Judicial Ethics and the Eradication of Racism

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If you are neutral in situations of injustice, you have chosen the side of the oppressor.

–Archbishop Desmond Tutu

INTRODUCTION

In 2020, the Washington Supreme Court entrusted the legal community with working to eradicate racism from its legal system.[1] Soon after, Washington's Commission on Judicial Conduct (hereinafter the Commission) received a complaint about a bus ad for North Seattle College featuring King County Superior Court Judge David Keenan. Along with a photo of Judge Keenan's face, the ad included the following language: "A Superior Court Judge, David Keenan got into law in part to advocate for marginalized communities. David's changing the world. He started at North."[2] The Commission admonished Judge Keenan for violating the Code of Judicial Conduct, in part because the language in the ad may have reflected bias on the part of Judge Keenan. The Commission determined that a reasonable person reading the ad would be concerned about a person from a non-marginalized community receiving a fair trial in Judge Keenan's court.[3] A concern about the unreasonable perception of the possibility of reverse discrimination. The Commission, by erroneously interpreting and applying the Code to Judge Keenan's case, impeded the development of a more equitable legal system; therefore, the standard employed by the Commission in evaluating potential ethical violations should be changed to promote, rather than inhibit, judicial efforts to achieve racial equity.

This Note will explore the implication of the Commission's interpretation of the Code of Judicial Conduct; its decision in *In re* The Honorable David S. Keenan; and the potential impact on judicial advocacy, particularly in the context of Washington's efforts to eradicate racism from its legal system. This Note will also examine a history of judicial advocacy in Washington State, and how the Commission's decision is reflective of a system struggling to maintain the status quo. Finally, this Note will consider how the Washington Supreme Court should have used the objective observer standard in deciding Judge Keenan's case.

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1. *See* Letter from the Supreme Court, State of Washington, to Members of the Judiciary and the Legal Community (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/LS56-6WF5].

2. Statement of Charges at 2, *In re* The Honorable David S. Keenan Judge of the King County Superior Court (2020) (CJC No. 9608-F-189), 2020 WL 12894545, at *1.

3. Commission Decision and Order at 3–4, *In re* The Honorable David S. Keenan Superior Court Judge for King County (2021) (CJC No. 9608-F-189), 2021 WL 6499313, at *4–5.

I. SUMMARY

A. Washington State Code of Judicial Conduct

Washington State's Code of Judicial Conduct (hereinafter the Code) is intended "to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct."[4] The Code serves to guide judges in maintaining the dignity of the judicial office at all times, and "to avoid both impropriety and the appearance of impropriety in their professional and personal lives."[5] Further, judges "should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[6]

The Code is divided into four canons.[7] The relevant one here is Canon 1, which states, "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[8] Within Canon 1 lies Rules 1.1, 1.2, and 1.3.[9] Rule 1.1 broadly states that a judge must comply with the law, including the Code of Judicial Conduct.[10] Rule 1.2 requires judges to act, at all times, "in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary."[11] Rule 1.2 also advises judges to "avoid impropriety and the appearance of impropriety."[12] Canon 1 concludes with Rule 1.3: "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."[13] The Commission's decisions and the Ethics Advisory Committee's opinions provide further guidance on the interpretation and application of the Canons.

B. Other Commission Decisions Involving Canon 1

Here, we will explore the Commission's interpretation and application of Canon 1. We will review the Commission decisions and Ethics Advisory Committee advisory opinions involving the rules held to have been violated by Judge Keenan.

Canon 1 of the Code compels judges to aspire to conduct that ensures the greatest possible public confidence in their independence,

4. WASH. CODE OF JUD. CONDUCT pmbl [3] (COMM. ON JUD. CONDUCT 2011).
5. WASH. CODE OF JUD. CONDUCT pmbl [2] (COMM. ON JUD. CONDUCT 2011).
6. *Id.*
7. *See generally* WASH. CODE OF JUD. CONDUCT (COMM. ON JUD. CONDUCT 2011).
8. WASH. CODE OF JUD. CONDUCT Canon 1.
9. *Id.*
10. WASH. CODE OF JUD. CONDUCT r. 1.1.
11. Wash. Code of Jud. Conduct r.1.2.s
12. *Id.*
13. WASH. CODE OF JUD. CONDUCT r. 1.3.

impartiality, integrity, and competence.[14] The Commission sanctions members of the judiciary who are in clear violations of those fundamental principles.

In 2014, the Commission censured Judge Kathleen Hitchcock of the Granger Municipal Court. Judge Hitchcock was driving under the influence when she was pulled over and arrested by local police.[15] During the interaction with the arresting officer, Judge Hitchcock "gratuitously" identified herself as a judge.[16] The Commission held that Judge Hitchcock's conduct, "at a minimum, [gave] the appearance that she was attempting to use the prestige of office to gain favorable treatment."[17] Judge Hitchcock's conduct constituted a violation of Rule 1.3, abusing "the prestige of judicial office" to advance her personal interests.[18] Inherent in Judge Hitchcock's violation of Rule 1.3 is a failure to promote public confidence in the judiciary and avoid the appearance of impropriety, placing the judge in violation of Rule 1.2. In this case, the Commission noted that once a judge violates nearly any rule of the canons, it triggers a violation of Rule 1.2.[19] However, a Rule 1.2 violation does not require a trigger. A judge's conduct may be a direct violation of Rule 1.2.[20]

