

Spring 2021

## When Justice is Blind: Accommodations for Judges with Visual Impairments and Blindness

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### Recommended Citation

Annie Mann, *When Justice is Blind: Accommodations for Judges with Visual Impairments and Blindness*, 26 Pub. Interest L. Rptr. 188 (2022).

Available at: <https://lawcommons.luc.edu/pilr/vol26/iss2/6>

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## When Justice is Blind: Accommodations for Judges with Visual Impairments and Blindness

Annie Mann

Western legal systems have the long-held iconography of ‘blind justice.’<sup>1</sup> Western society views blindness and visual impairments as a debilitating disability that affects a person’s ability to contribute to society.<sup>2</sup> So, how are these concepts reconciled when the person sitting on the bench is blind?

It is not an exaggeration to say that many people in the United States would question a person with blindness’ ability to perform in a range of professions.<sup>3</sup> That is the consequence of living in an inherently ableist society.<sup>4</sup> Ableism is the discrimination of people with sensory, physical, or mental abilities that differ from a non-disabled person.<sup>5</sup>

Disability is a relative new area of academic study in the social sciences.<sup>6</sup> The discipline of disabilities studies examines disability as a socially constructed concept rather than one of medical pathology.<sup>7</sup> Due to the novelty of disability studies, data regarding judges with blindness can be difficult to come by. One 2019 study by the Center for American Progress was unable to find publicly available data to ascertain the number of sitting federal judges with disabilities.<sup>8</sup> Therefore, anecdotal reports about individual judges are the best vignette into blindness on the judiciary.

### BLINDNESS ON THE BENCH

Justice Richard Bernstein was elected to the Michigan Supreme Court in 2014.<sup>9</sup> Prior to his career on the bench, Justice Bernstein spent most of his

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<sup>1</sup> Doron Dorfman, *The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor*, 5 Cambridge J. of Int’l and Comp. L. 2 (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Access Living, *Ableism 101: What it is, what it looks like, and what we can do to fix it* (December 12, 2019) available at <https://www.accessliving.org/newsroom/blog/ableism-101/>.

<sup>5</sup> Dorfman, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Danielle Root et al., *Building a More Inclusive Federal Judiciary*, AMERICAN PROGRESS, 2019, <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/>

<sup>9</sup> Justice Richard Bernstein, <https://courts.michigan.gov/Courts/MichiganSupremeCourt/justices/Pages/justice-richard-bernstein.aspx>.

time as an attorney “as a tireless advocate for disabled rights.”<sup>10</sup> Justice Bernstein also acknowledges that his success is due in part to his affluent socioeconomic background.<sup>11</sup> Another major reason is that in the state of Michigan, state high court judges are elected by the public, rather than appointed.<sup>12</sup> Justice Bernstein also acknowledged the new challenges that the pandemic has presented.<sup>13</sup> He attends Zoom meetings with assistance and criticized the inaccessibility of the virtual platforms that are being used during the pandemic.<sup>14</sup>

Judge Louis Corbin was appointed to the Fourth Circuit in 1972.<sup>15</sup> Judge Corbin lauded the benefits of being a blind judge.<sup>16</sup> Advantages include avoiding the distraction of appearances and any efforts to impress or influence the judge.<sup>17</sup>

Judge Peter O’Donoghue was elected to a ten-year term on New York’s Civil Court in 1995.<sup>18</sup> Judge O’Donoghue reported using a court attorney for assistance.<sup>19</sup> He additionally used a braille typewriter and a computer program that translates written material to audio to read his mail and do legal research.<sup>20</sup> Judge O’Donoghue credits his listening skills and acute memory as skills that have distinguished his career on the bench.<sup>21</sup>

Judge David Tatel has been serving on the United States Court of Appeals for the District of Columbia since 1994.<sup>22</sup> Retinitis pigmentosa rendered him blind after law school.<sup>23</sup> Tatel has a reputation for an acute memory of both the parties in the courtroom and legal documents.<sup>24</sup> He was able to thrive in

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<sup>10</sup> *Id.*

<sup>11</sup> Dorfman, *supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> Emily Morris, *Justice Bernstein promotes disability inclusivity*, THE OAKLAND POST, November 2020.

<sup>14</sup> *Id.*

<sup>15</sup> Dorfman, *supra* note 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Charlie Leduff, *This Justice Is Blind but He’s a Great Listener*, THE NEW YORK TIMES, Sept.7, 1997.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> US Court of Appeals for the District of Columbia, *Judge David S. Tatel Biography*, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+ST>.

