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A Lawless Judiciary: The Gilded Age and Today

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A LAWLESS JUDICIARY: THE GILDED AGE AND TODAY

*Michael D. Cicchini**

“PRECEDENT, n. In Law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases.”

—Ambrose Bierce (1911)¹

“Bierce’s only error, it turns out, was to exclude ‘a definite statute’ from the list of legal authorities that judges will disregard in their pursuit of doing as they please.”

—Michael Cicchini (2025)²

The American journalist Ambrose Bierce, who wrote in the late 1800s, was a fierce critic of the judiciary. He lampooned judges for their defective reasoning, arbitrary decisions, and ignorance of the law; he criticized their practice of legislating from the bench and even exposed their outright corruption. Bierce’s work was highly entertaining—in a satirical, cynical way. Yet, as law professor J. Gordon Hylton explained, “beneath the humor and the bitterness of his work lay a sophisticated understanding of the shortcomings of the late nineteenth-century bench and bar.”

This Essay examines Bierce’s criticisms of the judiciary and asks this question: After an intervening century, are his complaints still valid today? Amazingly, after more than 100 years, Bierce’s criticisms are still relevant; in fact,

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¹ AMBROSE BIERCE, *The Devil’s Dictionary*, THE COLLECTED WORKS OF AMBROSE BIERCE (1911), <http://ambrosebierce.org/dictionary.htm> (last visited Sep. 30 2025).

² Michael D. Cicchini, *The Preliminary-Hearing Swindle: A Crime Against Procedure*, 58 LOY. L.A. L. REV. 117, 130–31 (2025) (explaining how courts disregard the plain language of many statutes in order to serve the prosecutor’s interests).

they apply as much to the modern judiciary as they did to that of the Gilded Age. Equally important, Bierce complained with purpose, offering “concrete recommendations” for reform. His primary recommendation—a call to arms for his fellow journalists to expose judicial lawlessness to the public—remains a viable cure for what ails our modern judiciary.

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INTRODUCTION: WHO IS AMBROSE BIERCE?

Memories fade. Yet I recall it as though it happened yesterday. It was the fall semester of 1997, and I had just recently stepped into the old Sensenbrenner Hall as a One-L at Marquette University Law School.³ I was sitting in Professor J. Gordon Hylton's⁴ first-year class, "The Lawyer in American Society."⁵ Hylton began quoting from his own law review article, titled "The Devil's Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America."⁶ His purpose was to introduce us to Bierce, a fierce critic of the American legal system including (and perhaps especially) the judiciary. Hylton's words have always stayed with me, making it easy to locate his article online a quarter-century later. He read aloud:

Upon learning that a San Francisco woman had filed suit against the city for injuries suffered when she fell into an open sewer, Bierce is said to have remarked, "It is surprising that the lady should have consented to go into Court; we should suppose that one adventure in a cesspool would suffice."⁷

For me, this was a refreshing change from the standard puffery the other professors were using to sell the law as a grand, noble profession. I had no real basis on which to judge the accuracy of Bierce's cynical view, but unlike

³ See J. Gordon Hylton, *The Dedication of Sensenbrenner Hall*, MARQ. U. L. SCH. FAC. BLOG (Aug. 27, 2010), <https://law.marquette.edu/facultyblog/2010/08/the-dedication-of-sensenbrenner-hall/>. The law school has since been moved (unfortunately, in my opinion) to a newer and much larger building.

⁴ For a bio sketch of Hylton, see Alan R. Madry, *J. Gordon Hylton: In Memoriam 1952-2018*, MARQ. U. L. SCH. FAC. BLOG (June 14, 2018), <https://law.marquette.edu/facultyblog/2018/06/j-gordon-hylton-in-memoriam-1952-2018/>.

⁵ J. Gordon Hylton, *Legal Ethics Course Name*, MARQ. U. L. SCH. FAC. BLOG (OCT. 10, 2009) ("From 1997 to 2000, Marquette had a second required course on the legal profession, called 'The Lawyer in American Society.'"), <https://law.marquette.edu/facultyblog/2009/10/legal-ethics-course-name/>.

⁶ J. Gordon Hylton, *The Devil's Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America*, 23 CONN. L. REV. 705 (1991).

⁷ *Id.* at 706 (citing O'Brien, *Ambrose Bierce*, in 11 DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN HUMORISTS, 1800-1950, at 40-41 (1982)).

the others' positive spin, his cynicism rang true. And it was also hilarious—at least to me. I remember sitting in the back row of the lecture hall, laughing out loud as Bierce, through Hylton, called the court system a cesspool. But I also remember laughing alone; the other students seemed far less amused. Maybe they didn't like having their chosen profession compared to an open sewer. Or maybe they were now a bit worried about what they, like the aforementioned San Francisco woman, were crawling into.

Continuing with a modified version of the Socratic method, Hylton then called on a student in the first row. Flustered, the student fumbled his pen and could only muster the following response: "I'm so nervous, I dropped my pen." Hylton—a droll southerner and true gentleman if ever there was one—picked it up, returned it to him, and said, "Don't worry, it's only a Bic." That exchange generated more laughter from the class than the Bierce quote, perhaps because it restored the mood to something less alarming. But I was hooked—on the law and on Ambrose Bierce.

Bierce wrote primarily in the late 1800s, the Gilded Age of America.⁸ As Hylton explained, he "was one of the best known men-of-letters of his day as well as an influential journalist who wrote vigorously on an array of contemporary issues."⁹ With regard to the legal system, and in particular the judiciary, "Bierce had nothing favorable to say."¹⁰ His criticisms were highly entertaining and very cynical. Yet, "beneath the humor and the bitterness of his work lay a sophisticated understanding of the shortcomings of the late nineteenth-century bench and bar."¹¹ And Bierce complained with a purpose. In fact, "his essays and editorials on legal subjects offered concrete recommendations" for legal reform, "many of which anticipated the

⁸ See *id.* at 708 ("While editing the weekly *San Francisco Wasp* in the early 1880s, Bierce began . . . a series of wittily cynical epigrams presented under the title 'The Devil's Dictionary.' He continued this feature in a variety of publications until 1906"). See also THE AMBROSE BIERCE PROJECT: RESOURCES: AMBROSE BIERCE TIMELINE, <http://www.ambrosebierce.org/resources.html>.

⁹ Hylton, *supra* note 6, at 705.

¹⁰ *Id.* at 706.