In 2019, King County Judge David Meyer was admonished by the Commission for violating Canons 1 and 2. Judge Meyer violated Rule 1.2. The Commission described his conduct during two hearings for Anti-Harassment Orders as "unnecessarily confrontational."[21] He "unreasonably limited the litigants' presentations of their respective cases[; he] criticized a domestic violence survivor for her choice in relationships[; and he] laughed at a response of [a] lawyer who was present for one of the hearings."[22] The Commission found Judge Meyer's criticism of a female litigant and domestic violence survivor may be viewed as victim blaming and improper.[23] Public confidence in the judiciary is eroded by improper conduct.[24] Judge Meyer's conduct may erode public confidence in the judiciary and give the appearance of impropriety, thereby violating Rule 1.2.

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14. *See generally* WASH. CODE OF JUD. CONDUCT Canon 1 (addressing avoiding "impropriety and the appearance of impropriety" within the judiciary).

15. Stipulation, Agreement and Order of Censure at 1, *In re* The Honorable Kathleen E. Hitchcock Judge of the Granger Municipal Court (2014) (CJC No. 7377-F-160), 2014 WL 5493213, at *1 [hereinafter Hitchcock Stipulation].

16. *Id.* at 3.

17. *Id.*

18. *Id.*

19. *Id.* at 2–3.

20. *See infra*, note 21, at 2–3.

21. Stipulation, Agreement and Order of Admonishment at 1, *In re* The Honorable David Meyer Former Judge of the King County District Court (2019) (CJC No. 9126-F-185), 2019 WL 2296514, at *1 [hereinafter Meyer Stipulation].

22. *Id.*

23. *Id.* at 3.

24. WASH. CODE OF JUD. CONDUCT r. 1.2 cmt. 1.

The Commission found that Judge Keenan abused the prestige of judicial office in violation of Rule 1.3.[25] Rule 1.3 prohibits using "the prestige of judicial office to advance the personal or economic interests of judges or others, or allow[ing] others to do so."[26] We will review ethics advisory opinions addressing Rule 1.3. The Ethics Advisory Committee provides opinions to advise officials of the judicial branch on the Code.[27]

Ethics Advisory Opinion 96-06 is the Commission's answer to the question of whether a judicial officer may appear on a law school's video sent to prospective students describing the law school.[28] The judge in question was a faculty member at the law school for seven years prior to being appointed to the bench.[29] She was also a graduate of the law school, and one of two female superior court judges on the bench in the county where the law school is located.[30] The judge spoke about the experiences she had as both a student and a faculty member, and the quality of education at the law school.[31]

In Advisory Opinion 96-06, the Commission determined that a judge's appearance in a law school's video did not constitute abuse of the prestige of judicial office.[32] This opinion permitted a judge to be identified as a judicial officer. Further, it allowed judges to provide comments based on their personal experiences and observations of a student, facility member, or both, at the law school.[33]

In Advisory Opinion 21-02, another ethics advisory opinion concerning Rule 1.3, the Commission said that a judge was permitted to write a letter to prospective law students on behalf of the law school in an effort to further diversity at the law school and in the legal community.[34] The letter would need to "include the judge's personal experience/story" about "attending the law school" and "practicing law in the community."[35] And the letter was to be "emailed by the law school's admissions department to students who [were] considering attending the law school."[36] In referencing Advisory Opinion 96-06, the Commission held

25. Commission Decision and Order, *supra* note 3, at 8–9.

26. *See* WASH. CODE OF JUD. CONDUCT r. 1.3.

27. *Ethics Advisory Committee*, WASH. CTS. (Dec. 8, 2021), https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=124 [https://perma.cc/3CC2-JQ36].

28. *Ethics Advisory Committee, Opinion 96-06*, WASH. CTS. (May 10, 1996), https://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=9606 [https://perma.cc/CYR8-2YK6] [hereinafter *Opinion 96-06*].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

34. *Ethics Advisory Committee, Opinion 21-02*, WASH. CTS. (Apr. 13, 2021), https://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=2102 [https://perma.cc/4BDW-DDAD] [hereinafter *Opinion 21-02*].

35. *Id.*

36. *See id.*

that the judge's conduct is permitted if: (1) "recruitment of law school students is directly related to improving the law, the legal system, and the administration of justice"; (2) "the letter will be sent to prospective law students only[,] and is not associated with general fundraising efforts"; and (3) "the judge is speaking about their personal experience during their time as a law student and practicing law in the same community."[37]

Further, the Commission cited Canon 3, which permits extrajudicial activities concerning "the law, the legal system, and the administration of justice."[38] A judge's conduct is permitted so long as it does not interfere with: "the proper performance of the judge's judicial duties"; "lead to frequent disqualification of the judge"; or "undermine the judge's independence, integrity, or impartiality."[39]

These past Commission decisions and advisory opinions clarify what types of conduct are permitted under Canon 1. The conduct of the judges in these cases has a stark contrast to that of Judge Keenan. A judge compromises their integrity when they "gratuitously" identify themselves as a judge during a traffic stop.[40] When a judge proceeds to victim blame a domestic violence survivor and is confrontational with the victim, they undermine public confidence in their impartiality.[41] Next, we review the Commission's application and interpretation of Canon 1 in Judge Keenan's case.

