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Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts

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A SYMPOSIUM ON JUDICIAL INDEPENDENCE

SAFEGUARDING A CROWN JEWEL:
JUDICIAL INDEPENDENCE AND
LAWYER CRITICISM OF COURTS*

Judith S. Kaye**

I. INTRODUCTION

It is truly a privilege to participate in this lecture series honoring the
late Howard Lichtenstein, and I thank you for inviting me to address the
Hofstra Law community. Let me also express my appreciation to your
distinguished Lichtenstein Professor, Monroe H. Freedman. At this same
podium some seven years ago, Thomas Shaffer praised Professor
Freedman as a lawyer who makes the profession better simply by being
in it. What an extraordinary tribute. It’s so easy for just one lawyer, by
indifference and carelessness, to debase the entire profession, but
enormously difficult for just one lawyer—like Professor Freedman—by
a lifetime of dedicated, competent, ethical practice, to elevate it.

* The Howard Lichtenstein Legal Ethics Lecture, Nov. 6, 1996, Hofstra University School
  of Law.
** Chief Judge of the New York State Court of Appeals. I am grateful to my law clerk James
  A. Shifren for his superb assistance in the preparation of this Article.
1. See Thomas L. Shaffer, Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer
   Professionalism as a Moral Argument, 26 GONZ. L. REV. 393, 393 (1990/91).
This lecture series honors another such person, Howard Lichtenstein, by wonderful coincidence a beloved partner in the New York City law firm Proskauer Rose Goetz and Mendelsohn. To me, Proskauer is the "in-law" firm—that's where my husband practices law, and where we both came to know Howard as a gentle friend and a dynamite lawyer. By force of prowess and personality, Howard could bring together the fiercest adversaries in labor disputes; all of them, incredibly, extolling his virtues. The former chairman of the Proskauer firm, Edward Silver, having witnessed that feat innumerable times, summed up Howard as "a lawyer who practiced law as it used to be."

This brings me to the substance of my remarks: how things are and how things used to be in the legal profession. To provide a bit more focus, from the universe of potential topics that might fit that bill I discuss lawyer criticism of judges' decisions—a subject in which I have more than a passing interest.

A. A New Reality

To set the stage, I would like to touch briefly on a reality that is vastly different from what some would call the more "gentlemanly," "civilized" days when Howard Lichtenstein first became a lawyer. I might add that in my own youth in Monticello—still in the twentieth century—attorneys were referred to as, for example, "Lawyer Weiss," a title that bespoke the community's respect for the lawyers' role.

While there have obviously been many changes—not the least among them the growth in our numbers, in law firm size, and in the complexity of life generally\(^2\)—I put technology, specifically modern communications, right at the top of the list of what is dramatically different today. And I do not just mean the astounding capacity to fax documents to Singapore from the back of a New York City taxicab, or talk on the telephone while crossing Forty-Second Street to an airline passenger several miles overhead. I mean, as well, another kind of

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2. Predictions are that by the end of the century, the number of lawyers will reach the one million mark. In 1929, when Howard Lichtenstein was admitted to the bar, there were approximately 161,000 lawyers nationwide—approximately the number of New York attorneys today. See BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 75 (1960). With the growth in numbers has come an explosion in what lawyers do: they are presidents, governors, mayors, politicians of every stripe; they are CEOs and CFOs; they are novelists and pundits; they litigate, legislate, mediate, educate, and negotiate on a heroic scale all across the nation. Indeed, the range is so great that it is no longer possible to define comprehensively what is that lawyers do.
power—the unparalleled power of the media, and the use of the media, to shape public opinion.

Modern technology has shrunk the world and put it into everyone’s living room. Suddenly, we can immediately know everything, delivered byte-by-byte or (most people’s menu preference) already chewed and digested in prepackaged snappy soundbites. Can there be a better example than the infamous O.J. Simpson trial? Instant education in all of the intricacies of the law; instant “thumbs down” to the entire justice system.3

Then too, the ability to “spin” masses of information and manipulate public opinion is staggering. There is no time, or taste, for anything more than someone else’s quick label, usually written in indelible ink that is impossible to eradicate. Responses (unless offered in kind) invariably seem “defensive” and are back-burnered, if noticed at all.

B. A Reality That Has Endured

To be sure, not all of the realities have changed. Many seem to have endured. I know, for example, that for as long as there have been judges, there have been lawyers critical of their decisions, often very vocally. Discontent is a natural part of the litigation process, which usually leaves one side unhappy. At the same time, there has always been widespread recognition in this country that a cornerstone of a peaceful, orderly society is respect for law and respect for the dignity of the judicial process.4

Through the ages, legal luminaries have wrung their hands over the proper balance between the fundamental value of respect for the law and the fundamental right of citizens—even lawyer-citizens—to have their go

3. During the O.J. Simpson trial, a poll (pre-verdict) commissioned by the ABA Journal showed that news coverage of the trial caused twenty-eight percent of those questioned to have less respect for the criminal justice system and twenty-five percent to have less respect for lawyers. See Don J. DeBenedictis, The National Verdict, A.B.A. J., Oct. 1994, at 52, 53. In what might be viewed as poetic justice, but which offers only cold comfort, the survey of 1,011 adults also found that fifty-six percent had less respect for the media. See id.; see also Lincoln Caplan, Why Play-by-Play Coverage Strikes Out for Lawyers, A.B.A. J., Jan. 1996, at 62, 63 (noting that narrow legal coverage offers “information delivered without knowledge, escorted by opinion without explanation, and soothsaying without heed of consequences”). But cf. Nadine Strossen, Free Press and Fair Trial: Implications of the O.J. Simpson Case, 26 U. Tol. L. REV. 647, 654 (arguing that televised mega-trials make “an enormous, invaluable contribution to [the] public[’s] understanding”).

4. See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 242-48 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., 1st ed. 1966) (noting the strong respect for law that animates American political culture and radiates across all economic classes).
at courts and judges.\textsuperscript{5} By the same token, we have long struggled with the question of the appropriate response for judges who find themselves the targets of such criticism.

The debate is not new, but its parameters have recently been radically rewritten. If there was a struggle to strike the right balance in the kinder, gentler day of “Lawyer Weiss” and young Howard Lichtenstein—a day before boom boxes, stereophonic sound, and remote control—just imagine the enormity of the challenge today, when a politician can seize the entire front page of a tabloid or a spot on the evening news with a soundbite slap at a judge who cannot bite back.

In joining the dialogue on this critical issue, I would like to begin by first revisiting principles: what is this debate all about and why is it so important? I then plan to touch on the guiding ethics principles. Finally, I will conclude with a couple of suggestions for ameliorating a situation today that is at least undesirable and perhaps even dangerous.\textsuperscript{6}

\textbf{II. INDEPENDENCE OF THE JUDICIARY}

Without being unduly provincial, it is safe to say that the recent nationwide assault on the judiciary—rarely front-page fodder—began right here in New York.