¹¹ *Id.* at 707.

reforms that would be associated with legal progressivism in the twentieth century.”¹²

This Essay has three objectives. First, I aim to organize Bierce’s criticisms of the judiciary into five categories. Part I discusses his claim that the judiciary’s underlying method of “legal reasoning” was fundamentally flawed. Part II explores his claim that the legal decisions produced by such defective reasoning were, at best, “arbitrary.” Part III then delves into Bierce’s conclusion that judges were largely “ignoramuses” who were unworthy of the bench.

Bierce’s remaining criticisms are, if it is possible, even less kind. Part IV addresses his claim that, worse than merely being ignorant, judges would consciously disregard the law when it suited them—in effect, legislating from the bench. Part V then explores Bierce’s even more alarming claim that judges were often corrupt and would rule in ways that benefited their own financial interests.

The second aim of this Essay is to examine the current state of the judiciary and determine whether Bierce’s criticisms remain relevant today. Therefore, in each of the five Parts, after discussing a particular criticism, I answer this question: After an intervening century, is Bierce’s complaint still valid? Despite the passage of more than 100 years, I demonstrate that his criticisms are largely still relevant.

Finally, given that Bierce’s complaints remain valid, this Essay’s third aim is to discuss his recommended legal reforms. In the Conclusion, I identify some of his reform proposals and explore whether they, too, are still relevant today.

I. THE PROBLEM WITH “LEGAL REASONING”

Ambrose Bierce was highly critical of “legal reasoning”—the peculiar method of thinking that underpins the judiciary’s work product.¹³ He saw this hollow form of reasoning as a lawless, deceitful tactic. His story, “A Defective Petition,” about an unsuspecting traveler’s fateful encounter with a skilled jurist, illustrates his point:

¹² *Id.*

¹³ *Id.* at 710.

An Associate Justice of the Supreme Court was sitting by a river when a Traveler approached and said:

“I wish to cross. Will it be lawful to use this boat?”

“It will,” was the reply; “it is my boat.”

The Traveler thanked him, and pushing the boat into the water embarked and rowed away. But the boat sank and he was drowned.

“Heartless man!” said an Indignant Spectator. “Why did you not tell him that your boat had a hole in it?”

“The matter of the boat’s condition,” said the great jurist, “was not brought before me.”¹⁴

Bierce identified the judicial tactic of addressing only a highly and artificially specific legal issue. He then lifted this tactic from the legal context and inserted it into everyday life. In so doing, he demonstrated just how absurd it is; he exposed it as a disingenuous tool for issue-dodging without any regard for the resulting harm.¹⁵

Bierce’s poignant criticism has fallen on deaf ears in the intervening century, as this form of legal reasoning remains a hallmark of judicial decisions today. It is easily recognized by a variety of catchphrases that are quite similar—sometimes nearly identical—to Bierce’s chosen language that “[t]he matter . . . was not brought before me.”¹⁶ Sometimes courts will say “we need not express any opinion” on the true, underlying issue;¹⁷ other times they will conclude that a particular issue, despite its great import, “is not before us”;¹⁸ and in some cases they will simply

¹⁴ *Id.* (quoting 6 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: THE MONK AND THE HANGMAN’S DAUGHTER, FANTASTIC FABLES* 234 (1911)).

¹⁵ See E.J. Yera, *Blakely, Apprendi, Booker, Begay, and Santos: Judicial Minimalism and the U.S. Supreme Court’s Ill-Conceived Attempts at a Rational Jurisprudence*, 22 ST. THOMAS L. REV. 87, 94 (2009) (Calling the resulting harm “the cost of deliberate omission.”) (discussing the Court’s defective sentencing cases).

¹⁶ Hylton, *supra* note 6, at 710

¹⁷ See, e.g., *Ephraim v. State*, No. 02-19-00076-CR, 1, 2 (Tex. App. 2020) (denying the defendant relief).

¹⁸ See, e.g., *Commonwealth v. Hunter*, No. J-S15033-24, at *4 (Pa. Super. Ct. 2024) (declining to decide an issue).

“leave for another day” any attempt to address the substantive issue on which the matter actually turns.¹⁹

Today’s judiciary may justify its issue-dodging tactic by citing the virtue of judicial restraint, along with the resulting need for narrowly tailored decisions.²⁰ But a close examination reveals that this justification falls flat. Take, for example, the United States Supreme Court opinion of *Crawford v. Washington*, in which the Court decided whether a criminal defendant’s constitutional right of confrontation had been violated at trial.²¹ Far from exercising judicial restraint and deciding the case on narrow grounds, the Court completely redefined the right of confrontation—but then it dodged the central issue it had just created.²²

More specifically, when the *Crawford* case reached the Court, the existing law was that a prosecutor could use hearsay at trial if the judge deems the statement to be reliable.²³ In *Crawford*, the majority of the Court rewrote the law, holding that admissibility instead turns on whether the judge deems the statement to be “testimonial.”²⁴ But after redefining this basic, constitutional right, the Court left the job unfinished and simply walked away. “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”²⁵

Two justices dissented from the majority’s legal reasoning.²⁶ First, they observed that the majority’s decision was anything but an exercise in judicial restraint: “[T]he Court’s adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent . . . and is by no

¹⁹ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (deciding that if hearsay is “testimonial” the defendant has the right of confrontation, but then stating that “[w]e leave for another day any effort” to define the term “testimonial.”).

²⁰ See Yera, *supra* note 15, at 93 (According to Professor Sunstein, these ‘minimalists’ write ‘no more than necessary’ and ‘resolv[ed] the largest issues of the day . . . as narrowly as possible.’”).

²¹ See *Crawford*, 541 U.S. at 68.

²² See *id.* See also Yera, *supra* note 15, at 92 (stating that, with regard to its sentencing decisions, the “Court should have answered some of the very questions the Court itself created.”).

²³ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

²⁴ *Crawford*, 541 U.S. 36 at 68.

²⁵ *Id.*

²⁶ See *id.* at 69 (Rehnquist, C.J., and O’Connor, J., concurring in the judgment but dissenting “from the Court’s decision to overrule *Ohio v. Roberts*”).

means necessary to decide the present case.”²⁷ Further, they complained, “we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware.”²⁸

Second, by analogy, the dissenters on the Court played the role of the Indignant Spectator in Bierce’s story, “A Defective Petition.” Much to the delight of lawyers (and especially prosecutors) who operate in the trenches of criminal practice, the dissenters were, well, indignant:

The Court grandly declares that “we leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.²⁹

The Indignant Dissenters’ perception that prosecutors are actually concerned with, or attempt to abide by, the “rules of criminal evidence” is arguably erroneous. As Bierce cynically observed, the prosecutor “tries to convict by hook or crook, even when he is himself persuaded of the defendant’s innocence,”³⁰ and little has changed in that regard in the intervening century.³¹ Nonetheless, returning

²⁷ *Id.*

²⁸ *Id.* at 72.