C. Background and Facts of Judge Keenan's Case

Judge Keenan had a non-traditional path into the legal field that included attending North Seattle College where he earned his General Educational Development (GED), diploma, and Associate of Arts degree.[42] Judge Keenan joined the King County judiciary in 2017 and has since:

> [S]erved as a Racial Justice Institute Fellow at the Shriver Center on Poverty Law, on the Washington Supreme Court's Access to Justice Board, on the Board of Choose 180, as a member of the National Association of Women Judges Ensuring Racial Equity Committee, as a member of the King County Bar Association's Rev. Dr. Martin Luther King, Jr. Luncheon Committee, as a member of the Washington State Bar Association's Equity and Disparity Workgroup, as a member of the Task Force on Race and the Criminal Justice System, and as the American Bar Association Judicial

37. *Id.*
38. WASH. CODE OF JUD. CONDUCT r. 3.1 cmt. 1.
39. *Opinion 21-02*, *supra* note 34.
40. *See* Hitchcock Stipulation, *supra* note 15, at 3.
41. *See* Meyer Stipulation, *supra* note 21, at 2–3.
42. *David Keenan*, N. SEATTLE COLL., https://northseattle.edu/david-keenan [https://perma.cc/E8LZ-Z6D7].

> Division's Liaison to the Council for Diversity in the Educational Pipeline.[43]

Since joining the bench, Judge Keenan has worked to promote equity, diversity and access to justice.[44]

In 2019, after delivering a commencement speech at North Seattle, Judge Keenan was approached about appearing in a bus ad for the college.[45] He agreed to appear in an ad promoting the college, and he also knew the ad would be featured on buses.[46] When the school sent Judge Keenan a copy of the proposed ad, "[h]e had concerns about the ethics of appearing in the photograph wearing a robe." He "asked [the college] to use a photo of him in a coat and tie."[47] "After [the] change, Judge Keenan approved the ad."[48] Judge Keenan reviewed Canons 1 and 3 and Ethics Advisory Opinion 96-06 because of his ethical concerns.[49]

1. The Ethics Complaint

The college's ad ran on buses throughout King County.[50] In the ad, Judge Keenan was identified as a judicial officer. "The language in the ad accompanying his photograph read as follows: 'A Superior Court Judge, David Keenan got into law *in part* to advocate for marginalized communities. David's changing the world. He started at North.'"[51] The Commission received a complaint from unidentified judges about a bus ad for North Seattle College featuring Judge Keenan.[52] The judges found the messaging in the ad to be "unbecoming, undignified, and startlingly out of character for a judicial officer."[53]

The Commission held that, "[b]y allowing and sanctioning the bus ad, Judge Keenan neither promoted public confidence in the impartiality of the judiciary, nor avoided the appearance of impropriety."[54] The Commission determined that the language of the ad could reasonably "be read to suggest that Judge Keenan has a leaning, or preference, and would advocate accordingly for marginalized communities," and that this interpretation of the ad is reasonable.[55] Further, the Commission reasoned

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43. *Judge David Keenan*, KING CNTY. SUPERIOR CT. (June 21, 2022), https://kingcounty.gov/courts/superior-court/directory/judges/keenan.aspx [https://perma.cc/BP3L-7VZF].

44. *Id.*; *David Keenan*, *supra* note 42.

45. Commission Decision and Order, *supra* note 3, at 2.

46. *Id.*

47. *Id.* at 3.

48. *Id.*

49. *Id.*

50. *Id.*

51. Statement of Charges, *supra* note 2, at 2 (emphasis added).

52. *See id.* at 1; *see also* Appellant's Corrected Brief at 19, *In re* The Honorable David S. Keenan Superior Court Judge for King County (2021) (CJC No. 9608-F-189).

53. Appellant's Corrected Brief, *supra* note 52, at 19.

54. Commission Decision and Order, *supra* note 3, at 6.

55. *Id.* at 7.

that "[p]eople who are not from [marginalized] communities could reasonably be concerned about being treated unfairly by Judge Keenan," and "the use of the phrase 'advocate for marginalized communities' juxtaposed with the phrase 'he is changing the world' could indicate a predisposed bias . . . in favor of members from marginalized communities."[56] Therefore, the Commission held that Judge Keenan violated the rules of Canon 1.

II. ANALYSIS

A. The Commission's Decision and Application of Canon 1

The Commission misapplied Canon 1 in Judge Keenan's case. Judge Keenan was admonished, in part, because he was featured in an ad for his alma mater, North Seattle College, and the ad represented his desire for a more equitable legal system. The Commission's interpretation and application of Canon 1 may impede the development of a more equitable legal system. Considering Judge Keenan's peers' anonymous reporting and the Commission's strained reasoning in reaching its decision, impeding the development of a more equitable legal system may be the intent of some of Judge Keenan's colleagues.