<sup>23</sup> Barbara Slavin, *A Judge of Character: Although he’s blind, David Tatel skis, run and climbs mountains. By summer’s end, he may be a top jurist too.*, THE NEW YORK TIMES, July 28, 1994.

<sup>24</sup> *Id.*

his legal career due to a computer device that translated printed material into audio.<sup>25</sup>

In an address to the National Federation for the Blind, Judge Richard Casey stated, “I think we have made great strides in [the legal] profession” in accommodating blind attorneys and lawyers.<sup>26</sup> Casey further remarked, “one is developments in technology, and the other is the change in attitudes in society.”<sup>27</sup> Judge Casey navigated his position on the bench with the help of real-time reporting with a synthetic voice in the courtroom, an optical scanner with a synthetic voice, and tape recorders.<sup>28</sup> Casey was nominated to federal judiciary in 1992.<sup>29</sup> He served until his passing in 2007.<sup>30</sup>

In Cook County, Nicholas T. Pomaro was appointed as an Associate Circuit Judge in 1976.<sup>31</sup> Pomaro lost his sight at age six due to a blood clot on his optic nerve.<sup>32</sup> Although Pomaro had a successful academic career, that did not prevent people from doubting his capabilities.<sup>33</sup> One of Pomaro’s deans at John Marshall Law School told Pomaro he would never succeed as a trial lawyer because he could not see facial expressions.<sup>34</sup> Pomaro credits this interact as the catalyst for developing finely tuned listening skills to pick up on the subtleties of human interaction.<sup>35</sup> During his career on the bench, a lawyer once asked Judge Pomaro to recuse himself from a murder trial, claiming Pomaro lacked the ability to properly review a videotaped confession.<sup>36</sup> The lawyer claimed the deficit was Pomaro’s inability to “see the defendant’s expression.”<sup>37</sup> Pomaro refused to recuse himself and his decision was upheld by the Illinois Supreme Court.<sup>38</sup> Despite this hiccup, Pomaro’s professional reputation was more than favorable, as he was “almost universally acknowledged by colleagues to be a jurist of exceptional fairness, diligence, intellect, and sensitiv-

<sup>25</sup> *Id.*

<sup>26</sup> Richard C. Casey, Address at the National Federation of the Blind: A Jurist Who Happens to be Blind in the Federal Courts (July 7, 1998).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Richard Conway Casey, 74, *Blind Federal Judge, Dies*, THE NEW YORK TIMES, March 24, 2007.

<sup>31</sup> Dorfman, *supra* note 1.

<sup>32</sup> Jim O’Donnell, *Judged on his Own Merits*, THE CHICAGO TRIBUNE, Sept. 8, 1996.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Dorfman, *supra* note 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

ity.”<sup>39</sup> A fellow Cook County judge is quoted describing Pomaro as “thoroughly capable and. . . well-regarded.”<sup>40</sup> Pomaro said in the past the courtroom bailiff will make him aware of any nonverbal information that is relevant to the court proceedings.<sup>41</sup> Pictures and physical evidence would be described to Pomaro by the bailiff or an attorney.<sup>42</sup> Any question about the description of a piece of physical evidence was agreed to by the opposing parties’ attorneys before it was described to Pomaro.<sup>43</sup>

Other countries have had success in appointing judges with blindness to the judiciary, John Wall was the first visually impaired judge on the High Court of Justice in the United Kingdom, appointed in 1990.<sup>44</sup> In 2007, Judge John Lafferty was appointed to England’s largest court, the Crown Court.<sup>45</sup> Lafferty has been blind since birth and still currently serves on the bench.<sup>46</sup>

### INSTITUTIONAL BARRIERS

Historically, persons with disabilities were not seen as employable.<sup>47</sup> As recently as 2014, a mere 37% of persons with blindness were employed to some degree.<sup>48</sup> Many factors contribute to this, ableism included, but there are notable barriers that prevent persons with blindness from entering the legal profession.

