

Staying Off the Sidelines: Judges as Agents for Justice System Reform

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ABSTRACT. Chief Justice Bridget McCormack argues there is no ethical obstacle to judges working to improve the justice system. To the contrary: although ethical constraints limit the form of their advocacy, effective law reform depends on judges' contributions and they are ethically obligated to improve the judicial system over which they preside.

States across the country—from Texas, to Michigan, to California—are enacting criminal-justice reforms that transcend any red state/blue state divide.¹ Reform-minded prosecutors have also been elected in diverse places, from big cities to small towns.² These important decarceral policies and elections are un-

* I want to thank David Arnold and Len Niehoff for their very helpful feedback.

1. See Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> [<https://perma.cc/4WCM-ZZF9>] (discussing reforms enacted in Oklahoma, New Jersey, and New Mexico).
2. See Steve Volk, *Larry Krasner vs. Everybody: Inside the Philly DA's Crusade to Revolutionize Criminal Justice*, PHILA. MAG. (Nov. 23, 2019), <https://www.phillymag.com/news/2019/11/23/larry-krasner-criminal-justice-reform> [<https://perma.cc/GR64-Y6M3>] (chronicling the Philadelphia District Attorney's efforts to divert nonviolent offenders from prison, eliminate cash bail in some cases, and decriminalize marijuana possession and some prostitution offenses); Kristina Zheng & Shannon Stocking, *Washtenaw County Prosecutor Makes Sweeping Changes During First Two Weeks in Office*, MICH. DAILY (Jan. 15, 2021), <https://www.michigandaily.com/ann-arbor/washtenaw-county-prosecutor-makes-sweeping-changes-during-first-two->

winding decades of tough-on-crime practices. The public has demanded criminal-justice reform, and diverse interest groups have successfully aligned to advocate for it.³

Judges have been part of this story too.⁴ In many instances, their decisions have supported reform efforts. For example, they have made system-disrupting determinations about the cash-bail system.⁵ They have adopted practices aimed at preventing citizens from being jailed for nonpayment of fines.⁶ And they have even played an important role in criminal-justice reform work outside of their courtrooms, chairing reform taskforces,⁷ authoring amicus briefs,⁸ and advocating in legislatures.⁹ This should come as no surprise: judges have significant and unique experience with the flaws in the legal systems over which they preside, and reform is difficult to achieve without the support of the bench. This is not

weeks-office [<https://perma.cc/HM5K-HHMX>] (documenting the new prosecutor's decisions to rescind zero-tolerance policies, reform the cash-bail system, and prioritize treatment and rehabilitation).

3. Carlie Porterfield, *A Whopping 95% of Americans Polled Support Criminal Justice Reform*, FORBES (June 23, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/06/23/a-whopping-95-of-americans-polled-support-criminal-justice-reform> [<https://perma.cc/CJ53-MR94>]; John Arnold & Laura Arnold, *Fixing Justice in America*, POLITICO (Mar. 13, 2015), <https://www.politico.com/magazine/story/2015/03/criminal-justice-reform-coalition-for-public-safety-116057> [<https://perma.cc/9MV9-VM7R>] (describing an “emerging bipartisan consensus” for criminal-justice reform).
4. State courts and state judges adjudicate the vast majority of criminal (and civil) cases, and it is therefore state judges who have the most to contribute to reform efforts. Federal judges have decided important questions around poverty and criminal justice, to be sure, but state judges have vastly greater experience with criminal-justice policy. This piece therefore focuses primarily on the latter. Even so, my view is that both state and federal judges have an obligation to improve the laws they enforce.
5. See *In re Humphrey*, 482 P.3d 1008, 1012 (Cal. 2021) (“The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.”); *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987 (Nev. 2020) (holding unconstitutional a statute requiring a showing of “good cause” before a person may be released without bail); *ODonnell v. Harris Cnty.*, 251 F. Supp. 3d 1052, 1084 (S.D. Tex. 2017) (discussing “a clear and growing movement against using secured money bail to achieve a misdemeanor arrestee’s continued detention”).
6. See Jonah Beleckis, ‘A Debtor’s Prison:’ Judges Want to End Jailing People for Unpaid Fines, JANNESVILLE GAZETTE (Oct. 27, 2019), https://www.gazettextra.com/news/crime/a-debtor-s-prison-judges-want-to-end-jailing-people-for-unpaid-fines/article_babde46b-867e-5a80-b7d2-65f9a4efcd22.html [<https://perma.cc/9EK7-RZ89>].
7. See *infra* text accompanying notes 11-13 and Part III of this Essay.
8. Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party, *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333).
9. See Tracie A. Todd, *Mass Incarceration: The Obstruction of Judges*, 82 L. & CONTEMP. PROBS. 191, 202-03 (2019) (detailing the Massachusetts judiciary’s involvement in criminal-justice reform legislation).

to say that judges have uniformly supported reform efforts. Indeed, some judges have blocked reform-minded prosecutors' decisions in individual cases.¹⁰ But many judges watch closely for opportunities to improve our justice system and press for change when it is needed.

