

AN LGBTQ JURIST'S PERSPECTIVE ON THE CRISIS IN THE JUSTICE SYSTEM

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We universally accept that we must judge without bias. Indeed, we are required as judges to confront bias in our courtrooms and to strive for and do our best to ensure bias free proceedings.¹ But that is a heavy lift for an individual bench officer if bias is systemic rather than episodic in the justice system. Indeed, if that were the case, systemic bias could not be rooted out or solved by a jury instruction or a well-intentioned bench officer; systemic bias could not be addressed let alone resolved by an individual judge. Instead, concerted effort by the justice system would be required.

Of course, there is ongoing and fierce debate about whether the justice system is indeed systemically biased. For purposes of this article, I need not and could not resolve that issue. But someone of note recently wrote: "Perception is more important than reality. If someone

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1. *See, e.g.*, CAL. CODE OF JUD. ETHICS Canon 3 advisory committee's commentary to the 2020 Amendment, note(B)(5) ("A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity,* gender expression,* religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.").

perceives something to be true, it is more important than if it is in fact true.”²

In other words, even the idea that people consider the justice system to be systemically biased is certainly cause for pause, reflection, and response. Just the perception, let alone the possible reality, of two justice systems arguably undermines the system and its effectiveness.

This is in part a dispute about math. The results of our justice system when looked at by the numbers are bracing; the arrest and incarceration rates for minorities, including the LGBTQ community,³ are significantly disproportionate.⁴ One side looks at these numbers and argues that minorities are targeted, rather than protected, by the legal system. They urge that justice, perhaps, is not blind after all. The other side looks at the numbers and argues they simply represent the crime present in the respective communities.⁵

What is the concerned jurist to do about this divide? Our canons of ethics necessarily prevent political and social involvement.⁶ But our canons also teach that our overriding goal is justice and the constant striving

2. IVANKA TRUMP, *THE TRUMP CARD: PLAYING TO WIN IN WORK AND LIFE* 192 (2009).

3. Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 708 (2017) (“Recently available data suggests that the incarceration rate for self-identified lesbian, gay, and bisexual adults is three times that of the U.S. adult population.”).

4. THE SENTENCING PROJECT, *REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES JUSTICE SYSTEM 1* (March 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [hereinafter U.N Report].

5. For an example of a different perspective see Heather Mac Donald, *Drive-by homicides: Don't these black lives matter, too?*, N.Y. POST (Nov. 3, 2020), <https://nypost.com/2020/11/03/drive-by-homicides-dont-these-black-lives-matter-too/>.

6. See CAL. CODE OF JUD. ETHICS Canon 5 (2020) (“A Judge or Candidate for Judicial office shall not Engage in Political or Campaign Activity that is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary.”).

toward the best possible justice.⁷ A justice system perceived as partisan and flawed is one at risk. The avoidance of error is at the very heart of the system.

As judges, we strive to get it right every day. Should we not then also consider whether the system we operate in gets it right every day and whether we have allowed ourselves to be co-opted by polarization and systemic bias. Indeed, polarization and potential systemic bias have real world costs to the judiciary. Isn't it time we address them?

We further can and should agree that many pay a high cost for being an "other" in this society. That cost impacts our justice system in myriad and surprising ways. That too is worthy of discussion and further examination.

In this article, I explain my high job satisfaction but express my concern for the future of our profession. I then address the lightning rod that has been LGBTQ constitutional litigation and suggest perhaps a different way forward for such contentious social issues. I also talk about the extraordinary stigma and cost of being an other in this society.

As you read, a word of caution. It is easy to categorize me; openly LGBTQ Judge; appointed by a Democrat; father of adopted multi-racial children. But really I consider myself an institutionalist first. Whatever your individual beliefs, surely, we should all be shaken by the fact that many from differing points of view are questioning our legitimacy. We are the deliberative "rise above it" branch of government. But can we continue along as if nothing has happened?

7. *See id.* Canon 1 ("An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this code are to be construed and applied to further that objective.").

