Osmundson, 315 N.W.2d 9, 11–14 (Iowa 1982) (finding that the constitutional right to counsel under the Fourteenth Amendment applies to contempt proceedings).

55. *See McNabb*, 315 N.W.2d at 11–14.

56. *Id.* at 11–12, 14 (noting that when the defendant is confronted with the loss of liberty, "the trial judge and the counsel prosecuting [the] contempt proceeding" shall engage in a "predictive evaluation . . . to determine whether there is a significant likelihood" that "the judge will sentence him or her to a jail term") (internal quotation marks omitted).

57. *See, e.g.*, State v. Martin, 608 N.W.2d 445, 449–50 (Iowa 2000) ("Before a

Another example illustrates the role of the trial judge in assuring fairness through access to counsel. Many domestic violence cases are commenced by a pro se filing on the civil docket, and unrepresented parties press them to conclusion.[58] As they implement litigants' rights to be heard, judges may make referrals to assist litigants in preparation of these cases.[59] Such action might include referring a plaintiff to Iowa Legal Aid or referring a respondent to the defense attorney working a companion case on the criminal docket.

A discussion of judicial responsibility regarding representation would not be complete without acknowledging the important part a judge plays in encouraging pro bono service contributions to meet the needs of people unable to pay. All lawyers have the responsibility to volunteer, including judges.[60] Judicial acknowledgement of a judge's own duty,[61] together with approbation of a lawyer's efforts,[62] rightly promotes the purpose of the rule and endorses our country's commitment to due process of law.

As a matter of principle, adverse parties may see a cautious judicial

trial court accepts the defendant's request to proceed pro se, the court must make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open." (quoting Faretta v. California, 422 U.S. 806, 835 (1975)) (internal quotation marks omitted)).

58. *See* IOWA CODE § 236.3A (2011) (noting that the clerk of the district court shall furnish "standard forms to be used by plaintiffs seeking protective order by proceeding pro se").

59. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2010). Comment 4 guides the judge in considering the balance of responsibilities inherent in complying with all provisions of the Model Code of Judicial Conduct, specifically with respect to Rule 2.6: Ensuring the Right to Be Heard, stating: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." *Id.* at cmt. 4.

The Iowa Rule features expanded Comment 4 guidance, including approval of judicial action to "make referrals to any resources available to assist the litigant in the preparation of the case." IOWA CODE OF JUDICIAL CONDUCT R. 51:2.2 cmt. 4 (2010).

60. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay."); *see also* IOWA RULES OF PROF'L CONDUCT R. 32:6.1 (2005).

61. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 5 (stating that judges may participate in activities that improve the legal system or the legal profession, as their service). Iowa's rule regarding public service also acknowledges the duty of judges, as lawyers, to perform this public service. IOWA RULES OF PROF'L CONDUCT R. 32:6.1 cmt. 5.

62. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4; s*ee also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.2 cmt. 4.

approach to pro se litigants as undue empathy for people who simply are disinclined to prepare for court and protect themselves with a lawyer's expertise. Thus, when a judge takes time to inquire, reschedules proceedings to afford a litigant the opportunity to secure representation, or undertakes other arrangements for counsel to be accessed, the judge may engender controversy. Yet, judicial attention to the overall fairness in litigation and preference in having merits of a dispute prepared and fully presented is an impartial function of a court of integrity, and it is important in maintaining respectable justice under our Constitution.