I am one of them. For two years, I co-chaired Michigan Governor Gretchen Whitmer's Jail and Pretrial Taskforce, which collected data, research, best practices, and public comments to make recommendations to reduce Michigan's county jail populations.¹¹ The legislature acted on many of these proposals, and the Governor signed nineteen bills in January 2021 that will decriminalize many low-level offenses and divert people from the criminal-justice system.¹² I am hardly alone. I have lots of company in states across the country.¹³

These developments present an important question: what is a judge's ethical obligation to address inequities in the system over which she presides? From one

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10. See, e.g., Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/42AD-FU9A>] (recounting judicial pushback against policies deemed “too lenient”); Jaclyn Diaz, *Judge Blocks LA District Attorney's Reforms*, NPR (Feb. 9, 2021), <https://www.npr.org/2021/02/09/965673109/judge-blocks-l-a-district-attorneys-reforms> [<https://perma.cc/3LUP-4PFK>] (reporting on a judge's “ruling [that the District Attorney's] policy to end sentencing enhancements in criminal cases is unlawful”).
 11. See *Report and Recommendations*, MICH. JOINT TASK FORCE ON JAIL & PRETRIAL INCARCERATION (Jan. 10, 2020), <https://www.courts.michigan.gov/48e562/siteassets/committees,-boards-special-initiatives/jails/jails-task-force-final-report-and-recommendations.pdf> [<https://perma.cc/33R5-NZ45>]. I also co-chair the Michigan Jail Reform Advisory Council and the Task Force on Forensic Science. See Exec. Order No. 2021-4 (Apr. 2, 2021), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-556135--,00.html [<https://perma.cc/RL4S-KSLN>]; Exec. Order No. 2021-5 (Apr. 21, 2021), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-557491--,00.html [<https://perma.cc/6URK-XENQ>].
 12. 2020 Mich. Pub. Acts 375-87, 393-98.
 13. There are many other recent examples in states across the country. See, e.g., *Gov. Cooper Signs Bill into Law that Would Allow People to Clear Non-Violent Crimes from Record*, WTVD-TV ABC NEWS (June 25, 2020), <https://abc11.com/second-chance-act-roy-cooper-signed-into-law-opportunity/6268470> [<https://perma.cc/B7GF-NAZV>] (observing bipartisan passage of a North Carolina law that allows people with nonviolent criminal pasts to have parts of their records expunged); *Governor Murphy Signs Major Criminal Justice Reform Legislation*, OFF. N.J. GOVERNOR (Dec. 18, 2019), <https://www.nj.gov/governor/news/news/562019/approved/20191218a.shtml> [<https://perma.cc/G83D-NXYS>] (summarizing two New Jersey bills that, among other things, create a petition process for “clean slate” expungement for certain individuals); *Tennessee Legislature Passes Two Bills to Reform Criminal Justice System*, WBIR NBC NEWS (Apr. 28, 2021), <https://www.wbir.com/article/news/politics/tennessee-legislature-passes-two-bills-to-reform-criminal-justice-system/51-0doae356-aad1-4859-9e68-10fe5248ado4> [<https://perma.cc/LN6A-EBHN>] (outlining Tennessee laws creating a way for local governments and private organizations to develop community-based alternatives to incarceration).

view, the answer is little or nothing. This view holds that the judge has a limited role in the justice system. Her job is to interpret and apply the law, not to create it, change it, or work toward its improvement. To the contrary, the argument goes, a judge who engages in such activities is overreaching and involved in ethically questionable behavior.