I. BEING AN LGBTQ JUDGE IS THE BEST JOB EVER,
BUT I AM WORRIED ABOUT THE IMPACT OF
POLARIZATION ON OUR PROFESSION

As an LGBTQ judge, I took my judicial role after decades of negotiating the legal world from my own individual LGBTQ perspective. That involved decades of advocacy and community service. It also involved navigating the discomfort of others and learning how to move forward in the face of opposition.

When the robe went on, the advocacy and community service stopped, but one's own individual LGBTQ perspective remains. When you are aware of your difference, power structures can both fascinate and oppress at the same time. You must understand them to survive. You also must struggle to find a place within them to thrive.

A great privilege of working in the justice system is its emphasis on fairness, process, and equal treatment under the law. So often LGBTQ individuals have not received fairness, process, or equal treatment under the law. I strive to provide each, every day. Imagine the job satisfaction.

Yet, as the focus of this special issue of *The Journal* reflects, the justice system is strained. Judges are seen as partisan, appointments to higher courts treated as epic Borkian battles. Consider the nomination hearings for our recently appointed Supreme Court justices. They were flat out brawls. And does anyone think a close confirmation vote builds confidence in the system as non-partisan and fair?⁸

8. Amelia Thomson-DeVeaux, *Why the Supreme Court's Reputation Is at Stake*, FIVETHIRTYEIGHT (Oct. 12, 2020), <https://fivethirtyeight.com/features/why-the-supreme-courts-reputation-is-at-stake> (According to polling by Gallup, "Americans' confidence in the Supreme Court has fallen significantly over the past two decades. A 2020 poll conducted before Justice Ruth Bader Ginsburg's death found that only 40 percent of Americans said they had 'a great deal' or 'quite a lot' of confidence in the Supreme Court, down from a two-decade high of 50 percent in 2002.").

Constitutional law is also treated as a zero-sum game. There are winners and losers in a self-declared culture war. We have apparent litmus tests for higher-court appointments.⁹ The talk is of a reliably liberal or reliably conservative appointment. How about reliably right, reliably just, reliably open-minded?

Judging is such an extraordinary act. The idea that society allows us to resolve disputes is humbling in its trust of us. And jurists know well the struggle that comes with trying to do it right. I am a trial court judge in the largest trial court system in the world. I work in its central civil and administrative building that has a world-class self-help department. Every day, you see the majestic and wonderful act that is our justice system take place in real time. I work with an extraordinary group of fellow judges; our purpose so intent that we only briefly acknowledge each other in passing on the escalators. It is a beautiful thing we do and an example of government at its best.

But the justice system has been overly politicized from all sides and the world it judges is polarized. Our process has held, but the public perception that we are political and politicized matters. And perception, as we all know too well, can be reality.

In short, the judiciary passed its most recent test. But will we pass the next? And doesn't the fact that we even had to pass a test merit further self-examination and discussion? Why are we so reluctant to self-examine?

9. Chris Schmidt, *The Rise and Fall of the No-Litmus-Test Rule*, IIT CHICAGO-KENT COLLEGE OF LAW: SCOTUS (May 15, 2018), <http://blogs.kent-law.iit.edu/iscotus/rise-fall-no-litmus-test-norm/> (reviewing the history of political views on litmus tests for high court appointments and advising the “2016 election shattered what previously had been a stable precedent that presidential candidates must openly reject litmus tests for potential Supreme Court appointments”).

II. ARE THERE LESSONS TO BE LEARNED FROM THE LGBTQ BATTLE FOR CONSTITUTIONAL RIGHTS?

The LGBTQ battle for human rights is, of course, part of the polarization of our society and the judiciary. The LGBTQ community sought and received protection under the Constitution to marry and protection under the federal statute (Title VII) to work without discrimination.¹⁰ That happened as a function of the law catching up with our social acceptance. Yet the recognition and exercise of those rights causes others to feel their religious liberty is being challenged and that they are being labeled as bigots for their religious beliefs.¹¹ Let us consider a less divisive path forward for further discussion of these complex legal, social, and moral issues. We need a less politicized justice system. We cannot be part of the solution if we are part of the problem.

