



Foreword by former Supreme Court Justice
Sandra Day O'Connor

Rebuilding Justice

Civil Courts in Jeopardy and
Why You Should Care

Rebecca Love Kourlis
and Dirk Olin

Institute for the Advancement of the
American Legal System

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Foreword

Our country's courts are in danger. Our democratic society depends upon the existence of a qualified and independent third branch of government. A healthy, fully functioning judiciary provides the counterbalance to the political branches that is necessary to assure protection of our constitutional rights. But support for judicial independence has faltered, in large part because our education system is failing to impart an understanding of the role and importance of the courts. We must rebuild public support for maintaining and protecting the courts.

This book is an effort to contribute to that project. I applaud its contribution to the general level of knowledge about the courts—for lawyers and nonlawyers alike. And, I commend its observations about developing judicial selection systems that take cash out of the judicial selection process and that provide objective judicial evaluation tools to assure accountability.

We are blessed with many excellent judges and court staff around the country, in both the federal and state systems. But they and all the rest of us have an obligation to work hard to improve the system so that it is both impartial and accountable and so that it provides just and efficient resolution of cases. It is a duty that falls to all citizens, not just to judges and

lawyers. This book should be of interest to individuals committed specifically to the health of the courts, and more broadly to the health of our democratic system.

—former Supreme Court Justice
Sandra Day O'Connor

Preface

We gratefully acknowledge the invaluable assistance of Natalie Knowlton, research analyst with the Institute for the Advancement of the American Legal System (IAALS). Natalie helped us to synthesize our two voices into one; provided research and the benefit of her own work and knowledge on these various subjects; organized and checked our work; and generally made the train run on time. We thank you, Natalie. We offer our thanks as well to Jordan Singer, assistant professor of law at the New England School of Law, and Betsy Morris, former writer and editor with *Fortune* magazine and the *Wall Street Journal*. Jordy was involved in the early fashioning of this book and Betsy in the refashioning and reorganizing.

We further acknowledge those attorneys, judges, court administrators, and other participants in the system who lent their insights and voices to this effort.

Finally, we would like to thank the individuals, committees, and organizations with whom IAALS works. Without your input, support, constructive criticism, and creative optimism, this book—and the broader efforts to which IAALS is dedicated—would not be possible. Thank you.

Introduction

This book is an effort to sound the clarion call about the crisis in the courts in twenty-first-century America. Its purpose is to illuminate why courts are critical, and how they are being eroded, defaced and undermined—and to present some solutions, both internal and external. *Rebuilding Justice* is a joint product of two authors: one a former trial judge and state court justice who has seen the system from the inside for thirty years, and the other a legal affairs journalist who has made a career of following and commenting on the system from the outside. We hope that, between the two of us, we provide a balanced perspective.

Our stories differ, so we will begin them separately.

The Judge

After a few years in California, earning undergraduate and law degrees from Stanford University, I came back to Colorado and started practicing law. Over the following ten years, I practiced in a medium-size firm, a large national firm, and in a Main Street law practice in a small agricultural town in Colorado. After that diverse experience, I became a state trial court judge in a small rural district in northwestern Colorado. I handled death penalty murder cases (my

first being two weeks after I took the bench, having never practiced criminal law), divorces, complex commercial disputes, water cases, juvenile and probate cases. It was a diverse docket in every sense of the word. I rode circuit among three counties, over one very mountainous pass.

My first day as a judge, the docket was set in what is referred to as a “cattle call” mode. In short, everything was set for two times: 9:00 AM or 1:00 PM. The courtroom was packed. Prisoners from the jail were seated in the jury box, with sheriff’s deputies on either side. Attorneys and their clients milled in the hallway and crowded the benches. It fell to me to call out the cases in some numerical or other order. The long and short of it was that everyone sat and waited while other cases were being heard. The only person in the courtroom who benefited from the docket method was the judge. Everyone else waited, spent money on attorneys, and wasted their time. That system was a court-centric model—not a user-centric model.

After seven years on that trial court, I spent one year as a mediator and arbitrator and then eleven years as a justice on the Colorado Supreme Court. Over that almost twenty-year period, I saw countless examples of a system that is judge- and lawyer-centric, and not citizen-centric. I found myself spending more and more time advocating for the redesign of the system and the reshaping of expectations—everything from allowing jurors to take notes and ask questions of witnesses (written out, then passed to and posed by the judge), to not keeping jurors waiting in a back room while the judge and attorneys handle other matters; from streamlining the way grievances against attorneys are addressed, to sorting out the best way to

handle divorces for the benefit of kids and families. The citizens rely on the system, and they are the ones who should be at the center of it. It is my mission in life to work toward that goal.

It is also the reason I left the court to found and serve as the executive director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver (<http://legalinstitute.du.edu>). The mission of IAALS is to identify problems within the legal system, research, propose solutions, support implementation of those solutions, and then measure their success. In short, we try to fix things that are amiss in the legal system in order to make it more responsive, transparent, efficient, and impartial. This book is the outgrowth and overview of that work.

I am not riding circuit as a trial judge anymore, but my experiences in that position shape everything I see and believe. I know how important it is for everyone who walks out of a courtroom to believe that they have been treated fairly.

My husband is a sheep and cattle rancher, and I often look to him as my lodestar. He has two maxims that apply here. First, if a system or a portion of a system does not make sense, something is wrong and needs to be fixed. Second, the measure of how much people care about something is how hard they are willing to work to make it better. There are parts of the legal system that just don't make sense, and I care about the system enough to work very hard at trying to change those parts.

The Journalist

I attended Dartmouth College on a debate scholarship, with every intention of going to law school.