In this Essay, I maintain that this line of thinking is wrong on every count. In Part I, I argue that judges are uniquely valuable contributors to reform efforts precisely because they are exposed to the day-to-day workings of the justice system and the flaws within it. In Part II, I contend that there is no formal ethical obstacle to judges working toward the improvement of the law and the justice system. Although there are some ethical constraints on *how* judges may do so, a wide range of plainly permissible activities remain. And in Part III, I make the case that judges are not only *permitted* to engage in reform efforts, but also have an ethical *obligation* to do so. That is, a judge cannot ignore inequities once she becomes aware of them. To borrow Brendan Sullivan's phrase, in the dynamics of reforming and improving the justice system, a judge should not be a potted plant.¹⁴

I. JUDGES ARE CRITICAL WITNESSES

The recent momentum behind criminal-legal-system reforms notwithstanding, improving complex systems is difficult. This is especially true where many stakeholders contribute to a particular system and no one individual bears responsibility for its problems. Further, system-level reform is almost never successful without participation from all stakeholders.¹⁵ This is in part because stakeholders left out of a reform process can be obstacles to its success. But more fundamentally, different stakeholders have unique information and perspectives about the system and its shortcomings. Only by bringing together these vantage points is it possible to imagine solutions.

Judges have high-quality and unique information about the system they oversee. In my state, Michigan, the district courts alone hear close to three million cases each year.¹⁶ Probate and circuit courts hear hundreds of thousands

14. See *Iran Contra Investigation Day 25*, C-SPAN (July 10, 1987), <https://www.c-span.org/video/?c4762875/user-clip-potted-plant-brendan-sullivan> [<https://perma.cc/CG7N-GJC4>].

15. Dan Heath addresses this (and many other) aspects of complex system reform in DAN HEATH, *UPSTREAM: THE QUEST TO SOLVE PROBLEMS BEFORE THEY HAPPEN* (2020).

16. See *2019 Court Caseload Report*, MICH. CTS. (2019), <https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf> [<https://perma.cc/J4P4-H6UQ>].

more.¹⁷ The sheer volume of cases heard gives many judges unparalleled exposure to a broad cross section of their jurisdiction's citizenry and the wide range of legal problems it faces, as well as the obstacles to resolving those issues.

Additionally, much of judges' experience with individuals in the justice system is not mediated through attorneys. While reliable statistics on the number of self-represented litigants is difficult to compile, a 2015 report focusing on divorce cases in Michigan state court found that forty-eight percent of cases were filed by pro se plaintiffs and sixty-eight percent of cases had one or more pro se litigants.¹⁸ And the numbers of self-represented litigants are rising—not just in Michigan, but in courts across the country.¹⁹ According to the Self-Represented Litigation Network, in matters such as family law, housing, and consumer litigation, sixty to one-hundred percent of state court cases today involve at least one pro se party.²⁰ As these statistics make clear, many judges directly interact with members of the public trying to navigate the legal system on a daily basis.²¹

This experience provides judges with an informed perspective on what policies are working well and what policies are working *less* well. As direct witnesses to the daily experiences of people navigating legal problems, judges have critical information about what reforms are needed, as well as ideas on how such reforms can be implemented.²² Indeed, some failed criminal-justice reform efforts arguably failed because they lacked sufficient input from judges; when legislatures and executives act without the perspective of the judiciary, judges often find themselves administering laws with unintended consequences.²³

17. *Id.*

18. Kerry Sheldon, *Evaluation: Michigan Legal Help Evaluation Report*, SELF-REPRESENTED LITIG. NETWORK (Jan. 2015), <https://www.srln.org/system/files/attachments/michigan-legal-help-evaluation-report-1-15.pdf> [<https://perma.cc/JPG4-M3B5>].

19. Anica Madeo, *Self-Help Center Evaluation*, MICH. LEGAL HELP PROGRAM (Aug. 2018), <https://mplp.org/sites/default/files/2020-02/MLHP%2520Self-Help%2520Center%2520Evaluation%2520-%2520Final%2520Report%2520-%2520August%25202018.pdf> [<https://perma.cc/JPG4-M3B5>].

20. *About SLRN - 2020 Report*, SELF-REPRESENTED LITIG. NETWORK (Aug. 22, 2021), <https://www.srln.org/node/21/about-srln> [<https://perma.cc/YS5J-23MM>].

21. This is not to say that appellate judges, who have far less direct interaction with members of the public, do not have anything to offer in policy discussions. I believe they do. After all, they review the decisions of trial judges and see the legal system's flaws in that role too. Indeed, because they review cases from a number of different jurisdictions, appellate judges have an opportunity to see those flaws on a broader scale.

22. Todd, *supra* note 9, at 205 (arguing that “any genuine effort to effectively reform the criminal justice system and reduce prison populations must include substantive involvement of state judges”).