Of course we must consider the demographics of the LGBTQ community and the high cost we pay for being part of the larger community. The reality is that LGBTQ life is American life. The community's demographics are extraordinary in their ordinariness. But those same demographics also teach us that we pay a higher price in many key metrics for being part of American life. Consider the minority stress model, first introduced by Dr. Ilan Meyer of the Williams Institute and used in the federal litigation challenging California's marriage ban.¹² That model teaches that equal rights do not translate to equal treatment or outcomes.

Stigma has a price. That price needs to always be on the table when discussing the balancing of constitutional rights. But shouldn't we also consider the urgency of the

10. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

11. *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

12. See generally Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH. BULL. 674, 691 (2003), <https://doi.org/10.1037/0033-2909.129.5.674>; Maura Dolan, *Bias Raises Gays' Risk of Mental Disorders, Witness at Prop. 8 Trial Says*, L.A. TIMES (Jan. 15, 2010), <https://www.latimes.com/archives/la-xpm-2010-jan-15-la-me-prop8-trial15-2010jan15-story.html>.

other side's position? Sometimes urgency occurs when a point of view is not being heard or respected. It is easier to label, categorize, and compartmentalize thinking; it is far harder work to actually do the balancing of constitutional rights. Let us get to the work of that but perhaps not in such partisan or contentious forums. Indeed, the judiciary is not necessarily the best place to resolve the matter. How has that gone for us so far?

We need a national commission with faith and community leadership from all perspectives to establish a path forward for the intersection of LGBTQ rights and religious liberty. That is not to say we stop constitutional litigation over the balance of LGBTQ rights and religious liberty. It is to say that we need more voices added to the mix. These are community issues. Shouldn't all the concerned parties be at the table talking rather than litigating?

Indeed, isn't a core part of judicial thinking to treat our jurisdiction cautiously and to encourage avoiding further litigation when possible? If the nation is polarized—and the evidence appears to suggest that it is—litigation is not always the best path forward for the nation or for the health of the judiciary. Arguably, leaving those issues solely for the courts continues the zero-sum nature of constitutional litigation and cements polarization itself.

The LGBTQ community well understands the cost of demonization and polarization. The legal system has been used to criminalize and oppress our community.¹³ Of course, the LGBTQ community fought to be treated equally, and it always will. At the same time, do we not need a less divisive future? We already move forward on a daily basis as part of the rich fabric of American life, which also includes a significant religious component.

No less of a religious figure than Pope Francis recently wrote:

13. See Woods, *supra* note 3, at 708.

To come out of this crisis better, we have to recover the knowledge that as a people we have a shared destination. The pandemic has reminded us that no one is saved alone. What ties us to one another is what we commonly call solidarity. Solidarity is more than acts of generosity, important as they are; it is the call to embrace the reality that we are bound by bonds of reciprocity. On this solid foundation we can build a better, different, human future.¹⁴

Shouldn't we take up the Pope's wise counsel and hope to build a better, different, human future and justice system? What is the current perception of the justice system? For many, it is flawed, but that is to be expected because people are flawed. It is my own view—and I believe it largely held—that the justice system, like society itself, has reflected systemic prejudice against minorities. I believe the math on police stops, incarceration, and sentencing for communities of color and the LGBTQ community is overwhelming and cannot be explained away.¹⁵ The videos cannot be ignored, and their images should remain indelibly etched in our minds. The names cannot and should not be forgotten. We are well past a tipping point. But I also recognize others may see it differently.

I am not a social scientist. I look at the math and reach my own conclusions through my own experience and realities. Others, as noted above, see it differently.

I shared an iteration of a draft of this article with a treasured colleague from a different perspective. He wisely wrote back to me:

Until rational, academic and legal scholars, including some of us on the bench, cease defaulting to epigrammatic and dogmatic street talk and begin doing balanced research and presenting pros and cons in our interviews, articles, commentaries, briefs, and opinions, any hope to finding middle ground and

14. Pope Francis, *A Crisis Reveals What Is in Our Hearts*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/opinion/pope-francis-covid.html>.