The Commission's application of Rule 1.2 fashions the rule as a weapon that may be used by opponents of progress against judges who try to comply with Washington's Code of Judicial Conduct's aspiration: for all judges to "promote access to justice for all."[57] Washington's court system is not exempt from the nation's racial history, and the implications of race are reflected in the unjust outcomes produced by the court system.[58] Rule 1.2 should not prohibit a judge from acknowledging their interest in working to correct injustices, "[e]specially in regard to issues that are historical weaknesses for the courts, whether it be marginalizing certain populations, allowing racial bias, or joining in oppressing protected minority groups."[59] It is not unethical for judicial officers to publicly express aspirations for creating a more just legal system. Judges are powerful stakeholders in the legal system and ought to leverage their power to challenge injustice.

In his appellate brief, Judge Keenan contends that "[t]he Commission's strained and unreasonable interpretation stands at odds with

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56. *Id.*

57. Appellant's Corrected Brief, *supra* note 52, at 24; WASH. CODE OF JUD. CONDUCT r. 1.2 cmt. 4.

58. *See* Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 635, 87 WASH. L. REV. 1, 12, 47 GONZ. L. REV. 251, 262 (2012).

59. Opinion Dissenting in Part at 2, *In re* The Honorable David S. Keenan Superior Court Judge for King County (2021) (CJC No. 9608-F-189), 2021 WL 6499317, at *1.

the ad's plain language [and] the purposes and policies underlying the Rules."[60] Rule 1.2 states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[61] The Code defines impropriety as the "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality."[62] Impartiality is defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[63] The Commission found that the ad had "the appearance of impropriety" and the language of the ad could reasonably "be read to suggest that Judge Keenan has a leaning, or preference, and would advocate accordingly for marginalized communities."[64] "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[65]

The Commission's majority erroneously opined that "[b]ased on the ad, a litigant who appeared in Judge Keenan's court against a member of a *marginalized community* could reasonably have concerns about being at a disadvantage before [the] judge."[66] There is a bias inherent in the expression "marginalized community," similar to the term "minority" ("a part of a population differing from others in some characteristics and often subjected to differential treatment").[67] To marginalize means "to relegate to an unimportant or powerless position within a society or group."[68] Individuals from marginalized communities are generally at a disadvantage, particularly in healthcare, education, and the legal system.[69] Scholars have noted:

> Marginalized communities are those excluded from mainstream social, economic, educational, [or] cultural life. Examples of

60. Appellant's Corrected Brief, *supra* note 52, at 13.

61. WASH. CODE OF JUD. CONDUCT r. 1.2.

62. WASH. CODE OF JUD. CONDUCT Terminology (defining "impropriety").

63. *Id.*

64. Commission Decision and Order, *supra* note 3, at 7.

65. WASH. CODE OF JUD. CONDUCT r. 1.2 cmt. 5.

66. Commission Decision and Order, *supra* note 3, at 8 (emphasis added).

67. *Minority*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/minorities [https://perma.cc/YY7Z-JJXD].

68. *Marginalize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/marginalize [https://perma.cc/4VU9-MPJ5].

69. *See generally* Jae M. Sevelius, Luis Gutierrez-Mock, Sophia Zamudio-Haas, Breonna McCree, Azize Ngo, Akira Jackson, Carla Clynes, Luz Venegas, Arianna Salinas, Cinthya Herrera, Ellen Stein, Don Operario & Kristi Gamarel, *Research with Marginalized Communities: Challenges to Continuity During the COVID-19 Pandemic*, 24 AIDS & BEHAV. 2009 (2020).

> marginalized populations include, but are not limited to, groups excluded due to race, gender identity, sexual orientation, age, physical ability, language, or immigration status. Marginalization occurs due to unequal power relationships between social groups.[70]

The term *marginalized community* is rarely, if ever, used to simply describe a group of people without reference to the group's social disadvantage.

The Commission's interpretation is wrong, and frankly, tone deaf. It is unreasonable for an individual to read the term marginalized community, in almost any context, and immediately think about themselves as not being from a marginalized community and the potential victim of those who proclaim to advocate for marginalized communities. In the context of a changing tide in Washington courts, the anonymous reporting of the ad and the Commission's strained reasoning appear to be a challenge to more progressive minded judges and effort to maintain the status quo.

B. The "Reasonable" Perspective

When you are accustomed to privilege, equality feels like oppression. This sentiment summarizes the theory of relative deprivation. Psychologists describe relative deprivation as a person feeling deprived of some desirable thing relative to their own past, another person, group, or other social category.[71] Glenn Lee Starks notes relative deprivation theory as a source of the recent rise is racial resentment and right-wing extremism, where groups supporting rights for minorities are seen as enemies.[72]

The Washington Supreme Court is among the most diverse in the country.[73] And, as mentioned above, all nine justices signed a letter pledging to eradicate racism from Washington Courts.[74] The Commission's "reasonable" person may be feeling, as a person not from a marginalized community, "dispossessed, persecuted, and threatened" by the impending transformations.[75] The reasonable person may be perceiving a deprivation and is of the belief that other groups are receiving

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70. *Id.* at 1.

71. Iain Walker & Thomas F. Pettigrew, *Relative Deprivation Theory: An Overview and Conceptual Critique*, 23 BRITISH J. SOC. PSYCH. 301, 302 (1984).

72. Glenn Lee Starks, *Explaining Antithetical Movements to the Black Lives Matter Movement Based on Relative Deprivation Theory*, 53 J. BLACK STUDIES 346, 353 (2022).