But my passion for writing combined with a growing interest in politics to send me in a different direction—albeit one that eventually led back to the justice system. After graduating from Northwestern University’s Medill School of Journalism, I covered Congress for the *New Republic* and the *St. Petersburg Times*. I met senators and presidents, dodged a bullet while writing stories about the Nicaraguan Civil War, and delved extensively into debates over Social Security and immigration. Occasionally, I also covered oral arguments before the US Supreme Court. That, along with research I conducted for a biography of William Brennan (written by Stephen Wermeil and published in 2010) increasingly led me into legal affairs.

In 1989, my wife and I moved from DC to San Francisco, where I took the helm of the *San Francisco Daily Journal*, a legal affairs newspaper, and eventually its sister glossy magazine, *California Lawyer*. Soon after our arrival came the Loma Prieta earthquake, and the newspaper’s staff geared up in anticipation of a deluge of personal injury litigation. But it was the dog that barely barked. Relatively few suits were filed. During the ensuing decade, I developed a much more nuanced view of the civil justice system’s failings and challenges.

Slip-and-fall lawsuits were not what were choking the docket, I concluded, but business-on-business litigation that was just veiled commercial strategy. Simultaneously, I became increasingly dismayed by the rise in private judging (via high-priced mediation and arbitration) and a growing politicization of the judiciary, with moneyed interests pouring dollars into a system that had once enjoyed a fairly broad expectation of nonpartisanship.

Toward the end of the ’90s, I took a sabbatical,

studying immigration law as a fellow at the University of California–Berkeley’s Institute of Governmental Studies. We then returned to the East Coast, where I launched what is today law.com and became national editor for the *American Lawyer* magazine. I subsequently collaborated on or directed many award-winning projects and features, including in-depth reporting on the fallout from the Enron scandal and the dot-com bubble bursts, as well as, most poignantly, writing on the liability fallout from the Catholic Church’s child abuse scandals. I also wrote a column (“Crash Course”) for the *New York Times Magazine* and occasionally contributed pieces on legal matters to the *Times*’ op-ed page.

It was after writing one such piece—on the social corrosion I believed was wrought by New York’s ferocious and secretive judicial election system—that I received backing to launch a think tank. The Institute for Judicial Studies inaugurated unprecedented journalistic tracking of a judiciary whose members were too often installed by shadowy backers and whose record of performance was so underreported as to be virtually opaque. We harvested metrics such as reversal rates, docket dispensation numbers, and motion practice statistics, with our work appearing in the *New York Times*, the *Wall Street Journal*, and *Newsweek*. When funding for that project ended, I became editor in chief of *Corporate Responsibility Magazine*, where my experiences are today serving a new readership.

Just as I was making that switch, Justice Kourlis approached me about working on this project, and I leapt at the chance. Justice Kourlis and the institute’s reputation preceded them, and I eagerly joined as a fellow. My own writings about rebalancing

judicial independence and accountability jibed with the IAALS agenda, and the opportunity to combine my reporter's pad with the institute's extensive research on civil justice reform has been well worth the nights and weekends that I sacrificed to the effort.

The Story

The justice system is fundamental to our democracy. The courts are the counterweight to the other two branches of government, assuring that no branch becomes overzealous. Our Founders specifically established a system of government that is not pure majoritarian rule; rather, it is a system that focuses on protecting the rights of individuals—even against the majority if need be. The courts are the last line of defense for those rights—the safeguard. And, just to be clear, this is about more than the rights that attach to criminal prosecutions or defense. The legitimacy and trustworthiness of the courts underlie our willingness to enter into a contract, hire or be hired, buy a house, drive a car, or get married. The courts ensure that *all* of the rights guaranteed by the US Constitution and state constitutions are enforced and upheld. The individuals who wear the mantle of this responsibility include not just judges, but jurors as well. We are the only country in the world that has the benefit of a right to trial by jury in civil cases as well as criminal cases, and the enshrinement of that right in the Seventh Amendment was no accident. The courts were positioned to balance the excesses of the executive or legislative branches, and the jury to balance the excesses of the judges. Trial by jury—in all kinds of cases—was envisioned as an additional way to place power in the hands of the governed, as well as to

ensure transparency and accountability of the court system. Lady Justice, more even than the Statue of Liberty, is the beacon of our freedom, our way of life, and our sustainability as a country.

Now, for the bad news.

Justice is in jeopardy, for a variety of reasons, but few Americans know or care. When the education or medical services systems are at risk, there is a national uproar. But, as chapter 1 addresses, because a majority of the American public does not understand the courts or recognize how vital they are to our body politic, there has been no public outcry about the justice system. (Speaking of understanding, for those of our readers who are not lawyers, you might find it useful to scan the Primer on page ## and the glossary on page ## before reading on. Lawyers whose practice does not regularly involve civil pretrial and trial practice might also find these sections to be a useful refresher course.)

One last introductory note: our focus is on court reform, not tort reform. Is that just a different consonant, a distinction without a difference, or perhaps just a less incendiary moniker for the same concept? No. Tort reform proposes amendments to the law that either limit the circumstances under which injured people may sue, limit how much money juries may award to injured people, or both. Court reform is a different animal. It is an effort to reform the *process*, not the substantive law. We believe that making the process work is the real objective: ensuring that if an individual or company has to file *or* defend a case, they will come away from the process believing that the judge was fair and impartial and that the process was just, efficient, and cost-effective. That objective

crosses all ideological and economic divides—it is a bid for a system with “justice for all.” Court reform has universal application—and involves much higher stakes than tort reform.

Why is justice in jeopardy? We begin our exploration with some of the fundamental players who operate within these federal and state systems: the judges. Judges come to their positions in a variety of ways. At the federal level, the system is appointive—judges are nominated by the president, confirmed by the Senate, and then serve for life or until resignation, retirement, or impeachment. This appointment process is increasingly politicized and lengthy. Courts are often left with vacant seats for years while the president and the Senate alternately hold nominees hostage. In districts with heavy caseloads, dockets can languish. The battle over nominees in the Senate has trickled down to affect not only US Supreme Court nominees, but also lower court nominees, and party affiliation and doctrinal litmus tests can sometimes be predominate measures.

