

NAVIGATING AND TRANSCENDING THE GRAVITATIONAL PULL OF PRIVILEGE AND STRUCTURAL BIAS TO WORK FOR JUSTICE INSIDE THE LEGAL SYSTEM

Hon. Darleen Ortega
Oregon Court of Appeals

Women in Prison Conference October 2018

I belong to a class of people—judges—who receive a lot of deference and are treated as experts and are asked to deliver keynote addresses. But unlike most people, I know better than to assume that the fact that I or anyone else is a judge necessarily means we are experts or even that we have something valuable to say. In general, when it comes to women's justice and justice in general, my time is better spent listening.

How I am so clear about that is what I want to spend some time talking about this morning. I began my career as a judge 15 years ago today, which makes this a particularly resonant time for me to reflect on what I do have to share that might be worth listening to. In doing that, I quickly realized that my best wisdom has far less to do with my legal training and much more to do with the personal work I have engaged in over the past 15 years that helps me to listen well, to expand my capacity to hold discomfort in a healthy and non-destructive way, to develop the courage and urgency to act strategically even and especially when the odds are against me, to see the value in leveraging other voices, and to be a good strategic partner.

I'll start by saying that all my best wisdom derives in some way from my experiences of being at the margins myself—not from being a judge. I'm not saying that being at the margins automatically makes one wise, or that being a judge automatically makes one unwise. However, because of the pull of gravity in the culture we live in, being a judge and functioning in the ways that most judges are expected to function actually undermines my ability to develop the sort of wisdom I am offering you today.

Really nothing about the way my job is set up requires or encourages or even supports me in understanding or appreciating the experiences of those at the margins. And when we talk about women in prison, we are necessarily talking about people at the margins. Our prisons may be full of people who have committed crimes, but how we police, how we prosecute, how we judge, and how we punish is not evenly distributed across every population. The pull of gravity always favors those with the most privilege. The system is more generous and fair to you the more privilege you have. That's just gravity.

I'll give you some examples, but they will only skirt the edge of what I'm talking about. In this culture, women have less privilege than men. Due to the flow of gravity, men tend to

be believed over women. They tend to have economic or structural power that helps them avoid the criminal justice system that women don't have. The system is designed around the behavior of men and around male problems. Those who police and prosecute and judge and punish are predominantly men and understand how men think better than they understand women.

In this culture, women of color have less privilege than white women. Due to the flow of gravity, women of color are more likely to live in a neighborhood that is poor and has a heavy police presence. Women of color are less likely to benefit from a presumption that they are telling the truth. People are less likely to be concerned that punishing women of color will result in a loss to society that they should care about. People are more likely to expect that prison is exactly where women of color belong. Those who police and prosecute and judge and punish are predominantly white and benefit from the culture of white supremacy in ways they don't understand and that affect how they see women of color.

In this culture, women who have experienced trauma and domestic and sexual violence and poverty have less privilege than women who have not experienced those things. Such women experience long term health effects that may affect their ability to work, or to manage stress, or to advance professionally or socially, or to form and sustain healthy relationships. Their ability to trust and their reasons to trust may be permanently altered or destroyed. Due to the flow of gravity, they are likely to be judged by standards that make no sense of their actual circumstances. Those who police and prosecute and judge and punish are predominantly more privileged and have little life experience that helps them to understand trauma, domestic and sexual violence, and poverty.

These are just examples, of course, and other examples exist that affect women's experience of the justice system. And yet the job of decisionmakers like me doesn't equip us to understand or even to recognize how the flow of gravity operates. Our work is constructed in such a way that actually follows the flow of gravity rather than challenging it, though we regularly comfort ourselves that our good intentions ensure that the system is fair. That is really wishful thinking on our part because it doesn't grapple with how structural bias works.

What I'm referring to as gravity always works in favor of privilege. That is just how gravity works. Our good intentions don't come into it. Robin DiAngelo describes the gravitational pull of racism this way:

"A structural understanding recognizes racism as a default system that institutionalizes an unequal distribution of resources and power between white people and people of color.

