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PREFACES

A JUDICIAL ROLE IN CALMING OUR DIVIDED NATION

George Nicholson*

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

Our nation and our people are strongly but fairly evenly divided. Both sides claim the high ground. Too many of us irrationally despise and demonize one

* Associate Justice, Ret., Court of Appeal, Third Appellate District, State of California. I wish to thank Carol Benfell, a distinguished, veteran legal journalist, for editorial advice and assistance.

1. Thurgood Marshall, Remarks at Independence Hall, Philadelphia (July 4, 1992), https://constitutioncenter.org/libertymedal/recipient_1992_speech.html (last visited Apr. 30, 2021).

another, including those we have never met. Even for those of us with the mind, heart, and will to do so, the challenge of helping to mitigate the division and demonization looms large. It is a daunting, but consuming task.

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

This special issue of *The Journal of Appellate Practice and Process* is one attempt to suggest potential ways and means judges may help. As you read the distinguished authors who have contributed articles, you may wish to intersperse readings of three of Abraham Lincoln's most memorable and eloquent orations: his "House Divided Speech" and his first and second inaugural addresses, especially their soaring final paragraphs.[2]

Countless major and minor problems complicate our attempts to utilize "the better angels of our nature"[3] and to hold "malice toward none; with charity for all; with firmness in the right, as God gives us to see the right."[4] And, of course, difficulty in applying Lincoln's humility is compounded by the COVID-19 pandemic and how to rise from it.

An underlying complication to building bridges that began long before the pandemic involves the

2. Abraham Lincoln, *House Divided Speech* (June 16, 1858), http://www.abrahamlincolnonline.org/lincoln/speeches/house.htm; Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm; Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), http://www.abrahamlincolnonline.org/lincoln/speeches/inaug2.htm.

3. Lincoln, *First Inaugural Address*, *supra* note 2.

4. Lincoln, *Second Inaugural Address*, *supra* note 2.

fundamental question of whether we have one or two Constitutions. The first is the "founders' Constitution—written in 1787 and ratified in 1788, grounded in the natural rights and practical wisdom of the Declaration, interpreted in *The Federalist*, and expounded in their best moments by subsequent American jurists and statesmen."[5] The second is called the living constitution. "The term implies the original Constitution is dead—or at least on life support, in which case, in order to remain relevant to our national life, the old frame of government must continually receive life-giving infusions of new meaning, and along with them new duties, rights, and powers."[6]

The two constitutions dispute has brought confusion and consternation to our people and, for almost thirty-five years, dismaying, ad hominem disunity and negative role modelling to judicial confirmation proceedings in the United States Senate.[7] This implicates the question of whether Chief Justice John Roberts was right or wrong when he said, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[8]

A young law professor, Aaron Tang, suggests a solution to the two Constitutions dilemma may lie in a novel "harm-avoider approach." He points to numerous cases in which the courts have ruled, not on precedent, but based on which group will suffer least if the court decides against it.[9]

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5. CHARLES R. KESLER, CRISIS OF THE TWO CONSTITUTIONS: THE RISE, DECLINE, AND RECOVERY OF AMERICAN GREATNESS, xii–xiii (2021).

6. *Id.*

7. *See generally* ILYA SHAPIRO, SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT (2020).

8. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2020), https://apnews.com/article/c4b34f9639e141069c08cf1e3deb6b84.

9. Aaron Tang, *The Simple Principle That Can Fix American Law: What if a Coherent Legal Philosophy Could Exist Between the Poles of Living Constitutionalism and Originalism?*, THE ATLANTIC (Apr. 2, 2021), https://

The issues involved in and related to that fundamental question of whether we have two constitutions are among the most contentious of our problems.[10] Even the founding of our nation and its founders are subjects of fierce and widespread, contemporary dispute.[11] Similarly, the work of administrative agencies run by unelected bureaucrats in the executive branch, empowered