23. *Id.* at 191 (asserting that there is “widespread agreement that too many people are being incarcerated for too long” and how “very little attention has been paid in public discourse to what judges think about their role in sentencing, and how it relates to mass incarceration”).

II. THERE ARE ETHICAL PATHWAYS TO ADVOCACY

Despite the value that they can add to conversations about reform, some judges hesitate to get involved. Different reasons motivate their reluctance. Some judges view reform work as outside of the traditional judicial role.²⁴ Others believe that the judicial role is inconsistent with being in the public eye.²⁵ But perhaps the most common explanation for judges' hesitation to engage in any activity perceived as advocacy is a concern about not appearing impartial, contrary to the rules governing judicial conduct.²⁶ This concern is important, serious, and not easily dismissed. In my view, however, it should not keep judges from participating in systemic reform.

Canon 1 of the Model Code of Judicial Conduct governs a judge's obligations with respect to impartiality and the appearance of impropriety: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."²⁷ The appearance of impropriety is considered an objective standard because it is based on whether a reasonable observer would think that a particular activity or event impaired a judge's ability to carry out her duties with impartiality.²⁸ But it is difficult to apply.²⁹ Critics of the standard have argued that there is no way to know what constitutes an "appearance of impropriety" and therefore no way to enforce this provision coherently.³⁰ Even a former Justice of the United States Supreme Court once deemed it "unbelievably ambiguous."³¹

24. *Id.* at 202 (describing a "clear aversion among Massachusetts judges to individually engage legislators, telegraphing a rank and file mindset in this regard"). See generally Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 74 N.Y.U. ANN. SURV. AM. L. 277 (2019) (discussing judges' views of the traditional judicial role).

25. Stephen Louis A. Dillard & Bridget Mary McCormack, *The Robed Tweeter: Two Judges' Views on Public Engagement*, 20 J. APP. PRAC. & PROCESS 179, 180-81 (2020).

26. Roth, *supra* note 24, at 350-51 ("[T]he Canons omit how judges are to balance the call to participate in law reform efforts with the need to maintain their impartiality. This is a difficult line to walk").

27. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2020).

28. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) (referring to the appearance of impropriety as an objective standard).

29. Other canons, by contrast, establish clear bright-line rules for judges that are easy to apply. See, e.g., MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 3.3 ("A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.").

30. CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES J. SAMPLE, *JUDICIAL CONDUCT AND ETHICS* § 1.04 (2020).

31. *Id.* (quoting former Justice Goldberg, who served on the Court from 1962 to 1965).

Some judges have been disciplined for violating the appearance of impropriety based on their advocacy efforts.³² Concern about violating Canon 1 of the Code of Judicial Conduct therefore has an understandable chilling effect on judges' decisions to participate in any activity that might be perceived as advocacy. The result has been that "[j]udicial discipline which relies solely on appearances may effectively isolate judges from society."³³

Of course, it is not only the formal rule that constrains judges, but also the implicit normative sentiment behind it. Public confidence is the only currency that courts and judges have, and impartiality is central to public confidence.³⁴ A judge may feel that anything that might cause someone to question their ability to rule impartially comes with a heavy adverse presumption.

These constraints are significant, which is why many judges are tempted to stay on the sidelines. But this reflexive response, while understandable, can lead to missed opportunities. Careful adherence to formal and informal constraints still leaves ample room for nuanced approaches.

First, it is simply not the case that judges are *entirely* barred from participating in law-reform efforts. To the contrary, judges are commonly involved in improving the law and justice system processes that take place within their courtrooms. Court rule changes and administrative orders are both judicial-system reforms, but no one maintains that judges are acting improperly when they revise and improve court rules or issue administrative orders. Likewise, judges do not act improperly when their opinions steer the common law in an improved direction. Those are core judicial functions that judges regularly and unremarkably use to improve the law and legal processes. The question we need to answer