²⁹ *Id.* at 75–76 (internal citations and punctuation marks omitted). The Court’s attempted cure is often as bad as its original decision. For an analogous example of this, see Yera, *supra* note 15 at 92 (“even when the Supreme Court later attempted to fix the sentencing dilemma it had created . . . the Court generated yet another set of formidable and serious questions, which it did not answer.” (footnote omitted)).

³⁰ Ambrose Bierce, *Some Features of The Law*, THE SHADOW OF THE DIAL AND OTHER ESSAYS (1909), https://www.gutenberg.org/files/25304/25304-h/25304-h.htm#link2H_4_0022.

³¹ See, e.g., Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV.

to the subject of the judiciary, the Indignant Dissenters in *Crawford* convincingly made this important point: the issue-skirting method of legal reasoning loathed by Bierce is still alive and well in the modern judiciary. The Supreme Court “has issued rulings so incomplete as to be almost intellectually deficient.”³² And just as in the Gilded Age, leaving “the law in a state of deliberate confusion” harms “the integrity of the judicial system as a whole.”³³

But what came of the defendant’s right of confrontation? Did the Court ever finish the job and define “testimonial”? That will be explained in the next Part, which demonstrates that another judicial flaw Bierce complained about, arbitrariness, is also thriving today.

II. THE ARBITRARY JURIST

J. Gordon Hylton explained that “Bierce disliked the arbitrary exercise of power, and he seized upon judges as a particularly attractive target.”³⁴ Once again, Bierce was ahead of his time, demonstrating “an awareness of the unfairness of the existing system that escaped many of his contemporaries.”³⁵ His complaint of arbitrariness is best captured by his “Devil’s Dictionary” entry, “precedent,” which he defined as “a previous decision, rule or practice which . . . has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases.”³⁶

But are modern court decisions as arbitrary as they were in Bierce’s Gilded Age America? An analysis of modern Confrontation Clause jurisprudence will answer that question. Recall that before the *Crawford* decision, whether the prosecutor could use hearsay against a defendant at trial hinged on whether a judge deems the statement

335 (2007) (“Prosecutors rarely, if ever, commit misconduct by failing to live up to some lofty, vague standard. Instead, prosecutors commit misconduct by violating ‘well-established’ trial rules . . .”); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018) (“As far back as 1987, for example, one judge conceded that prosecutorial misconduct in closing argument is ‘chronicled with alarming regularity.’”).

³² Yera, *supra* note 15 at 91 (discussing the Court’s sentencing-related cases).

³³ *Id.* at 93.

³⁴ Hylton, *supra* note 6, at 738.

³⁵ *Id.*

³⁶ Bierce, *supra* note 1.

to be reliable.³⁷ When deciding reliability, judges would look to the circumstances surrounding the making of the statement. And the cases of the early 2000s—cases decided a full century after Bierce decried the judiciary’s arbitrariness—continued to demonstrate judicial unpredictability and randomness.

For example, in Virginia, “when a [hearsay] declarant is *in custody* and *accused* of a crime, any statement he or she made is likely to be found reliable and therefore admissible against a defendant . . .”³⁸ Yet the opposite factors led to the same result in Wisconsin. “When a declarant was *not* in custody and *not* accused of a crime, any statement he or she made [will] likely be found reliable and therefore admissible against a defendant . . .”³⁹ (The only consistency, as we will see, is the pro-prosecutor result.)

Far from being an anomaly, the art form of attaching opposite meanings to identical circumstances is the stock in trade of the judiciary. In Colorado, for example, a court held “that a hearsay statement was reliable and therefore properly admitted because it was *detailed*.”⁴⁰ By comparison, the Fourth Circuit Court of Appeals held “that a hearsay statement was reliable and therefore properly admitted . . . because the declarant’s statement contained *little detail*.”⁴¹

And these irreconcilable decisions occur not only across states, but also within states.⁴² To make matters even worse, if it were possible to do so, these arbitrary, contradictory decisions exist even *within courts*. For example, in one case, Colorado’s highest court “found a statement reliable and therefore admissible in large part because it was made *immediately after* the alleged crime. In another case, the same court found a statement reliable and therefore

³⁷ Ohio v. Roberts, 448 U.S. 56, 66 (1980).

³⁸ Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 759 (2008) (discussing Nowlin v. Commonwealth, 579 S.E.2d 367 (Va. Ct. App. 2003)).

³⁹ *Id.* (discussing State v. Bintz, 650 N.W.2d 913 (Wis. Ct. App. 2002)).

⁴⁰ *Id.* (emphasis added) (discussing People v. Farrell, 34 P.3d 401 (Colo. 2001)).

⁴¹ *Id.* (emphasis added) (discussing United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229 (4th Cir. 2001)).

⁴² *Id.* at 760–62 (discussing intra-state decisions in the Washington state-court judicial system).

admissible in large part because it was made *two years after* the alleged crime.”⁴³

But the Court’s *Crawford* decision, which uprooted the reliability standard and replaced it with the testimonial standard, was specifically designed to eliminate these wild, arbitrary decisions.⁴⁴ Unfortunately, it did nothing to change the status quo that has existed since Bierce’s Gilded Age.

For example, after *Crawford*, judges would still look to the circumstances surrounding the hearsay statement, and in so doing, an Ohio court “found a declarant’s statement to a government nurse (and mandatory reporter) to be nontestimonial, and therefore admissible, because a police officer first took a statement from the declarant and *then* brought her to the government nurse to repeat the statement.”⁴⁵ However, a Minnesota court also found such a statement “to be nontestimonial, and therefore admissible, but so found because a police officer purposely *avoided* taking a statement from the declarant, and instead sent her *directly* to the government nurse to make her allegation.”⁴⁶

And on a post-*Crawford*, intra-court basis, even the Supreme Court has applied its own framework arbitrarily. In one case, “it found that a statement was testimonial, and therefore not admissible, because the declarant described past events, rather than an ongoing incident, to police.”⁴⁷ But in another case, “the Court found that a statement was nontestimonial, and therefore admissible, even though this

⁴³ *Id.* at 762–63 (comparing *People v. Farrell*, 34 P.3d 401 (Colo. 2001) with *Stevens v. People*, 29 P.3d 305 (Colo. 2001), which were decided a mere four months apart).