C. *Regarding Jurors in Context, as Judges*

One of the most frequent issues to complicate the fairness in a jury trial is the level of hearing by jurors randomly summoned, and sometimes selected, to be trial fact-finders. A typical scenario would involve a prospective juror who reports for service, alerts the judge to a hearing disability, and seeks to be excused. A more difficult issue confronts the court when it becomes apparent that a prospective juror does not seek excusal and desires to exercise the civic privilege to serve. In that case, an accommodation must be made under prevailing law to assist the hard-of-hearing juror in serving.[63]

In a situation where it is discovered mid-trial that an acting juror has been impaired in hearing during a portion of the trial, the matter presents a dicey situation. While the juror may be content to continue to serve—perhaps having become accustomed to picking up what can be picked up and making the most of it—a question of fairness emerges. Litigating parties and their counsel may be inclined to just turn up the volume. Much investment is made in a trial, and some litigants and their attorneys may just be willing to barter the juror's incomplete grasp of the evidence for the opportunity to salvage the investments already made in the trial.

But, a due-process concern looms like an elephant in the room. The hard-of-hearing juror essentially sits as a judge who will, with collaboration of the other jurors, determine the facts. In that context, a "judge" who has not heard everything up to that point is problematic. The parties are

63. *See* IOWA CODE § 607A.2 ("A person shall not be excluded from jury service or from consideration for jury service in this state on account of age if the person is eighteen years of age or older, race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation."); Kristi Bleyer et al., *Access to Jury Service for Persons with Disabilities*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 249, 250 (1995) (reporting that a growing number of jurisdictions are requiring accommodations such as sign language interpreters for disabled jurors).

entitled to a trial where the decisionmakers are able, or able when reasonably accommodated, to experience all the testimony and the court's instructions about the law and the procedure.[64] Even without a motion for mistrial or a party's request for substitution of an alternate, the judge must act sua sponte to address the issue and protect the fairness of the proceedings.[65] An alternative for the judge may be to make a transcript of the transpired testimony available to the hearing-impaired juror, and remind all jurors of the importance of hearing every word.

Judges and lawyers encountering these kinds of developments might immediately offer a simple solution: just dismiss the juror and call up an alternate. Or, it might be thought if no party is objecting, no one notices, or cares. Plainly, the judge cannot rest mute when aware that there is a denial of due process underway. The judge must take reasonable action to ensure each party's right to be heard and treated in accordance with the law.[66]

The courts also need to be cognizant of a party's right to trial by a cross-section of the community and a juror's own entitlement to serve as a decisionmaker, with accommodation for a disability.[67] The days of summary dismissal of qualified jurors with impairments who want to serve, and who can be reasonably accommodated, are over.

64. *See, e.g.*, Fulford v. Maggio, 692 F.2d 354, 357 (5th Cir. 1982), *rev'd in part on other grounds*, 462 U.S. 111 (1983) (holding that a jury must *hear* and *evaluate* all relevant evidence); State v. Crofford, 96 N.W. 889, 891 (Iowa 1903) ("It must not be overlooked, however, that the right to have an impartial jury, who will hear the case calmly and dispassionately, and render a verdict upon the evidence, and the evidence alone . . . is absolutely essential to the proper administration of justice.").

65. *See* State v. Mitchell, 573 N.W.2d 239, 240 (Iowa 1997) (noting that it is the court's "job . . . to make sure [the juror is] put somewhere . . . where [they] can hear the witnesses").

66. *See id.* (recognizing that trial court judges have broad discretion in determining whether to allow a hearing-impaired juror to serve); Bleyer et al., *supra* note 63, at 251 (finding that courts largely retain discretion in findings of juror competency based on hearing impairment); *see generally* Jean E. Maess, Annotation, *Deafness of Juror as Ground for Impeaching Verdict, or Securing New Trial or Reversal on Appeal*, 38 A.L.R.4th 1170 (1985) (discussing the implications of a hearing-impaired juror on the court process).

67. *See* U.S. CONST. amend. VI (providing the right to a trial by a jury); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12300 (2006); Bleyer et al., *supra* note 63 (discussing how the Americans with Disabilities Act is influencing model rules and state statutes to increasingly require reasonable accommodations for disabled jurors).