73. Mark Joseph Stern, *Washington State Now Has the Most Diverse Supreme Court in History*, SLATE (Apr. 17, 2020), https://slate.com/news-and-politics/2020/04/grace-helen-whitener-washington-supreme-court.html [https://perma.cc/QKX4-EHZG].

74. *See* Letter from the Supreme Court, *supra* note 1.

75. *See* Francis T. Cullen, Leah C. Butler & Amanda Graham, *Racial Attitudes and Criminal Justice Policy*, 50 CRIME & JUST. 163, 208 (2021).

some benefit at the expense of their own.[76] Rule 1.2 should not be used, or appear to be used, in a way that impedes the progress.

An individual motivated to ensure the legal system embodies justice by correcting for the inequities faced by marginalized communities is fit to serve as a judge. Several Washington judges have taken steps to address the injustices experienced by Black Americans and other marginalized groups. The participation of judicial officers' efforts to create a more just legal system should not bring their impartiality into question. They ought to be lauded as advocates for transformative systemic change.

C. Judicial Advocacy in Creating a More Equitable Court System

Washington courts have been evolving over the past three decades. The current Washington Supreme Court has essentially taken judicial notice of systemic racism. Committees and reports have been commissioned by the Court to better understand the inequitable outcomes and to inform solutions. Washington judges have been involved or at the forefront of much of this work aimed at creating a more fair and equitable system, particularly for marginalized groups. The Commission even noted that "Judge Keenan has volunteered and continues to volunteer his time with a number of organizations that promote access to justice, diversity, and equality in the law."[77] Like the Commission's decision in Judge Keenan's case, it would be just as unreasonable to question the impartiality of these judges.

Next, we will explore efforts by judicial officers that aim to create a more equitable system and promote public confidence in the judiciary. The Washington Supreme Court acknowledged that the conditions of Black Americans in the United States are systemic, persistent, and predate the nation's founding.[78] The Court noted that, "[o]ur institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed."[79] The result of these historical afflictions are Black Americans being overrepresented at every stage of the criminal legal system.[80] Washington courts have a history of implicit and explicit racial discrimination reflected in the outcomes they produce. Judges have led the charge as stakeholders and advocates in the effort to challenge systemic racism.

In October 2020, the Washington Supreme Court overruled the decision in *Price v. Evergreen Cemetery Co*., where the Court upheld

76. *See id.*
77. Commission Decision and Order, *supra* note 3, at 2.
78. *See* Letter from the Supreme Court, *supra* note 1, at 1.
79. *Id.*
80. *See id.*

racial segregation.[81] In 1957, the baby boy of Milton and Bernice Price, Milton Jr., fatally drowned in a neighbor's swimming pool.[82] As the grieving parents were making burial accommodations for their child, the indignities of segregation compounded the family's tragedy.[83] Evergreen Cemetery elected to maintain the segregation of its "Babyland" and denied the Price family access to the exclusively white burial plots.[84] The Prices brought action against the cemetery to force integration.[85]

In 1960, the Washington Supreme Court held that the cemetery had the right to maintain its white only sections.[86] In his concurring opinion, Justice Joseph A. Mallery wrote that the action was brought for an injury to the family's feelings "because they were not permitted to intrude upon the white children segregated therein."[87] Justice Mallery's concurrence criticized the National Association for the Advancement of Colored People (NAACP) and its crusade "for the special privilege of Negroes to intrude upon white people in their private affairs . . . at the expense of the traditional freedom of personal association which has always characterized the free world."[88] Justice Mallery concluded his concurring opinion by lamenting the "Negro dream of compulsory total togetherness."[89] For context, this decision came at the heels of the second *Brown* decision and the start of the decade where the Civil Rights movement resulted in Civil Rights legislation and the Voting Rights Act. However, nearly three decades later Mallery's "Negro dream" still had not been realized in Washington Courts.

"The 1987 Washington State legislature mandated that measures be taken to prevent minority and gender bias in Washington courts."[90] "Acting on this mandate, the Washington Supreme Court established the State Task Force on Gender and Justice and the State Task Force on Minority and Justice in the Courts."[91] Each produced reports that universally concluded that gender and racial bias was pervasive in the legal profession; that bias deterred and sometimes prohibited the effective delivery of justice; and that affirmative steps were needed to address and

81. *See* Garfield Cnty. Transp. Auth. v. State, 196 Wash. 2d 378, 390 n.1, 473 P.3d 1205 (2020).

82. *See* Price v. Evergreen Cemetery Co. of Seattle, 57 Wash. 2d 352, 352, 357 P.2d 702 (1960).

83. *See id.* at 352–53.

84. *Id.*

85. *Id.*

86. *Id.* at 354–55.

87. *Id.* at 356.

88. *Id.* at 357.

89. *Id.* at 358.

90. Melisa D. Evangelos, *Bias in the Washington Courts: A Call for Reform*, 16 U. PUGET SOUND L. REV. 741, 741 n.2. (1993) (citing Act of June 12, 1987, ch. 7, § 110(3)(a)–(c), 1987 Wash. Laws 1st Ext. Sess. 2673).

91. *Id.*

eliminate the effects of gender and racial bias.[92] Today, gender and racial bias persist in our legal system.