⁴⁴ *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (declaring that the *Roberts* reliability framework was “so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”).

⁴⁵ Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1315 (2011) (discussing *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482, ¶ 46).

⁴⁶ *Id.* (discussing *In re A.J.A.*, No. A06-479, 2006 WL 2474267, at *4 (Minn. Ct. App. Aug. 29, 2006)).

⁴⁷ *Id.* (discussing *Davis v. Washington*, 547 U.S. 813, 830 (2006) (finding statements testimonial because police officers were “not seeking to determine . . . ‘what is happening,’ but rather ‘what happened’”)).

particular declarant *also* described past events, rather than an ongoing incident, to police.”⁴⁸

If appellate courts, state supreme courts, and the United States Supreme Court rule in such a random fashion—even when their decisions are published for all to read and criticize—the problem is not a small one. Criminal defense lawyers know firsthand the arbitrariness of *trial judges* who, unlike appellate-level judges, operate essentially under the radar as the vast majority of their decisions are never appealed and are therefore never exposed by the light of day. And their capriciousness is by no means limited to the Confrontation Clause.⁴⁹ As the cynical reader might suspect, if judges rule arbitrarily with regard to the Constitution, there is little chance they will apply mere statutes consistently from case to case.⁵⁰

In short, the higher courts have created enough self-contradicting precedent that, as Bierce wrote more than a century ago, when a judge makes a decision, he “may be guided by either of any two inconsistent precedents, as best suits his purposes.”⁵¹

III. IGNORANCE OF THE LAW

Ignorance of the law is no excuse, as the saying goes; however, in Ambrose Bierce’s *Gilded Age*, ignorance was the norm for judges. Bierce wrote that “[t]he judge is commonly an ignoramus incapable of logical thought and with little sense of the dread and awful nature of his

⁴⁸ *Id.* (discussing *Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011) (finding statements nontestimonial even though the police admitted they were questioning the declarant to “find out who did this, period.”)).

⁴⁹ For an analogous example dealing with sentencing law, see Yera, *supra* note 15, at 102 (“Right now in the federal courts, two individuals who have committed the same offense conduct can be sentenced to completely different sentences with one individual serving decades more in prison than the other.”).

⁵⁰ I recall one case in which I told the trial judge that his interpretation of a statute contradicted his previous interpretation in another case. His response, which I subsequently learned was a *misquote* of a famous saying, was that “consistency is the hobgoblin of little minds.” See Paul Rosenzweig, *A Foolish Consistency is the Hobgoblin of Little Minds—The Metadata Stay*, LAWFARE (Dec. 18, 2013), <https://www.lawfaremedia.org/article/foolish-consistency-hobgoblin-little-minds-metadata-stay>.

⁵¹ Bierce, *Some Features of the Law*, *supra* note 30.

responsibility.”⁵² J. Gordon Hylton demonstrates that Bierce’s cynical view was supported by the numbers:

[T]rial judges often lacked an adequate understanding of legal procedures. In the 1870s, the California Supreme Court reversed convictions in *more than fifty percent of the criminal cases* brought before it. Although the percentage declined in subsequent decades, the corresponding figure remained just under forty percent for the rest of the century. . . . The source of the problem was almost always the failure of the lower court to follow proper procedures—eighty-three percent of all reversals were for procedural reasons.⁵³

Today, little has changed with regard to judicial competence, as judges struggle with the most basic rules of criminal procedure. Consider the statutory right to substitute judges. Under Wisconsin law, for example, “In any criminal action, the defendant has a right to only one substitution of a judge.”⁵⁴ In cases with “more than one defendant,” all defendants must first agree to substitute.⁵⁵ And as far as the timing of the substitution request, it must be filed “before arraignment.”⁵⁶

Despite its simplicity, the statute has boggled the minds of modern judges. In one case, a defendant “filed a timely and proper request for substitution of judge,” and “the [trial] court approved” it.⁵⁷ The case was therefore assigned to a different judge, but only temporarily, as the original (substituted) judge reinserted himself into the case for the trial and sentencing.⁵⁸ The prosecutor—attempting to “convict by hook or crook” as Bierce would say⁵⁹—argued

⁵² *Id.*

⁵³ Hylton, *supra* note 6, at 727 (emphasis added) (citing Vernier & Selig, *The Reversal of Criminal Cases in the Supreme Court of California*, 20 J. AM. INST. CRIM. L. & CRIMINOLOGY 60, 63 (1929)).

⁵⁴ WIS. STAT. § 971.20 (2) (2024).

⁵⁵ WIS. STAT. § 971.20 (6) (2024).

⁵⁶ WIS. STAT. § 971.20 (4) (2024).

⁵⁷ *State v. Harrison*, 858 N.W.2d 372, 374 (Wis. 2015).

⁵⁸ *See id.* at 374–76.

⁵⁹ Bierce, *supra* note 30.

that the defendant “forfeited” his right to substitute.⁶⁰ Fortunately, the state’s high court held that, because the defendant had “requested *on four occasions* that [the judge] not preside in the instant case,” and even did so in a proper and timely manner, “these facts do *not* support a conclusion that the defendant forfeited his request for substitution.”⁶¹

In a subsequent case, a different defendant filed a substitution request and the court commissioner granted it.⁶² But then, the originally assigned judge overruled the commissioner and denied the request because “co-defendant case.”⁶³ This terse explanation refers to the requirement that, when there is a codefendant, both must join in the request.⁶⁴ There indeed had been a co-defendant, but he died and his case had been dismissed five months earlier.⁶⁵ Fortunately, a higher-ranked trial judge understood that dead men, already famous for telling no tales, also file no substitution requests.⁶⁶

But after correcting that error, the judge *also* denied the defendant’s substitution request, but for a different reason: the defense lawyer had filed it *too early*, the judge believed.⁶⁷ The lawyer had filed it electronically, just before leaving his office to attend the combined preliminary hearing and arraignment hearing.⁶⁸ The judge thought the statute required filing in the “mere seconds” that exist after the preliminary hearing and before the arraignment.⁶⁹ While some statutes *do* have waiting periods,⁷⁰ the substitution statute does not. Therefore, because the defense

⁶⁰ *Harrison*, 858 N.W.2d at 379.

⁶¹ *Id.* at 382-83 (emphasis added).