The Law School Admission Test (LSAT) is a notably inaccessible exam for persons with blindness as the ‘logical games’ portions of the exam require the test-taker to draw diagrams to solve them.<sup>49</sup> Litigation in 2016 attempted to bring suit against the American Bar Association (ABA) because the ABA only accredits schools that admits students using the LSAT.<sup>50</sup> The plaintiff alleged that the ABA “compels law schools to require the LSAT in law school admissions.”<sup>51</sup> Plaintiff’s blindness rendered him “incapable of perceiving spatial relationships or performing the necessary diagramming to successfully complete

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<sup>39</sup> O’Donnell, *supra* note 32.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Dorfman, *supra* note 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Binno v. American Bar Association*, 826 F.3d 338, 345 (6th Cir. 2016).

the logic-games questions on the LSAT at a competitive level.”<sup>52</sup> However, the Court reasoned that the ABA policy in question merely requires that a “valid and reliable” admission test be taken by law school applicants.<sup>53</sup> The Sixth Circuit held that the appropriate target for the suit would be the Law School Admission Council (LSAC), as the body that administers the LSAT.<sup>54</sup>

While the issue of LSAT accessibility was never resolved in court, since 2016 several law schools have begun to admit students under the Graduate Record Examinations (GRE).<sup>55</sup> This eliminates one barrier to blind individuals seeking admission to some of the most prestigious law schools in the country.<sup>56</sup>

Even if a person with blindness is able to overcome the barriers of the LSAT and attends law school, a career on the bench is anything but smooth sailing. A Colorado judge with blindness refused to disqualify himself from a hearing where he needed to use accommodations to review video evidence.<sup>57</sup> A narrator assisted the judge by describing the contents of the video.<sup>58</sup> The defendant in the case was convicted and appealed, claiming the judge “erred in failing to disqualify himself by reason of his blindness.”<sup>59</sup> A Colorado appeals court affirmed the conviction because the judge “took substantial steps to ensure that he was full aware of the contents of the videotape evidence.”<sup>60</sup> The substantial steps included the detailed narration of the tape, the defendant’s opportunity to cross-examine the narrator, and the defendant’s ability to clarify the contents of the video for the judge.<sup>61</sup>

The legal profession is guilty of exclusivity. Persons with disabilities and blindness experience significantly higher rates of unemployment than able-bodied persons, 12.5% compared to 5.9%.<sup>62</sup> The lack of persons with blindness in the legal profession could partially be attributed to the false assumption

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<sup>52</sup> *Id.* at 343 (Internal quotation marks removed).

<sup>53</sup> *Id.* at 345.

<sup>54</sup> Dorfman, *supra* note 1.

<sup>55</sup> Susan Svruga, *Harvard Law School will no longer require the LSAT for admission*, THE WASHINGTON POST, March 9, 2017.

<sup>56</sup> *Id.*

<sup>57</sup> *Mobility/Access*, 21 Mental & Physical Disability L. Rep. 43 (1997).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Gregory P. Care, *Accessible Technology Need Not be a Fight, and the Legal Community has a Role in Securing the Peace*, 48 MD. B.J. 14 (2015)

that legal work requires a person to have full sight.<sup>63</sup> Title III of the Americans with Disabilities Act (ADA) requires that legal offices make their services accessible.<sup>64</sup> Title II of the ADA additionally requires courts and court programs to be accessible.<sup>65</sup>

The ADA was passed in 1990.<sup>66</sup> Thus, the impact of the law is still evolving. Soon after the passage of the ADA, the law was used to challenge a ruling that barred a juror with blindness from serving on a Superior Court jury.<sup>67</sup> A district court later overturned this decision and held that the Superior Court had violated the ADA.<sup>68</sup> The Court stated, “there are several active judges who are blind [and] no distinction can be drawn between a blind judge’s ability to make factual finding and the abilities of a blind juror.”<sup>69</sup> The court found that, the same as with sighted persons, persons with blindness may be empaneled when they are qualified to do so.<sup>70</sup>

### CONCLUSION

There are many more layers to the issue of blindness on the judiciary, such as intersectionality with other minority identities, but this glimpse into the issue provides insight into the measured progress that has been made in including legal practitioners with blindness in one of the more prestigious jobs in the legal profession. It has even been suggested that increasing diversity of all kinds on the federal judiciary could foster and increase public trust in the judiciary.<sup>71</sup> As Judge Casey so aptly puts it, a politician “no longer has to ask, ‘Can it be done?’ ‘Has it ever been done?’ It has been done, and they should do it.”<sup>72</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> David L. Abney, *Excluding the Disabled from Trial: The Impact of the Americans with Disabilities Act*, 28 AM. J. TRIAL ADVOC. 415 (2004).

<sup>67</sup> 4 No. 5 ADA Compliance Guide Newsletter: *Excluding Blind People from Juries Violates ADA*, *Court Rules* (1993).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Root et al., *supra* note 8.

<sup>72</sup> Casey, *supra* note 26.