Marking the ten-year anniversary of its preliminary report, the Task Force on Race in the Washington Courts released a report in 2021.[93] According to the report, from 2013 to 2020 in Washington State, 253 people were killed by police.[94] Based on each group's relative population, Black people were killed at a rate 3.6 times greater than that of non-Hispanic white people;[95] Indigenous people at a rate 3.3 times greater;[96] Latinos at a rate 1.3 times greater;[97] and Pacific Islanders at a rate 3.3 times greater.[98] Data from four major Washington cities found that Black persons were 3.9 times to 10.6 times more likely to be subjected to use of force by police than white persons.[99] In 2019, Black, Indigenous, and other people of color (BIPOC) received significantly longer felony sentences for non-drug offenses than did white defendants for the two most serious offense levels.[100] "[D]isproportionality was pronounced for BIPOC defendants with lower criminal history scores . . . ."[101] Black persons, Indigenous persons, and Latinx people were sentenced to court fines and fees (Legal Financial Obligations, or "LFOs") more frequently, and at higher rates, than white and Asian persons.[102] Even after controlling for relevant legal factors, Latinx people are sentenced to significantly higher LFOs than similarly situated white defendants.[103] The Code should not be applied in a way that could deter the efforts of judicial officers to reverse the disparate outcomes of the legal system.

Under the Commission's application of Canon 1, the conduct of a judge who participates in the various court commissions may reasonably give the appearance of impropriety.[104] The Washington judiciary has organized several commissions in service to address the inequities of the legal system's effect on marginalized communities. Numerous judges and legal stakeholders, including those who aspire to sit on the bench, make up these commissions, whose work may be considered as advocacy. The Gender and Justice Commission, for example, has a mission to promote gender equality. In 2021, the Gender and Justice Commission released its

92. *Id.* at 741–42.
93. *See* Task Force 2.0 Research Working Group, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, 57 GONZ. L. REV. 117 (2021).
94. *Id.* at 146.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 146–47.
100. *Id.* at 137.
101. *Id.*
102. *Id.*
103. *Id.*
104. *See* WASH. CODE OF JUD. CONDUCT Canon 1.

report, *2021: How Gender and Race Affect Justice Now*, a multi-year project working to determine the impact of gender bias on access to justice, focusing on the intersection of gender and race, poverty, and other identities.[105] Promoting gender equality may be understood as fighting against gender inequality. Historically, gender inequality has been understood to be embodied in the patriarchy—a system of relationships, beliefs, and values embedded in political, social, and economic systems that structure gender inequality between men and women.[106] A patriarchal system values traits attributable to men and labeled masculine over traits attributable to women and labeled feminine.[107] Applying the logic of the Commission, a male-identifying person may infer that a judge who is a member of the Gender and Justice Commission may be partial to female-identifying persons in their courtroom. Here too, the Commission's logic is unreasonable and irrational.

Similar to the Gender and Justice Commission, part of the mission of the Minority and Justice Commission is to eliminate racial, ethnic, and cultural bias and to prevent the reoccurrence of such bias.[108] Judges who are members of the Minority and Justice Commission are directly involved in or support the work of its commission. For example, in 2020, the Minority and Justice Commission released a special report on *Girls of Color in Juvenile Detention in Washington State*.[109] The findings in the report underscore policies aimed at race-conscious juvenile justice reform, especially those that are geared toward young women and girls who are often left out of the conversation on the impact of carceral punishment on youth development.[110]

The conduct of the judges involved in the production of this report does not undermine the integrity of the judiciary and does not give the appearance of impropriety. It is not reasonable to believe that judicial

105. *See* WASH. CTS. GENDER & JUST. COMM'N, 2021: HOW GENDER AND RACE AFFECT JUSTICE NOW 1 (2021) https://www.courts.wa.gov/subsite/gjc/documents/GJ_Study_Fact_Sheet_English.pdf [https://perma.cc/4U8W-NK76].

106. Catherine J. Nash, *Patriarchy*, *in* INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 43, 43–47 (Audrey Kobayashi ed., 2d ed. 2020).

107. *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24–25.

108. *Washington State Minority and Justice Commission*, WASH. CTS., https://www.courts.wa.gov/?fa=home.sub&org=mjc&layout=2 [https://perma.cc/V4HU-PPS7] ("The Minority and Justice Commission seeks to foster and support a fair and bias-free system of justice in the Washington State courts and judicial systems by: 1) identifying bias of racial, ethnic, national origin and similar nature that affects the quality of justice in Washington State courts and judicial systems; 2) taking affirmative steps to address and eliminate such bias, and taking appropriate steps to prevent any reoccurrence of such bias; and 3) working collaboratively with the other Supreme Court Commissions and other justice system partners.").

109. *See* ALIYAH ABU-HAZEEM, AMANDA B. GILMAN, RACHAEL SANFORD & FRANKLIN G. THOMAS, GIRLS OF COLOR IN JUVENILE DETENTION IN WASHINGTON STATE (2020).

110. *Id.* at 1.

commission members are biased against litigants who do not identify as girls of color. To think otherwise would be unreasonable and irrational.