⁶² *See* *State v. Larson*, 8 N.W.3d 129, 130-31 (Wis. Ct. App. 2024).

⁶³ *Id.* at 174.

⁶⁴ *See* WIS. STAT. § 971.20 (6) (2024).

⁶⁵ *See* *Larson*, 412 Wis. 2d at 172-74 ([T]he co-defendant “passed away on February 19, 2023,” and [his] case was dismissed on “February 22, 2023”; the judge denied the defendant’s substitution on “July 17, 2023”).

⁶⁶ *See id.* at 174 (the chief judge conceded that the codefendant’s death and the state’s dismissal of his case meant that “the co-defendant rule did not apply”).

⁶⁷ *Id.* at 174-75.

⁶⁸ *Id.* at 173.

⁶⁹ *Id.* at 179.

⁷⁰ *See, e.g.*, WIS. STAT. § 971.10 (2) (a) (“The [speedy trial] demand may not be made until *after* the filing of the information or indictment.”) (emphasis added); WIS. STAT. § 971.31 (5) (b) (“[M]otions to suppress evidence . . . shall not be made at a preliminary examination and *not until* an information has been filed.”) (emphasis added).

lawyer filed it “before arraignment,” which is the statute’s *only* time-related mandate, the appellate court reversed and granted the substitution—albeit seven months after the defense had filed it.⁷¹

While the above errors are surprising—and time-draining and maddening for defense lawyers in the trenches—they’re hardly the most significant judicial flops. In perhaps the most common type of error, “[j]udicial incompetence shines brightest when it comes to the rule against hearsay, and the published case law is rich with examples.”⁷² And in my own experience, judicial errors run the gamut from the serious, e.g., the constitutional right to counsel, all the way down to the seemingly mundane yet potentially critical, e.g., the court’s reading of its own scheduling order. As one modern scholar observed, “[b]ad judges may lack even slight command of the law. They . . . misunderstand fundamental rights, rule prematurely, and generally display egregious ignorance of the rules that supposedly govern their decisions.”⁷³

It is true that we no longer see reversals of fifty percent as in the Gilded Age.⁷⁴ However, there is no reason to believe that the decline in reversals is due to fewer errors being committed. Instead, the decline in reversals is due in large part, if not entirely, to a *higher tolerance* of errors. For example, if a defendant accepts a plea offer, nearly all judicial errors will be deemed waived.⁷⁵ Conversely, when a defendant goes to trial, other judicial errors will be deemed cured.⁷⁶ And when an appellate court must find that the trial judge erred, it simply brands the error as

⁷¹ *Larson*, 412 Wis. 2d at 172–73 (the defendant requested substitution on July 12, 2023; the appellate case was decided April 24, 2024).

⁷² Michael D. Cicchini, *Combating Judicial Misconduct: A Stoic Approach*, 67 BUFF. L. REV. 1259, 1283 (2019) (discussing several serious errors involving the rule against hearsay).

⁷³ Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 440 (2004) (footnotes omitted).

⁷⁴ See Hylton, *supra* note 6, at 727.

⁷⁵ See, e.g., *Mack v. State*, 286 N.W.2d 563, 566 (Wis. 1980) (“[A] guilty plea . . . constitutes a waiver of non-jurisdictional defects and defenses including claims of violations of constitutional rights.”).

⁷⁶ See, e.g., *State v. Webb*, 467 N.W.2d 108, 114 (Wis. 1991) (discussing how a trial cures judicial error committed at the preliminary hearing).

“harmless” and affirms the conviction.⁷⁷ “[T]he harmless error doctrine as presently configured enables trial judges . . . to persistently evade accountability for procedural errors, diminishing their incentives to comply with legal norms.”⁷⁸ The harmless error doctrine therefore “teach[es] judges . . . what they can get away with, not what they ought to do.”⁷⁹

Consequently, despite a lower percentage of reversals, there has been a dumbing-down of the modern judiciary—possibly to levels not seen since Bierce’s time. As another modern scholar and clinical professor noted, today’s judges are “bewildered by the most basic procedural and evidentiary rules,” and will “say and do idiotic things with no awareness of their idiocy.”⁸⁰ And when judicial ignorance is combined with overconfidence—or, on the other hand, insecurity—the result can be yelling and screaming from the judicial throne,⁸¹ or worse.⁸²

IV. LEGISLATING FROM THE BENCH

Thus far we have seen Ambrose Bierce condemn judges for their method of legal reasoning, arbitrary decisions, and ignorance of the law. But perhaps what he despised most about judges was their legislating from the bench. J. Gordon Hylton explains that “[f]or Bierce, ‘law’ properly meant statutes (which, he insisted, were bad enough). What he objected to was the body of additional ‘law’ created by judicial interpretations of existing

⁷⁷ Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, 1413 (2021) (discussing a “pattern of lower court error and appellate rubber-stamping” in order to affirm convictions).

⁷⁸ *Id.* at 1414.

⁷⁹ *Id.* at 1415.

⁸⁰ Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 259 (2017).

⁸¹ *See id.* at 264 (“One judge yelled at me throughout the entire voir dire”). In my own experience, judicial explosions are quite common. *See* Cicchini, *supra* note 72, at 1274 (“During my argument, the judge repeatedly interrupted me by yelling—in a packed courtroom, no less—that I was a liar.”).

⁸² *See, e.g.,* Cicchini, *supra* note 72, at 1290 (discussing the illegal arrest of, and even violence toward, defense lawyers). For a more recent example, *see* David Boucher, *Detroit Judge Forces Teen Who Fell Asleep on Field Trip Into Handcuffs, Threatened Jail*, DETROIT FREE PRESS (Aug. 14, 2024), <https://www.freep.com/story/news/local/michigan/detroit/2024/08/14/detroit-judge-forces-teen-who-fell-asleep-on-field-trip-into-handcuffs/74794293007/>.

statutes.”⁸³ Bierce realized that these “superingenious writings” could then be used “as authority for setting aside any statute (i.e., legitimate law) with which the judge hearing a case might disagree.”⁸⁴

Bierce wrote that a judge may first “sternly affirm that he sits there to interpret the law as he finds it, not to make it accord with his personal notions of right and justice.”⁸⁵ But then, after making that grand declaration, that same judge may disregard the statute, or take his pick of inconsistent case precedents, or even “throw aside both statute and precedent” and create the law out of whole cloth.⁸⁶ With regard to this wide array of tactics, Bierce explained:

I have in mind judges whom I have observed to do all these things in a single term of court, and could mention one who has done them all in a single decision, and that not a very long one. The amazing feature of the matter is that all these methods are lawful—made so, not by legislative enactment, but by the judges. Language can not be used with sufficient lucidity and positiveness to land them.⁸⁷

Despite the intervening century, Bierce’s criticism of judges legislating from the bench is highly relevant today. And remarkably, judges still falsely assert their fidelity to the statutes immediately before violating them.⁸⁸

For an excellent example of modern judicial legislation, consider a criminal repeater statute which increases a defendant’s punishment whenever he or she has been “convicted of a misdemeanor *on 3 separate occasions*” in the previous five years.⁸⁹ This particular statute is *not* invoked when a defendant merely has three prior convictions in the

⁸³ Hylton, *supra* note 6, at 738.