As the calendar changed from 1995 to 1996, so did the climate for

\textsuperscript{5} In 1830, for example, impeachment proceedings were spearheaded by then-House Judiciary Committee Chairman (later, President) James Buchanan against a federal judge, James H. Peck of the District of Missouri, for his efforts at silencing attorney criticism. Judge Peck had held an attorney in contempt and disbarred and imprisoned him based on the lawyer’s anonymous newspaper article criticizing one of the judge’s decisions. See \textit{Arthur J. Stansbury, Report of the Trial of James H. Peck} (Boston, Hilliard, Gray & Co. 1833). Although the impeachment failed by a one-vote margin, the proceedings prodded Congress to enact the federal contempt statute, see Act of Mar. 2, 1831, ch. 99, 4 Stat. 487, and have long demarked important principles of First Amendment jurisprudence. See \textit{Cammer v. United States}, 350 U.S. 399, 406 (1956) (discussing impeachment proceedings against James H. Peck); \textit{Nye v. United States}, 313 U.S. 33, 45 (1941) (discussing public concern of Judge Peck’s opinion). Also consider \textit{In re Sawyer}, 360 U.S. 622 (1959), in which conflicting visions of the First Amendment’s proper scope are embodied. Justice Brennan’s plurality opinion concluded that attorney criticism of the judiciary should not be proscribed unless the statement directly “tend[s] to obstruct the administration of justice.” \textit{Id.} at 636. On the other hand, Justice Frankfurter’s dissent held out the notion that an attorney is an officer of the court who must abide by higher standards of conduct. \textit{See id.} at 668.

the courts, which every day became headline news. A confluence of four events relating to crime—far and away the number one “hot button” issue—proved a wicked combination for judges: first, the New York Governor’s criminal justice package, announced concomitantly with an attack on the Court of Appeals; second, Judge Lorin Duckman’s bail decision in a domestic violence case that ended in two deaths; third, promotion of Judge Harold Rothwax’s book tantalizingly titled *Guilty: The Collapse of Criminal Justice*; and finally, Judge Harold Baer’s suppression of eighty pounds of heroin and cocaine in the trial of a drug courier.

For judges, it was a chill winter, barely thawing in the spring, with the media and public officials vying for the most cutting criticisms. “Mindless,” “idiotic,” and “junk justice” likely top the list. After the Baer decision, White House Press Secretary Michael McCurry put “a Federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation.”

Then-Senate Majority Leader

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7. See S. 219-6041, 2d Legis. Sess. § 2 (N.Y. 1996) (proposed Police and Public Protection Act of 1996 to amend N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)). Governor Pataki sought, among other things, to limit New York’s exclusionary rule (article 1, section 12 of the state constitution, the analog to the Fourth Amendment of the U.S. Constitution) to bad-faith violations which were “not in whole or in part [committed] for the purpose of protecting the safety of the [police officer] or another person.” Memorandum from the Office of the Governor of New York to the New York State Legislature 2 (1996) (Governor’s Program Bill No. 64) (on file with the Hofstra Law Review).

Before the press conference announcing the proposed legislation, a two-page spread on the New York Court of Appeals appeared in New York City’s Daily News, highlighting several decisions going back a decade or more and characterizing the court as “all too ready to toss out criminal convictions.” Paul Schwartzman, *Sitting in Judgment: Highest State Court on Trial*, DAILY NEWS (New York City), Jan. 28, 1996, at 6; see also George Pataki, *Evidence Shows Court Must Change*, DAILY NEWS (New York City), Feb. 7, 1996, at 31 (“To win [the] war [on crime], police officers must be free from the yoke of complex [evidentiary] rules that endanger their lives and prevent them from doing their jobs.”).


Robert Dole added that if Judge Baer did not resign "'[h]e ought to be impeached.'"\textsuperscript{13} Months later, in a speech applauded in the opinion polls, Senator Dole declared that "'[t]he single most important thing a President can do to fight crime is put crime fighters in our courtrooms—both on the bench and at the prosecutor's desk.'"\textsuperscript{14}

Lawyer committees formed\textsuperscript{15} and declarations of judicial independence abounded.

In a letter to Judge Baer, Mary Jo White, U.S. Attorney for the Southern District of New York, wrote:

"We greatly regret that this case has become a topic of political debate and that there has been so much inappropriate rhetoric surrounding it. . . . The independence of the judiciary is obviously one of the fundamental cornerstones of our government and democracy. It is indeed that independence that both the Government and defendants rely upon in every case for a fair and just decision on the merits."\textsuperscript{16}

Second Circuit Chief Judge Jon O. Newman, together with three senior judges, Judge J. Edward Lumbard, Judge Wilfred Feinberg, and Judge James L. Oakes, issued a unique joint statement warning that "'[a]ttacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.'"\textsuperscript{17} And Chief Justice William H. Rehnquist reminded a Washington audience that judicial independence is "'one of the crown jewels of our system of government.'"\textsuperscript{18}

\section*{A. What Judicial Independence Is}

That crown jewel, of course, has been a centerpiece of American government since this nation's founding. Alexander Hamilton, in persuading New York to ratify the Constitution, explained that "there is no liberty, if the power of judging be not separated from the legislative
and executive powers . . . . The complete independence of the courts of justice is . . . essential . . . ."\(^ {19} \)

And on the floor of the House of Representatives nearly 200 years ago, John Rutledge, Jr. admonished his colleagues:

The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe . . . . Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure.\(^ {20} \)

Much more recently, John Feerick, Dean of Fordham Law School, in a magnificent address on the subject, noted that "[a] judge is not there to implement a political agenda of a president, legislator, governor, or mayor, for that would be to corrupt the judiciary and to substitute political will for the rule of law."\(^ {21} \)

Indeed, many landmarks of American history give life to those words. I think, for instance, of the extraordinary courage displayed by federal judges of the South issuing antisegregation orders during the early days of the civil rights struggle.\(^ {22} \) I think of the role of Judge John

\(^ {19} \) THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Bernard Bailyn ed., 1993). Without judicial independence, Hamilton argued, "all the reservations of particular rights or privileges would amount to nothing." Id.

\(^ {20} \) 11 ANNALS OF CONG. 739-40 (1802). Judicial independence, of course, consists of "institutional" independence as well as "adjudicatory" independence. See Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 MERCER L. REV. 697, 699 (1995). The judiciary's institutional independence in New York is embodied, in part, in the constitution's vesting of responsibility for the administration and operation of the state's courts in the chief judge. See N.Y. CONST. art. VI, § 28. In the federal system, such institutional independence is guaranteed by the salary and tenure protections provided by Article III of the U.S. Constitution.