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www.theatlantic.com/ideas/archive/2021/04/moderate-legal-philosophy-does-not-exist/618430. In this article, Professor Tang introduces his "harm-avoider approach" to deciding hard constitutional questions. He recognizes its novelty and likely reception by lawyers and judges. "To be sure, progressives and conservatives alike might be skeptical of this principle as a first-best solution. To progressives, any defeat for their most cherished values might seem too much to stomach. Many on the right likely feel the same, and understandably so." *Id.*

In a forthcoming article, *Harm-Avoider Constitutionalism*, 109 CAL. L. REV. (forthcoming 2021) (manuscript at 1), Professor Tang more fully describes and defines his "harm-avoider approach":

> In a surprising number of cases spanning a range of doctrinal areas such as Congress's Article I power, equal protection, substantive due process, presidential immunity, and the dormant commerce clause, the Court has decided hard constitutional questions using a kind of argument that has evaded scholarly attention thus far. Rather than relying on original meaning, precedent, or other common tools for discerning the Constitution's proper application, the Court has decided these cases on the basis of a raw, second-order consideration: which group, if the Court rules against it, would be better able to avoid the harm it would suffer? And in each case, the Supreme Court has consciously ruled against the best harm-avoider, trusting in that group's superior ability to protect its interests outside the courts. I call this approach "harm-avoider constitutionalism."

Perhaps, there is no need for court-packing or "harm-avoidance" processes. *Unpacked and Undivided: Is the Court Sending a Message with a Litany of 9-0 Decisions?*, JOHNATHAN TURLEY (June 1, 2021), https://jonathanturley.org/2021/06/01/unpacked-and-unanimous-is-the-court-sending-a-message-with-a-litany-of-9-0-decisions/.

10. *See* KESLER, *supra* note 5; s*ee also Crisis of the Two Constitutions*, 10 BLOCKS PODCAST (Mar. 10, 2021), https://www.city-journal.org/crisis-of-two-constitutions (interviewing Charles Kessler); R. Shep Melnick, *Claremont's Constitutional Crisis*, LAW & LIBERTY (Mar. 29, 2021), https://lawliberty.org/book-review/claremonts-constitutional-crisis (mercilessly reviewing Kesler's book).

11. *See 1619*, N.Y. TIMES, https://www.nytimes.com/column/1619-project (last visited Apr. 30, 2021) (providing the 1619 Project, an audio series observing the 400th anniversary of the beginning of American slavery); *1776 Commission Takes Historic and Scholarly Step to Restore Understanding of the Greatness of the American Founding*, WHITE HOUSE (Jan. 18, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/1776-commission-takes-historic-scholarly-step-restore-understanding-greatness-american-founding.

with legislative and adjudicative powers unexpressed in the Constitution, are related to the two-Constitution dispute.[12] I believe both problems to be pivotal subjects more of us should seriously and dispassionately ponder and discuss in public.

Whether dealing with disputes involving two constitutions, our nation's founding and founders, judicial confirmation proceedings, administrative law, or anything else dividing us, Judge Thomas B. Griffith, quoting Peter Wehner, suggests a state of mind we all may find useful in the days ahead, on and off the bench:

> Civility has to do with . . . the respect we owe others as . . . fellow human beings. It is both an animating spirit and a mode of discourse. It establishes limits so we don't treat opponents as enemies. And it helps inoculate us against one of the unrelenting temptations in politics (and in life more broadly), which is to demonize and dehumanize those who hold views different from our own. . . .
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> [C]ivility, properly understood, advances rigorous arguments, for a simple reason: it forecloses *ad hominem* attacks, which is the refuge of sloppy, undisciplined minds.[13]

Judge Griffith then intones, "But civility is the very *least* we should expect of those in the public square."[14]

In the spirit of Judge Griffith's commentary, all judges, lawyers, law professors, law librarians, and law students are role models to varying degrees. Everyone in the law and their professional organizations and associations must actively try to satisfy the demands of that burden. This is especially so for trial judges and appellate justices in California because civic education and

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12. *See, e.g.,* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL (2014)); Philip Hamburger, *Response, Vermeule Unbound*, 94 TEX. L. REV. 205 (2016).

13. Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J.L. & PUB. POL'Y 633, 634 (2020).

