A WHOLE OF SOCIETY APPROACH (WOSA): LOOKING OUTWARD BEYOND THE COURTHOUSE

Ingo Keilitz

Principal, CourtMetrics; Visiting Scholar, Public Policy Program, and Research Scholar, Global Research Institute, College of William & Mary

How should courts respond to the existential crises facing our society today—not only the global pandemic and deepening inequality, but also economic collapse, domestic terrorism, institutional dysfunction, and political turmoil? Court leaders and their justice system partners should focus both inward to courts' practices and outward to the community and society. They should not only speak out, but also act now with urgency. Management philosopher Peter Drucker once said, "The important thing is to identify the future that has already happened and face the realities immediately and decisively" (Drucker, 1989: 3).

Every hundred years or so, we experience a sharp transformation. We come to an inflection point and must cross a divide, writes Drucker in *The New Realities* (1989). "Within a few short decades, society rearranges itself—its worldview, its basic values, its social and political structure, its arts, its key institutions. Fifty years later, there is a new world. And the people born then cannot even imagine the world in which their grandparents lived and into which their own parents were born."

In addition to the COVID-19 pandemic, society and the courts face an array of existential challenges, such as inequality and economic turmoil. If courts are to face these challenges, they much look both outward at the community and inward at their own practices.

We are currently experiencing such a transformation with separate existential crises combining with each other, rapidly forging new realities where the impacts are felt today. These realities underlie the necessary reinvention of our courts and other public institutions, a rethinking of our basic values, and what is likely a permanent reorganization of everything we do.

> *The important thing is to identify the future that has already happened and face the realities immediately and decisively.*

FULFILL PRIMARY MISSION BUT LOOK BEYOND BORDERS

The future is inherently uncertain. The new realities we face in this transformation are fundamentally different from the issues on which we tend to fix our professional attention. Drucker's urgent message for court administration scholars and practitioners alike is clear. We need to wake up to the new realities of this transformation—to face the future that has already happened.

Drucker believed that public and private organizations should be responsible and accountable for their own performance guided by their unique and limited mission. But that is not enough. They should also take social responsibility and lead beyond the borders of their institutions for the sake of their community and society (Drucker,1995:196-97).

Accordingly, courts should concentrate their efforts on dispute resolution and related judicial services. But they should also lead beyond their boundaries in their community and in society and take care of the common good. For example, to fight for racial justice, courts should identify practices that breed racism then actively mitigate future negative effects caused by past injustices in which courts were complicit.

A WHOLE-OF-SOCIETY APPROACH (WOSA)

In an August 2020 article, "Racial Inequality and Systemic Injustice, the Coronavirus Pandemic, and the Courts," my colleagues and I urged that judicial leaders, both judges and court administrators, should not only continue providing critical justice services, but also take a much broader perspective and participate in a whole-of-society approach (WOSA) to respond to racial injustice and the pandemic.

The concept of WOSA is rooted in common sense, most notably that complex threats to our national and transnational safety, security, and well-being defy solutions by the actions of just a few government entities, such as the military and intelligence communities. Rather, WOSA stresses unity of action and a wide range of viewpoints. WOSA includes perspectives on threats and risks in an increasingly complex and uncertain world that demand coordinated and rapid responses by many diverse actors in and out of government, including ethicists, moral philosophers, and scientists (Keilitz, 2020a).

The argument for courts' participation in WOSA is simple. The threats we face include the "known unknowns," threats we know exist, but about which little or no information is available. We might know, for example, that domestic terrorism exists today, but not where, what, how much, and when. More frightening and difficult are the "unknown unknowns," threats about which we are neither aware nor understand and that are impossible to anticipate. One or more actors in WOSA may recognize something not seen by others that staves off a catastrophe, thwarts a threat, or mitigates damage. It is far better for such agents to be available and prepared as part of WOSA, than to face catastrophe with a deficit in personnel, preparation, and training.

> *Judges and court administrators should not only continue providing critical justice services, but also take a much broader perspective and participate in a whole-of-society approach (WOSA) to respond to racial injustice and the pandemic.*

Dozens of leading jurists in the highest state courts issued public statements condemning police violence and racial inequities in the wake of the brutal killing of George Floyd, an unarmed Black man, while in police custody in Minneapolis on May 25, 2020. Their speaking out publicly about racial justice and police violence, beyond the routine judicial practice of not commenting on social issues except in published opinions, seemed to signal that the judiciary has an important, active role to play in rooting out racial biases (Keilitz et al., 2020: 3-4).