\(^ {22} \) See generally J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971) (illustrating the social, political, and personal pressures faced
Sirica, a longtime staunch Republican, in forcing out the truth in the Watergate case, ultimately toppling the Nixon Administration.\(^{23}\) To be contrasted against these examples are the Third Reich judges of yesterday\(^{24}\) and some Peruvian judges of today\(^{25}\)—puppets of a political regime—reminding us just how prized that crown jewel should be.

I think not only of the strength but also of the fragility of judicial independence.

The "least dangerous branch," as Hamilton called the judiciary,\(^{26}\) has frequently been the target of efforts to weaken its standing. Proposals have been made for the recall of judges, shortened terms, and court-packing.\(^{27}\) But perhaps most threatening of all are unfounded frontal assaults on the courts themselves. People respect the law and are willing to live by the law, only as long as they believe that it operates fairly and effectively. Therefore, unfounded attacks on the courts exact a high price. As a federal court of appeals judge warned in his letter of resignation from the bench (where he, unlike New York State judges, enjoyed lifetime tenure), "[t]he current tactics will affect the independence of the

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25. See Lynn F. Monahan, Peru May Free Many Who Deny Terrorist Ties, L.A. TIMES, Oct. 20, 1996, at A24; see also Weinstein, supra note 6, at 2-4 (describing how the Peruvian President's replacement of most of the country's judges with temporary judges violated the principle of judicial independence).

26. THE FEDERALIST NO. 78, supra note 19, at 468 (stating that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution"). See generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (making the phrase, "the least dangerous branch," famous as a symbol for his theory of judicial restraint).


In addition to Franklin D. Roosevelt's attempt to "pack the bench" that had impeded the progress of his New Deal legislation, there have also been significant efforts to limit the Court's appellate jurisdiction. For example, during Reconstruction, northern radicals sought to shrink the Supreme Court's jurisdiction, an episode memorialized in Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1868). See Kaufman, supra, at 690 & n.60 (citing 1 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, at 433-514 (1971)).
judiciary and the public’s confidence in it, without which [the judiciary] cannot survive."

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B. What Judicial Independence Is Not

There are many eloquent expressions of what judicial independence is, but I think it equally as important to note what it is not.

Judicial independence does not mean the judicial branch is sealed off from the legislative and executive branches. Indeed, the judiciary is vitally linked to its partners in government in many ways, not the least of which is funding. Nor does independence mean that the judiciary is immune from criticism or full accountability to the public which it serves. Quite the contrary, the courthouses and the business conducted within them are wide open for public viewing and comment.

While the judiciary, as part of government, is fully accountable to the public, in this respect there are crucial differences between the judiciary and the other two “political” branches of government. One crucial difference is that those public officials are supposed to be responsive to the popular will. Judges are not. Judges are not part of the executive branch. They are not “on the team with the police to catch criminals.”29 They are not “crime fighters.”30 Instead, their sworn duty is to impartially apply the law, which may at times be countermajoritarian; it may at times not be to their liking; it may at times not even make “common sense” to them personally.

A second crucial difference is that to secure an impartial forum, even for their most vocal critics, and to assure the dignity of the judicial process, judges by and large must stay out of the fray. They do not duel with public officials about the correctness of their decisions; they do not...
conduct press conferences about cases; and they have no call-in radio and television programs to explain their rulings. They rely on their decisions, whether written or oral, to speak for themselves.

This is not simply a matter of choice. Rather, it is a matter of prohibition. The Model Code of Judicial Conduct bars judges from making statements that detract from the dignity of office, commenting publicly on the merits of a pending or impending action, or making

31. In fact, where that option has been considered it has been rejected. For example, a South Carolina ethics opinion decided that Canon 2 of its Code of Judicial Conduct prohibited a judge from answering questions on a radio talk show. The committee concluded that the judge's regular appearance would improperly lend the prestige of his office to the radio station, and added that the spontaneous interchange between the judge and the call-in listener could well affect the dignity of the judge, his office and interfere with his performance of his judicial office, as well as having a negative impact on the dignity of other members of the judiciary and the effectiveness of their performance of their judicial duties. South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. No. 14-1991 (1991); see also In re Broadbelt, 683 A.2d 543 (N.J. 1996) (offering an excellent compendium of relevant principles in this area), cert. denied, 117 S. Ct. 1251 (1997).

32. The American Bar Association ("ABA") first adopted a Canon of Judicial Ethics in 1924. The impetus for the Canons was apparently the refusal of United States District Court Judge Kennesaw Mountain Landis, Major League Baseball's first commissioner, to resign from the court while overseeing America's pastime. Landis remained on the court, earning $7,500 as judge and $42,500 as baseball czar. His activities prompted the ABA, at its 1921 convention, to pass a resolution of censure and appoint a committee to propose standards of judicial ethics. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 549 (1997); JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180-82 (1974). The 1924 Canons, drafted by a committee headed by Chief Justice William Howard Taft, consisted of 36 Canons in all and were a mixture of generalized admonitions and specific rules of proscribed conduct. With occasional amendment, they served the profession for nearly 50 years and were adopted by most states. See GILLERS & SIMON, supra, at 549.

In 1969, however, in response to the perceived flaws in the original Canons, the ABA created a Special Committee on Standards of Judicial Conduct. The committee, chaired by California Supreme Court Justice Roger Traynor, was charged with developing a modern code of ethics. And in 1972, the ABA formally adopted the Model Code of Judicial Conduct. See id. Nearly all the states have adopted Codes of Judicial Conduct closely modeled after the ABA Code. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 (1990).


34. See id. Canon 3A(6). In a recent decision, the New Jersey Supreme Court found that a judge's regular appearances on television to comment on cases pending in other jurisdictions violated its version of this Canon, as well as Canon 2B. See Broadbelt, 683 A.2d at 548-51.

In 1990, the ABA proposed a revision to the Model Code. See GILLERS & SIMON, supra note 32, at 549-50. The 1990 Model Code of Judicial Conduct modified the proscription against such comment from prohibiting judicial comment while a proceeding is pending or impending in any court, to prohibiting a judge from "mak[ing] any public comment that might reasonably be expected to affect its outcome [of the proceeding] or impair its fairness." MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990). The language of New Jersey's Canon at issue in Broadbelt is identical to the language of the 1972 Code. As of spring 1994, 29 jurisdictions had adopted Codes or Canons wholly or partly based on the 1990 Code. See GILLERS & SIMON, supra note 32, at 550; SHAMAN ET AL.,
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any statements that cast doubt on their impartiality. Further, judges must disqualify themselves when their impartiality might reasonably be questioned. For New York State judges, those same proscriptions are contained in the Rules of the Chief Administrator of the Courts which, like the Code, prohibits judges from commenting on any cases in the judicial pipeline, even cases in other jurisdictions.