The abovementioned efforts were led by members of the judiciary. Their conduct may be perceived as advocacy, but in no way gives the appearance of impropriety. The intentional work of ensuring legal stakeholders are aware of systemic inequities and taking affirmative steps where possible to make the system more equitable for historically marginalized groups increases public confidence and legitimizes the court system.

In Judge Keenan's case, the Commission interpreted and applied the rules of Canon 1 in a way that could deter judges from taking the lead on addressing bias and inequity. Based on the Commission's reasoning, one could question the impartiality of any judge involved with the efforts mentioned above. But that is unreasonable and irrational. The 2020 letter from the Washington Supreme Court, the decades of work by the Gender and Justice Commission and the Minority and Justice Commission, and all judges involved, challenge the status quo. This body of work helps transform the court system from a mechanism of oppression to a tool for justice.

III. ARGUMENT

A. The Commission's Decision as Maintenance of the Status Quo

Neither Judge Keenan's involvement with the college ad nor the plain language of the ad call into question his integrity or impartiality as a judge. The Commission's distorted reading of the ad and the reasoning used in this case, at best, reveals an implicit complacency with the status quo systemic inequities. At worst, the Commission and the anonymous reporting judges reflect an explicit contempt for progressive, equity-oriented judges. Under the guise of neutrality, the Commission's decision maintains the status quo and sends a clear message to those who may challenge it—in this case, advocates for marginalized groups.

Judge Keenan argues that the Commission distorted the language of the bus ad and misrepresented his email communications as concessions of his violations.[111] "The Commission first isolates the phrase 'advocate for marginalized communities' from the preceding," clarifying, "words that David Keenan 'got into law in part' to do such advocacy."[112] "The majority thus improperly changes the message's meaning, and then condemns that changed meaning."[113] One cannot determine the intent of the Commission's distortion of the ad's language. The inference can be

111. Appellant's Corrected Brief, *supra* note 52, at 17, 22.
112. *Id.* at 16.
113. *Id.*

made that the Commission's opinion is addressing those who choose to advocate from the bench.

As noted above, in recent times, judges have been crucial advocates—along with other legal stakeholders—for moving Washington's legal system closer to equity and justice. For example, the conduct of the current justices of the Washington Supreme Court may not be traditional, but tradition has contributed to the racially disparate outcomes of our legal system. It is certainly non-traditional to pledge to eradicate racism. The nine justices who signed on to the 2020 letter are no more in violation of the Code rules than Judge Keenan. The Washington Supreme Court justices have not compromised their impartiality by essentially declaring themselves anti-racist advocates, calling out systemic racism, and vowing to eradicate racism. Claiming the Court is somehow impartial for challenging the status quo or bias against those perceived to benefit from racist systems is incorrigible.

Judges should embrace their responsibility as stewards of justice and resist the myth that being neutral requires rote obeisance to settled traditions or norms.[114] For many individuals in this country, the status quo has never been neutral. The bus ad was brought to the attention of the Commission by unidentified judges who found the message to be "unbecoming, undignified, and startlingly out of character for a judicial officer."[115] The unidentified judges and the Commission failed to resist the myth and mistook the norm for neutral.

The legal system's outcomes are statements about who we are. The legal system is an institution reflective of the values of our society. In many instances our ideals are stories we tell about ourselves. Particularly in the U.S., we attach the ideals of justice to our legal system. Many use the terms "justice system" and "legal system" interchangeably. The truth is, our legal system is an institution of a society based on racial caste, among others, and contributes to the marginalization of entire groups and communities and must not be mistaken as neutral. For some, the truth does not matter because ideology is not about truth or accuracy.[116] Rather, its purpose is to perpetuate the norm and maintenance of the status quo "by making it appear normal and legitimate."[117]

A basic understanding of the realities of the U.S. legal system shows how it can best be understood as a type of caste system. "Caste systems aim for complete, absolute, [and] totalizing top-down domination and

114. Debra Stephens & Veronica Galván, *Why Judges Should Not Mistake the Norm for the Neutral*, 57 CT. REV. 92, 94 (2020).

115. Appellant's Corrected Brief, *supra* note 52, at 19.

116. ALLEN G. JOHNSON, PRIVILEGE, POWER, AND DIFFERENCE 113 (2d ed. 2006).

117. *See id.*

bottom-up obedience."[118] This aspiration amounts to an unquestioned and unquestionable status quo.[119] "[T]he hierarchical organization of society is preserved and justified by the existence of legitimizing myths, that is, 'attitudes, values, beliefs, stereotypes and ideologies which provide an intellectual and moral justification for social practices.'"[120] Individuals with power in this system exert their influence and endorse a set of ideologies allowing the justification of existing inequalities between social groups to protect existing social arrangements.[121]

In its opinion, the Commission minced the language of the ad, giving the appearance that Judge Keenan was advocating from the bench for individuals from marginalized communities in his court.[122] The plain language of the ad clearly states that Judge Keenan "got into law in part to advocate for marginalized communities."[123] This language is expressing nothing more than Judge Keenan's motivation for pursuing a career in the law. However, even if it were interpreted as expressing Judge Keenan's current advocacy efforts it should not violate the Canons. Judges, as legal stakeholders and stewards of justice should be permitted to challenge the inequities of the legal system. As mentioned above, over the past three decades judicial officers have worked to create a more fair and just legal system. Judges, along with other legal stakeholders, have worked to educate the judiciary about the disparate outcomes produced by the legal system—moving beyond relying on ideals and ensuring that the system produces outcomes that reflect its ideals.