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32. *Id.* (citing *Comm'n Jud. Performance v. Dearman*, 66 So. 3d 112 (Miss. 2011) (censuring a judge for, among other things, creating an appearance of impropriety by writing columns in the local newspaper expressing disagreement with the sheriff's handling of the county's drug problem, advocating her policy of setting low bonds in drug cases, and inviting readers to share their thoughts and ideas)). The advocacy went too far because the judge in that case was publicly advocating on an issue that came before her on a regular basis and implied that public sentiment could influence her decisions. *See also In re Chaisson*, 549 So. 2d. 259, 259 (La. 1989) (censuring a judge for creating the appearance of impropriety "by making inquiries [about settlement negotiations] on behalf of a litigant in an action before another judge"). *But see* *Jud. Inquiry & Rev. Comm'n v. Bumgardner*, 801 S.E.2d. 406, 406 (Va. 2017) (holding that judges did not create an appearance of impropriety by being members of a referendum committee seeking to influence the outcome of the vote on a public referendum, including publicly endorsing one side of the issue in an interview in a local newspaper, but reaching that conclusion on procedural grounds because the Commission had failed to set forth any argument regarding how the facts of the case supported a violation of Canons 1 and 2).
33. James D. Nosedá, Comment, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*, 36 DEPAUL L. REV. 519, 543 (1987).
34. *See In re Simpson*, 902 N.W.2d 383, 398 (2017) ("Our judicial system depends on public confidence in the integrity and impartiality of the judiciary.").

is not *whether* judges can ethically participate in law-reform efforts, but *how* and *under what circumstances* they can do so.

Second, some of the unease with participating in reform efforts may arise from concerns about judicial competence rather than partiality. After all, judges are trained to make decisions in cases and preside over proceedings in their courtrooms. They are not trained to administer or participate in policymaking processes. Legal-reform efforts may be outside their comfort zone because they are perceived to be beyond their competence zone.

Just as Rule 1.1 in the American Bar Association's Model Rules of Professional Conduct suggests that lawyers can become sufficiently competent to do new things,³⁵ so too can judges. Consider, for example, problem-solving courts,³⁶ where parties participate in nontraditional efforts to work toward solutions rather than becoming mired in the adversary process. When those courts were newly created, the judges assigned to them were squeamish. As one judge put it, "[W]e are judges, not social workers or psychiatrists."³⁷ With the passage of time, however, judges sitting on problem-solving courts have become more comfortable in their roles, and general unease over potential ethical issues has receded. Indeed, today a contrary perspective prevails: that problem-solving courts are "not a departure from the judicial norm, but rather part of a rich tradition of an engaged judiciary."³⁸ This perspective shift is in large part attributable to the fact that we now have decades of data showing how effective problem-solving courts can be at both addressing the issues that land people in court and

35. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

36. "Problem-solving courts are specialized dockets within the criminal justice system that seek to address the underlying problem(s) contributing to certain criminal offenses." *Problem-Solving Courts Guide*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/home> [<https://perma.cc/8LTA-E37E>].

37. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1477 (2000).

38. Greg Berman & John Feinblatt, *Judges & Problem-Solving Courts*, CTR. FOR CT. INNOVATION 13 (2002), <https://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf> [<https://perma.cc/293R-CW33>]. The authors quote a New York judge as saying "the process of judging, where judges use their authority to form an informed response to social problems, is simply not new, it is not unusual." *Id.*; accord Paul A. Haskins, *Problem-Solving Courts: Fighting Crime by Treating the Offender*, NAT'L INST. JUST. (Sept. 26, 2019), <https://nij.ojp.gov/topics/articles/problem-solving-courts-fighting-crime-treating-offender> [<https://perma.cc/HR28-WTDW>] (describing problem-solving courts as "a fixture of the American criminal justice system").

reducing recidivism.³⁹ But the shift is also due to judges having more confidence in their competence to assist the individuals before them.⁴⁰

Related to concerns regarding judicial competence to advocate for reform is the discomfort some judges feel engaging in any out-of-court activities. To be sure, there is something intuitively awkward about a judge participating in community events. After all, her role at those events will certainly be different than the one she inhabits in her courtroom. But declining to participate in community activities altogether is a mistake for several reasons. For one, judges are public servants, and the public has a right to know who serves in their courts. The public also deserves to have judges who understand what is happening in the community. Further, many of the legal tests and rules that judges apply on the bench require practical judgment, so the common experience they gain through immersion in nonjudicial activities makes them better judges.⁴¹

Granted, judges should exercise great caution to avoid violating Canon 1. They must not engage in activities that could jeopardize the appearance or reality of impartiality in matters that are likely to come before them in court. For this reason, it is understandable why some judges may feel comfortable becoming involved in their communities but hesitate to take the additional step of advocating for legal reforms.

Still, the broad directive to avoid an appearance of impropriety should not become a straitjacket that constrains judges from advocating for legislative or other legal system reforms. On many occasions, no tension exists whatsoever between a judge fairly adjudicating cases in court and pressing for change outside of it.⁴² In sum, judges have a lot of room to advocate for change.

