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A Call to Action: Fighting Racial Inequality Behind the Bench

THE HONORABLE ASHLEIGH PARKER DUNSTON*

When I was asked to write this essay for the *Campbell Law Review*'s issue on "The State Court Judges' Perspectives," I was asked to specifically share my experiences with racism in practice and now on the bench. Quite frankly, I'm a thirty-three-year-old, black woman and have been practicing law for only the last eight years and serving on the bench for the past three years; however, even during that small amount of time, I have experienced my fair share of racism, sexism, and ageism. I've been asked if I'm the secretary, ignored during calendar calls, told that I was "unqualified, inexperienced, and too young" to be a judge, and had a defendant ask for a "white male judge next time"—just to name a few of my experiences.

While any amount of experience with discrimination is painful, damaging, and unnecessary, I know that my experiences cannot compare to those who paved the way before me. This includes individuals like my father, Jason Parker, the first African-American prosecutor to practice in western North Carolina, and my first cousin, the late Chief Resident Superior Court Judge Ola Lewis, of Brunswick County, who, at the time of her death, was the longest-serving female on the judiciary in North Carolina. When my father began practicing in 1979, there was a judge who wouldn't allow him to call for trial any cases that involved a white defendant because the judge couldn't stand to see a black man prosecuting a white man.

I also consider the experiences of individuals like Judge Elreta Melton Alexander-Ralston who, in 1968, became the first African-American elected to a judgeship in North Carolina.¹ As the first African-American woman to practice law in the state, Judge Alexander once represented members of the Ku Klux Klan, believing that she was helping to steer many of them "away from the fold."² Almost fifty years after Judge Alexander

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1. Adrienne DeWitt, *Biographical Sketches and Bibliographies of the First African Americans of the North Carolina Bench*, 42 *CAMPBELL L. REV.* 81, 83 (2020).

2. *Id.* at 85; Virginia Summey, *Judge Elreta Alexander and Civil Rights Activism*, N.C. HUMANS. COUNCIL, <http://nchumanities.org/programs/road-scholars/judge-elreta-alexander-and-civil-rights->

took her seat on the North Carolina district court bench, I was appointed as the third, and youngest, African-American female district court judge in Wake County history. As I put on my robe and take the bench every day, sometimes to see the disdain of members of the public and even from attorneys because of my skin color, I wonder how much has really changed now that blatant racism has become more subtle.

When we speak of social justice and social inequality, it is important for us to understand that, as attorneys, legal professionals, and judges, we have the greatest opportunity to effectuate much-needed change. Before this can happen, we must acknowledge that there is, in fact, a problem with systematic racism within our justice system. Chief Justice Cheri Beasley of the North Carolina Supreme Court said it best:

Too many people believe that there are two kinds of justice. They believe it because that is their lived experience—they have seen and felt the difference in their own lives. The data also overwhelmingly bears out the truth of those lived experiences. In our courts, African-Americans are more harshly treated, more severely punished, and more likely to be presumed guilty We must come together to firmly and loudly commit to the declaration that all people are created equal, and we must do more than just speak that truth. We must live it every day in our courtrooms.³

The fact is that there is not only an issue with systemic racism involving those who appear in our court system as defendants, victims, or parties, but also for the attorneys and judges who practice within our system. Unfortunately, due to our years-long education as legal professionals, we may believe that we are immune to implicit biases or micro-aggressive behavior; however, I implore each and every individual to take an Implicit Bias Test⁴ and acknowledge their biases so that they can be accounted for and corrected. In order to be administrators of justice, we must be able to look at and think critically about how to address racism in our field. That starts with the simple recognition that racial biases do not evaporate once you pass through doors of the courtroom or by putting on a robe.

Recently in my courtroom, a plea was offered for a nineteen-year-old black male charged with resisting, delaying, or obstructing an officer by specifically “running from the police officer while investigating a disturbance.” When I asked the assistant district attorney what the

activism#:~:text=Elreta%20Melton%20Alexander%20became%20the,an%20elected%20di strict%20court%20judge [https://perma.cc/K6KA-B4BL].

3. Chief Justice Cheri Beasley, *The Intersection of Justice and Protests Around the State* (June 2, 2020) (transcript available at bit.ly/Fall2020Journal3); *see also* Ashleigh Parker Dunston, *Justice Isn't Always Blind*, N.C. STATE BAR J., Fall 2020, at 6.

4. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> [https://perma.cc/9ZYC-RSFU].

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arrangement was, I was told it was for “two-days credit for time served.” Upon further inquiry into his prior record, I learned that he was a “Level One” with no priors. Typically, this type of case would have resulted in some form of a deferral with community service; instead, the young man was now going to have a criminal record after he had already served more time in jail than the sentencing guidelines allowed. I rejected the plea in the interest of justice and verbalized my hesitation with the plea arrangement. In that situation, I don’t believe that the prosecutor even noticed what had occurred or that his biases may have led to this plea arrangement being offered, but regardless, it is the unintentional actions that can lead to the unforeseen and dire collateral consequences for the individual when they leave the courtroom.

Change takes time, but as a district court judge, I see it as my job to encourage that change to ensure equal justice under the law. This experience and others fueled me to become an advocate and educator on biases within our system, and so I’ve written several articles and conducted Continuing Legal Education courses regarding discrimination in our legal profession, such as: *Sexism: The Elephant in the Courtroom*,⁵ *My Crown is Professional*,⁶ *The 3 P’s of Being a Prosecutor*,⁷ and most recently, *Justice Isn’t Always Blind*.⁸ In *Justice Isn’t Always Blind*, I collected the stories of black attorneys and judges to further demonstrate that discrimination within the legal profession is pervasive. Here are a few of their experiences:

When I first started practicing, I walked behind the courtroom to go in a side door and check the docket. A deputy chased me down the hallway and told me that this area was for attorneys only. When I told him I was an attorney, he did not apologize, but instead just walked into the courtroom as if nothing had happened. Mind you, I was in a suit and had my files with me. This is only one of many times that I have been told that I could not be somewhere or sit somewhere because I was not an attorney.

I had only been at the District Attorney’s Office for a month when a defense attorney came into the courtroom telling me that another ADA made a deal on a previous court date. I informed him that I didn’t feel comfortable dismissing the case because I was new, but that he could take the file to

5. Ashleigh Parker Dunston, *Sexism: The Elephant in the Courtroom*, WAKE CNTY. BAR ASS’N: PROFESSIONALISM COMM. (Aug. 14, 2018), <https://www.wakecountybar.org/blogpost/727449/307564/Sexism-The-Elephant-in-the-Courtroom> [https://perma.cc/CF6L-5Q6G].

6. Ashleigh Parker Dunston, *My Crown is Professional: Wearing Natural Hair in the Courtroom*, WAKE BAR FLYER, Fourth Quarter 2019, at 12.

7. Ashleigh Parker Dunston, *The Three P’s Behind Being a Prosecutor*, NOW COMES THE STATE, Sept. 2020, at 1.

8. *Justice Isn’t Always Blind*, *supra* note 3.

another courtroom and ask that ADA to dismiss it. As he was leaving out of the side door, he called me a “f*cking n*gger.” I confronted him and told him that I heard what he said. I knew that I couldn’t do anything because I would be fired for reacting, so I had to swallow my pride and continue to handle my docket. I’ve continued to work with this individual who has yet to apologize.

I was applying for a job as an assistant public defender. During the interview, the attorney in charge of hiring was making typical small talk. He asked what I did over the weekend. I told him that I had gone to visit my brother in Raleigh. His immediate response was, “So how is Central Prison?” I just sat shocked and uncomfortably laughed. I’ve never been more thankful for not getting a job.

As a new judge, I was assigned court in a smaller county in N.C. I arrived at work with my robe draped over my arm and greeted the deputies. After holding court for the morning session, we took our customary lunch break. I left for lunch and returned to the courthouse and decided to make some phone calls. I was parked in the assigned spaces for judges. At that time one of the deputies came outside and tapped on my window and told me that I could not park there because the spaces were reserved for “judges only.” I replied, “The last time I checked I was a judge, but moreover you saw me this morning.” She looked and I looked, then she replied, “Oh,” and walked away. She never apologized, but I realized that she couldn’t conceive that I could even be a judge. I also had a fellow judge (whom I did not know), during one of our conferences, ask me to “get napkins” for her as though I was her servant.⁹