14. *Id.* at 635.

public outreach are now judicial functions.[15] Trial judges and appellate justices everywhere "must accept primary responsibility for reaching out to the public and [they must recognize] they are effective communicators and educators when they apply themselves to the task."[16] It was long ago resolved by the American Bar Association that:

> judges, courts, and judicial organizations . . . support and participate actively in public education programs about the law and justice system, and further, that judges be allotted reasonable time away from their primary responsibilities on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct.[17]

Court–community outreach is a useful mechanism by which judges may contribute to public and civic education in a variety of ways and places. Through outreach programs, our standing as role models for those in and out of the legal profession, and our recognition as the nation's neutrals, cloaked with community standing, credibility, prestige, and power, can help bring disparate, often divided people together. We are usually able to foster rational, well-reasoned discourse by attendees during informal sessions at court–community outreach programs, such as tutored or mediated discussions, open luncheons, and pre-programmed breaks.

Court–community outreach also compels us to reflect deeply on how we can help sustain constitutional

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15. CAL. STDS. JUD. ADMIN. § 10.5 (Jan. 1, 2007) (describing "The Role of the Judiciary in the Community"). Subdivision (a) reads, "Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics." Court–clergy outreach is an important species of court–community outreach; to learn more, see Appendix A.

16. Editorial, *Creating Court–Community Partnerships*, 80 JUDICATURE 204, 204 (1997).

17. ABA House of Delegates, Resolution (August 11–12, 1992), https://www.americanbar.org/content/dam/aba/directories/policy/1992_am_114.authcheckdam.pdf.

governance and the rule of law in our increasingly cleaved and troubled era. Time may be growing short because even our nation's judiciaries are no longer insulated from derivative and damaging influences.[18]

In a conversation with Judge Richard L. Fruin, Superior Court, County of Los Angeles, and Justice William J. Murray, Jr., my former Third Appellate District colleague, they suggested to me why this work is important. They believe court–community outreach is a "multiplier program." They conclude, "Multiplier programs leverage the judicial branch's scarcest resource: the time of its judges. These programs identify intermediary audiences that have both a need for information about the justice system and an incentive to convey that information to their own constituencies." The two judges' message suggests to all of us the utility of leveraging our limited time by reaching out to audiences outside the legal profession, particularly teachers and clergy, who are highly educated, eloquent, and articulate speakers, and possessed of permanently and regularly associated constituencies of their own.

Judge Fruin says COVID-19 has changed, but not stopped, judicial outreach programs.[19] He believes they will emerge stronger and better than ever because judges will increasingly utilize virtual platforms to participate in more court–community and court–clergy outreach programs and reach larger audiences, sometimes gathered simultaneously in several sites, all linked virtually.[20] He believes judges will do these things from their

18. *See* George Nicholson, *Courthouses Under Siege*, THE BENCH, California Judges Association (Fall 2020), at 23 (inviting judges to respond to recent anger against legal institutions, and judges, by reaching out to their communities and fostering civic education). There are other examples of judicial outreach leadership dealing with constitutional governance and the rule of law in appendices A and B with links to published articles.

19. Richard L. Fruin, Jr., *Judicial Outreach Will Emerge Stronger After the Pandemic*, DAILY J. CORP (Oct. 2, 2020), https://www.dailyjournal.com/articles/359815; *see also* LAW TEACHING STRATEGIES FOR A NEW ERA BEYOND THE PHYSICAL CLASSROOM (Tessa L. Dysart, Tracy Norton, eds.) (Forthcoming August 2021).