15. U.N. Report, *supra* note 4, at 1.

mitigating seemingly intractable differences will never materialize.

I could not agree more.

We must embrace the reality that we live in a polarized world, where algorithms determine the news you see and the viewpoints you hear.¹⁶ The whole jury system is based on the notion of putting aside individual biases and reaching decisions based on facts and not prejudices. Should anyone really feel confident about that these days? Isn't that surely a topic for pause, concern, and consideration? Polarization has a price, and it may come into play as jury trials resume.

Rather than ignore polarization, let us learn from it and improve. We need to do a better job of statistics. We have ignored them at our peril. The statistics, largely tracked by nonprofits rather than the government, arguably show a justice system with a demonstrative and significant bias against minorities, reflective of society's larger systemic racism.¹⁷ That is not sustainable. It must be changed. We have been advised of our participation in an error; continuing the error should be unthinkable.

Our justice system reflects society. Of course, society must address the underlying issues, but judges are experts in dispute resolution. Let us lead by example. We must find a common ground for moving forward, as Pope Francis so wisely counsels, as an independent branch of government. We are perfectly situated and trained to resolve problems, but we have let ourselves become part of the problem. We have been politicized, and that should be addressed by us. We ignore the cost of our politicization at our peril.

Our world is fractured and fractious. Judging is such a unique and humbling privilege. We get to be deciders

16. Nicholas Diakopoulos, *The Journalistic Newsfeed: Editorial Values and Algorithms*, COLUM. JOURNALISM REV. (Dec. 13, 2019), https://www.cjr.org/tow_center/journalism-newsfeeds-ai-artificial-intelligence.php.

17. Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing>.

because of our perceived wisdom. Let us learn from our own errors—whatever they may be—and use our collective wisdom to move forward with more solidarity of purpose and unity of voice. We must lead by example.

III. IT'S NOT THE OPPRESSION OLYMPICS,
BUT NEGATIVE LGBTQ OUTCOMES MATTER:
CONSIDER THE MINORITY STRESS MODEL

Pope Francis's message of solidarity was previously echoed in a conversation between scholars Betita Martínez and Angela Davis on May 12, 1993. In discussing coalition building, Ms. Martinez explained: "There are various forms of working together. A coalition is one, a network is another, an alliance is yet another. . . . But the general idea is no competition of hierarchies should prevail. No Oppression Olympics!"¹⁸ Ms. Davis further reasoned, "As Betita has pointed out, we need to be more flexible in our thinking about various ways of working together across differences."¹⁹

That is a resonant sentiment in today's world. In considering such solidarity of purpose, and in considering how we manage to work together across our differences, I feel obligated to suggest that the media portrayal of LGBTQ life is not necessarily reflective of the painful realities facing the community and the ongoing daily cost of being part of the ever-complicated American fabric.²⁰

It is a plain and proven fact that being LGBTQ in this country is not generally good for your health or well-

18. Elizabeth "Betita" Martínez & Angela Y. Davis, *Coalition Building Among People of Color*, 7 INSCRIPTIONS 42, 42–43 (1994), <https://culturalstudies.ucsc.edu/inscriptions/volume-7/angela-y-davis-elizabeth-martinez/>.

19. *Id.* at 43.

20. For a discussion of stereotypes in sexual orientation in television, see smf5514, *Sexual Orientation Represented in Television*, SITES AT PENN STATE: BLOG (Mar. 1, 2016), <https://sites.psu.edu/eswhydee/2016/03/01/sexual-orientation-represented-in-television/>.

being.²¹ It is a further plain and proven fact that, like the rest of this country, our queer communities of color fare less well than our white LGBTQ community, which is already behind on many key metrics.²² We pay a price for being a part of the larger community, and our queer communities of color even more so.