Although there is technically no rule forbidding a judge's public statements about a current completed case, and considering that even judges have First Amendment rights, such statements are generally viewed as “an unwise course.” In a legal system where stare decisis plays such an important role, today's completed case—particularly a case

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supra note 32, § 16.01 (Supp. 1994). As of January 1996, certain provisions of New York State's Rules Governing Judicial Conduct were amended based on the 1990 Model Code. The proscription against comment on pending and impending cases was not one of these. See generally Marjorie E. Gross, Updated Rules on Judicial Conduct, N.Y. L.J., May 14, 1996, at 1 (outlining the changes in the New York Rules).

35. See MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1972).
36. See id. Canon 3C(1).
37. See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.0-100.6 (Supp. 1996).
38. See id. § 100.3(B)(8); see also New York Advisory Comm. on Judicial Ethics, Op. 93-133 (1994) (interpreting rule to prohibit a judge’s television commentary on cases pending in other jurisdictions).
40. See In re Rome, 542 P.2d 676, 684 (Kan. 1975) (stating that a judge does not relinquish his or her First Amendment rights on ascending to bench); D'Alemberte, supra note 6, at 630 (noting that any standard limiting a judge’s capacity to speak impartially is subjective, and therefore troublesome in the context of free speech).

However, limitations may be placed on a judge’s First Amendment rights. See Scott v. Flowers, 910 F.2d 201, 212 (5th Cir. 1990) (“[T]he state may restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials.”); Halleck v. Berlinger, 427 F. Supp. 1225, 1239 (D.C. Cir. 1977) (holding that a “judge’s constitutional right to say what he pleases from the bench is not without limits”). Commentators have advocated that courts apply an intermediate level of scrutiny to regulations that impose limitations on judicial speech. See, e.g., Erwin Chemerinsky, Is It the Siren’s Call?: Judges and Free Speech While Cases Are Pending, 28 LOY. L.A. L. REV. 831, 842-43 (1995).

41. See, e.g., New York Advisory Comm. on Judicial Ethics, Op. 92-13 (1992) (stating that it is better for a judge not to respond to a letter to the editor criticizing a judge’s ruling); see also In re Benoit, 523 A.2d 1381, 1382-83 (Me. 1987) (holding that it is inappropriate for a judge, after cases were remanded, to write a letter to the editor of a local newspaper defending his original sentences); Broadbelt, 683 A.2d at 548 (holding that a judge’s regular appearance on commercial television to discuss pending cases in other jurisdictions had potential to compromise the integrity and independence of the New Jersey judiciary).
significant enough to command public attention—is, after all, the grist for tomorrow's docket.

Interestingly, while judges are bound to silence when facing their critics about particular cases, that was not always so. When *McCulloch v. Maryland* was pilloried in the press, Chief Justice John Marshall himself apparently published not one, but two, rebuttals, the second under the pseudonym "A Friend of the Union." More recently, a young Washington reporter for the *Louisville Courier-Journal*, assigned to cover a Supreme Court opinion written by Justice Oliver Wendell Holmes, simply rang the Judge's doorbell to get the story. Holmes was entertaining guests at tea and, at first, asked the reporter to return later; however, he changed his mind, invited the reporter upstairs, and spent an hour going over the opinion, "literally dictating much of the article in newspaper language. It ran... a couple of columns in the...

42. In fact, the 1924 Canons of Judicial Ethics, while providing that judges should be "impartial" (Canon 5), "independent" (Canon 14), free of "political bias" (Canon 28), and "fearless of public clamor" (Canon 34), contain no proscription against commenting on pending or impending cases. See CANONS OF JUDICIAL ETHICS (1924).

According to commentators and chief participants, a tension arose in drafting the Model Code of Judicial Conduct during the late 1960s and early 1970s between the philosophies of Dean Acheson, who wanted to prohibit judges from engaging in all but the most narrowly defined "legal" activities, and Judge Irving R. Kaufman, who argued that the Code should encourage, rather than discourage, judicial activities that exceed the four corners of cases in the courtroom. See Dean Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A. J. 919, passim (1969); Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970). In the compromise between these two positions, the 1972 Model Code of Judicial Conduct was born. See generally D'Alemberte, supra note 6, at 629-30 (discussing Canons 4 and 5 of the Model Code, which deal with restrictions on a judge's legal, quasi-legal, and non-legal activities).

43. 17 U.S. (4 Wheat.) 316 (1819).

"Our opinion in the Bank case has aroused the sleeping spirit of Virginia, if indeed it ever sleeps. It will, I understand, be attacked in the papers with some asperity, and as those who favor it never write for the publick [sic], it will remain undefended and of course be considered as damnably heretical."


Courier-Journal and was esteemed as a clear and intelligible newspaper story.\footnote{46}

What different times we live in! I cannot imagine doing that today: neither being asked, nor being allowed, a full hour of time by a journalist to discuss a case, nor controlling the interview as well as the article, nor taking it upon myself to expound upon an opinion joined in by several of my colleagues. But then again, I'm no Holmes.

I will leave for another day the question of why there has been this shift from following every human being's instinct to respond, enlighten, persuade, and punch out the critics to, instead, seeking saintly ground in silence. Whatever its causes, whether wisdom, inexperience, terror, or something else, the fact is that judges today cannot and do not answer back, but hold up the banners of judicial dignity, judicial impartiality and judicial independence, and look to the bar to hold up the other end of those banners. The prevailing view is that a judge's defenses are "best left to the objectivity of a local, county or state bar association."\footnote{47}

And that brings me to my next subject, the rightful defenders of the crown jewel: lawyers.

III. THE LAWYERS' ROLE

Lawyers are by definition "officers of the court."\footnote{48} Lawyers are part and parcel of the legal system; they depend on, and in turn are depended on for, the effective administration of justice. Most importantly, they, like judges, speak and understand the language of the law. That language is often (perhaps too often) incomprehensible to anyone else. It needs translators.