⁸⁴ *Id.*

⁸⁵ Bierce, *Some Features of The Law*, *supra* note 30, at 26.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Michael D. Cicchini, *Wisconsin Courts as “Superlegislatures”*, WIS. L.J. (Oct. 31, 2016) (providing examples of how courts will pay lip service to their duty to apply a law as written, right before they rewrite it), <https://wislawjournal.com/2016/10/31/critics-corner-wisconsin-courts-as-superlegislatures/>.

⁸⁹ WIS. STAT. § 939.62 (2) (2024) (emphasis added).

last five years; rather, to be a repeater, those convictions must have occurred “on 3 separate occasions” during that timeframe.⁹⁰

Despite the law’s clarity, the court did not like the statute, so it feigned confusion to uphold a defendant’s sentence: “it is not clear whether occasion refers to the time of *conviction* or the time of the crime’s *commission*.”⁹¹ That’s bad enough. But what happened in a subsequent case is worthy of a Biercean fable, which I will do my best to write using the court’s actual language. I will call this fable “A Defective Appeal”:

A Defendant, having been sentenced as a repeat offender, appealed to his state’s High Court, where he encountered a Great Jurist:

“I will hear your appeal,” said the Great Jurist. “But you had three prior convictions, thus making you a repeater, is that not true?”

“Yes and no, Your Honor,” replied the Defendant. “I had three priors, but the statute says that to be a repeater a defendant must have been convicted of those crimes *on separate occasions*.”

“That is true,” said the Great Jurist.

“And in your previous and eminently wise decision,” the Defendant groveled, “you wrote that ‘it is not clear whether *occasion* refers to the time of *conviction* or the time of the crime’s *commission*.’”⁹²

“Yes, go on,” said the Great Jurist, appearing intrigued by the Defendant’s argument.

“In my case, Your Honor, it does not matter which it refers to! Not only was I *convicted* on a single occasion, i.e., at a single court hearing, but my crimes were also charged in a single case and were even *committed* on a single occasion!”⁹³

⁹⁰ *Id.*

⁹¹ State v. Wittrock, 350 N.W.2d 647, 651 (Wis. 1984) (emphasis added).

⁹² *Id.* (emphasis added).

⁹³ Stacking multiple charges for a single criminal act is incredibly common. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L.

“Interesting,” said the Great Jurist. “But ‘merely stating (as I did) that it is unclear whether *occasion* refers to the time of conviction or the time of commission *does not mean that it in fact refers to either!*’”⁹⁴

The real-life court then went on to hold: “all that is required by the statute is that a defendant be convicted of three misdemeanors within the five-year period.”⁹⁵ It brashly and illegally erased the words “separate occasions” from the statute.⁹⁶ Finally, in 2023, the same court admitted that “convictions based on charges filed in a *single* case and occurring during the *same* hearing have *not* occurred on . . . separate occasions”⁹⁷—although it strained mightily to justify its previous, word-defying decision.⁹⁸

Such judicial word-twisting calls into question the wisdom of Bierce’s first criticism. That is, we might actually be better off if, instead of issuing any opinions at all, judges would simply “leave for another day” any attempt at deciding actual cases.⁹⁹

V. GRAFT AND CORRUPTION

Ambrose Bierce also took aim at the judiciary for its alleged corruption. In the Gilded Age, this took two different forms, the first of which is the appearance of impropriety. As J. Gordon Hytton explains, “Although there was no reason to think that California judges were any more corrupt than judges in other states, their alleged ties to powerful economic interests were a frequent source of

REV. 1303, 1313 (2018) (“[T]he prosecutor can inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses”).

⁹⁴ State v. Hopkins, 484 N.W.2d 549, 553 (Wis. 1992) (parenthetical, emphasis, and punctuation added).

⁹⁵ *Id.* at 555.

⁹⁶ See Michael D. Cicchini, *Criminal Repeater Statutes: Occasions, Convictions, and Absurd Results*, 11 Hous. L. Rev. ONLINE 1 (2020) (discussing the judiciary’s illegal rewrite of this statute).

⁹⁷ State v. Rector, 990 N.W.2d 213, 216 (Wis. 2023) (discussing a different repeater statute that uses nearly identical, and in every way substantively identical, language).

⁹⁸ See *id.* at 219–25.

⁹⁹ See *supra* Part I.

complaint” in Bierce’s day.¹⁰⁰ For example, “the judges of the California Supreme Court held annual passes entitling them to free travel on the Southern Pacific Railroad and were widely believed to be under the control of that railroad.”¹⁰¹

To find the modern equivalent, one need only look to analogous complaints about the United States Supreme Court. The Court is currently “facing a historic lack of confidence from the American public,” due in part to its decisions but also due to the justices’ alleged economic entanglements.¹⁰² For example, Justice Clarence Thomas is frequently under attack for “unreported luxury gifts from a conservative billionaire over two decades . . .”¹⁰³ Consequently, there is a push for legal action against him: “An executive branch employee or, for that matter, even a member of Congress who so flagrantly violated the financial disclosure law as Clarence Thomas had, would certainly face some sort of consequences for their actions.”¹⁰⁴

A second category of Gilded Age judicial corruption took a more obvious *quid pro quo* form, which Bierce illustrates with another entertaining fable:

A Man of Experience in Business was awaiting the judgment of the Court in an action for damages that he had brought against a railway company. The door opened and the Judge of the Court entered.

“Well,” said he, “I am going to decide your case today. If I should decide in your favor I wonder how you would express your satisfaction.”

“Sir,” said the Man of Experience in Business, “I should risk your anger by offering you one-half the sum awarded.”

¹⁰⁰ Hylton, *supra* note 6, at 727.