In state courts, where selection systems significantly diverge from that of the federal judiciary, these problems are heightened. Although something of a mishmash, they generally fall into three categories: appointment, election, or “merit selection.” In states where judges are elected, judicial candidates—especially at the supreme court level—have run increasingly no-holds-barred expensive election campaigns in which they malign their opponents and align themselves with particular interest groups. One of the issues that judges and lawyers are debating in those states is how *much* money in campaign donations should cause a judge to be required to step down in a case involving a contributor to his or her campaign.

This presents sort of a *Price Is Right* question: how much does the perception of bias cost? Appointment/retention systems are increasingly under fire as voters try to figure out what they should expect of judges and how to get the information they need in order to evaluate judicial candidates. In the meantime, even those retention elections are seen by some groups as an opportunity for making political hay, and judges are looking over their shoulders for fear of losing their jobs if they make an unpopular decision. On top of that, there is an entire movement that seeks to make courts *more* accountable to partisan ideology—a reasonable goal if judges are just one more species of political hack. But they're not, as we will explain in chapter 2.

Jurors are also fundamental players in the civil justice system, although they are rapidly vanishing from the courtroom. The Seventh Amendment to the US Constitution guarantees us trial by jury in most civil matters in federal court, and the state constitutions similarly provide for jury trials in many kinds of civil cases. We are the only nation in the world that guarantees that right. The jury is one of the ways by which our Founders sought to protect against tyranny and ensure citizen participation in every aspect of our government. Yet, as we will detail in chapter 3, jury trials are now almost nonexistent in civil cases. Today, a tiny fraction of lawsuits filed actually go to trial by jury. Many of our readers might initially applaud that fact, thinking that juries are unpredictable, untrustworthy, and incapable of deciding today's complex issues. The McDonald's hot coffee verdict was big news for months, maybe even years. It was a 1994 product liability case in which a jury awarded \$2.86

million to an older woman who suffered severe burns from spilled coffee she had purchased at McDonald's. The trial judge reduced the award to \$640,000 before any appeal, and the parties then settled for an unknown amount under \$600,000 before the appeal was concluded. The case fanned a frenzy of concern about runaway juries.

The heat of that concern has since cooled but jury trials have not rebounded. Before congratulating ourselves on stymieing that prospect, let us remember that the right to trial by jury was one of the fundamental tenets of the American Revolution. The Declaration of Independence listed "the denial of the benefits of trial by jury" as one of the offenses by England against the Colonies. We fought for the right to have citizen participation in the justice system, to ensure that even the power of judges was not without limits or accountability. Let us also remember that jurors are us, and when presented with clear information and good instructions from the judge, we come to reasonable and trustworthy conclusions.

Jury trials have fallen prey not only to skepticism, but also to the expense of the pretrial process that depletes the resolve and resources of parties to a lawsuit before they ever get to a jury. The tortuous process of getting a case ready to go to trial (and paying for that preparation) might actually have the effect of ensuring that it never gets there. This is a trend we must reverse. When we as jurors are present in the courtroom, the whole process is more inclusive, transparent, and, well, democratic. It is the way the system was intended to operate.

Last, but not least, litigants are the fundamental users of the civil justice system. The faces of these

players, too, are drastically changing. Particularly in state courts, but increasingly in federal courts, individuals are self-represented (in other words, they proceed without attorneys). The number of self-represented parties has increased dramatically in the last decade, either because they cannot afford a lawyer or do not trust lawyers, or because they do not think their case requires the services of a lawyer. The growing number of these litigants creates a unique challenge in the court system and plays into a number of the issues that will be raised in the chapters to come.

The shared component for these players is the stage on which they meet: the system itself. Our focus is the civil justice system—the taken-for-granted and much misunderstood civil justice system. Our Constitution and Bill of Rights, brilliant as they are, are not automated. They rely upon the courts for interpretation and enforcement. Think back in history to turning points in the American experience and the role of the courts. It was the courts that established the sanctity of contract (*Dartmouth College v. Woodward* in 1819); the protection of interstate commerce (*Wabash, St. Louis and Pacific Railroad Co. v. Illinois* in 1886); and the right to an equal vote (*Baker v. Carr* in 1962). It was in the courts where the agony of slavery played out and was finally addressed: holding first that a slave did not have the right to sue in court (*Dred Scott v. Sanford* in 1856); then that “separate but equal” facilities were constitutional (*Plessy v. Ferguson* in 1896); and finally that segregation was not permissible (*Brown v. Board of Education of Topeka* in 1954). It was the courts that ruled that unions and strikes were legal (*Commonwealth v. Hunt* in 1842) and courts that have parsed the meaning and application of the free

exercise of religion clause (*Wisconsin v. Yoder* in 1972, holding that Amish children could be exempted from state school-attendance requirements). Courts protect personal property rights (*United States v. Causby* in 1946, holding that the government was required to compensate a farmer for his land when low flying jets rendered it unusable); rights to free speech (applying protection of free speech to the states through the Fourteenth Amendment's due process clause in *Gitlow v. New York* in 1925); and free press (protecting all statements about public officials unless the speaker lied with the intent to defame in *New York Times v. Sullivan* in 1964). These were all civil cases. Civil courts are the byways for the establishment of norms and the enforcement of rights and remedies.