\footnote{46. Id. at 1560 (quoting Letter from George Garner to Justice Oliver Wendell Holmes (Jan. 13, 1932) (on file with the Harvard Law Library)); see also D'Alemberte, supra note 6, at 620-27 (providing a long and wide-ranging list of judges' speeches and activities outside the courtroom, beginning with the activities of John Jay, the first Chief Justice of the Supreme Court, who served as counselor to President Washington and Ambassador to England while on the bench).}

\footnote{47. New York Advisory Comm. on Judicial Ethics, Op. 92-13 (Jan. 30, 1992). One distinguished commentator observed the following: In order to preserve the appearance of impartiality, judges normally follow the wise tradition of refusing to be drawn into public controversies about their actions. That judicial tradition leaves judges unable to defend themselves against groundless public charges. For such protection judges have traditionally relied upon lawyers, their colleagues for that occasion at least.}

\footnote{CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3, at 601 (1986).}

\footnote{48. See, e.g., Mark R. Killenbeck, Professionalism in the Balance?, 49 ARK. L. REV. 671, 674 (1997); Ronald D. Rotunda, Dealing with the Media: Ethical, Constitutional, and Practical Parameters, 84 ILL. B.J. 614, 617 (1996).}
It is therefore not surprising that from earliest times lawyers have had, in addition to special privileges, special responsibilities to the courts. The distinguished lawyer and judge, George Sharswood, a founder of American legal ethics, explained:

Fidelity to the court requires outward respect in words and actions... There are occasions, no doubt, when duty to the interests confided to the charge of the advocate demands firm and decided opposition to the views expressed or the course pursued by the court, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved, which is here inculcated. Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts, should be regarded with respect...

A. The Rules on Paper

The very first formal Canons of Professional Ethics, drafted almost ninety years ago, embodied these sentiments, beginning with the principle that

[1]In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.

To this day, the Model Code of Professional Responsibility, which essentially governs New York lawyers, charges lawyers with an

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51. CANONS OF PROFESSIONAL ETHICS Preamble (1936).

52. “The Code of Professional Responsibility, as promulgated by the New York State Bar Association... was adopted by the New York State Bar Association as its own code of ethics, effective January 1, 1970, with certain amendments...” N.Y. JUD. LAW Appendix (McKinney 1992). The four New York Appellate Divisions of the Supreme Court adopted as joint rules the Disciplinary Rules of the Code, with amendments, effective September 1, 1990. See N.Y. COMP. CODES R. & REGS. tit. 22,
obligation both to "assist in improving the legal system" and to promote public confidence in it.\textsuperscript{53} The Code encourages attorneys to "protest earnestly against the... election of those who are unsuit[ed] for the bench,"\textsuperscript{54} but recognizes that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."\textsuperscript{55}

According to the Code, "'[c]onfidence in our law, our courts, and in the administration of justice is our supreme interest.'"\textsuperscript{56} Furthermore,

\begin{quote}
[\textit{w}hile a lawyer as a citizen has a right to criticize [judges] publicly, [the lawyer] should be certain of the merit of his [or her] complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.\textsuperscript{57}
\end{quote}

Apart from these statements of aspiration, under the Code, a lawyer is actually subject to discipline for "conduct that is prejudicial to the administration of justice,"\textsuperscript{58} for "conduct that adversely reflects on his fitness to practice law,"\textsuperscript{59} and for "knowingly mak[ing] false accusations against a judge or other adjudicatory officer."\textsuperscript{60}

Much to the same effect, though somewhat more limited, the American Bar Association's Model Rules of Professional Conduct (now in effect in forty states as well as the District of Columbia,\textsuperscript{61} but not

\begin{quote}
\textsuperscript{§ 1200 (Supp. 1996).}
\textsuperscript{53. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980).}
\textsuperscript{54. Id. EC 8-6.}
\textsuperscript{55. Id.}
\textsuperscript{56. Id. EC 9-1 n.1 (quoting Erwin M. Jennings Co. v. DiGenova, 141 A. 866, 868 (Conn. 1928)). The Code further provides as follows: "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession." Id. EC 9-1 (footnote omitted).}
\textsuperscript{57. Id. EC 8-6 (footnotes omitted). "'[E]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." Id. EC 8-6 n.10 (quoting Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321, 326 (Ky. 1955)).}
\textsuperscript{58. Id. DR 1-102(A)(5); see also N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(a)(5) (Supp. 1996) (adopting the same language).}
\textsuperscript{59. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6); see also N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(a)(8) (adopting the same language).}
\textsuperscript{60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B); see also N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.43(b) (adopting the same language).}
\textsuperscript{61. See GILLERS & SIMON, supra note 32, at 3.}
\end{quote}
New York) declare that a “lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.”

Specifically, the Model Rules direct:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

As explained in the comment, “[t]o maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.” Another rule provides that “[i]t is professional misconduct for a lawyer to... engage in conduct that is prejudicial to the administration of justice.

In sum, the ethics rules that govern lawyers direct that they should help maintain the fair and impartial administration of justice, promote public confidence in the courts, support and defend the judiciary against unjust criticism, and refrain from making knowingly false statements about judges. Except for the last provision—prohibiting knowingly false statements—these loose standards obviously leave wide room for interpretation and misinterpretation.

B. The Rules in Application

And how are the rules actually applied? The paucity of published decisions is itself significant. Despite a long tradition of outspoken criticism by the bar, there are in fact relatively few proceedings that address this matter.

To be sure, several state courts have interpreted the rules to confine the expression of opinions that diminish public confidence, not merely knowingly false statements of fact. The Supreme Court of South

63. Id. Rule 8.2(a).
64. Id. Rule 8.2 cmt.
65. Id. Rule 8.4(d).
66. See, e.g., In re Riley, 691 P.2d 695, 706 (Ariz. 1984) (in banc) (sanctioning a judicial candidate for mischaracterization of an incumbent opponent); In re Terry, 394 N.E.2d 94, 95 (Ind. 1979) (stating that unwarranted criticism does nothing but weaken and erode the public’s confidence.
Dakota, for example, censured a lawyer for telling a local weekly newspaper that "'[t]he state courts were incompetent and sometimes downright crooked, Judge Adams excepted.'" The court found the attorney "voice[d] his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the members of the judiciary without the slightest possibility that any constructive, remedial actions would result from those remarks." Similarly, the Nevada Supreme Court reprimanded a district attorney for a television interview criticizing the court's reversal of the death penalty in a high publicity case as "'the most shocking and outrageous decision in the history of the Supreme Court of this State. It's unexplainable, and in my opinion totally uncalled for.'" The court concluded that the district attorney's comments were sanctionable because they eroded essential public confidence in the justice system.

Decisions such as these (and there are several) are implicitly, if not explicitly, grounded in the view that, as members of a regulated profession and officers of the court, lawyers surrender some of their First Amendment rights.

in an impartial adjudicatory process); Iowa State Bar Ass'n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980) ("To permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and . . . foster unwarranted criticism of our courts."); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam) (stating that a lawyer's comments at a press conference, regarding a judge's unethical behavior, tends "to bring the bench and bar into disrepute and . . . undermine public confidence in the integrity of the judicial process"); State ex rel. Inman v. Brock, 622 S.W.2d 36, 52 (Tenn. 1981) (issuing an injunction against further suits by a lawyer who challenged the legality of the composition of the Tennessee Supreme Court, because past filings of papers made scandalous, impertinent, and demeaning allegations about judges).