¹⁰¹ *Id.*

¹⁰² See Domenico Montanaro, *Justice Thomas Gifts Scandal Highlights “Double Standard” for Ethics in Government*, NPR (Apr. 24, 2023; 5:00 AM), <https://www.npr.org/2023/04/24/1171343472/justice-thomas-gifts-scandal-highlights-double-standard-for-ethics-in-government>.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting Walter Shaub of the Project on Government Oversight).

“Did I say I was going to decide that case?” said the Judge, abruptly, as if awakening from a dream. “Dear me, how absent-minded I am! I mean I have already decided it, and judgment has been entered for the full amount that you sued for.”¹⁰⁵

In the fable, the businessman actually turns the tables and gets the best of the greedy jurist in the end by denying him his kickback,¹⁰⁶ yet Bierce’s claim about judicial corruption is a clear one. And in the modern age—perhaps unsurprisingly at this point of the Essay—outright judicial corruption is still alive and well.

An outrageous example is the “Kids for Cash” scandal in Pennsylvania, in which two unusually tough-on-juvenile judges tore children from their families and sent them to private detention facilities in exchange for kickbacks.¹⁰⁷ One of the judges “ordered children as young as 8 to detention, many of them first-time offenders deemed delinquent for . . . jaywalking, truancy, smoking on school grounds and other minor infractions.”¹⁰⁸ Simply put, the judges made sure the private facilities remained filled, and they were handsomely rewarded for it. Their total take: “\$2.8 million in illegal payments from the builder and co-owner of two for-profit lockups.”¹⁰⁹ The result was a long period of incarceration for both judges.¹¹⁰

Shortly before that scandal—and about a century after Bierce criticized judges for their corruption—an Illinois

¹⁰⁵ Hylton, *supra* note 6 at 709–10 (quoting 6 A. BIERCE, THE COLLECTED WORKS OF AMBROSE BIERCE: THE MONK AND THE HANGMAN’S DAUGHTER, FANTASTIC FABLES 234, 294 (1911)).

¹⁰⁶ *See id.* at 710.

¹⁰⁷ *See* Associated Press, *Former Judges Who Sent Kids to Jail for Kickbacks Must Pay More than \$200 Million*, NPR (Aug. 18, 2022, 7:48 AM), <https://www.npr.org/2022/08/18/1118108084/michael-conahan-mark-ciavarella-kids-for-cash>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.* However, at least one judge got a reprieve. He was first released to home confinement due to the viral panic of 2020; then, to the shock of many Pennsylvanians, he received a presidential commutation of his sentence in 2024. *See* John Cole, *Shapiro Says Biden Commuting Kids for Cash Judge’s Sentence ‘Absolutely Wrong’*, PENN. CAP. STAR (Dec. 13, 2024), <https://penncapital-star.com/criminal-justice/shapiro-conahan-says-biden-commuting-kids-for-cash-judges-sentence-absolutely-wrong/>.

judge was taking bribe money from criminal defendants in exchange for favorable treatment; he therefore had to treat other, non-bribing defendants more harshly in order to maintain his overall reputation as a “strict prosecution oriented judge.”¹¹¹ This turned out to be problematic in the case of two non-bribing defendants who were convicted and sentenced to death; they then appealed.¹¹² “A case combining two men scheduled to die at the hands of the State with a corrupt judge who sentenced them creates a toxic mix,” the court wrote.¹¹³

Although the appellate court vacated the two non-bribing defendants’ death sentences, it upheld their underlying trial convictions over which the corrupt judge had presided.¹¹⁴ Why overturn the sentence but not the conviction? Somewhat ironically, the appellate court’s refusal to overturn the two underlying convictions may have also been motivated by economics—albeit not on a personal level. As one group of dissenters astutely observed, the corrupt trial judge had “presided over the disposition of *thousands of cases*, and recognizing his lack of impartiality in one case presents the prospect that *all of the cases* he handled must be vacated.”¹¹⁵

The economic cost of doing the right thing would have been enormous. And that potential cost, the dissenters observed, “is the one and only justification that has been offered . . . for concluding that a thoroughly corrupt judge amounts to a constitutionally acceptable decisionmaker” at the defendants’ trials.¹¹⁶ But what about the fundamental right to an impartial judge? Well, “as with any constitutional safeguard, proof of the right lies in its enforcement.”¹¹⁷ As for the crooked judge himself, his “perversion of his oath forced [him] to exchange his judge’s robe for the garb of a prisoner at a federal correctional

¹¹¹ *Bracy v. Schomig*, 286 F.3d 406, 413 (7th Cir. 2002).

¹¹² *See id.*

¹¹³ *Id.* at 407 (bracketed letters added).

¹¹⁴ *See id.* at 419.

¹¹⁵ *Id.* at 427 (Rovner, Ripple, Wood, and Williams, J., dissenting in part) (emphasis added).

¹¹⁶ *Id.* (Rovner, Ripple, Wood, and Williams, J., dissenting in part).

¹¹⁷ *Id.* at 426 (Rovner, Ripple, Wood, and Williams, J., dissenting in part).

institution.”¹¹⁸ As for the reputation of the larger judiciary, however, “the ashes of his corruption still smolder.”¹¹⁹

CONCLUSION: BIERCEAN REFORMS

Ambrose Bierce didn’t just criticize the judiciary; he also offered “concrete recommendations” for reform.¹²⁰ For example, with regard to imposing sentences, he argued that the error-prone, incompetent judiciary should sentence defendants *after* the appeals process. “As long as there exists the right of appeal there is a chance of acquittal. . . . So long as acquittal may ensue guilt is not established.”¹²¹ Bierce then asked rhetorically, but reasonably, “Why are [defendants] punished in the middle of proceedings against them?”¹²²

As another example of legal reform, with regard to the selection of the judiciary, Bierce argued for appointment rather than election by popular vote. He favored “non-elective judges, well paid, powerful to command respect and holding office for life or good behavior.”¹²³ This too seems reasonable, although we must be cautious about who does the appointing—is a politician’s appointment any better than a popular election?—and who reviews the judges’ performance for ongoing good behavior, i.e., competence.

Bierce’s most powerful reform recommendation, however, was a call to arms for journalists. He urged “that the corrupt practices in our courts of law be uncovered to public view, whenever that is possible, by . . . *the press*.”¹²⁴ (This is not surprising given his work history with the newspapers.¹²⁵) Bierce rejected the dire warnings “about ‘attacks upon the dignity of the Bench,’ ‘bringing the judiciary into disrepute’ and the rueful rest of it.”¹²⁶ He believed that a truly competent and dignified judge “needs

¹¹⁸ *Id.* at 407–08.