Our nation's history is marked by times when the courts were both the last resort and the vision for the future—breathing life into statutes, holding people accountable, and providing “Equal Justice Under Law.” The role of the courts in our brand of government is to enforce the rights constitutionally guaranteed to individuals—against even the will of the majority. All of us are members of some minority with rights that we hold dear. Without the courts, those rights could be quickly eroded. However, the impartial, efficient administration of justice is imploding, and a number of factors are to blame.

At both the state and federal level there is a complex support structure for the courts. The on-the-ground manifestation of that support is clerks, jury commissioners, and administrators who run the courthouses and undergird the judges. More broadly, both the federal and state court systems have administrative offices that supervise budgets, train judges and

staff, develop plans and analyze implementation, and maintain information systems. This complex support structure is at risk as courts face free-falling budgets.

Legislators are urging the courts to figure out ways to cut out case types, cut back services, reduce jury trials, and add more folks who act as judges (but who are really not judges) to resolve cases more cheaply. In another corridor of the legislature, lawmakers are mandating that certain kinds of cases be expedited or given priority on the docket. Criminal, juvenile, and family cases necessarily move to the front of the line, and civil cases languish at the back. This is a multifaceted problem that, as we will discuss in chapter 4, threatens to destroy the system from within.

Into this mix comes the fact that the rules of civil procedure guiding federal courts and many state courts were crafted in 1938 and have not been fundamentally revised since then. A great deal has happened since 1938; enough to make it feel like ancient history. With population growth, changing demographics, and the advent of the digital age, the playing field is larger and more complex. Compounding the issue are the judges and lawyers who are change-averse and trained to spell out every possible contingency. The result is complexity, and with complexity comes delay and skyrocketing cost. The rule of thumb among lawyers around the country today is that a lawsuit must involve at least \$100,000 to be cost-effective. So if someone defaulted on your \$50,000 promissory note, for example, you might not be able to find a lawyer to bring the case. It is no wonder, then, that more and more litigants are proceeding through the court system without being represented by an attorney. We will explore the interplay of the rules of civil

procedure and the issue of costs in chapter 5.

The cost of litigation is one of the factors driving this implosion of the civil justice system. *Litigation* is the formal name for the lawsuit business—and it *is* a business. In this business, discovery is the name of the game, not trial. Discovery is the process by which the parties to the lawsuit demand information from each other. That information can come in the form of written questions, inspection of documents, or oral examination under oath. Discovery can be used and abused not to seek truth, but rather to increase costs, cause delay, and create inconvenience—all with a view toward leveraging settlement. Plaintiffs routinely complain that defendants stonewall them and manipulate them to ensure that the costs go up so that they will take less for their case. Defendants complain that plaintiffs hold them hostage by filing thin cases, demanding broad and deep discovery, and leveraging settlement possibilities.

Take document discovery as an example. In 1938—or indeed up until about 1988—it was not unusual for a lawyer to show up in court for a trial with one or two files of documents. That same type of case can now generate thousands or even millions of documents that need to be reviewed and perhaps produced to the other side, including e-mails, text messages, voice mails, and multiple drafts of documents. Under the current rules, *all* of that information can be mandatorily discoverable even if it has only a tangential connection to the case. The costs of electronic discovery in a medium-size case can be in the millions of dollars. Chapter 6 will explore the consequences of data overload to the functioning of the civil justice system.

The problems of court funding and excessive

litigation costs can come together to reduce access to both the state and federal civil justice systems for all but the very wealthy. This is, however, not a death knell—provided that there is the necessary support for innovation and solutions, as we will explore in chapter 7.

Finally, the issues identified above—budget crises, expensive and time consuming pretrial procedures, and reduced access to courts—are even more acutely felt in family cases, where the very nature of the process involves litigants in crisis. Chapter 8 will explore the issues faced by children, families, and individuals as they move through the domestic relations process.

So walk with us through the courts of the second decade of the twenty-first century as we chronicle the problems and identify some possible solutions. This is important stuff; the courts require the support of a knowledgeable and attentive citizenry if they are to continue to guard the ramparts of our way of life.

Civics and the Courts: A Crisis Hidden in Plain View

Most Americans do not understand the courts and what we do not understand we will not prioritize, much less fix. We are at risk of losing something critical to our democracy, in part because too few of us comprehend it and value it. This is truly ominous for a branch of government that lives or dies by the faith and goodwill of the American people. Without that faith and goodwill, the courts lose their legitimacy and judges become robes with no authority.

Unfortunately, what we cannot see as a society, we are not likely to understand—and we see less and less of what happens in courts. Root causes of the new opacity include the vanishing jury trial, the rise of resolution of disputes through private arbitration or mediation methods, and a litigant preference for sealed settlement agreements. While these trends do offer some possible benefits (in that they can reduce the cost of resolving a case and also decongest the courts), they also combine with the loss of court beat reporters and contraction in traditional media coverage to obscure and contort the public's view of the system.

If justice is not perceived as being served, perhaps it is not served at all. Participants or observers

of specific litigation can come to the belief, rightly or wrongly, that justice has not been served. More broadly, the citizenry can become cynical—deriding jackpot justice when they find outcomes random, or special interest justice when they suspect the system has been gamed. Only the most sensational civil cases make the news (with the exception of the blogs), and they are likely not representative of the millions of cases that flow in and out of courts every year. This might explain much of the reason for the increasing attacks on the civil justice system. Insurance companies and businesses fear that juries find liability too easily and dole out excessive damages. Individual litigants think injury compensation takes too long, is oppressively expensive, and is a David-versus-Goliath proposition in any event. Others fear that civil litigation has become a piggybank for powerful lawyers who monetize technicalities and churn cases.

Arriving at a consensus about these varied claims is somewhere between extremely difficult and impossible, in part due to the lack of objective data and the fog that surrounds the courts. Without data, partisan interests can too easily hijack reform initiatives. Greater transparency and dissemination of that data would help the public and policymakers alike improve their understanding of the system, assess its performance, and soberly evaluate reform alternatives. The judiciary itself, with assistance from a more publicly communicative bar, must take the lead in opening the courthouse windows and switching on brighter courthouse lights.