To that end, the ethical rules establish helpful boundaries, with the federal Code of Judicial Conduct and state judicial codes providing concrete limitations on the mechanisms by which a judge may seek reforms. For example, judges

39. See, e.g., *FY 2020 Problem-Solving Courts Annual Report: Solving Problems, Saving Lives*, MICH. SUP. CT. (2021), <https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Reports/PSCAnnualReport.pdf> [<https://perma.cc/93AQ-U7Z3>] (discussing the success rates of Michigan’s problem-solving courts).

40. See Berman & Feinblatt, *supra* note 38, at 22-23.

41. See MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 3.1 cmt. 2 (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”).

42. For one example, while Judge Boyd and Judge Edwards served on the Michigan Joint Taskforce on Jail and Pretrial Incarceration, they were regularly deciding questions that resulted in jail time for litigants in their courts, as that is what the law required. That did not stop them from advocating for different policies that would result in different outcomes. In fact, their experiences supported their advocacy. See *Report and Recommendations*, *supra* note 11.

cannot engage in political campaigns or endorse candidates for nonjudicial offices.⁴³ And judges should not individually solicit funds for any organization, including organizations dedicated to the goal of improving the legal system, or use the prestige of their office for that purpose.⁴⁴

But those limitations leave open a vast *educative* function, where judges can inform legislators, the legal profession, and the public about their observations, insights, and recommendations. Indeed, for many years, judges have engaged in the time-honored traditions of teaching, writing, and speaking.⁴⁵ And judicial canons explicitly permit a judge to serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency concerned with the law, the legal system, or the administration of justice.⁴⁶ Other canons also allow judges to appear at public hearings before executive or legislative bodies or officials in connection with such matters.⁴⁷ Because there are few governmental bodies whose work has no relationship to law, the legal system, or the administration of justice, these provisions provide a significant formal opening for judges to take an active role in advocating for improvements to the justice system.

This is not to say that there are no hard questions about when a judge's policy advocacy might cause concern. A judge contemplating taking a public stance on an issue must weigh whether that issue is likely to come before her in later litigation, and whether her advocacy would require her recusal.⁴⁸ If associating with an organization would call the judge's impartiality into question, the judge should decline it.⁴⁹

Nevertheless, those limitations do not preclude judges from actively working for reforms – even in ways that go beyond the educative function previously discussed. My work on the Jail and Pretrial Taskforce is an example. Created in the spring of 2019, the Michigan Joint Task Force on Jail and Pretrial Incarceration was charged with examining how state laws, policies, and budgetary decisions affect who goes to jail and how long they stay, and with crafting policy recommendations for the legislature's consideration. The Taskforce brought together stakeholders from across the justice system, including judges, sheriffs, social workers, prosecutors, and legislators. It held six public meetings, several rounds

43. MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 4.1(A)(1), (3).

44. MICH. CODE OF JUD. CONDUCT Canon 4(D) (2019).

45. M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 Yale L.J.F. 190 (2021).

46. MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 3.7(A).

47. *Id.* r. 3.2.

48. Geyh, Alfani & Sample, *supra* note 30, § 4.17.

49. *See id.* §§ 8.03, 9.05.

of subgroup meetings, and more than a dozen roundtables – and it received testimony from roughly 150 practitioners and members of the public.⁵⁰ Based on the quantitative and qualitative data it gathered, the Taskforce was able to identify why jail incarceration rates remained high despite historically low crime levels, and to recommend reforms to correct the imbalance.⁵¹

It is not unusual for judges to serve in this capacity, and various states’ ethics advisory committees have blessed those activities as falling well within “the law, the legal system, or the administration of justice.”⁵² The ethical rules are therefore “broad enough to accommodate most activities where judicial participation is essential.”⁵³ Given judges’ unique role, judicial participation in improving the legal system is necessary because it adds a perspective otherwise unlikely to be captured. Reform efforts without this perspective lack a critical voice.

III. JUDGES HAVE AN OBLIGATION TO WORK TOWARD IMPROVING THE LEGAL SYSTEM

That legal-ethics rules permit law-reform work should not be controversial. But I believe that law-reform work is the floor. Indeed, I believe that the ethical rules governing judges not only allow them to work to improve the legal system, but also impose an obligation to do so.