This system is historic, taken for granted, deeply embedded, and it works to benefit whites.” Other types of privilege function in much the same way.

ALL institutions and systems are biased--not just the legal system, but definitely the legal system. All institutions and systems have a dominant culture. No exceptions, including in the law. Without conscious effort, those systems will function in deference to privilege, to whatever cultures are dominant, are valued as normative, usually without that ever being named.

In the legal system, the decisionmakers, as I’ve suggested, are, by definition, relatively privileged in comparison to those who are affected by our decisions. That is true even of those few of us who are people of color; although many of us come from challenging circumstances and all of us experience racism, we now enjoy the privilege of being decisionmakers, and that affects our life experience. In most or all ways, we don’t live in proximity to the experiences of those we judge. That does not make us objective, though we often act as though it does. Viewed accurately, our relative privilege often functions to disadvantage us in really understanding the cases and people who come before us. But the legal system functions in a way that mightily resists acknowledging that. So to the extent some of us do have lived experience of being at the margins, the benefits to our perspective—the real advantage that lived experience offers us in judging our cases—is not valued by the system itself. Instead, to the extent we speak from that perspective, we are likely to be viewed with suspicion.

In order to value that aspect of our experience, the system would have to acknowledge the ways that it tilts toward privilege. Instead, the legal system mostly functions as though privilege doesn’t exist.

An important part of the difference that I have worked to cultivate in my own perspective is that *I value* my experiences of oppression, even if the legal system doesn’t. I have experienced domestic violence, racism, economic disadvantage, sexism, and other forms of oppression. Although my current circumstances have improved from my early life, I still experience some forms of oppression. I don’t enjoy that and I don’t think it is justifiable or okay, I promise you. And those experiences don’t automatically give me insight or make me right when I disagree with other people who aren’t experiencing the oppression that I’m experiencing. Nevertheless, I have learned to value my ongoing experiences of oppression.

Suffering can be a good teacher. In fact, the Women in Prison Conference always gives us an opportunity to observe that firsthand in those among us who are formerly incarcerated and from those who are currently incarcerated. Those who manage somehow to survive

and recover despite all the cards stacked against them have undertaken the hard work that suffering offers, often in spite of all the ways the legal system has failed them. They regularly inspire me, and I know to expect that today. I hope the rest of us will also allow their example to stir our concern for those who have *not* managed to find the superhuman strength that it has required for our sisters here to survive.

In my own case, my experiences of oppression give me plenty of reminders that the legal system regularly misjudges people, that gravity favors those with the most privilege, that the person who wins the argument is not necessarily right, that we do not live in a functioning meritocracy. That lived experience teaches me to listen better to those at the margins, to ask hard questions, to hold room for the possibility that those at the margins have wisdom that I am likely to miss if I don't work hard to listen.

What my own experiences of oppression do not do is automatically equip me to speak for others who experience oppression. I hate it when white women speak for all women, or when certain people of color speak for all people of color, or when the powerful claim to speak for "the American people." I almost never feel represented by such claims. So my experiences at the margins remind me to lead with curiosity, to not *assume* that I understand others' experiences of suffering, to make space for the voices of others at the margins. I'm useful only to the degree that I manage to keep those goals in mind.

All of you who have suffered and experienced oppression have access to these lessons. But you may also carry a lot of anger. I have spent a lot of time being angry in my life, and processing anger at oppression is an important to do; I would not suggest otherwise. But living inside anger has not been good for my body and has real limits in equipping me to be a powerful advocate. The best thing my ongoing experiences of oppression offer me is not anger but a sense of urgency--a regular stoking of my determination to up my skills as an advocate, to speak up for others in the way that I wish others would speak up for me. I am not kidding when I say that just about everything I understand about people who experience marginalization has been in some way helped and fueled by my own experiences of suffering. I value that in myself even if the legal system hasn't learned to value it. And I value it in those of you who have experienced oppression and whose voices are marginalized. My suffering teaches me to value what I can learn from your suffering. That constitutes a right-sizing of expectations that can be replicated, and that has the potential to change the world.