68. Id. at 252.


70. See id. at 500-01.

71. "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." In re Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring). In Sawyer, the lawyer subject to discipline spoke at a public meeting during a pending trial, stating that "horrible" and "shocking" things go on at Smith Act trials and that "[t]here's no such thing as a fair trial in a Smith Act case." Id. at 628-29. Justice Brennan, writing for a four-member plurality to reverse the suspension, held that although the lawyer's statements were an attack on the state of the law generally, they did not impugn the integrity of the trial judge or reflect adversely on the trial. See id. at 636.

Justice Stewart concurred in the reversal solely on the basis that the evidence was insufficient. See id. at 647. The quotation above suggests Justice Stewart's general agreement with the dissent of Justice Frankfurter, who was joined by three other Justices, which stated that direct attacks on the administration of justice and the integrity of a presiding judge were violations of professional standards of conduct. See id. at 668-69; see also Florida Bar v. Went For It, Inc., 115
Probably the best example of the contrary view is the Ninth Circuit's recent decision in *Standing Committee on Discipline v. Yagman.* In *Yagman,* the attorney in question had told a reporter that a particular judge was "'drunk on the bench'" and also wrote that he was an anti-semite, "'ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States.'" The court dismissed the charges, holding that criticisms of judges may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target.

In the same vein but closer to home is *Justices of the Appellate Division, First Department v. Erdmann,* in which the New York Court of Appeals concluded that a lawyer's vulgar and demeaning statement of opinion regarding the judiciary—without reference to a particular judge or pending case—fell outside the reach of professional discipline.

S. Ct. 2371, 2381 (1995) (holding that regulation of an attorney's speech, in the area of direct-mail solicitation, was not a First Amendment violation); *Gentile v. State Bar,* 501 U.S. 1030, 1076 (1991) (holding that a state may constitutionally limit a lawyer's speech if the expression is "substantially likely to have a materially prejudicial effect" on an adjudicatory proceeding). But see *Morris B. Chapman, Criticism—A Lawyer's Duty or Downfall?,* 1981 S. ILL. U. L.J. 437, 449-50 (arguing in favor of giving attorneys the identical First Amendment protections afforded laymen who criticize the judiciary); Sandra M. Molley, *Note, Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights,* 56 NOTRE DAME LAW. 489, 507 (1981) (arguing against disciplinary rules restricting an attorney's right to criticize the judiciary).

72. 55 F.3d 1430 (9th Cir. 1995).
73. *Id.* at 1434.
74. *See id.*
75. *Id.* at 1434 n.4. The court was quoting from a letter written by Yagman, which was sent in response to a request from *Prentice Hall* for information that could be included in the *Lawyer's Evaluation section of its Almanac of the Federal Judiciary. See *id.* at 1434.
76. *Id.* at 1438 (citations omitted). The *New York Times Co. v. Sullivan* "actual malice" standard for statements about public officials imposes liability only on proof that the speaker acted with knowledge that the statement was false or with reckless disregard of whether it was true or false. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). As the Ninth Circuit applied this test, recklessness is determined objectively, by reference to the kind of investigation that would be made by a "reasonable attorney, considered in light of all his professional functions . . . in the same or similar circumstances." *Yagman,* 55 F.3d at 1437-38 (quoting United States District Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993)).
77. 301 N.E.2d 426 (N.Y. 1973).
78. The court held that "[w]ithout more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility, uttered, written, or committed
I do not want to leave you with the impression that a lawyer can say absolutely anything regarding a judge without risking professional discipline. Last year, the Seventh Circuit, for example, upheld the federal disbarment of an Illinois lawyer who criticized a judge, calling him "a crooked judge, who fills the pockets of his buddies." The court noted that attorneys are not "entitled to excoriate judges in the same way, and with the same lack of investigation, as persons may attack political officeholders." Only months ago, the Supreme Court of Idaho imposed a public reprimand where an attorney, speaking to the local media, criticized a judge's decision as "motivated by political concerns." And in New York, the former Kings County District Attorney was disciplined for publicly making false accusations about a judge and demanding severe disciplinary measures be applied against him for conduct during a criminal trial, when those accusations had been made without even so much as consulting a transcript of the proceedings.

The long and short of it is that, as a matter of ethics, judges are well advised to avoid all public comment about current cases, leaving it to the

outside the precincts of a court are not subject to professional discipline." Id. at 427.

79. See, e.g., Florida Bar v. Kleinfeld, 648 So. 2d 698, 701 (Fla. 1994) (suspending an attorney-client for filing an affidavit accusing a judge of trying to intimidate her attorney); In re Graham, 453 N.W.2d 313, 317, 325 (Minn. 1990) (holding that an attorney's accusation that two judges had conspired to "fix" a case was an ethics violation, where the allegation was based on a hearsay report of bits of a conversation heard at a holiday party); In re Golub, 597 N.Y.S.2d 370, 371 (App. Div. 1993) (disciplining an attorney for making allegations of judicial bias—he had accused the judge of being in love with the defendant, actor William Hurt—in the wake of a determination adverse to his client).


81. Id. at 487.

82. Idaho State Bar v. Topp, 925 P.2d 1113, 1114 (Idaho 1996). Additionally, under DR 1-102(A)(5) and Model Rule 8.4(d), courts have prohibited criticism made by a lawyer during the pendency of a trial on the basis that the conduct prejudiced the administration of justice. See e.g., In re Friedland, 376 N.E.2d 1126 (Ind. 1978); In re Paulsrude, 248 N.W.2d 747 (Minn. 1976).

Indeed, the Supreme Court’s decision in Gentile v. State Bar, 501 U.S. 1030 (1991), accepted the proposition that attorney “speech that is substantially likely to have a materially prejudicial effect” was subject to limitation. Id. at 1076. Gentile, however, specifically dealt with a defense lawyer’s press conference held before trial, not with criticism of a judge or the judiciary.

83. See In re Holtzman, 577 N.E.2d 30, 31-32 (N.Y. 1991). But see United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995) (overturning the imposition of sanctions against an attorney who challenged the impartiality of a trial judge, and holding Louisiana Rule of Professional Conduct 8.2 to prohibit only “false or reckless statements questioning judicial qualifications or integrity (usually allegations of dishonesty or corruption)”; State ex rel. Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 961 (Okla. 1988) (dismissing a disciplinary proceeding against an attorney who called the judge a racist after the trial concluded because the attorney had established “unrefuted evidence that he had subjectively formed an opinion based upon experiences”).
bar to respond to criticism of them. Judges are, however, sitting ducks for critics, even for lawyer-critics.