¹¹⁹ *Id.* at 408.

¹²⁰ See Hylton, *supra* note 6, at 707.

¹²¹ Bierce, *supra* note 30.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Among other positions, Bierce was the editor of “the weekly San Francisco *Wasp* in the early 1880s . . .” Hylton, *supra* note 6, at 708.

¹²⁶ Bierce, *supra* note 30.

not the artificial safeguarding which is a heritage of the old days when if dissent found a tongue the public executioner cut it out.”¹²⁷ Instead, “The Bench will be sufficiently respected when it is no longer a place where dullards dream and rogues rob . . .”¹²⁸ Until that time, he contended, “respect is out of the question and ought to be.”¹²⁹

It is uncontroversial, even obvious, to say that judges would not like such criticism. Criticism, no doubt, makes them uncomfortable. But that is good. “When your daily life consists of sitting in an elevated position in judicial robes, with people bowing and scraping before you, it likely goes to your head.”¹³⁰ Even the term “Your Honor”—a title I stopped uttering decades ago in favor of the more accurate label of “Judge”—artificially and dangerously inflates the judicial ego. “Your Honor is a term of nobility that English judges apparently borrowed from French hereditary aristocrats . . .”¹³¹ In stark contrast, our country “fought a war and wrote a Constitution to blot out titles of nobility.”¹³² In any event, harsh journalistic criticism—unsettling as it may be to its targets—will keep judges grounded and remind them of their very limited role: “what judges say and write” must not “supplant the actual law as written down in the Constitution and code books.”¹³³

The role of journalists in policing the judiciary is as vital today as in Bierce’s *Gilded Age*. And to some extent, modern journalists *are* doing this—albeit with far less wit than Bierce employed in his “sardonic attacks.”¹³⁴ For example, even milquetoast corporate media outlets will write about judges who are accused of certain wrongdoing, such

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Smith, *supra* note 80, at 254.

¹³¹ Benjamin Beaton, *Judging Titles*, 29 HARV. J. L. & PUB. POL’Y PER CURIAM 1, 4 (2022).

¹³² *Id.* at 3.

¹³³ *Id.* at 5.

¹³⁴ Hylton, *supra* note 6, at 707.

as sexual misconduct,¹³⁵ misbehaving at a nightclub,¹³⁶ or misappropriating public funds.¹³⁷ But this is just the low-hanging fruit. By and large, this type of shock-journalism fails to capture the far more pervasive misconduct that judges commit in the performance of their judicial duties.

Although it would be more challenging, journalists must focus on matters of legal procedure. “Order, reason, and justice—which would later be called procedural due process—were the qualities that Bierce found missing in the law and in society generally.”¹³⁸ And his criticisms regarding defective reasoning, arbitrariness, ignorance of the law, and legislating from the bench—all of which are discussed in this Essay—certainly fall into that due-process category. Excellent modern-day examples of this kind of journalism include exposing judges who violate a defendant’s statutory rights,¹³⁹ deny a litigant’s constitutional right to counsel,¹⁴⁰ and violate the judicial ethics code.¹⁴¹

¹³⁵ See Thadeus Greenon, *Judge Kreis ‘Censured and Barred’ in Agreement to Close Ethics Case*, N. COAST J. (May 28, 2024, 3:53 PM), <https://www.north-coastjournal.com/NewsBlog/archives/2024/05/28/judge-kreis-censured-and-barred-in-agreement-to-close-ethics-case>.

¹³⁶ See Allie Griffin, *Georgia Supreme Court Removes Judge Accused of Pushing Cop in Foul-Mouthed Scuffle Outside of Nightclub*, N.Y. POST (June 25, 2024 9:51 PM), <https://nypost.com/2024/06/25/us-news/georgia-supreme-court-dis-bars-embattled-douglas-county-probate-judge-christina-peterson/>.

¹³⁷ Bethany Bruner, *Retired Franklin County Judge Accused of Misappropriating \$65,000 Could Lose Law License*, COLUMBUS DISPATCH (Aug. 8, 2024), <https://www.dispatch.com/story/news/courts/2024/08/08/franklin-county-judge-michael-brandt-law-license-ohio-columbus/74720625007/>.

¹³⁸ Hylton, *supra* note 6, at 738.

¹³⁹ See Kevin Mathewson, *Two Kenosha County Judges Overruled by Appellate Court*, KENOSHA COUNTY EYE (Apr. 24, 2024) (discussing how two judges made two different errors to deny a defendant the statutory right of judicial substitution), <https://kenoshacountyeye.com/2024/04/24/two-kenosha-county-judges-overruled-by-appellate-court/>.

¹⁴⁰ See Kevin Mathewson, *Kenosha Judge Rebuked by the Court of Appeals—Again*, KENOSHA COUNTY EYE (May 9, 2023) (discussing how two judges combined to deny a litigant the fundamental right to counsel), <https://kenoshacountyeye.com/2023/05/09/kenosha-judge-rebuked-by-the-court-of-appeals-again/>; Kevin Mathewson, *Judge Dismisses Felony Domestic Violence Case, Critical of Court Commissioner’s Constitutional Violations*, KENOSHA COUNTY EYE (Aug. 23, 2025), (discussing how court commissioner conducted a preliminary hearing without obtaining the defendant’s waiver of counsel or waiver of the right to remain silent), <https://kenoshacountyeye.com/2025/08/23/judge-dismisses-felony-domestic-violence-case-critical-of-court-commissioners-constitutional-violations/>.

¹⁴¹ See Kevin Mathewson, *Kenosha Judge Says She Can Be Fair to Incoming DA, Despite Sharp Criticism, Campaigning for His Opponent*, KENOSHA COUNTY EYE (Nov. 8, 2024) (discussing how a sitting judge actively campaigned for her

If journalists were to routinely criticize judges for these types of due-process violations, such journalistic efforts would help deter such conduct on the bench. But if, despite such reporting, judges continued with their procedural misconduct, they would no longer be entirely to blame. In that case, as Bierce wrote more than a century ago, judges “only create and thrust it down our throats; we are guilty of contributory negligence in not biting the spoon.”¹⁴²

preferred district attorney candidate contrary to judicial ethics rules), <https://kenoshacountyeye.com/2024/11/08/kenosha-judge-says-she-can-be-fair-to-incoming-da-despite-sharp-criticism-campaigning-for-his-opponent/>.

¹⁴² Bierce, *supra* note 30.