The Williams Institute at UCLA School of Law is the preeminent research center on sexual orientation and gender identity law and public policy. If you wish to understand the complex portrait of LGBTQ life in America, the research from the Williams Institute is a treasure trove of data and instructive analysis. From the Institute's research, we learn that LGBTQ self-identified individuals reside in 93 percent of America's counties.²³ In terms of geographics, we are everywhere. We are also rather ordinary. The large majority of us are in long-term relationships and a full quarter of us are raising children.²⁴

Consider, though, the numerous Williams Institute studies that demonstrate LGBTQ individuals have a higher incidence of poverty, food insecurity, and homelessness than society writ large, and by a significant factor.²⁵ LGBTQ youth have a higher incidence of school

21. See generally Rita Lee, *Health Care Problems of Lesbian, Gay, Bisexual, and Transgender Patients* 172 W.J. MED. 403 (2000), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1070935/>.

22. SOON KYU CHOI ET AL., *LGBT BLACK ADULTS IN THE U.S.* 3–7 (2021), <https://williamsinstitute.law.ucla.edu/publications/black-lgbt-adults-in-the-us/>.

23. GARY J. GATES & ABIGAIL M. COOKE, *UNITED STATES CENSUS SNAPSHOT 2010* 1 (2011) <https://williamsinstitute.law.ucla.edu/publications/us-census-snapshot-2010/>.

24. *LGBTQ Demographic Data Interactive*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data>; ILAN H. MEYER & EVAN A. KRUEGER, *LEGALLY MARRIED LGB PEOPLE IN THE UNITED STATES* 1–2 (2019), <https://williamsinstitute.law.ucla.edu/publications/legally-married-lgb-people-us/>.

25. See, e.g., BIANCA D.M. WILSON & KERITH J. CONRON, *NATIONAL ESTIMATES OF FOOD INSECURITY: LGBTQ PEOPLE AND COVID-19* (2020), <https://williamsinstitute.law.ucla.edu/publications/food-insecurity-covid19/>; BIANCA D.M. WILSON ET AL., *HOMELESSNESS AMONG LGBTQ ADULTS IN THE U.S.* 1 (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-homelessness-us/>.

discipline, involvement with the foster and delinquency courts, and homelessness. In a 2014 study, LGBTQ youth made up 19 percent of the children in care in Los Angeles County.²⁶ In a 2020 study commissioned by the New York City Administration for Children's Services, LGBTQ youth made up 34.1 percent of the children in care in New York City.²⁷ That involvement with the system leads to a statistically significant higher incarceration rate for our youth community, a de facto LGBTQ school-to-prison pipeline.²⁸

Part of the unique price the LGBTQ community pays is also its inability to be accurately counted. Statistics count those willing to be counted. You cannot really consider what portion of the population we make up until the stigma of being LGBTQ is eased. If it is generally bad for your health and safety to be LGBTQ, including having your family kick you out as a child because of your sexuality, it is not a surprise that many of us chose not to self-identify. And through last year, you could be fired from your job for being LGBTQ in twenty-two of our fifty states.²⁹ Moreover, a number of government surveys like the Census do not even collect data points on sexual orientation and gender identity.³⁰ It is as if, at times, we do not exist.

26. BIANCA D.M. WILSON ET AL., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 6 (2014), <https://williamsinstitute.law.ucla.edu/publications/sgm-youth-la-foster-care/>.

27. THEO G. M. SANDFORD, EXPERIENCES AND WELL-BEING OF SEXUAL AND GENDER DIVERSE YOUTH IN FOSTER CARE IN NEW YORK CITY: DISPROPORTIONALITY AND DISPARITIES 6 (2020), <https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf>.

28. Angela Irvine & Alisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth within the Child Welfare to Juvenile Justice Crossover Population*, 24 AM. U. J. GENDER SOC. POL'Y & L. 243, 244 (2015).

29. For a recent survey of LGBTQ employment discrimination post-*Bostock*, see Brad Sears, *Equality Act Testimony: Discrimination by State Governments*, WILLIAMS INST. (Mar. 22, 2021), <https://escholarship.org/content/qt8ff9g341/qt8ff9g341.pdf>.