That is no easy task. The ignorance about the system is pervasive and horrifying. For example, the chief justice of one state recently reported that after his presentation to the legislature on budget requests for that

state's courts for the upcoming year, one member of the budget committee approached him and noted that he had never really understood that the judiciary is a separate and equal branch of government, rather than just another executive administrative agency. And although Senator Chuck Schumer (D-NY) who serves on the Senate Judiciary Committee surely misspoke when he listed the three branches of government as the House, the Senate and the president¹, this omission is symptomatic of the backseat role our third branch of government all too often occupies in the public's perception.

The black hole of misunderstanding is dangerous to the health of our body politic. Surveys sponsored by the Philadelphia-based National Constitution Center (NCC) conducted in the late 1990s reached profoundly depressing conclusions about Americans' civics knowledge, generally, and their legal knowledge, specifically. In the first comprehensive study of constitutional knowledge, the NCC 1997 survey found that one in three surveyed did not know the number of branches in the federal government.² Of those surveyed, 62 percent could not name all three branches, only 14 percent could name one, and mere 15 percent could name two.³ In a 1998 poll, the NCC found that more American teenagers (59 percent to 41 percent) could name the Three Stooges than the three branches of government.⁴ Even worse, 94.7 percent could identify actor Will Smith, but only 2.2 percent could name the chief justice of the United States.⁵ (Okay, we like Will Smith, but *really*?)

Speaking about this later study, former mayor Edward Rendell, who subsequently became governor of Pennsylvania, explained that this was not some abstract, neoconservative lament about the decline of

Western civilization. The implications, he said, were much more concrete than that. Rendell crystallized the impact of this reality in words that are still sadly true. “These results are alarming for everyone who cares about the future of our democracy,” he said.⁶ “The Constitution doesn’t work by itself. It depends on active, informed citizens. And that’s who these kids are: our future citizens.”⁷

Rendell’s assertion was subsequently borne out in a plain and practical study published by Professor Kimberlianne Podlas in a 2002 issue of the *American Journal of Trial Advocacy*.⁸ Using the coinage “syndi-courts” to describe the syndicated judge shows on television, Podlas reported on how watching such programs affects the opinions of prospective jurors.

Podlas’s conclusion was that these shows have created a unified body of misinformation. Easily digestible narrative lines of legal conflict are glibly wrapped up and resolved. As such, the shows capture nothing of the complexity that informs the liberty or property tussles in real-world courtrooms. Or, as Podlas nicely distilled it: “These shows rely on aggressive, often unsympathetic judges, laughable litigants, and simplistic legal results.”⁹

Podlas demonstrated that the syndi-court programs (*Judge Judy*, *People’s Court*, *Divorce Court*, etc.), filling the vacuum of some citizens’ civics knowledge, can have significantly damaging effects. When viewers have no actual knowledge of the system, the syndi-courts’ mischaracterizations take root and grow malformed expectations.

The study encompassed 225 individuals reporting for jury duty in Manhattan, Washington, DC, and Hackensack, New Jersey. Group members were

asked whether—and, if so, how often—they watched any of the syndi-court shows then being aired. Of the 225, almost two-thirds (149) were “frequent” viewers (checking “two to five times per week” on number of times watched), and 76 were infrequent (“once per week”) or nonviewers.¹⁰ Some might find the fact that two-thirds of the individuals plunked themselves down in front of a syndi-court show two to five times per week disturbing enough in its own right.

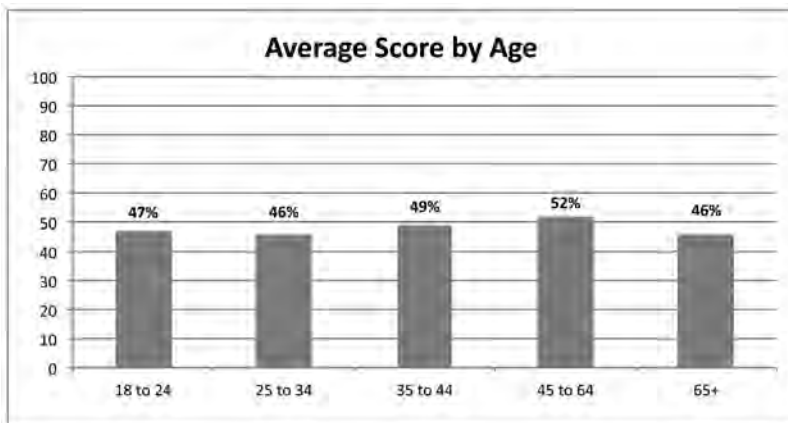
The consequences of “television law school” are positively jaw-dropping. The findings here, as described by Podlas, were hardly subtle. Apparently having internalized a televised judicial role model that prizes snark, cant, quip, and put-down, frequent syndi-court watchers viewed judges as active participants in the dispute. They expected the judges to have an opinion, and to make this opinion clear to the jury. They expected them to ask questions, be aggressive with litigants, and express displeasure or disbelief.

The significance? Those viewers expect judges to be participatory, partial, invested decision makers—not independent and impartial arbiters. As adduced in a seminal piece by Judge Bruce M. Selya for the *New England Law Review*, the justice system’s skeletal structure might consist of rules and principles, but its life-blood is the collective respect derived from public opinion.¹¹ When a majority of the public obtains its central understanding of law from television—and when that programming is dominated by legal soap operas and courtroom game shows—fundamental misperceptions of the system’s purposes and processes are like a virus invading a compromised immune system.

