

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

2019

Aspiring To A Model of the Engaged Judge

Ellen Yaroshefsky

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Ellen Yaroshefsky, *Aspiring To A Model of the Engaged Judge*, 74 N.Y.U. Ann. Surv. Am. L. 393 (2019)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1251

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

ASPIRING TO A MODEL OF THE ENGAGED JUDGE

ELLEN YAROSHEFSKY*

In 1967, within months of his appointment by President Lyndon Johnson to the Federal Bench in Detroit, Judge Damon Keith, [a] rookie judge and an African American . . . faced controversy almost immediately when, in an unusual confluence of circumstance, four divisive cases landed on his docket—all of which concerned hidden discriminatory practices that were deeply woven into housing, education, employment, and police institutions. Keith shook the nation as he challenged the status quo and faced off against angry crowds, the KKK, corporate America, and even a sitting U.S. President.¹

In 1970, Judge Keith ordered citywide busing in Pontiac, Michigan, to help integrate the city's schools—a ruling that prompted death threats against him and intense resistance by some white parents.² In August 1971, ten school buses in Pontiac were firebombed by members of the Ku Klux Klan.³

* Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University. I thank the staff of the NYU Annual Survey of American Law for their work on this forum.

1. *The Movie*, THEDKDOC.COM, <https://www.thedkdoc.com/the-movie> [<https://perma.cc/TA45-LPG7>] (last visited April 9, 2018).

2. DeNeen L. Brown, *'I Don't Scare Easily': A 94-Year-Old Judge's Refusal to Bow to Racism, Death Threats*, WASH. POST (Oct. 6, 2016), https://www.washingtonpost.com/local/i-dont-scare-easily-a-94-year-old-judges-refusal-to-bow-to-racism-death-threats/2016/10/06/cc8a2004-88fa-11e6-b24f-a7f89eb68887_story.html?utm_term=.593461a6a115.

3. In 2002, in *Detroit Free Press v. Ashcroft*, when Keith was on the Sixth Circuit, the Court ruled that President George W. Bush could not conduct deportation hearings of terrorism suspects in secret. 303 F.3d 681 (6th Cir. 2002). In perhaps his most famous ruling, challenging the claims of President Richard Nixon of executive power to suspend the Constitution, he told President Richard Nixon and Attorney General John Mitchell that the administration could not wiretap telephones of citizens without a warrant. *United States v. Sinclair*, 321 F. Supp. 1074, 1078-79 (E.D. Mich. 1971). That ruling became known as "the Keith Decision." *U.S. v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). In response, Nixon sued Keith personally. *United States v. United States Dist. Court*, 444 F. 2d 651 (1971). In *United States v. United States District Court*, the Supreme Court upheld Keith's decision in a 9-0 decision. 407 U.S. 297 (1972).

Judge Keith is one of the most prominent of the remarkable judges who sought to advance the promise of the Civil Rights Amendments in the Courts. As one of Justice Thurgood Marshall's students at Howard University, Judge Keith embodied Justice Marshall's teachings. Judge Keith told a 2016 audience who came to view a film about his life: "Thurgood would say, 'When you finish Howard Law, I want you to use the law as a means for social change,' . . . He used to tell us in class, 'Equal justice under the law was written by white men.'"⁴ Justice Marshall urged his students to make the country live up to its words. Judge Keith's judicial decisions promoted equal justice under the law.⁵

Judge Keith is remarkable, but not unique. Noted federal court judges in southern states endured personal threats for their brave decisions in the civil rights era. For example, federal judge Frank Johnson ruled that it was a violation of due process and equal protection to refuse to allow Rosa Parks to ride the bus in Montgomery, Alabama.⁶ This was the first time that *Brown v. Board of Education*⁷ was applied outside of a school context.⁸ Judge Johnson played a leading role in setting the nation's course on civil rights, access to public facilities, voting rights, school desegregation, and affirmative action.⁹ His *Washington Post* obituary stated: "Although he was a man of the law rather than a reformer or a politician, many of his decisions had social and political consequences that have become touchstones of American life as the 20th century draws toward its close."¹⁰

4. *Brown*, *supra* note 2.