30. Nico Lang, *Inside the Battle to Get LGBTQ Americans Counted in the Census*, DAILY BEAST (July 1, 2019), <https://www.thedailybeast.com/inside-the->

What is the cause of these negative outcomes for the LGBTQ community? As my colleague and co-founder of our California LGBTQ Bench Officers Association Justice Therese Stewart makes clear in her article in this special issue,³¹ courts have long been overtly hostile to the LGBTQ community. That hostility causes further stigma; it is the stigma that leads to less positive outcomes for our community.

The minority stress model as it relates to sexual and gender identification is based on the pioneering work of Dr. Ilan Meyer of UCLA and the Williams Institute. As he explains:

Minority stress is based on the premise that (a) prejudice and stigma directed toward LGBTQ people bring about unique stressors and (b) these stressors cause adverse health outcomes including mental and physical disorders. The minority stress model shows that circumstances in the environment, especially related to stigma and prejudice, may bring about stressors that LGBTQ people experience their entire lives.³²

Dr. Meyer's work was cited by the U.S. District Court for the Northern District of California³³ in a case that ultimately led to the Supreme Court's gay marriage ruling.³⁴ Dr. Meyer was one of several social scientists whose work was relied on by the district court.³⁵ That work teaches that the negative outcomes detailed above for the LGBTQ community reflect the unique stressors

battle-to-get-lgbtq-americans-counted-in-the-census. See also Bonnie Ruberg & Spencer Ruelos, *Data for Queer Lives: How LGBTQ Gender and Sexuality Identities Challenge Norms of Demographics*, BIG DATA & SOCIETY, Jan.–Jun. 2020, at 2.

31. Therese M. Stewart, *Judicial Words Matter*, 21 J. APP. PRAC. & PROCESS 433 (2021).

32. Ilan H. Meyer, *Resilience in the Study of Minority Stress and Health of Sexual and Gender Minorities*, 2 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 209, 209 (2015).

33. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010).

34. *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

35. See *Perry*, 704 F. Supp. 2d at 935–43.

placed on them by the mainstream community.³⁶ All of us should be cognizant of this dynamic.

IV. WE MUST CONSIDER THE MATH ON INCARCERATION FOR COMMUNITIES OF COLOR AND THE LGBTQ COMMUNITY

Generally speaking, state and federal governments track crime statistics with amazing detail. Generally speaking, though, tracking crime statistics by race is a far more complex issue.³⁷ Regardless of the complexity; the math remains stunning. Consider California, where the Public Policy Institute of California reported that for 2017, the most recent year for then available data, Black people were imprisoned at a rate five times greater than their percentage of the population.³⁸ Notably, the imprisonment rate for Black men is ten times the imprisonment rate for white men. Black women are imprisoned at five times more than white women.³⁹ For Latino men, the imprisonment rate is 2.4 times higher than white men.⁴⁰

The Massachusetts Supreme Judicial Court recently commissioned Harvard Law School to review racial disparities in its state courts.⁴¹ The study noted the difficulty in collecting the data.⁴² But the researchers were able to conclude, similarly to California: “Black people make up just 6.5% of the Massachusetts population and

36. *Id.* at 942.

37. *See generally* ENSURING THE QUALITY, CREDIBILITY, AND RELEVANCE OF U.S. JUSTICE STATISTICS 326 (2009); *see also* David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection* 66 L. & CONTEMP. PROBS. 71 (2003).

38. HEATHER HARRIS ET AL., JUST THE FACTS: CALIFORNIA’S PRISON POPULATION 1 (2019), <https://www.ppic.org/wp-content/uploads/jtf-prison-population-jtf.pdf>.