D. *Cases that Fall into the Cracks*

Judges and lawyers alike adapt to the "new normal" in an era of short staffing,[68] and they take pride in resourcefully getting by without delivering the optimum service to cases that could be dedicated with more time and help. However, an ethical issue confronts judges when they become complicit in tolerating denial of the full measure of process due to litigants and others affected by judicial process. Inherent in the promise of fairness is timely delivery of justice.[69]

Consider this scenario, which is emblematic of the types of incidental matters that may come to a judge's attention in daily treks through a courthouse. In the clerk's office, the judge discovers file records waiting to be processed for appellate review, languishing on a back burner behind the priority, emergency-driven filings that flood the office daily. Whether the delayed files are ones tried by that judge, or by colleagues, overdue servicing stalls appellate review and delays the final result. With this, the judge bears a responsibility to take notice, to undertake appropriate steps to immediately secure service for these files, and to seek a solution through worker training or additional staffing.[70]

E. *Spotting the Cyber Threat*

Litigants have a due-process right to have their disputes resolved by an independent and impartial tribunal of integrity.[71] Pervasive use of electronic media now thrusts to the forefront the danger of inadvertent prejudice in contemporary jury management. Judges maintain vigil over a fair trial process in all cases, wary of engaging in behavior that conveys even an appearance of impropriety.[72] The pulsating presence of sixty-five prospective jurors seated impatiently in a courtroom gallery holding cellphones, iPads, and other electronic devices, ratchets up the odds for trouble.

The judge must take notice of the unique challenge of spontaneous

68. *See supra* note 14 and accompanying text.

69. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmts. 2–4 (2010).

70. *See id.*; *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.5 cmts. 2–4 (2010).

71. *See supra* Part II.

72. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (stating a judge must avoid behavior that would lead a reasonable person to question the judge's "honesty, impartiality, temperament, or fitness to serve"); *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:1.2 cmt. 5.

communication by these lay judges who have time on their hands, a device in their palms, and possibly an attitude about jury duty. Even one Facebook post relating a juror's distaste for the plaintiff's attire, questioning a lawyer's competence, mocking the court process, or joking about the haze of a hangover, will undermine the public's confidence in the forum and its decisionmakers. Pushing the matter even further, a panelist's publication of attitude—about a criminal defendant ("lookin' guilty!") or in pre-judgment of a personal-injury outcome ("feeling frugal today!"), implicates a prejudice incompatible with a fair trial.[73] Behavior like this, which would cripple public trust in a judge, is also discrediting for a juror.[74]

Proactive management of jury communication is a crucial task for a judge. Whether or not a judge has been faced with declaring a mistrial or recalling a verdict due to discovered juror transgressions, the judge must anticipate the customs in contemporary culture and act to avert damage.[75] At the outset of juror service, and before recreational communication contaminates the process, the jury venire must be educated about the risks and instructed to abstain from communications about the court system, the trial, the parties, counsel, and the issues or their outcome. The assembled panel of prospective jurors must be ushered to place its priority in finding the truth in a fair manner through a process that promotes public trust and confidence.[76]

F. *Deference Dilutes Court Mission*

People who come up with efficiencies are pretty proud of them and keep tweaking them to pick up even more speed, more volume, and more pride. What starts out as a seemingly harmless shortcut, however, risks becoming the standard without exercise of judicial diligence. Fairness principles may be tacitly forfeited over to lawyers who model a different set

73. *See, e.g.*, Dimas-Martinez v. State, 385 S.W.3d 238, 246–49 (Ark. 2011) (finding an unfair trial due to a juror "tweeting" about the trial on Twitter after being given instructions to abstain from social media).

74. *See id.*

75. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 1 ("[A] judge must be objective and open-minded."); *id.* at R. 2.4(B) ("A judge shall not permit family [or] social . . . [forces] to influence [a] judge's judicial conduct or judgment."); *id.* at R. 2.12(A) (stating that a judge must require others to act consistently with Model Code of Judicial Conduct obligations). Iowa provisions reflect those of the Model Code of Judicial Conduct. *See* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.2 cmt. 1, 51:2.4(B), 51:2.12(A).

76. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2; *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:1.2.

of priorities, or who may be prone to succumb to cultural pressures that are incompatible with constitutional directives for due process, including a speedy justice.

One streamlining mechanism some courts employ to adapt to burdens of growing caseloads is to defer judicial functions to attorneys who represent the litigants. Prosecutors may be put in charge of the trial schedule, to work it as tight or as light as their personal or professional proclivities. The defense attorneys may end up vested with discretion to draft judgment entries—the sentencing orders—for a busy criminal-court judge to sign. The judicial act of independent consideration of the circumstances of each case may reduce to directing traffic and affixing signatures.

Eventually it comes to pass that the judicial officers, who are the courthouse operatives beholden to the larger community to uphold the Constitution, have delegated the acts of constitutional conscience to others.[77] And, while the attorneys—legally trained and acting in good faith as officers of the court—work judicial tasks without complaint, there is risk that they do not employ the same objectivity and fiduciary focus as the judge. Thus, judges inclined to hand over control of their dockets and their orders must maintain a close watch on the discretion being applied to both.

By allowing attorneys to work at a pace they select on all cases, the criminal justice system loses its constitutional gatekeeper—the judge.[78] There is insidious threat to a court system when a judge adopts a work style of pushing docket-management responsibility and case-resolution discretion onto lawyers, or allows counsel to assume the authority. Issues arising in trial-court management call for close attention, exercise of discretion, and allegiance to fairness, best exercised by an independent judicial officer.

While defense attorneys might be expected to carefully guard a client's right to speedy trial and fair process as many do, plans can be designed to accomplish delay for strategic or other reasons. Obviously, witnesses may forget with time, may lose resolve, or may disappear. Sometimes a lawyer's busy calendar interferes with getting work done; occasionally a difficult client obstructs progress on a case, or one is not

77. *Cf.* Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987) (finding a trial court improperly delegated the judicial function of drafting a sentencing order to an attorney).

78. *See supra* Part III (explaining the duty of the court to ensure litigants due process rights sua sponte).

forthcoming with payment for services. Similarly, the prosecutor has a set of plans: one goal might be to timely prosecute cases; yet, the prosecutor may have a competing caseload, may hold out for a hoped-for plea bargain to avoid trial, or may not have the safeguards in place to keep track of a busy docket. No matter what the risk, judges must maintain control of their dockets and courtrooms to ensure the bargain is kept with the public for support of the Constitution.

A culture of continuance develops in some courts and is a standing threat to justice when people get caught in the cycle of postponement, and are denied their access to justice.[79] The right to a speedy trial recited in the Bill of Rights is a key expectation in our system of justice,[80] and it is reiterated in rules of procedure for the criminal courts.[81] With such underpinnings, one might expect that timely prosecution would be the expectation, and delays the exception. Yet, many court systems come to tolerate inverted priorities in case management. Defense attorneys and prosecutors alike can become acculturated to working back from the deadline, rather than moving forward powered by the abiding principle of a speedy trial.

A common pitch in Iowa trial courts is, "this case isn't one-year old yet, judge"[82]—as if the goal is to reach the legal maximum in the amount of time that can tick away on a case before dismissal is mandated rather than honing in on justice as soon as possible.[83] While in an academic discussion it

79. *See, e.g.*, Terkel, *supra* note 34 (discussing the plight of litigants waiting decades to have disputes resolved before budget-strapped courts).

80. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

81. In Iowa, for example, speedy-trial rules direct the moving forward of process by the filing of an indictment within forty-five days of arrest, and a defendant must be brought before the court within ninety days of indictment. IOWA R. CRIM. P. 2.33(2). A defendant who waives the initial speedy-trial protection, still is entitled to be brought to trial within one year of arraignment. *Id.* at R. 2.33(2)(c). Dismissals for failure of timely prosecution effect a bar to re-filing, highlighting the importance of the right to a speedy trial. *See* State v. Abrahamson, 746 N.W.2d 270, 273 (Iowa 2008).