5. *Id.*

6. Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES (July 24, 1999), <https://www.nytimes.com/1999/07/24/us/frank-m-johnson-jr-judge-whose-rulings-helped-desegregate-the-south-dies-at-80.html> [<https://perma.cc/MQP6-EE6E>].

7. 347 U.S. 483 (1954).

8. *Id.*

9. *Mieth v. Dothard*, 418 F. Supp. 1169 (M.D. Ala. 1976); *Carr v. Montgomery Cty. Bd. of Ed.*, 289 F. Supp. 647 (M.D. Ala. 1968); *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). He imposed federal mandates on state mental hospitals and state prisons for the treatment of patients and inmates, previously regarded as being the exclusive responsibility of state governments and carved a path toward redefining the relationship between the federal government and the states. He was influential and admired by many but was quite controversial.

10. J.Y. Smith, *Judge Frank M. Johnson Jr. Dies*, WASH. POST (July 25, 1999), https://www.washingtonpost.com/archive/local/1999/07/25/judge-frank-m-johnson-jr-dies/db3794fd-6ffa-4d1f-9ed2-2de2e813eeaf/?utm_term=.696b361f95f9.

In current times, among the most notable judges is Judge Jack Weinstein, whose significant, creative, and brave contributions to law and justice have been the subject of various symposia honoring him.¹¹ Judge Shira Scheindlin is another jurist who demonstrates creativity and courage. In a widely anticipated ruling in 2013, the judge issued a 198-page opinion concluding that the New York City police department's "stop and frisk" program violated the Fourth and Fourteenth Amendments because of the police department's widespread practice, and de facto policy of, making and conducting stops and frisks without reasonable suspicion.¹² The Court imposed somewhat unique and creative remedies to change police practices, including appointing a monitor to oversee a process that involved a broad range of community stakeholders in order to develop reforms.¹³

Professor Roth's article *New Judicial Activism* analyzes the most recent wave of federal judges who take it upon themselves to advance fundamental rights through creative and brave judicial decisions.¹⁴ In addition to Judge Scheindlin, federal judges, such as Jed Rakoff, John Gleeson, Emmett Sullivan, Nancy Gertner, Frederic Block, Nicholas Garaufis, Paul Cassell, and Mark Wolf, make decisions and impose remedies to ensure that the criminal justice system is fair, uphold the constitutional rights of the accused, and demonstrate respect for individuals and for the justice system.¹⁵ They do so within the constraints of their role as judges by providing reasonable resolutions of controversies.¹⁶ As Professor Roth discusses, the last few decades marked a sea of change in federal and state criminal justice systems.¹⁷ Federal courts, reacting in great measure to the shift in power between judges and prosecutors brought about by the 1986 Sentencing Guidelines, slowly began to assume greater responsibility for their sentencing role and exercised discretion in imposing appropriate sentences.¹⁸ Professor

11. See, e.g., Symposium, *A Roundtable Discussion to Honor One of America's Great Trial Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL.'Y 149 (2003).

12. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013).

13. Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043, 1068 (2014) (discussing criticism and unfair treatment of Judge Scheindlin by the Second Circuit that the author calls a "perfect storm of procedural irregularity").

14. Jessica A. Roth, *The New District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187 (2018).

15. *Id.* at 272-73.

16. *Id.* at 194-95.

17. *Id.* at 228.

18. *Id.* at 221.

Roth also discusses judicial activism in response to over-criminalization and to the hundreds of wrongful convictions.¹⁹ Many judges, including those identified by Professor Roth, are willing to acknowledge that the criminal justice system's quest for fairness is often at odds with reality.²⁰

Criminal justice reform is often noted as *the* civil rights issue in current times.²¹ The United States' system of "mass incarceration," and its intersection with race and poverty, continues to receive significant and ongoing attention.²² Many stakeholders, including lawyers, policymakers, nonprofit organizations, governments, both local and federal, and the public, have identified numerous reasons for the significant increases in the United States jail and prison populations and have offered various comprehensive policies and programs to address mass incarceration.²³ These efforts to reform the criminal justice system focus on pretrial detention, sentencing disparities, alternatives to incarceration, increased consideration of collateral consequences in charging and sentencing, as well as increased attention towards implicit bias and how it affects decision-making.²⁴ The core of this work is primarily in state criminal justice systems because more than 90% of criminal cases are adjudicated in state and local courts.²⁵ But within the federal system, the judges in Professor Roth's article follow in the tradition of Judges Frank Johnson, Damon Keith, Julius Waties Waring, and others, by providing creative remedies in their judicial opinions to address criminal justice reform.²⁶

19. *Id.* at 198-99.