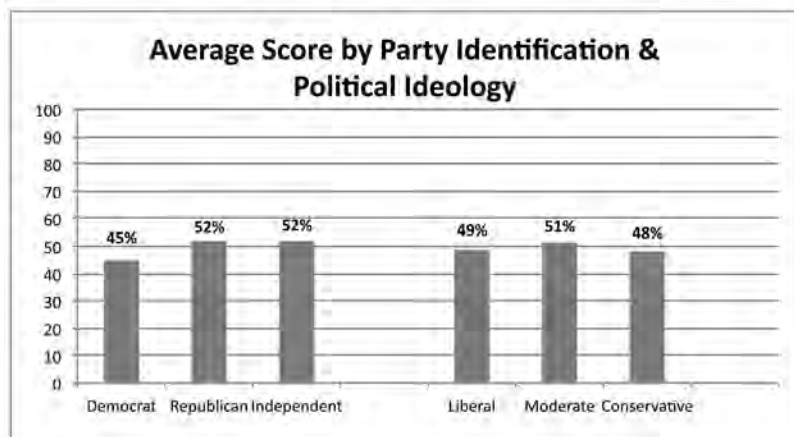
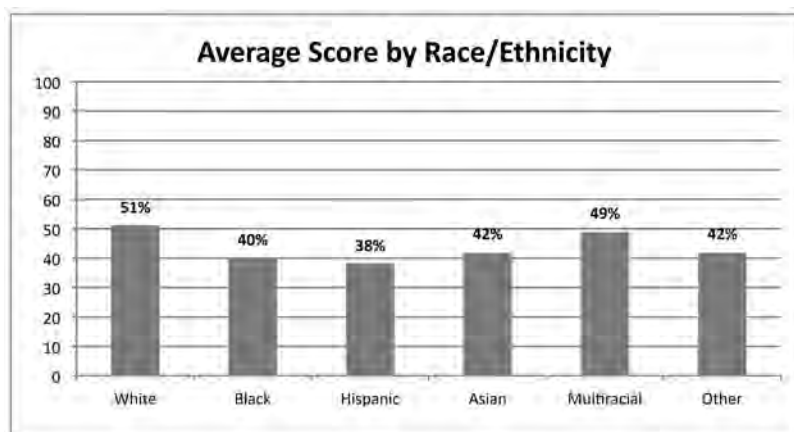
Granted, these findings might be dated. Surely, a decade of Internet access must have elevated the

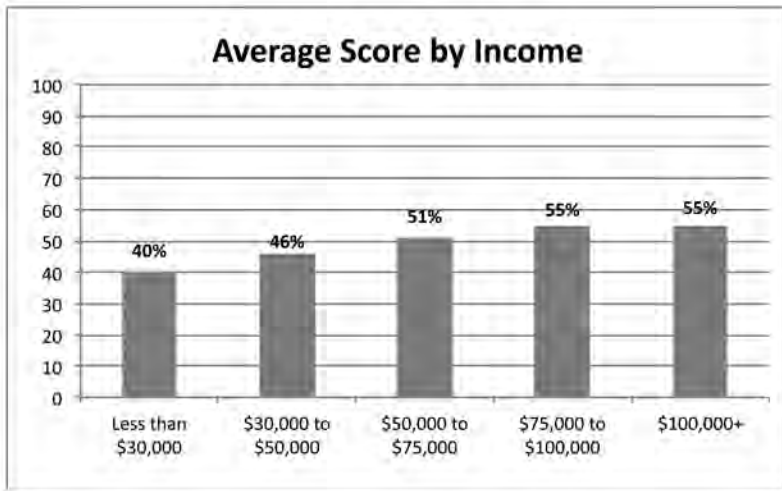
national awareness on this front? Well, no. A 2007 Annenberg Public Policy Center Judicial Survey found that only one in seven Americans surveyed (15 percent) can correctly name John Roberts as the chief justice of the United States.¹² But two-thirds of those surveyed (66 percent) knew *at least* one of the judges on *American Idol*.¹³ In a 2008 study of American adults by the Intercollegiate Studies Institute (ISI), more than twice as many respondents (56 percent) knew that Paula Abdul was a judge on *American Idol* than knew that the phrase “government of the people, by the people, for the people” was a quotation from Abraham Lincoln’s Gettysburg Address (21 percent).¹⁴

Most observers believe that American civics illiteracy is acute, chronic, and epidemic. Of the more than two thousand people to whom ISI posed its nearly three-dozen questions, fully 71 percent received a failing mark.¹⁵ Importantly, the plague is trans-demographic. ISI chairman Josiah Bunting III noted that the failure cut across all segments of the population. “Young Americans failed, but so did the elderly,” he reported to the National Press Club in 2008.¹⁶



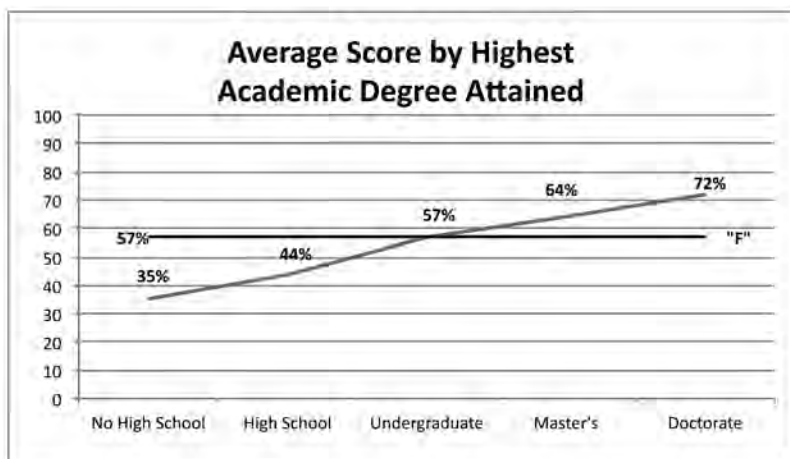
It does not end there. Bunting reported that “men and women, rich and poor, liberals and conservatives, Republican and Democratic, white, black, yellow and brown—all were united in their inability to master the basic features of America’s constitutional form of government.”¹⁷ The overall average score was 49 percent—an F in any classroom.¹⁸ Nor could partisans of any particular faction claim bragging rights. Liberals scored 49 percent, conservatives scored 48 percent, and independents and Republicans scored only slightly higher than Democrats (52 to 45 percent).¹⁹