The Commission's position, that advocating for marginalized groups compromises the impartiality and integrity of the judiciary, relies on ideals of fairness and justice while ignoring the system's outcomes. It requires an assumption that inequitable outcomes are legitimate and produced by a completely neutral and impartial judiciary. This is simply not true.

The Commission made a declaration in its decision that contradicts the Canons. Judges are to "promote access to justice for all."[124] However, in holding that the connections between having students enroll at North Seattle College because they may thereafter attend law school is too tenuous or strained, the Commission again elects to, implicitly or explicitly, maintain a status quo. The Commission held that judges are

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118. FRANCISCO VALDES, JENNIFER J. HILL & STEVEN BENDER, CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY 85 (2021).

119. *Id.*

120. Pierre De Oliveira, Serge Guimond & Michael Dambrun, *Power and Legitimizing Ideologies in Hierarchy-Enhancing vs. Hierarchy-Attenuating Environments*, 33 POL. PSYCH. 867, 868 (2012).

121. *Id.*

122. *See* Appellant's Corrected Brief, *supra* note 52, at 16–17.

123. *Id.* at 13.

124. WASH. CODE OF JUD. CONDUCT r. 1.2 cmt. 4.

confined to promoting law schools.[125] Community colleges create opportunities for individuals from marginalized communities to access higher education. The flexibility and affordability of community colleges remove barriers to education that state universities may not. Judge Keenan and the author of this Note are both graduates of community colleges, whose path to law school had its challenges but was not too tenuous or strained. If more legal stakeholders had an appreciation for the access that community colleges provide and the value of students who may need the flexibility or affordability in order to thrive, the legal profession may reach a meaningful level of diversity.

B. Shift from a Reasonableness Standard to an Objective Observer Standard in Matters Involving Canon 1

The Washington Supreme Court heard oral arguments for Judge Keenan's appeal in November 2021.[126] The Court should ground itself in its mission to eradicate racism and highlight the way in which the Commission's interpretation of the Code would preclude the conduct of many of the equity efforts of the judiciary. The way the Commission misconstrued the ethics rules (Rule 1.2) would limit several of the initiatives the Washington judiciary has advocated for over the past few decades.

In reviewing Judge Keenan's case, if the Commission had adopted an objective observer standard over the reasonable person standard, it would have been nearly impossible to perceive his conduct as undermining the integrity of the bench.

The objective observer standard was adopted with Court Rule 37 to prevent bias in jury selection. The rule's purpose is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.[127] "[A]n objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[128] If a party objects to the use of a preemptory challenge based on improper bias, the party exercising the challenge must "articulate the reasons the preemptory challenge has been exercised."[129] The court must evaluate the challenge as follows:

> The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or

125. *See Opinion 96-06*, *supra* note 28.
126. *In re* Keenan, 199 Wash. 2d 87, 502 P.3d 1271 (2022).
127. WASH. STATE CT. GR 37(f).
128. *Id.*
129. WASH. STATE CT. GR 37(c)–(d).

> ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.[130]

"The objective-observer standard instructs judges to disregard the question of intentional discrimination and invalidate any peremptory that would look discriminatory to an objective observer."[131] "It is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts [the Washington Supreme Court's] current decision making in nonexplicit, or implicit, unstated, ways."[132]

A similar standard could be applied by the Commission when reviewing the conduct of judges reported for violating Canon 1. The judicial ethics objective observer would be aware that implicit, institutional, and unconscious biases, along with purposeful discrimination, have caused the Washington court system to treat people unfairly. The Commission would consider the conduct of the judge and the surrounding facts. If the Commission determines that an objective observer could view the judge's conduct as that which undermines public confidence in their independence, impartiality, integrity, and competence, the Commission may then appropriately sanction the judge.

CONCLUSION

Washington State's Code of Judicial Conduct provides guidance to assist judges in maintaining the highest standards of judicial and personal conduct. Canon 1 of Washington's Code requires judges to uphold and promote the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. Judge Keenan did not violate the Code of Judicial Conduct. He was admonished, in part, because he was featured in an ad that represents his desire for a more equitable legal system. The admonishment of Judge Keenan was a symbolic backlash to the efforts to evolve Washington courts. The Commission's application of the reasonableness standard appears to address an unreasonable concern about reverse discrimination. But advocating for marginalized groups does not result in the detriment of the historical majority. The Washington Supreme Court has called on the entire legal community to eradicate racism. Racism is not neutral or impartial. At times, anti-racist solutions will be neither neutral nor impartial. An objective observer standard understands this. Applying an objective observer standard to judicial conduct reported under Canon 1

130. WASH. STATE CT. GR 37(e).

131. Ela A. Leshem, *Jury Selection as Election: A New Framework for Preemptory Strikes*, 128 YALE L.J. 2356, 2365 n.50 (2019).

132. State v. Jefferson, 192 Wash. 2d 225, 249–50, 429 P.3d 467 (2018).

will ensure a judge's efforts to eradicate racism or other oppressions are not sanctioned in the name of neutrality. If you are neutral in situations of injustice, you have chosen the side of the oppressor.