LOOKING BOTH OUTWARD AND INWARD

While important, it is not sufficient for courts to simply embrace WOSA and orient themselves toward the greater society beyond the courthouse doors. They should, at the same time, look inward, rigorously examining and fundamentally changing their policies, programs, and operations to eliminate conscious and unconscious bias. Examples include how court security personnel treat visitors as they enter the courthouse; how courts handle their judicial calendaring and hear cases; and how courts handle pretrial detention.

COURTESY, DIGNITY, AND RESPECT AT THE COURTHOUSE DOOR

"I know from experience," wrote Thomas Chatteron Williams (2020: C1), "that when people are able to meet as equals—or at the very least as equals with a certain floor of dignity—plenty of other tensions resolve themselves." Court leaders and administrators should ask themselves whether individuals' first encounters with the court involve discriminatory practices and, if so, remedy those practices. Are the encounters consistent with Standard 1.4 of the *Trial Court Performance Standards* (Commission on Trial Court Performance Standards, 1997: 9), which requires judges and trial court personnel to be courteous and responsive to the public and accord respect and dignity to all with whom they come into contact? The commentary of the standard states that the requirements "are particularly important in the understanding shown and assistance offered by court personnel to members of minority groups and those unfamiliar with the trial court and its procedures."

When entering most courthouses in the United States, one must go through a metal detector and put personal items through an x-ray machine operated by court security personnel. We are required to empty our pockets and place the contents in a container for further inspection. This first encounter either leaves an impression of dignity, courtesy, and respect, or instead signals its opposite—unfair treatment and lack of agency.

Several years ago, I led a delegation of Kenyan judges and senior court administrators focused on trial court performance on a tour of state courts. On a visit to the District of Columbia courts, as they stood in a long line joining others waiting in the rain to enter the busy Moultrie Courthouse, they remarked with approval at how everyone waiting to go through the security check was accorded the same courtesy and respect by court staff. Several expressed surprise and approval that the delegation was not given VIP treatment and ushered past the security check ahead of everyone in line.

> *The first encounter people have with the court at the courthouse door either leaves an impression of dignity, courtesy, and respect, or signals its opposite—unfair treatment, and lack of agency.*

JUDICIAL HEARINGS

Another, seemingly mundane, practice is the conduct of judicial hearings, or what court administrators call "judicial calendaring." One former court administrator, Edwin Bell, now the Director of Racial Equity, Fairness, and Inclusion at the National Center for State Courts, recounted an example for tackling injustice. For years he has seen judges, who may have more than 50 cases on their morning calendar, separate litigants into two groups, those who have attorneys and those who do not. Cases of litigants with attorneys are heard first; lower-income and self-represented litigants are left waiting, sometimes for hours. While this is not intended as a racial decision, Bell said "it can have a disproportionate impact on the economically disadvantaged, who are often minorities. . . . There has to be a way ahead of time to separate these groups" that does not leave one group missing work and suffering other potential personal and economic impacts not experienced by the other group (Keilitz, 2020b).

PRETRIAL DETENTION: STATE-IMPOSED RACIAL DISCRIMINATION

Individuals in pretrial custody account for roughly one-third of all incarcerated individuals. In many U.S. jurisdictions, especially in states with a cash-bail system like Virginia, when a defendant is jailed before trial and then acquitted or charges dismissed, the indefensible result is that an innocent defendant may spend more time in jail than if he or she had been found guilty. A disproportionate number of these pretrial detainees belong to poor and marginalized groups that are politically, economically, and socially discriminated against.

Because detention of people not convicted violates the presumption of innocence, prolonged pretrial detention punishes criminal defendants before they are tried and should be used only when release poses a likely threat to community safety. "Few rights are so broadly accepted in theory, but so commonly abused in practice," writes Martin Schönteich, in *Presumption of Guilt: The Global Overuse of Pretrial Detention* (2014: 1). Civil-rights veteran Clarence Dunnaville, Jr., writing in the *Virginia Lawyer*, opined that Virginia's antiquated cash-bail system frequently "imposes severe suffering on the indigent, who, solely because they are impecunious, must linger in jail, often for months, while awaiting trial." This "bail or jail" practice is "state-imposed racial discrimination" against Blacks and other minorities, he writes (Dunnaville, 2021: 32-33).

