

Appendix A:

Issues Identified in the “Courting Justice” Listening Tour

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Background

In 2016, the Engaging Communities in the State Courts Initiative convened a national listening tour in collaboration with the National Center for State Courts, the State Justice Institute, and the Public Broadcasting Service (PBS). The events were collectively titled “Courting Justice,” and they were held in Los Angeles (June 10), Little Rock (September 23), and Cleveland (December 8). Community leaders and members of the public were encouraged to express their concerns regarding the relationship between the state courts and society. Input obtained from these events were distilled to identify 11 major themes, organized into 3 broad categories (listed in Table 1). Each theme is discussed in greater depth in the following pages.

For more information about the “Courting Justice” listening tour and links to the videos go to <http://www.ncsc.org/Conferences-and-Events/Courting-Justice.aspx>.

Table 1. Issues and Themes from the Courting Justice Listening Sessions

<i>Issues based on how judges make decisions</i>	Lack of awareness of the reality of minority communities Implicit bias on part of judge Lack of diversity on the bench
<i>Issues based on unfairness in the court system</i>	Financial barriers to accessing the courts Court funding dependent on the amounts of fines and fees Bias in the plea-bargaining process Lack of diversity in juries/jury pools
<i>Issues based on the outcomes of judicial decisions</i>	Bias in sentencing outcomes Failure to hold police accountable Impact of sanctions on employment opportunities Bias in imposing legal financial obligations

Issues based on how judges make decisions

- **Lack of awareness of the reality of minority communities**

Minority communities live in a reality that differs from majority communities on many dimensions. Differences may relate to the variety of culture realities and language variations, the day-to-day experience of discrimination and bias, and many other issues. Sometimes these differences are recognized by the courts, but this is not always the case. Regardless of whether the courts are aware of the differences, their awareness is not always apparent to minority community members. Listening Tour discussions suggested an illustration of this problem might be seen in the opioid epidemic. Historically, when the problem was largely confined to minority communities, it was met by increasing sentencing severity, suggesting a criminal reality in which punishment was the answer. However, there was a change to a more addiction-centered treatment-based model when the same problems became prevalent in White, middle-class suburbs. In this case, the reality of minority and majority communities likely had similarities relating to the cause of opioid abuse. However, the different treatment of the matter over time suggested that, when the issue only affected minority communities, the courts did not take the time to understand the reality that minority addicts were experiencing. Court understanding only changed when the epidemic moved into majority communities.

- **Implicit bias on the part of the judges**

Implicit bias occurs when attitudes and stereotypes affect people's thinking and actions without them knowing. This is typically contrasted with explicit bias which refers to situations in which the effect of these attitudes and stereotypes are intentional. Implicit biases are common and can lead to disproportionate outcomes throughout the legal system.¹ In the Listening Tour sessions, audience and panel participants frequently discussed implicit bias, and implicit bias training for judges. Importantly, implicit biases are believed to be the source of some of the disparities in outcomes both in and beyond the courtroom.² Further, implicit biases are not limited to majority individuals, which suggests training is important for minority and majority members alike. Research has found negative implicit biases among both Black and White potential jurors and among defense attorneys.³

¹ Anthony G. Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945 (2006). (<https://scholarship.law.berkeley.edu/californialawreview/vol94/iss4/1/>).

² Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012) (<https://www.uclalawreview.org/pdf/59-5-1.pdf>).

³ Theodore Eisenberg and Sheri Lynn Johnson *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004) (<http://via.library.depaul.edu/law-review/vol53/iss4/6/>).

- **Lack of diversity on the bench**

While racial and ethnic representation on the bench has greatly increased in recent years, there remains room for further improvement. For example, despite representing 38% of the national population, people of color represent only 20% of the seats on state benches. It is estimated that close to 75% of trial judges are White.⁴ In contrast, people of color represent almost 70% of all criminal defendants nationwide.⁵ A diverse state judiciary may help reduce implicit bias. Similarly, more diversity on the bench would allow for a more representative judiciary and may address concerns about the extent to which courts are aware of realities of minority communities.⁶ Participants in the Listening Tour suggested representativeness of the judiciary is an important goal for both a racially and ideologically diverse court system. During the Listening Tour it was also pointed out that, in some jurisdictions, the political party affiliation of judges is not representative of the population in general and particularly not representative of communities with high levels of racial/ethnic minorities and low socio-economic income. Participants also suggested that the process of electing judges may influence the lack of diversity generally in the court system.

Issues based on unfairness in the court system

- **Financial barriers to accessing the courts**

Socioeconomic stratification plays a significant role in the proper administration of justice. Individuals who lack sufficient money or time often have significantly less access to justice. Such access has been defined as “the ability of any person, regardless of income, to use the legal system to advocate for themselves and their interests.”⁷ Listening Tour participants noted that courts may not understand how judicial sanctions, like imposing a court fee, can be prohibitively expensive for many even when they would be relatively small for others. When compounded with other costs, such as attorneys’ fees, fees for record searches, and the like, the costs associated with access to the courts may result in low-income individuals foregoing the process altogether.