These few experiences of attorneys of color don’t end there. As a woman and a woman of color, there is also the intersectionality of racism and sexism that is prevalent in our profession. I recall that as a young ADA, I wanted to appear as “professional” as I could and dole out justice fairly and efficiently without being seen as a distraction. I felt as though I could not wear my natural hair, and so I continued the life-long tradition of relaxing my hair. This chemical process made my naturally kinky hair straight. It wasn’t until I joined the North Carolina Attorney General’s Office and saw other African-American female lawyers who wore their hair in a variety of styles that I realized my inferiority complex, so on November 11, 2014, I cut off all my relaxed hair and wore it in a short, blonde afro. Since becoming a district court judge, I have been intentional in wearing my hair in different styles monthly, from crochets, braids, cornrows, faux locs, passion twists, and everything in between. Unfortunately, I have been approached while on the bench and told that my hair looks better straight than kinky curly. I know appearance is important as professionals in the

9. *Id.*

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courtroom, but it hurts to know that my natural hair styles are still seen as *un*professional or that my appearance is up for debate. These comments fuel the self-consciousness that black women already face in accepting who we are while suffering stigmatization of underrepresentation, oversexualization, and imposter syndrome.

These experiences are not just limited to North Carolina. Across the nation, your colleagues of color are being affected. Despite obtaining the same degree and passing the same bar exam, because of our skin color we are held to different standards, scrutinized at higher levels, seen as illegitimate, and “given” our titles due to affirmative action. Our judgment and competency are always questioned. Those issues do not just affect us personally or professionally; it isn’t just about our promotions or growth potential. We became lawyers to be zealous advocates, and these issues of systemic racism and implicit biases frustrate the representation our clients deserve. How can the public feel confident in the justice system if their primary representatives in a courtroom are treated unequally based upon the color of their skin?

While it’s obvious that no one is perfect, perfection is something that we should all strive for while holding such a powerful position. One of the most important reasons to strive for perfection is to ensure that prejudice doesn’t creep into our decision-making. Diversity and “awareness in thought” make us not only better as individuals but improve the whole system as well. It also makes us keen to when racism or bias has played a role in the other actors in the justice system, which gives us the ability to adjust accordingly. As we continue to gain understanding and acceptance of the fact that the legal profession is not immune to instances of racism, we must evaluate ourselves and our beliefs before turning outwardly to facilitate positive growth.

More tangibly, we have tools at our disposal to help implement procedures and processes to channel this change. First, we should advocate for a mandatory bias/diversity/inclusion CLE requirement semi-annually. It is imperative that our continuing education include how to be better advocates, which most certainly includes how to address racism and bias in our practice. Recently, The State Bar of North Carolina has required a mandatory bias training to begin in 2022. Second, we should advocate for our State Bar to adopt ABA Model Rule 8.4(g), which renders it misconduct for an attorney to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, . . . ethnicity, . . . or socioeconomic status in conduct related to the practice of law.”¹⁰ The facts that there was no professional recourse after a

10. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

fellow attorney called a colleague a “f*cking n*gger” and that this individual is still practicing today is absolutely unacceptable. We must find ways to hold our legal professionals to the highest ethical standards. Adopting this rule is one way to do that.

Moreover, as judges, we must acknowledge that our implicit biases affect our decisions. Sometimes, they are innocuous and could be considered harmless error. But when it comes to how implicit biases affect people of color in the courtroom, the data shows more than harmless errors.¹¹ The question then becomes what we do with this understanding and knowledge. To do nothing is simply no longer an option. We must be bold in the face of racism. When we see it affect our courtrooms and the individuals before us, we must be unafraid to take appropriate and swift action to ensure that justice is truly available to all. As judges, we are at the forefront of changing how the legal system operates to disproportionately affect black and brown Americans. Every time we encounter people of color in our courtroom—be they representatives or clients—we must take the time to evaluate whether our decisions are motivated by the law or motivated by implicit racial biases. This takes humility, honesty, and integrity—all characteristics that we took an oath to uphold and that we must rely on to guide us moving forward toward equity.

The year 2020 will forever be a landmark—a moment in time by which we measure all others. Social scientists will be studying the effects of this year for decades, and generations will be defined. For the legal profession, we must assess which lessons we are going to learn from 2020 and propel the practice of law and the administration of justice into a new era. Our colleagues, clients, future generations of lawyers, and the general public are depending on us to do everything we can to prevent the spread of racism and ensure the equal administration of justice. I am hopeful and truly believe that we will all rise to the call of action to make the necessary changes in our profession and in our lives.

11. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).