> *A disproportionate number of pretrial detainees belong to poor and marginalized groups that are politically, economically, and socially discriminated against.*

Measure 5, "Duration of Pretrial Custody," of the *Global Measures of Court Performance* (International Consortium for Court Excellence, 2020: 54) prescribes for courts the performance measure of the average elapsed time not-yet-convicted criminal defendants are detained awaiting trial. The commentary for this measure states:

> *Duration of Pretrial Custody* is an easily understood measure that resonates with ordinary citizens and policy reformers alike who worry about the injustices, as well as the attendant financial burdens and societal costs, of prolonged and unjust pretrial detention. It brings people together for joint work on improvements across institutional boundaries—the courts, law enforcement, jails, prosecution, and defense services.

This measure can be taken by courts and their justice system partners immediately, and on their own without legislation or formal approval of a state's highest court. In addition to performance measurement and management using this measure, courts should foster a culture of release to mitigate the discriminatory effects of the draconian dichotomy of "bail or jail."

These three examples are just a few practices courts can target to remove barriers to fairness and address racial disparities and biases. All lie within the power of courts and their justice partners to implement administratively and unilaterally. They are race-neutral and focused on fixing inequities of access and fairness for everyone who has business with courts. They are a shortcut to immediate implementation that sidesteps ideological and politically fraught debates over terms such as "institutional" or "systemic" racism, terms that are rarely defined accurately in the debates (Anderson, 2021: A13).

CONCLUSION

Circling back to the admonition of Peter Drucker noted at the beginning of this article, what is needed in response to the confluence of existential crises we face today, in my view, is a transformation of our courts and other justice institutions and their place and role in our society. Like Drucker, I suspect our grandchildren will contrast the courts in the future with courts today and barely imagine the world in which their grandparents lived.

REFERENCES

Anderson, J. H. (2021). "Biden, Claiming 'Systemic Racism' in Policing, Defies Science." *Wall Street Journal*, March 6-7.

Commission on Trial Court Performance Standards (1995). *Trial Court Performance Standards with Commentary*. Williamsburg, VA: National Center for State Courts. Perma link: https://perma.cc/7EC2-TURJ.

Drucker, P. F. (1995). *The Future of Industrial Man*. New York: Transaction Publishers (originally published by John Day, New York, 1942).

— (1989). *The New Realities*. New York: Harper and Row Publishers.

Dunnaville, C. M., Jr. (2021). "Virginia's Cash Bail System: Denying Due Process to the Poor." *Virginia Lawyer*, February.

International Consortium for Court Excellence (2020). *Global Measures of Court Performance*. 3rd ed. Sydney, Australia: Secretariat for the International Consortium for Court Excellence. Perma link: https://perma.cc/6EY6-S887.

Keilitz, I. (2020a). "Illiberalism Enabled by the Coronavirus Pandemic: An Existential Threat to Judicial Independence." 11:2 *International Journal for Court Administration*. Perma link: https://perma.cc/F63M-2YHK.

— (2020b). "Racial Inequality and Systemic Racism Tackled by U.S. Courts." *Made2Measure*. Blog. Perma link: https://perma.cc/6HKT-L8MM.

Keilitz, I., S. J. Abdool, J. A. Newman, and T. Cameron-Anglin (2020). "Racial Inequality and Systemic Injustice, the Coronavirus Pandemic, and the Courts." Social Science Research Network. Perma link: https://perma.cc/X4JU-BLLW.

Keilitz, I., K. W. Jennings, S. A. Ehrlich, C. N. Broun, K. H. Floyd, and M. L. Buenger (2019). "Courts Have a Significant Role to Play in the Whole-of-Government Approach (WGA) to Our Safety and Security." 34:4 *Court Manager*. Perma link: https://perma.cc/WJA9-Z2E6.

Schönteich, M. (2014). *Presumption of Guilt: The Global Overuse of Pretrial Detention*. New York: Open Society Foundations. Perma link: https://perma.cc/NML9-YBD7.

Williams, T. C. (2021). "Beyond Black History Month." *Wall Street Journal*, February 27-28.