⁴ Tracey E. George and Albert H. Yoon, *The Gavel Gap, Who Sits in Judgement on State Courts?*, American Constitution Society for Law and Policy (<http://gavelgap.org/pdf/gavel-gap-report.pdf>).

⁵ U.S. Dep’t of Justice, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (2009) (<https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>).

⁶ Kate Berry, *Building a Diverse Bench: A Guide for Judicial Nominating Commissioners*, p. 4, Brennan Center for Justice (2016) (<https://www.brennancenter.org/publication/building-diverse-bench-guide-judicial-nominating-commissioners>).

⁷ Texas Access to Justice Commission, *What is Access to Justice*, Texas Access to Justice Commission (<http://www.texasatj.org/what-access-justice>).

- **Court funding dependent on the amounts of fines and fees**

The underfunding of the justice system is one of the most critical issues facing the legal profession.⁸ Due in part to the War on Crime policies of 1970s, the criminal justice system has seen a massive increase in the number of citizens who are in contact with the courts, which in turn causes court expenses to increase dramatically. State courts bear most of these costs. Because politicians are reluctant to increase taxes, the costs are increasingly passed on to defendants through fees and fines. In Ferguson, Missouri, for example, revenue generation may have fundamentally compromised the role of the municipal court. A report concluded that the Ferguson court used its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests.⁹ It also found that these practices imposed unnecessary harm, overwhelmingly on Black individuals. Listening Tour participants echoed this sentiment, suggesting that this predatory posture is not limited to the Ferguson municipal court and that courts are often considered revenue centers through the imposition of fees, bail and fines. This leads to the burden of funding court systems being placed on the backs of people coming through the court system, which is disproportionately made up of racial/ethnic minorities and the poor.

- **Bias in the plea-bargaining process**

Generally, prosecutors' offices have significant discretion in determining what charges to bring against a defendant and what sentence to recommend. Often, criminal defendants will plead guilty to a lesser charge in return for a shorter sentence or other reduction in penalty. However, research suggests that the plea-bargaining process may be biased by both the prosecutor and the judge. For example, prosecutors can choose which charges to file, and may choose to reduce more serious to less serious charges. Research on Wisconsin cases found, compared to Whites, Black defendants were more likely to be convicted of their highest initial charge. Meanwhile, white defendants were significantly more likely than Black defendants to have their most serious initial charge dropped or reduced in severity.¹⁰ In addition to problems of bias, the heavy caseloads in trial courts can also work against defendants by encouraging plea deals in response to harsh criminal charges. Lack of sufficient representation or overworked public defenders can compound these problems.

⁸ American Bar Association, *Task Force on the Preservation of the Justice System* (https://www.americanbar.org/content/dam/aba/publishing/abanews/1306428613about_task_force_revised052411.authcheckdam.pdf).

⁹ United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

¹⁰ Equal Justice Initiative, *Research Finds Evidence of Racial Bias in Plea Deals*, EJI, (Oct. 26, 2017) (<https://eji.org/news/research-finds-racial-disparities-in-plea-deals>).

- **Lack of diversity in juries/jury pools**

Jury trials are supposed to be comprised of “peers” of the defendant. Problematically, the diversity of both juries and jury pools is limited. Research suggests that the composition of juries can be a source of bias. One study found that all-White juries are 16x more likely to convict a Black defendant than a White defendant; but when a jury contains at least one Black juror, the difference in conviction rates of White and Black defendants is not statistically significant.¹¹ Disparities in outcomes for minority defendants like these have led some to suggest that greater minority representation on juries is needed.¹² Minority participation may be increased by reducing barriers separating the courts and their communities, as well as by reducing barriers to participation. For example, it may be important both to increase trust in the courts generally and to address barriers that result in juries unreflective of their communities.

Issues based on the outcomes of judicial decisions

- **Bias in sentencing outcomes**

Contributing to feelings of fundamental unfairness in the justice system are documented disparities in sentencing outcomes. Research shows that, in federal trials, Black defendants receive sentences that are 20% longer than White defendants convicted of the same crime.¹³ Similarly, research on individuals sentenced to life in prison without the possibility of parole suggests that 71% are Black and Black defendants are 20% more likely to be sentenced to life without the possibility of parole for a nonviolent crime than White defendants.¹⁴ This topic was also touched upon during the Listening Tour. For example, during the second Los Angeles session, Judge Jimmie Edwards of St. Louis noted that there were more reasons for disparities than implicit bias. He had coined the phrase “sentencing while mad,” to recognize that when Judges sentence while feeling angry, defendants receive longer sentences. “And too often, they’re young African American men,” he added.