20. *Id.*

chambers without leaving their courthouses, and concludes by suggesting the "greatest challenge in using a virtual platform to reach an adult audience is advertising the outreach program to build an audience that will tune in to the program."[21]

Judges may thoughtfully and effectively foster interagency and interbranch outreach, too, by teaching in public and private schools, colleges, and universities, as well as law schools, writing articles in popular magazines as well as professional and law-related journals, drafting and pursuing law-related legislation, and, outside California, working to achieve provision for court-community and court–clergy outreach in court rules and standards.[22]

Some judges may suggest there is no time away from the bench to do outreach. While time may be limited, we can still do important outreach, although ultimately whether to do outreach and how much if it is to be done, are matters for each of us to decide for ourselves. From my first day on the trial bench in 1987, I chose to be

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21. *Id.*; *see also* INST. FOR LOC. GOV'T, A LOCAL OFFICIAL'S GUIDE TO WORKING WITH CLERGY AND CONGREGATIONS 2 (2007), https://www.ca-ilg.org/sites/main/files/file-attachments/2010_-_guide_to_working_with_clergy_and_congregations_0.pdf?1442595521 (providing useful ideas for how to best engage in clergy outreach in California; these ideas are applicable to communities across the nation); Glen Milstein et al., *Implementation of a Program to Improve the Continuity of Mental Health Care Through Clergy Outreach and Professional Engagement (C.O.P.E.)*, 39 PRO. PSYCH. 218, 219 (2008) (discussing how clergy outreach is useful for medical providers seeking improve mental health care); *50 Ways to Take Church to the Community*, LEWIS CTR. FOR CHURCH LEADERSHIP (Nov. 24, 2014), https://www.churchleadership.com/50-ways/50-ways-to-take-church-to-the-community/#prettyPhoto (listing ways to foster community engagement).

22. *See, e.g.*, George W. Nicholson & Jeffery A. Hogge, *Retooling Criminal Justice: Forging Workable Governance from Dispersed Powers*, *in* THE NATIONAL CONFERENCE ON LEGAL INFORMATION ISSUES: SELECTED ESSAYS 223 (Timothy L. Coggins ed., 1996); George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. APP. PRAC. & PROCESS 229 (2000), https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss2/2, (authoring an introductory essay to a special issue of *The Journal* that discussed the then looming influx of technologies for use by judges and by courts).

active with a variety of outreach approaches, on as many fronts, and in as many ways as possible.[23]

As you consider the outreach examples of the Sacramento bench and bar in my two appendices and my involvement with them, please bear in mind my bench work came first, just as yours does. I hope that is apparent from the fact I participated in almost 30 percent of our eleven-member court's caseload during my twenty-eight years sitting as an appellate justice. I was directly involved in 10,586 cases, and of them, authored 3,472 opinions, and concurred in 7,114 opinions. More than 300 of my opinions were published in the official reports. I served as a justice pro tempore seven times on the California Supreme Court.

Many courts have some sort of civics and public education institutional apparatus.[24] These structures are excellent as far as they go. However, based on long experience, I encourage individual judges to utilize their own time, initiative, and ingenuity to experiment with outreach, on and off the bench. It may enrich existing, official apparatus and bring new ideas to the attention of other judges, their judiciaries, and their associations, as well as of lawyers and bar associations.

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23. See Appendix B for examples of successful Sacramento bench and bar interbranch, interagency, and court–community outreach; and see Kari C. Kelso & J. Clark Kelso, *Civic Education and Civil Discourse: A Role for Courts, Judges and Lawyers*, *A Vision of the Future of Appellate Practice and Process*, 21 J. APP. PRAC. & PROCESS 473 (2021); *Kennedy Learning Center*, SACRAMENTO FED. JUD. LIBR. & LEARNING CTR. FOUND, https://www.sacjlc.com/learning-center (last visited Apr. 30, 2021) (associated with the United States Court of Appeals, Ninth Circuit); *Civics Education*, CAL. CTS., https://www.courts.ca.gov/programs-lawrelated.htm (last visited Apr. 30, 2021) (providing a number of civics-education resources for California educators).

24. Some other California examples, *Community Outreach*, https://www.courts.ca.gov/programs-commoutreach.htm; *Community Outreach Programs*, https://www.courts.ca.gov/27457.htm; *Tribal Court-State Court Forum*, https://www.courts.ca.gov/forum.htm, https://www.courts.ca.gov/3065.htm; *Third Appellate District Court Outreach Program*, https://www.courts.ca.gov/5131.htm.