50. *Report and Recommendations*, *supra* note 11, at 6. The roundtables included discussions with judges, prosecutors, defense attorneys, crime victims, survivors, victim-services professionals, law-enforcement patrol officers, jail administrators, corrections officers, district-court probation officers, felony probation and parole staff, pretrial services and community corrections agencies, county commissioners, bail agents and underwriters, rural practitioners, currently incarcerated individuals, and faith leaders. *Id.*

51. *Id.* at 7-32. The Jail Reform Advisory Council, of which I am also the chair, is an advisory body formed by the Governor to facilitate, assist with, monitor, and evaluate the successful implementation of jail-reform legislation throughout the state of Michigan. The Governor formed the Council via Executive Order 2021-5 in April 2021, so data on incarceration rates after reforms were implemented are not yet available.

52. MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 3.4 (“A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.”); Geyh, Alfini & Sample, *supra* note 30, § 8.03 n.67 (citing examples, including a governor’s task force on the seriously mentally ill and a governor’s select commission on juvenile corrections).

53. Geyh, Alfini & Sample, *supra* note 30, § 8.03.

The reason is partly practical. A judge's decision-making is only as good as the legal system in which it takes place, and the administration of justice is undermined when the system itself is unjust.⁵⁴ Because that legal system determines her ability to administer justice, a judge therefore has an ethical obligation to help make it as fair, equitable, and effective as possible.

The Commentary to Canon 4 of the 1990 Model Code of Judicial Conduct supports this idea:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.⁵⁵

As the comment notes, a judge's unique experience with the administration of justice is critical to improving the law. Many judges have worked to fix flaws in the justice system that they have witnessed firsthand, and they have been well within the formal ethical rules in doing so. Examples include remedying trial-court funding issues, making the legal system accessible to people who cannot obtain representation by an attorney and reducing inequities in the criminal process, and addressing the lack of appropriate solutions for people with behavioral health problems that end up in the courts.

Consider trial-court funding. In the 2014 case *People v. Cunningham*,⁵⁶ the Michigan Supreme Court held that a statute authorizing courts in criminal cases to impose “[a]ny cost in addition to” a statutorily fixed cost did not provide courts with independent authority to impose costs that were not separately authorized by statute.⁵⁷ The legislature responded by enacting Public Act 352 of

54. All legal systems have to confront this issue. See, e.g., Joe W. Pitts II, *Judges in an Unjust Society: The Case of South Africa*, 15 DENV. J. INT'L L. & POL'Y 49, 49-50 (1986) (discussing the role of judges in apartheid-era South Africa).

55. MODEL CODE OF JUD. CONDUCT Canon 4B cmt. (AM. BAR ASS'N 1990); see also MODEL CODE OF JUD. CONDUCT, *supra* note 27, r. 3.1 cmt. [1] (“Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice . . .”).

56. 852 N.W.2d 118 (2014).

57. *Id.* at 123.

2014, which authorized trial courts to assess criminal defendants “any cost reasonably related to the actual costs [of court operations]” for their case.⁵⁸ The legislature also created the Trial Court Funding Commission through Public Act 65 of 2017 and charged it with reviewing and recommending changes to the trial-court funding system in light of *Cunningham*.⁵⁹ Led by then-District Court Judge Boyd,⁶⁰ the Commission unanimously concluded in a 2019 report that the existing trial-court funding system was broken because it depended on a collection of assessments and transfers that did not achieve sustainability or equity throughout the state. The Commission determined that it was imperative to create a stable, consistent funding source for Michigan trial courts that did not require trial-court judges to play a role in raising money for their operation.⁶¹

Many judges have also taken a leadership role on access-to-justice issues in their courts. In 2008, former Chief Judge Katzmman of the Second Circuit Court of Appeals formed and led the Study Group on Immigrant Representation to examine the lack of adequate immigrant representation and propose solutions.⁶² In 2014, Ohio Supreme Court Chief Justice O’Connor created the Task Force on Access to Justice, with the goal of identifying and eliminating the gaps in and obstacles to accessing the civil-justice system.⁶³ The Task Force’s 2015 Report and Recommendations identified financial, structural, and cultural barriers to accessing the civil justice system and made numerous recommendations for reform.⁶⁴ Finally, in 2020, former North Carolina Chief Justice Beasley created the Chief

58. 2014 Mich. Pub. Acts 352. The law contained a sunset provision thirty-six months after enactment; that provision was subsequently extended to 2020, and then again to 2022. 2017 Mich. Pub. Acts 64; 2020 Mich. Pub. Acts 151.

59. 2017 Mich. Pub. Acts 65.