82. *See* IOWA R. CRIM. P. 2.33(2)(c) (requiring trial within one year of arraignment).

83. Under Iowa criminal procedure rules:

> *Speedy trial.* It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissals under this rule may be made by the prosecuting attorney or the defendant or by the court on its own motion.

is counter-intuitive and disturbing to think of widespread delays in prosecution or how or why skillful advocates would engage in dilatory practices, the human dimension yields rationale, and there is inertia in groupthink. If the group buys into procrastination, it can be cast as a comfortable and harmless virtue, unless a judge acts independently, as the judicial office presupposes, to insist on fair and timely case processing. Judges must remain tuned in to the purposes to be served by a due and fair process and act to sustain them.

G. *Zero Tolerance of Bias and Prejudice*

Judges adhere to a code of conduct that prohibits bias and prejudice of any kind.[84] Further,

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . .[85]

Harassment—recognized as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person" over the same types of characteristics[86]—is also not to be tolerated in the operation of the judiciary.[87]

As guardians of the integrity of the court process, judges are obligated to ensure not only that their own behavior meets the mark, but that people under their direction and control perform at the same high standard. This means that court staff and court officials (other judges), and lawyers in proceedings before the court are accountable for the nature of their conduct; judges are in charge of compliance.[88]

IOWA R. CRIM. P. 2.33(2).

84. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.3(A) (2010); *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3(A) (2010).

85. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B); IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3(B).

86. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 3; IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3 cmt. 3.

87. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B); *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3(B).

88. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (B)–(C), R. 2.12(A); *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3 (B)–(C), R. 51:2.12(A).

Manifestations of bias and prejudice cut to the core of court work, undermining the fairness of proceedings and casting the judicial system into disrepute.[89] Judges must conscientiously monitor their own actions, and also educate and mentor others working in the courthouse about the types of personal conduct that may reasonably be perceived as offensive and intolerant.[90] It is the duty of judges to notice and eliminate such behavior, even if its presence is long-standing under area culture or simply surfaces sporadically during social interactions in the courthouse hallway.

Attitude that runs afoul of ethical prohibitions on bias, prejudice, and harassment may be demonstrated through facial expressions or body language, which is not readily captured on the courtroom record for preservation in a transcript that can be judiciously studied. Nonetheless, the message channeled to people watching as it happens—be they litigants, lawyers, jurors, the media, the gallery—speaks volumes about the person with the manner, the forum in which it occurs, and the judge in charge. A judge who would ignore the slight or neglect to challenge it in real time, acquiesces in the accomplished affront to fairness and due process. The judge who rises instinctively to defend the honor of the courts, and fair process due to all, is a patriot.

VI. CONCLUSION

Even as judges armed with constitutional purpose negotiate the angles of due process in cases before them, the focus it takes and the pause it entails are difficult to marshal in a courthouse dynamic where efficiencies drive rapid results and the trial judge's attention is drawn many directions. Judges must be oriented to the big-picture responsibilities they bear to deliver due process in the courts and to practice a discipline that makes justice real in each case, each day.

89. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 1; *see also* IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3 cmt. 1.

90. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 2. Commentary on this rule illustrates for judges and Judicial Branch employees examples of offending behavior:

> Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

Id. The Iowa rule tracks this standard, but also includes "insensitive statements about crimes against women." IOWA CODE OF JUDICIAL CONDUCT R. 51:2.3 cmt. 2.

Lawyers would be well-served by broadened training on the seminal spot for fairness in all court proceedings and the judiciary's obligation to ensure access to justice through enforcement of due process. In that manner, lawyers may appreciate better how their own roles relate to the overall mission of the courts and how they can reach a new level of confidence as an officer of the court.