In a few minutes, I am going to sit down and return to listening mode because, as I said, I am clear that that is frequently my highest and best use. But because of structural bias, the effects of gravity that I've described, I know we are going to hear a lot of troubling news today. So many of you work inside the legal system, and so many of you have

experienced its failures yourselves. And it is frequently discouraging work. How can we do that work in a sustainable way? How can we listen well, expand our capacity to hold discomfort in a healthy and non-destructive way, develop the courage and urgency to act strategically even and especially when the cards are stacked against us, see the value in leveraging other voices, and be good strategic partners? I want to spend a few moments offering you some encouragement that I hope will assist you to hold the information you hear today in a positive way and to leave with hope rather than despair.

And I want to begin by encouraging us to live with a relentless commitment to the truth. And I do mean relentless. The temptations to do otherwise are everywhere, and usually involve our egos. We will want to go for the cheap win, to persuade ourselves that we impacted things positively so that we can feel good about ourselves. We will resist information about our own privilege. We will resist information about our own failures of imagination. We will want to believe that our good intentions ensure that we are not part of the problem. This is, again, how gravity works.

We all live inside an oppressive system, and shifting gravity inside that system is incredibly complex. For those of us who have some privilege, that generally is going to mean giving up some of it, including the privilege of being right, or of being understood. It's going to involve noticing that we are sometimes part of the problem, that our way of looking at things is full of holes. As we pull ourselves out of the flow of gravity and make space for the experience of the marginalized, it's going to involve being misunderstood. It's going to involve being outmaneuvered. It's going to involve other people taking credit for things that we have done.

But if we really want to be the sort of elite athletes who defy gravity, some of our efforts as we practice are going to fail. Sometimes we will feel embarrassed and ashamed, sometimes frustrated, sometimes angry. A relentless commitment to the truth will help us look, and take stock of the lessons that are there, about ourselves and about the difficulty of the maneuvers we are attempting. Recognizing that we are experiencing the realities of gravity will help us be honest with ourselves, and to absorb our own and others' actions more realistically. It will increase the possibility that our diagnoses of our failures will be accurate and not just what we need to believe. It will improve the chances that our efforts the next time will improve. What's true is true; the question is whether we deal with it or it deals with us.

To get at what is actually true, and not just what we wish were true, we will need to learn to LISTEN WELL. The skill of listening well is so undervalued in the legal world that most people at the margins lack lived experience of being listened to in that way. How many times when you were suffering have you tried to express yourself and been met with

advice, or excuses for why what happened was justified? I hold out some hope that those of us in this room can cultivate the skill of stopping ourselves from responding that way, ESPECIALLY when we are talking to someone whose social location lacks the privilege we enjoy. White people, that means you when you are interacting with a person of color. Men, that means you when you are interacting with a woman. Lawyers and judge, that means us when we are interacting with those who are in a position to receive punishment, who lack our access to information, our agency. *Stop.* Listen. The chances we will learn something depend on listening well.

What we hear if we truly listen well will regularly make us feel uncomfortable. *Guaranteed.* Those of us with privilege always underestimate how bad things are for those at the margins and the complexity of making things better. We will want to fix it. We will want to reach for a quick solution. We will want to find a way to be the hero. We will want to dispense charity that purports to solve everything but that robs the marginalized of agency and centralizes our own ego needs.

That is not listening well. Listening well absolutely requires us to EXPAND OUR CAPACITY TO HOLD DISCOMFORT IN A HEALTHY AND NON-DESTRUCTIVE WAY. I am literally suggesting that we practice listening long enough and deep enough to recognize that we don't know what to do. That is a kind of sweet spot. Practice living in that sweet spot.

Time spent in that sweet spot where you reach the end of your own resources is essential to good social justice work. To hold the truth that is hard to hold, to hang in there and ask the additional question for which you don't have an answer—that is the ministry of presence. The ministry of presence is an offering that few people who are suffering ever receive. Practicing the ministry of presence increases the possibility that the suffering will feel seen in a way that they have never been seen. It increases the possibility that they are heard, and that you have assumed part of the burden they have been carrying alone.