60. Now State Court Administrator. *State Court Administrative Office*, MICH. CTS. (2021), <https://courts.michigan.gov/self-help/directories/pages/scao-offices-and-programs.aspx> [<https://perma.cc/Q9GT-HLAC>]. As a then-district court judge, Judge Boyd was particularly qualified to lead the Commission because he saw first-hand the pressure the courts felt from state and local governments to increase revenue.

61. *Trial Court Funding Commission Final Report*, STATE MICH. TRIAL CT. FUNDING COMM’N 21-24 (Sept. 6, 2019), https://www.michigan.gov/documents/treasury/TCFC_Final_Report_9-6-2019_665923_7.pdf [<https://perma.cc/V44S-6E9A>].

62. Robert A. Katzmman, *Study Group on Immigrant Representation: The First Decade*, 87 *FORDHAM L. REV.* 485, 489-91 (2018).

63. *Report and Recommendations of the Supreme Court of Ohio*, TASK FORCE ON ACCESS TO JUST. 1 (Mar. 2015), <http://www.supremecourt.ohio.gov/Publications/accessJustice/finalReport.pdf> [<https://perma.cc/2CP7-P5SQ>].

64. *Id.* at 4-7, 14-35.

Justice's Commission on Fairness and Equity.⁶⁵ Among its other goals, the Commission aimed to root out discriminatory treatment and outcomes in state courts.⁶⁶

And remember problem-solving courts? Judges have pioneered reforms there as well. Consider drug courts, one subset of problem-solving courts. In 1989, a circuit-court judge in Miami was determined to address the problems caused by widespread drug use and so created a first-of-its-kind specialty drug-treatment court that became a model nationwide.⁶⁷ My state currently has eighty-four drug-treatment courts operating in forty counties, including three tribal healing-to-wellness courts.⁶⁸ Other problem-solving courts include veterans-treatment courts and mental-health courts.⁶⁹

Whether the ethical canons allow these activities is an easy question to answer: this work is not only permitted, but ethically required.⁷⁰ Our justice system bestows upon us the awesome responsibility of sitting in judgment over matters that affect every dimension of people's lives. Our capacity to do justice in that role is determined by the quality of the system in which we operate. We do not have the luxury of sitting back, passively observing, recognizing problems, and doing nothing. That approach does not make us impartial; it makes us complicit.

The formal constraints on judicial involvement in reform efforts are limited. They certainly do not support the argument that getting involved would undermine public confidence in the judicial system. Nothing undermines public confidence more than the perception that the judicial system is broken, rigged, or overseen by judges who are indifferent to the experiences of human beings. Judicial participation in reform efforts does not undermine public confidence; it provides evidence that such confidence has been earned.

65. *Chief Justice Beasley Announces New Commission on Fairness and Equity*, N.C. JUD. BRANCH (Dec. 30, 2020), <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-announces-new-commission-on-fairness-and-equity> [<https://perma.cc/24NC-A63T>].

66. *Id.*

67. See Brent L. Probinsky, *Herbert Klein, Founder of Miami Drug Court, Dies*, MIA. TIMES (Sept. 5, 2018), https://www.miamitimesonline.com/lifestyles/herbert-klein-founder-of-miami-drug-court-dies/article_6a61b8d2-b14e-11e8-9b71-b3ecd2d4961c.html [<https://perma.cc/C2WN-B9PK>].

68. *Drug Court*, MICH. CTS., <https://courts.michigan.gov/administration/admin/op/problem-solving-courts/drug/pages/default.aspx> [<https://perma.cc/52KZ-VYTL>].

69. *Problem-Solving Courts Guide*, *supra* note 36; *Problem-Solving Courts*, MICH. CTS., <https://courts.michigan.gov/administration/admin/op/problem-solving-courts/pages/default.aspx> [<https://perma.cc/KE2W-LGB5>].

70. See Roth, *supra* note 24 (arguing that “federal district court judges must continue to provide feedback and accountability to the other branches of government, to other judges, and to the public, and play a part in shaping the present and future of the criminal justice system”).

IV. CONCLUSION

When most people picture judges, they see us wearing robes and making decisions in a courtroom. Of course, administering the law is our primary role. But it is not our only one. As first-hand observers of the flaws in our legal system, judges are uniquely positioned to help fix them. The ethical rules governing judges do not preclude such advocacy. To the contrary, ethical rules and their accompanying moral concerns require it. Judges do themselves and their communities a disservice by invoking judicial-ethics rules and norms to avoid engagement in law reform where their insights and experience are critical.