39. *Id.*

40. *Id.*

41. ELIZABETH TSAI BISHOP ET AL., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM (2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

42. *Id.* at 1–3.

account for 17.1% of [criminal court] cases. Latinx people are similarly overrepresented, making up 8.7% of the Massachusetts population but 18.3% of the cases in the sample.”⁴³ White people, who make up 74 percent of the Massachusetts population, accounted for 58.7 percent of criminal court cases.⁴⁴ Black people are also imprisoned at a rate 7.9 times that of white people and Latinos at 4.9 times than white people.⁴⁵

Finally, the Prison Policy Initiative recently published an article noting the difficulty in locating race disparity data.⁴⁶ After researching the available nationwide data, the author concluded:

- Black people are disproportionately stopped on the street by police, while white people are much more likely to call the police for help;
- Among individuals who have any contact with police, people of color disproportionately experience the use of force;
- Black people are disproportionately likely to be arrested, and to be arrested repeatedly in the same year;
- Black youth are arrested far out of proportion to their share of all youth in the United States;
- The juvenile justice system confines Black youth at over four times the rate of white youth;
- For the lowest level offenses, Black and American Indian youth are confined at rates over three times the rate of white youth;
- Local jail incarceration rates, which have more than doubled over fifteen years,

43. *Id.* at 1.

44. *Id.*

45. *Id.* at 4.

46. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POLICY INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/>.

disproportionately affect Black and Hispanic populations;

- Black people are overrepresented on death row, while white people are underrepresented;
- Black men and women are overrepresented in solitary confinement, when compared to total prison populations; and
- The “prison penalty” in unemployment disproportionately punishes formerly incarcerated Black men and women.⁴⁷

These troubling statistics are not just related to racial minorities. Our LGBTQ community too has a prison population more than three times our general rate of the population.⁴⁸ And LGBTQ individuals of color, again, are disproportionately treated when it comes to imprisonment and their treatment in prison.⁴⁹

These numbers are no rounding errors. These are not within the margin of error. These numbers are not new, and they are not going away. These numbers are part of the problem. This is systemwide math, and it needs a systemwide response. Oh yes, there will likely be nationwide blue-ribbon panels on these issues and their resolution involve much more than the judiciary.

But don't we have some soul searching to do? Isn't the point to take a deep breath and recognize that we participated in a justice system with these types of numbers without even keeping track of them, let alone acknowledging them or addressing the critical issues they present? We committed reversible error as a system by not recognizing and addressing the issue. Continuing without recognition of that error, and without consideration of how it happened and what it all means, puts our treasured system at risk.

47. *Id.*

48. Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 267, 271 (Feb. 2017).

49. *Id.* at 271–72.

V. CONCLUDING THOUGHTS

Two of our most celebrated Americans have offered guidance on the opportunity crises offer us. General Douglas MacArthur wrote: "Like Abraham Lincoln, I am a firm believer in the people, and, if given the truth, they can be depended upon to meet any national crises. The great point is to bring before them the real facts."⁵⁰ And John F. Kennedy penned: "In a time of domestic crisis, [people] of goodwill and generosity should be able to unite regardless of party or politics."⁵¹

We are a nation facing many crises. I have tried to provide what I consider indisputable mathematical facts that demonstrate being an "other" in this society comes at a tremendous cost. Some may disagree about what causes the costs and whether there are two justice systems—but the costs remain still as does the perception of two justice systems. Those costs and those perceptions of two justice systems, whatever the cause, should lessen in the name of justice. People should not be demonized for who they love, the color of their skin, the god they believe in, or the opinions they hold. We must, as Pope Francis instructs, find a way forward through solidarity and reciprocity.

The judiciary prides itself on independence. Our system of justice is not preordained or a foregone conclusion. It is based on hundreds of years of history of jurists striving to get it right. People use our justice system because they trust its outcomes. Politicization of the judiciary and polarization of the community threaten those outcomes. Let us come together, from all walks of life and all faiths and perspectives. We need a better path forward.

50. *Entry from July 6, 2012*, BARRYPOPIK.COM, https://www.barrypopik.com/index.php/new_york_city/entry/i_am_a_firm_believer_in_the_people_if_given_the_truth_they_can_meet_any_nat/.

51. President of the United States John F. Kennedy, Civil Rights Announcement (June 11, 1963).