Some apologists for the status quo respond that this is why we depend on representative democracy to develop expertise, or at least working knowledge, among those chosen to lead. Again, the news is not good. As indicated by that legislator's ignorance of the governmental branches, politicians might not get it either: they scored more than five points *lower* than their unelected cohorts.²⁰ The number of officeholders who knew about the establishment clause was 21 percent.²¹

Others argue that education is the Holy Grail. If so, the current chalice is filled with Kool-Aid. College graduates did outscore those who didn't get a college degree, but not by as much as one might hope (just 57 percent to 44 percent).²² "For each year of college attained, college graduates answered only one more question correctly than their high school counterparts," ISI's Bunting said.²³ "If you can get as much civic education from a library card and newspaper subscription as you can from an expensive college education, then something is terribly wrong with the activities on our campuses."²⁴



If children are our future, as Governor Rendell asserted, and the health of our Constitution and judicial system rests on education, then we have much to fear. A 2009 survey of Arizona high school students attending public, private, and charter schools confirmed the grim reality of the previous surveys.²⁵ The survey pulled from the US Citizenship and Immigration Services database of questions given to citizenship candidates. The passing rate was 3.5 percent for public school students, 7.3 percent for charter school students, and 13.8 percent for private school students.²⁶ In comparison, Citizenship and Immigration Services reported that candidates for US citizenship, who are required to take a test on ten questions from the database, had a first-try passing rate of 92.4 percent.²⁷ Even acknowledging that the candidates for citizenship actually studied these materials for their test, shouldn't there be a corollary requirement for native-born students?

The combination of misinformation, misconception, and syndi-court-shaped perceptions is toxic. And most courts are not themselves trying to change

the brew by infusing the mixture with real information about the functioning of the courts and their role in our democracy.

To be sure, at least one significant critique has been made of the consensus on civic ignorance—by professors James L. Gibson of Washington University in St. Louis and Gregory A. Caldeira of Ohio State University. In *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, the pair denigrates “open-ended recall questions” that they claim do not reveal the true extent of the citizenry’s knowledge of the Supreme Court.²⁸ Instantly recollecting the chief justice’s name, they contend, is not as important as general ability to locate the purposes and powers that reside within the governmental structure. Gibson and Caldeira claim that “people know orders of magnitude more about their Supreme Court than most other studies have documented.”²⁹

Even if one concedes that this study is not an outlier (which it might well be), it is focused on the Supreme Court, per se. It does not undermine broadly demonstrated public misunderstandings of judicial independence and the impartiality of the courts in general.

Take this construction that is partly based on Gibson’s research:

I do not know the name of my plumber. But when the plumbing gets stopped up, I know how to get a plumber to come out and repair my plumbing. I may not know at any given moment who is most responsible for the detention camp at Guantanamo Bay. But when I hear discussion of this issue during the election season, I likely learn who is responsible (even if I might soon forget); and,

perhaps more important, I learn which political party, not individual actor, is responsible.³⁰

Political parties depend upon some level of Americans' knowledge of their system, but Americans' choice of judges and funding of the courts need to be as independent as possible of constituencies. There is a vital difference between homeowners subcontracting pipe repair and citizens who farm out their informed participation in participatory democracy. An uninformed citizenry leaves more than water damage in its wake.

Moreover, in the end, even Gibson grants the enormous and unique importance of public knowledge in this realm:

Politicians and scholars worldwide have long been impressed with the fragility of judicial power. When it comes to securing compliance with their decisions, courts are said to have neither the power of the "purse"—the ability to raise and expropriate money to encourage compliance—nor the power of the "sword"—the ability to coerce compliance. In the absence of these tools, courts really have only a single form of political capital: legitimacy. Compliance with court decisions is contingent upon judicial institutions being considered legitimate. Legitimacy is a normative concept, basically meaning that an institution is acting appropriately and correctly within its mandate. Generally speaking, a great deal of social science research has shown that people obey law more out of a felt normative compunction deriving from legitimacy than from instrumental calculations of the costs and benefits of compliance.³¹

There is no army standing at the ready to enforce court orders. Indeed, the rule of law is a bit like our monetary system—built on trust. But trust is easily eroded, and must be constantly earned.

Thus, the dearth of understanding about the courts can itself put our system at risk. Even Gibson makes the case for heightened awareness (i.e., knowledge) to preserve the “reservoir of goodwill” that is required to protect a minoritarian bulwark:

If democracy can be simply defined as “majority rule, with institutionalized respect for the rights of the minority, especially rights allowing the minority to compete for political power”, then the judiciary clearly represents the “minority rights” half of the equation. If courts are dependent upon majority approval for their decisions to be accepted, then one of the most important political functions of courts is in jeopardy.³²

The point is that courts should not be *dependent* upon or look to the will of the majority when enforcing rights; and if the majority does not know that, the courts are in jeopardy of being not just misunderstood and maligned, but more ominously, hijacked by partisan interests. The necessary complexity of our nuanced civil justice system—and the unique vantage point occupied by members of the bench—makes the judiciary itself the first, best Paul Revere in this cause. Among those who decry the almost viral ignorance of our court system’s true role, retired justice David Souter is one who believes that such ignorance has become so threatening that he has volunteered to wage a high-visibility public campaign to combat the disease.