My experience tells me this: real systemic change involves doing that A LOT. It involves avoiding the quick fix. It involves refraining from making excuses for how the system is functioning. It involves resisting the urge to explain away what is happening. If you can listen this way fifty times, and not give into those temptations, you will still be listening and engaged for the 51st time, when something you can do to correct injustice becomes apparent. And the thing you do on that 51st time will be much more likely to effect actual progress, and not just relieve your own anxiety.

Now remember that my encouragement is to learn to do this in a healthy and non-destructive way. By that I mean holding your anxiety rather than taking the quick-fix action or explaining away injustice. That may well be impossible to do without a spiritual

practice of some kind—time each day spent in silence, or prayer, or communing with nature, or reading from a good teacher like Pixie Lighthouse, the Native American shaman who is currently a source of information for me. I cannot encourage you strongly enough to find some sort of practice that improves your capacity to hold discomfort in this way, whether or not you have a religious faith. It's essential to your health, and to avoiding managing your discomfort in a destructive way. A good teacher taught me a lesson I have never forgotten: all of life is about pain management. Those who hurt others have inevitably mismanaged their own discomfort.

Expanding your capacity for discomfort in this way will help you to develop the courage and urgency to act strategically, even and especially when the cards are stacked against you. All oppression depends upon the acquiescence of the majority—including people who disagree with what is happening, but have convinced themselves that there is nothing they can do. They are convinced because they can't see a strategy for speaking up that looks like it will win. Instead, they worry about who they will offend, or how crazy they will sound, or how it will hurt their career, or that they will look like they are not a team player. I am not suggesting that you should not pay attention to the possibility that people may be offended, nor am I suggesting that you ignore how you will sound. But we are all leaving options on the table all the time.

When I think back to my early years on the bench, I lived in a state of vague discomfort with what was happening around me. I honestly couldn't see what I could do most of the time.

Now I can see all kinds of things I can do, and I act with ever-increasing clarity about what I am attempting—why it is right, why it is not crazy, how it can work, what is behind the resistance. How did I get there?

Definitely I have not stopped reading the signs. But I have not been waiting for green lights either. There are rarely green lights for systemic change, folks.

Instead, I built my own strength (including by a robust contemplative practice). And I started trying. And I failed. And I tried again. And sometimes I succeeded, and also I failed. And the failures are brutal, and they are unfair. But they are full of lessons about how to read the signs, and about the lengths people will go to block progress, and about the blindness that keeps things stuck. I have gotten used to failure--but I have made some progress in letting go of the need for success, the need for approval. And I question my definition of failure. I am have learned that sometimes failure and success are happening at the same time.

All of this has made me much more courageous. My level of clarity has increased. I am harder to intimidate. It's like the training an elite athlete goes through. You build callouses. Your perspective shifts. You know to expect the falls, and how to survive them. You know they don't kill you. And sometimes you win—and you win fights you wouldn't have had to skills to take on before.

None of this happens if you wait for the fights you can win. Losing leads to winning. Any elite athlete knows this. Those of us who care about justice need to know it too.

Here's another thing to keep in mind. LEARN TO SEE THE VALUE OF LEVERAGING OTHER VOICES. None of us can move systems alone. It is always a group effort. The best leaders always realize this, and devote energy to helping others find their voices. Finding clarity for myself has been freeing and encouraging—but what really gives me hope is less about what I do personally and more about seeing others find the courage to speak, planting the seeds that will help them find the courage to do what is *theirs* to do, not mine. Work that benefits seven generations after us will always include lifting up voices other than our own.

Finally, BE A GOOD STRATEGIC PARTNER. So many of us in this room operate in overlapping spaces, yet behave as though we are competing or don't know each other. I can't tell you how many times I have seen a good idea get killed because we don't think to cooperate, we don't return each other's phone calls, we don't follow through on what we have said we will do. We aren't paying enough attention to value what others are doing in the same spaces. Often that's because we are spreading ourselves too thinly, or we are focused solely on the success of our own efforts. But real, lasting change doesn't happen without careful strategy and coordination of efforts. Pay attention to who follows through on what they have promised—and be one of those who does.

And now back to my seat. I'm ready to listen.