IV. IMPROVING THE BALANCE

Have we struck a good balance—or, more accurately, a good imbalance—between the fundamental value of respect for the law and the fundamental right of lawyer-citizens to have their go at courts and judges? I wonder.

On the one hand, I personally enjoy the swashbuckling, romantic notion that judges are impervious “to the winds of public opinion . . . [and that they are people] of fortitude, able to thrive in a hardy climate.” Indeed, all through this year’s bombardment, all through this year’s gridlock and shutdown in state and national government, the New York courts have quietly and efficiently gone about their business of deciding thousands of matters every single day.

On the other hand, as one of my Court of Appeals colleagues recently observed, it feels “weak and pretty foolish” not to answer. And on the third hand (third hands are always the most worrisome), the judicial “stiff upper lip” both emboldens the critics (who come to believe their own hype) and leaves the public convinced that we are, after all, a pretty shabby lot.

The plain truth is that bar leaders and bar associations today cannot respond in equivalent fashion. Their responses just do not get the same billing. And the heavy assault on the New York State courts, with no rejoinder in kind, has unquestionably been costly. Based on a mere handful of cases plucked from the millions we hear annually, the public now has a false picture and diminished respect for a court system that deserves much, much better.

So I ask, should the professional ethics rules be reconsidered? If so, which ones and how? Is a defamation standard for public figures really the appropriate standard for lawyer criticism of judicial decisions? Are

84. Craig v. Harney, 331 U.S. 367, 376 (1947). Quoting Justice Douglas’s famous lines from this decision, Professor Monroe Freedman has argued that lawyers need to be more critical of judges, not less. See Monroe Freedman, Flab or Fortitude: A Verdict on Judges, CONN. L. TRIB., Mar. 11, 1996, at 22.


86. The New York State court system handles well over three million cases annually, of every variety—from family law to criminal law, from shareholder actions to real estate disputes. See E. Leo Milonas, Seventeenth Annual Report of the Chief Administrator of the Courts 22 (1995).
the existing rules sufficiently enforced not merely to exact but also to encourage compliance? Should our Judicial Code be revised? Should judges today be permitted, indeed encouraged, to enter the forbidden fray and speak out in defense of their rulings, or should the Monday-morning quarterbacking be left for others? What about the politician-lawyer-critics who from time to time remind the public of their law training? Plainly, the occasional practicing attorneys disciplined for criticizing judges do not pose the same potential threat to judicial independence as the politician-lawyer-critics, who have both enormous press access and appointment powers.

One prerogative I especially enjoy as a Court of Appeals Judge is that I can ask questions of lawyers that I do not have to answer myself (and I have no intention of answering my own questions today). Instead, I would like to pose, and close with, a few small steps that I think would be helpful. Before proceeding with my suggestions, however, I should say outright what I hope is implicit: though I strongly doubt that the answer lies in professional discipline, I think the balance most definitely does need adjustment. Recent events have amply proved this. I will begin with what judges can do to rebalance the system.

A. Judges as Communicators

When it comes to public discussion of current decisions, I cannot see judges offering David Letterman the top ten explanations of a controversial new decision, or answering callers about a case on Larry King Live, or facing off with the Governor about a ruling on Nightline. Sitting judges are not media stars nor are they Monday-morning quarterbacks. 87

In one important respect, however, judges can do more in the way of communication about their decisions. Judges speak through their rulings, and they should always try to speak fully, clearly, and comprehensibly. Judicial decisions, and the basis for them, should be accessible in every sense. They should be readily obtainable and as understandable as legal material can be. Decisions that are unnecessarily difficult to follow—subsegmented, cross-referenced, filled with foreign phrases and

87. See In re Broadbelt, 683 A.2d 543, 548 (N.J. 1996) (holding that a judge’s regular appearances on Court TV and Geraldo Live, in which he commented on cases pending in other jurisdictions, violated the state’s Code of Judicial Conduct).
excessive footnotes—are not models of scholarship or any other virtue.  

At the other extreme, and equally undesirable, are seemingly arbitrary pronouncements of result.

Of course there are limitations. Obviously not every decision calls for elaborate explanation. Time is another major limitation: many judges have dockets of hundreds of cases. Then too, no one should expect popular prose about the legal issues that come before us. It takes work to decide a case and compose a decision; it takes work to analyze and understand one. The point is simply that, whenever possible, decisions should be written or spoken so that “the reasonable critic”—meaning the person who spends the time and effort serious legal matters deserve before forming an opinion—can make sense of them.

Which leads me to the lawyer-critics, who, by virtue of their training and license, have a special responsibility to study judicial decisions before criticizing them.

B. Responsible Criticism by Lawyers

Criticism is useful and important for every institution, including the courts, but only so long as it is responsible criticism. In the words of Judge Learned Hand: “Let [judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand.”

Irresponsible criticism is destructive particularly for the Third Branch because judges for the most part cannot, do not, and positively should not engage in shouting matches with critics.

What then is responsible criticism? Responsible criticism of a decision requires, as an absolute minimum, that the critic, especially the lawyer-critic, study the decision before commenting on it. This requires attention not only to the result, or the first paragraph, or the dispositive sentence, or someone else’s opinion, but to the entire decision. A premise of composing judicial decisions comprehensibly is that they will be studied and some effort will be made to understand them.

Additionally, it is not too much to ask that before expressing a view, the critic should know something about the law underlying the decision. If decisions have absolutely no basis in law, that is itself a respectable

88. See Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 347 (1993) (lamenting on the demise of the model opinion, which has become “the long and excessively footnoted decision that moves, in a stiffly mechanical way”).

criticism. But if decisions are grounded on statutes or the Constitution or court precedents (as is much more likely), knowing the law involved is an essential part of every responsible critic’s evaluation.

I think much of the recent judge-bashing has not been responsible criticism. In many instances I doubt that the critic knew much more than the case result. Even more likely is the case where the critic was simply told someone else’s opinion of the result before commenting publicly. In several recent headline assaults, for example, the Court of Appeals was attacked as a citadel of technicality where it was applying requirements of existing statutes rather than its own notions of justice. No one would have known that from press releases and press reports. A responsible critic, and consequently an informed public, should know that statutes, which are enacted by the legislature and signed into law by the executive, confine a court’s discretion and limit the possible outcomes in a case. Courts are not free to ignore or disregard the words of statutes.

If in actual application a particular statute leads to results the legislature and executive find undesirable, those branches of government—the policymakers—can rewrite the statutes. It is not insulting to the courts when lawmakers amend statutes to make clear what they intend, and there is no need to insult courts in order to get the legislature’s attention. Indeed, the court system itself often advocates reform of a statute after it has been tested by the crucible of real-life facts.