- **Failure to hold police accountable**

Public perceptions and concern regarding privileged treatment of police by the courts and society more generally has become a major impediment to positive relationships among the police, the courts,

¹¹ Steve Hartsoe, *Study: All White Jury Polls Convict Black Defendants 16 Percent More Often Than Whites*, Duke Today (Apr. 17, 2012) (<https://today.duke.edu/2012/04/jurystudy>).

¹² Ashish S. Joshi and Christiana T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, American Bar Association, Diversity Inclusion Section of Litigation (2015) (<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences.html>).

¹³ *Hearing on Reports of Racism in the Justice System of the United States*, Inter-American Commission on Human Rights 153rd Session, 1 (2014) (written testimony of the American Civil Liberties Union on Racial Disparities in Sentencing) (https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf).

¹⁴ *Id.*

and the communities they serve. Supporting perceptions of privileged treatment (although outside the court context), research indicates that when police officers have been identified as being guilty of misconduct, only 54% are terminated from their position.¹⁵ In addition, some states statutorily block access to police misconduct records by the public, making it more difficult to hold police departments accountable.¹⁶ During the Listening Tour, when a member of the public brought up issues relating to balancing transparency versus confidentiality in Grand Jury trials, the conversation turned toward public trust (and distrust) in grand juries, particularly in cases of police use of lethal force on a minority civilian target. Former Justice Yvette McGee Brown pointed out that the prosecutor’s office and the police department in many jurisdictions work very closely together, encouraging community perceptions of unfairness and collusion in the case of Grand Jury trials. Meanwhile, Ohio Chief Justice Maureen O’Connor, described Task Force recommendations that cases of police lethal force be handled by the Attorney General rather than by local prosecutors. However, she also described difficulties and barriers to acting on such recommendations, especially relating to a lack of political support among numerous groups.

- **Impact of sanctions on employment opportunities**

When an individual cannot pay a sanction imposed by a court, they often incur additional penalties that compound the economic impact. For example, failure to pay sanctions can in many cases lead to a suspension of a driver’s license. A study conducted by the New Jersey Motor Vehicles Affordability and Fairness Task Force found that 42% of individuals whose license had been suspended lost their employment.¹⁷ Of those who lost their jobs due to a suspended license, 45% could not find employment after being fired.¹⁸ Consistent with this theme, an audience member participating in the “Courting Justice” sessions told a vivid and emotional story about the difficulties finding employment that would help him better himself after imprisonment. A job opportunity consistent with his pre-imprisonment work and career experience presented itself while he was on parole and “flipping burgers for minimum wage.” However, his parole officer told him he was not allowed to move or travel outside of the city to pursue the opportunity, and threatened to jail him if he tried to leave.

¹⁵ Tom Jackman, *Study finds police officers arrested 1,100 times per year, or 3 per day, nationwide*, The Washington Post, (Jun. 22, 2016) (https://www.washingtonpost.com/news/true-crime/wp/2016/06/22/study-finds-1100-police-officers-per-year-or-3-per-day-are-arrested-nationwide/?utm_term=.bb3a8dacadaa).

¹⁶ Michael Sisitzky and Simon McCormack, *This Law Makes It Nearly Impossible To Police The Police In New York*, New York Civil Liberties Union, (Apr. 19, 2018) (<https://www.nyclu.org/en/news/law-makes-it-nearly-impossible-police-police-new-york>).

¹⁷ Alan M. Voorhees and Edward J. Bloustein, *Motor Vehicles Affordability and Fairness Task Force Final Report*, 38, Jew Jersey Motor Vehicle Commission, (Feb. 2006) (http://www.state.nj.us/mvc/pdf/about/AFTF_final_02.pdf).

¹⁸ *Id.*

- **Bias in imposing legal financial obligations**

Legal financial obligations, or LFOs, refer to the fines and fees associated with legal system involvement. As noted in an earlier section of this document describing *Court funding dependent on the amounts of fines and fees*, the same LFOs can have different impacts on minorities and low-income persons than upon majority and average income persons. However, bias can exist in the actual imposition of LFOs, not just the impacts. In the Listening Tour, when explicitly asked “whether or not, people of color and poor people tend to be disproportionately treated in a punitive and pejorative way by these LFOs,” Ohio Chief Justice Maureen O’Connor replied, “I think that there’s no question, that that’s what’s occurring.” Consistent with this view are studies, such as one conducted in Washington State, which find significantly higher fines and fees assessed in cases involving minority (in this case, Hispanic) versus White defendants.¹⁹ Similarly, a study in Texas outlines disparities relating to race at each step of the process, from ticketing, to enforcement through jailing, to requiring forced labor for fine repayment prior to release.²⁰

The Conference of Chief Justices and the Conference of State Court Administrators formed a National Task Force on Fines, Fees and Bail Practices (National Task Force) to address the ongoing impact that court-ordered legal financial obligations have on economically disadvantaged communities and to draft model statutes and court rules for setting, collecting, modifying, and waiving such obligations. Fines and fees, and sanctions for nonpayment, can have a particularly devastating effect on the lives of low-income persons in civil as well as criminal matters, and the National Task Force addresses issues emanating from both. One of the more valuable results of the work of the National Task Force is an online Resource Center (<http://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide>), which includes work product created by this initiative and highlights other documents related to these issues.