Citing another poll that had just found two-thirds of the country unable to name the three branches of government, the normally reserved Justice Souter became apoplectic. “Consider the danger to judicial independence when people have no conception of how the judiciary fits within the constitutional scheme,” he said.³³ “If anyone put that question to my ninth-grade class, none of us would have failed to answer.”³⁴

Retired justice Sandra Day O’Connor has embraced this cause as part of her life’s work as well. Justice Souter’s voice, in fact, was echoing that of his former colleague. Calling the rift between citizens and their legal system “positively frightening,” in 2009 Justice O’Connor launched an education campaign, including a school-targeted website called iCivics.org. She told the National Education Association:

For a good many years, I think public schools, by and large, were conscientious and tried to teach civics and government. We have some very boring textbooks on the subject. Certainly most of them weren’t written to keep you awake. Nonetheless, we persisted...[But] in recent years, Congress and our then-President proposed federal money be given to school districts based on test scores in math and science, on the theory that schools doing a good job in those areas should be rewarded with some funding. The unintended result was that many schools stopped teaching civics and government.³⁵

Justice O’Connor proceeds from the same assumption as former Philadelphia governor Rendell that representative democracy is organic in nature and thus dependent upon an active, informed citizenry. In

Justice O'Connor's case, the twinned notions of do-it-yourself government and rugged communitarianism took root on the Arizona ranch of her childhood. "You can't avoid participating in the productive life of a ranch or farm," she told the *Arizona Republic*.³⁶ "It takes everybody's help to make it work. You learn how to be part of it and how to do things. When you live out a life like that, you can't look up in the Yellow Pages and get a repairman if something breaks. You have to fix it. You."³⁷ (Those who would suggest that all of us just have to know how to call the plumber, take note.)

Hardly a member of the Nintendo generation, O'Connor nevertheless recognized the implications of a population whose children spend an estimated forty hours per week in front of electronic screens (whether TV, computer, or cellular). Looking to harness that reality, her iCivics initiative includes platforms for Web-based games designed to teach seventh and eighth graders about government. In one, for example, a middle school student sues his school for banning a T-shirt he wears that features his favorite band. It's a real-world primer in First Amendment issues that relates directly to teen experience.

But the former justices' laudable efforts must be the floor, not the ceiling. Or, as Jon Stewart commented when Justice O'Connor revealed the public ignorance statistics on *The Daily Show*: "We're going to need more than a website."³⁸ For one thing, it is sadly ironic that the iCivics games—in which players can watch and listen to a Supreme Court argument—offer greater access to the courts than real life affords. What Judge Richard Posner has dubbed the law's "professional mystification" is an anachronism

that both shrouds the law in secrecy and diminishes the collective democratic character. The administrative governing body of the federal courts recently announced a pilot program to test the feasibility of allowing camera coverage of civil proceedings in federal district courts—much more appropriate for our edification than syndi-court programs. Moreover, beyond the curricular shifts wrought by No Child Left Behind reforms, docket management that discourages trials and media coverage that deemphasizes court cases have also helped decimate public understanding of the courts in recent years.

We have also lost jurors as a pool of informed citizens. For years, jury service was not only a significant way for citizens to have a voice in the system but also a way to learn about it. In the twenty-first century, however, jury service is virtually extinct in the civil realm.

Given these trends, it is increasingly falling to judges themselves to communicate their message to the broader public. This marks a change from the courts' traditional role of communicating primarily through activity in the courtroom or written opinions. In fact, many judges remain squeamish about any public outreach—except from behind the bench or the pen.

Take this question: should judges be blogging? Although former federal judge Nancy Gertner was an occasional blogger for Slate.com, one of the judges on the First Circuit Court of Appeals—the same Judge Selya who championed the public confidence as the lifeblood of the legal system—has voiced fears that such practices could come back to haunt judges if any comment is deemed prejudicial to a subsequent case. Indeed, when a judge ventures forth to

educate or inform the public (from whatever platform or podium), there is the danger that he or she will say something that will boomerang and show up in a motion to remove (recuse) the judge from a case.³⁹ The very reason that judges avoided those public venues in the past was because of a concern that they would slip over into statements that could be used to impugn their impartiality.

That might be a luxury judges no longer have. A hypothetical future cause for recusal should not become the enemy of the much more urgent need to promote legal literacy. The danger is now not the stray motion to recuse, but rather the ubiquitous misunderstanding of what courts do and why they do it.

Both at the level of educating adults and at the level of venturing into classrooms, there are examples of just that kind of outreach. In Colorado, the Our Courts program provides nonpartisan information programs to adult audiences to further public understanding of the state and federal courts in Colorado.⁴⁰ A judge or a judge/lawyer team, with the benefit of visual aids and handouts, conducts an interactive discussion to explain how the courts work and also presents on the process and procedures of different case types. These public education efforts are no longer optional. Anything short of that consigns us to a longer residency in the legal dark ages. Judges must go on the road, or the Internet highway, and take the lead in telling the story of the courts.

In short, for us to fix the courts, we must first understand them.



The Institute for the Advancement of the American Legal System (IAALS) is a national, nonpartisan ‘think-do’ tank located at the University of Denver, with a mission of participating constructively in achieving a transparent, fair, and cost-effective legal system that is accountable to and trusted by those whom it serves. IAALS conducts empirical and legal research and works with teams of judges, lawyers, and other stakeholders to develop innovative and practical solutions to the problems plaguing the system. IAALS has four initiative areas: judicial selection and performance evaluation; the Rule 1 initiative, dealing with rules reform and caseflow management; and domestic relations reform and Educating Tomorrow’s Lawyers, an initiative that seeks to develop better lawyers through innovative legal education.

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