Moreover, an informed public should know that trial court decisions are subject to appeal and that reversal of a conviction does not automatically put a dangerous criminal out on the street, but almost invariably


91. The New York legislature recently rewrote several criminal statutes. See N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1993) (dealing with substitution of an alternate juror for a regular juror); id. § 310.20 (pertaining to information that may be included on a verdict sheet provided to a deliberating jury); N.Y. CRIM. PROC. LAW § 30.30(4)(c) (McKinney 1992) (dealing with a defendant’s right to a speedy trial and the state’s obligation to locate an absent or unavailable defendant). For cases applying these statutes, see Page, 665 N.E.2d at 1041 (§ 270.35); Damiano, 663 N.E.2d at 607 (§ 310.20); People v. Spivey, 615 N.E.2d 961 (N.Y. 1993) (same); and Bolden, 613 N.E.2d at 145 (§ 30.30(4)(c)).

The fact that these statutes were substantially rewritten, rather than resulting from court decisions being “overruled,” is made amply clear by a side-by-side comparison of the original and the new laws.
results in a new trial. Facts like these deaden the soundbite, but fair is fair—both to the judiciary and to the public.

All of which points me to my last subject: the public.

C. Educating the Public

I have no delusion that there is any quick fix. There is simply too much entertainment value, too much political capital in the cynical soundbite uttered alongside crime victims and their families. In addition to concentrating on immediate solutions, I would pose as a final long-term solution a comprehensive program of citizen education in the law.

In 1906, Roscoe Pound, later Dean of the Harvard Law School, observed that a cause of the dissatisfaction with the administration of justice was the “public ignorance of the real workings of courts due to ignorant and sensational reports in the press.”92 A full ninety years later, it is sad to say, we are no better off. If anything, modern technology has greatly magnified the problem.

We live in a time when the public is saturated in the language and superficial trappings of the law. Terms like double jeopardy, presumed innocent, and reasonable doubt have become common parlance, by now probably even designer perfumes. Every day the media is filled with stories about the law. Yet, as a society we do little to educate the public about how the legal system really works. There is virtually no systematic teaching about the courts in the schools. We, the justice system insiders, have left it entirely to the media to educate the public in this area, which surely has not advantaged courts or lawyers, whose good works are rarely publicized. As recent history overwhelmingly has proved, the media does not see itself as responsible for educating the public, preferring rather to focus on our occasional foibles and fumbles.

Most people have never even met a judge—they have no human face to associate with the terrible things they now read of us. Judges tend to spend their nonworking time with one another or with lawyers. Speeches at law gatherings are most often by lawyers or judges, and extrajudicial writings are usually confined to law audiences and law reviews, which, regrettably, even lawyers do not read. Is it any wonder that more than half the public could name the Three Stooges, but not a

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Some of the questions I am asked—even by reporters—are frightening because they reveal such unfamiliarity with what we do.

I think the time has come for justice system insiders to take a much more aggressive role in the area of public relations, especially public education. Essentially, we need to find ways to work with the media, with the public at large, and with the school population. I will touch very briefly on each.

First, I know the media has numerous complaints about us; we surely have a long list of dissatisfactions with them. But I am convinced that, by focusing serious attention on one another’s problems in joint programs, we can each broaden our perspective to mutual advantage. Second, that same creativity and ingenuity will be needed to design educational programs for the public; not discussion of particular current cases but more generalized explanations about who we are, what we do, and how we do it. We need to go into the communities, and we need to bring the public into the courts. I know that a great deal already is done by judges and lawyers. Plainly, we must do more.

Finally, we need even more outreach to the school population, again already a subject many lawyers and judges are actively pursuing.


94. An example of such partnership is the New York Fair Trial Free Press Conference, established 27 years ago to provide a forum for judges, lawyers, journalists, and law enforcement officials to discuss fair trial/free press issues. See Frank P. Trotta, Jr., The New York Times Is on Hold and Mike Wallace Is Here from 60 Minutes, reprinted in LAW PRACTICE MANAGEMENT FOR THE SOLO AND SMALL OFFICE PRACTITIONER 1990, at 151, 154 (PLI Commercial Law and Practice Course Handbook Series No. 532, 1990).

95. For example, New York State’s Unified Court System, through its Speakers Bureau, has arranged for judges of the supreme court to speak before their respective community boards on the role of judges and the judiciary. The program has generated much interest, with community boards already requesting return engagements.

96. In 1993, New York created three pilot Judicial Advisory Councils—in Queens and Nassau Counties, and upstate New York—composed of local community leaders, citizen group representatives, local business leaders, academics, judges, and lawyers, which are designed to foster a closer working relationship between the courts and the communities they serve. New York’s efforts were cited as examples for the future by the National Courts and Community Advisory Committee. See NATIONAL COURTS AND COMMUNITY ADVISORY COMM., CITIZENS AND THEIR COURTS: BUILDING A PUBLIC CONSTITUENCY (1995). New Jersey also won accolades for its citizen volunteer program, which helps communicate understanding of the judicial system into the greater community. See id.

97. See, e.g., NEW YORK STATE BAR ASS’N, LAW, YOUTH & CITIZENSHIP: A STATEWIDE LAW-RELATED EDUCATIONAL PROGRAM (1996). The New York State Bar Association, together with the New York State Education Department, formed a partnership to provide training programs, publications for students and educators, a mock trial tournament involving over 550 school districts, and classroom presentations by attorneys concerning the law and the legal system.

Similarly, in Tennessee, a program for educating high school students provides an in-depth
have missed opportunities to educate the present generation, but hopefully we can do better with the next one. Systematic education about the justice system, so much a part of life today, could not only result in a better informed citizenry, but also could promote more law-abiding conduct and encourage alternatives to violence.

V. CONCLUSION

As a judge, I often marvel at the endless proliferation of novel legal issues: how is it that there continue to be so many questions courts have not already resolved? I feel much the same as I see long-simmering problems suddenly sweep society. A few years ago it was sexual harassment; more recently domestic violence and child abuse issues have come to the forefront. A person or an event kindles a blaze of media interest that makes its way from the front pages to the law reviews. Hopefully in the progression there are constructive stops along the way and something good emerges.

Whatever precisely ignited current interest, the subject of criticism of courts—politicizing the judiciary—has earned its spot among high-profile issues of the day. Speeches, articles, and forums on the subject of judicial independence suddenly are everywhere. Presently talking past each other are advocates for and against “criticism” when that is not the issue at all. No one can seriously object to criticism. It is its dramatically changed quality that is so troubling, and so threatening to the independence of the courts. Perhaps one of the constructive things that will emerge is a shared understanding of what is meant by responsible (and conversely irresponsible) criticism of judicial decisions, especially by lawyers. And as the ethics issues are weighed and settled, I hope that together we can embark on a positive program to make the justice system better appreciated and better understood by the people it serves.