¹⁹ Kathrine A. Becket, Ph. D., et al., *The Assessment and Consequences of Legal Financial Obligations in Washington State, Research Report*, 30, Washington State Minority and Justice Commission, (Aug. 2008).

²⁰ American Civil Liberties Union of Texas, *No Exit, Texas: Modern-Day Debtors’ Prisons and the Poverty Trap* (November 2016), (https://www.aclutx.org/sites/default/files/field_documents/debtorsprisonfinal_0.pdf)

Thoughts on how public engagement can help

In general, courts need to hear from minority communities about the challenges and realities that they face to better serve them. Conversely, minority communities may not know what the courts do not know about their realities. Bidirectional or multi-directional dialogue is therefore necessary to uncover and test potentially hidden assumptions. For example, while prior research provides information on how to encourage or disrupt implicit biases, dialogue with the communities is needed help to identify what community members see as the most troubling and problematic evidence of bias, and to guide choices of metrics and measures of such bias. Dialogue with communities and relevant partners may also suggest interventions that either reduce biases or intervene between implicit biases and decisions made at various stages of experience with the courts.

Engaging the public to discuss these and other bias-relevant problems may lead to a greater understanding of the problems and their impacts, their underlying causes, as well as generate new and creative solutions. In choosing stakeholders to involve, it is important to keep in mind that different experiences and expertise may be most relevant to different aspects of the problem. For example, some stakeholders may advance a deeper understanding of problem impacts while others may advance new solutions. However, for the solutions to meet the needs of those impacted by any given problem, it is necessary for persons with both types of experience and expertise to engage with one another and come to a deeper understanding of one another's perspectives. For more information on public engagement generally, see [Appendix B](#).

Thoughts on how to assess improvement

Efforts to address issues like those presented above can be evaluated in a variety of ways, including through direct measures, indirect measures, surveys and interviews of persons served by the courts, and surveys of the public.

- **Direct measures.** Some issues can be measured objectively. For example, courts can measure the diversity of their bench and juries through record-keeping that includes demographic information relevant to the disparity. Disparities in outcomes can be similarly assessed by maintaining records of dispositions that allow for tracking and comparisons of outcomes for specific groups.
- **Indirect measures.** Not all efforts lend themselves so well to direct measurement, however. In some cases, progress can be assessed by measuring conditions related to or likely to affect the target issue. For example, reductions in implicit bias may be difficult to measure, but tracking implicit bias training and showing increases in the numbers or percentages of court personnel who are trained, would show progress on a factor likely to impact implicit bias.
- **Surveys and interviews of those served by the court.** Another strategy for assessing improvement might include directly speaking to or surveying impacted individuals. CourTools (www.courtools.org) provides many resources for this strategy, some of which are directly related to the disparity issues described in this document. For example, CourTools provides resources for measuring:
 - [perceived fairness of legal financial obligations](#)
 - [perceptions of access to and fairness of the courts](#)
 - [time to disposition](#)Each of these types of variables can be compared between groups to determine if disparities exist and if such disparities change over time or in response to interventions and reforms.
- **Surveys of the public.** Finally, another strategy is to go beyond the perceptions of those having contact with the courts, to assess attitudes of the public. As has been only too clear in the aftermath of serious cases like those involving police use of deadly force, the decisions of the courts, and especially the way those decisions are made, also have important implications for people who may never have any personal contact with the courts. As courts work to overcome disparities, it would be beneficial if perceptions of the courts improved among the public as well as among those directly served. Surveys are one way in which broader public attitudes may be assessed. For example, a measure of confidence in the courts that has been validated with both community²¹ and older adult²² samples is available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1682&context=psychfacpub>.

²¹ Joseph A. Hamm et al., *Deconstructing Confidence in the State Courts*, Journal of Trust Research (<https://www.tandfonline.com/doi/abs/10.1080/21515581.2013.771501>).

²² Joseph A. Hamm et al., *Measuring Older Adult Confidence in the Courts and Law Enforcement*, Criminal Justice Policy Review (<http://journals.sagepub.com/doi/abs/10.1177/0887403415623034>).