20. *Id.* at 254-55; Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21, 23 (2017).

21. Comprehensive Criminal Justice Reform Must Include Both Front End and Back End Reform, THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (Oct. 4, 2017), <https://civilrights.org/comprehensive-criminal-justice-reform-must-include-front-end-back-end-reform/> [<https://perma.cc/HH7G-RDYT>].

22. *Id.*

23. *Id.*

24. Susan Klein & Ingrid Grobey, *Debunking Claims of Overcriminalization of Federal Law*, 62 EMORY L. J. 1, 50 (2012).

25. *Id.* at 27.

26. See Roth, *supra* note 14; see also *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (Johnson, J.); *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958) (Johnson, J.); *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971) (Keith, J.); *United States v. Dossie*, 851 F. Supp. 2d 478, 484 (E.D.N.Y. 2012) (Gleeson, J.); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (Scheidlin, J.); RICHARD GERGEL, UNEXAMPLED COURAGE: THE BLINDING OF SCT. ISAAC WOODARD AND THE AWAKENING OF PRESIDENT HARRY S. TRUMAN AND JUDGE J. WATIES WARING (2019). Of course, one could ask why it took so many years for judges to act and not simply defer to legislatures or other courts. Problems in the

Beyond judicial opinions, judges such as Judge Jed Rakoff engage in public advocacy by giving speeches and writing editorials in magazines and journals. Judge Rakoff famously said that judges have the responsibility to end mass incarceration.²⁷ Such commentary outside of judicial opinions is not a new phenomenon. In a 1997 article, former Chief Judge Judith Kaye of the New York Court of Appeals noted that Justice Oliver Wendell Holmes gave an hour-long interview to a reporter about a recent opinion, and that Justice John Marshall published several rebuttals to criticisms of *McCullough v. Maryland*.²⁸ Over the years, many Supreme Court justices have given speeches and have made public pronouncements in order to advance civil and constitutional rights.²⁹ In recent times, Justice Scalia's speeches before the Federalist Society, and at numerous events, have been credited with sparking the current

criminal justice system have been well known for many years and federal judges have significant power to address many concerns, but they do not. They may often agree that change is essential, but that "their hands are tied." A key example is *Strickland v. Washington*, a case that set the standard for reversal of a conviction for ineffective assistance of counsel. 466 U.S. 668 (1984). It requires a demonstration that the lawyer's performance fell below the standard of reasonably competent counsel and that, "but for" that performance, the result would be different. *Id.* It is well known that the second prong, the prejudice prong, contributes to affirming faulty convictions of the innocent. Adele Bernard, *Ineffective Assistance of Counsel and the Innocence Revolution*, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 226 (Daniel Medwed ed., 2017). District courts could begin to address modification of the prejudice prong to pave the way for the Supreme Court review.

27. Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/> [https://perma.cc/XM9F-8KXB].

28. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 714-15 (1997).

29. The examples are far too numerous to recount. Sterling Harwood, *Judicial Activism: A Restrained Defense* 113-17 (Rev. Ed. 1996) (labeling certain jurists as "activists," including Supreme Court Justices John Marshall, Hugo Black, Benjamin Cardozo, Warren Burger, William O. Douglas, Thurgood Marshall, William Brennan, Harry Blackmun, and in some areas, William Rehnquist); Jed S. Rakoff, U.S. Dist. Judge, S.D.N.Y., *Mass Incarceration and the "Fourth Principle,"* Speech at Harvard Law School (Apr. 10, 2015) (transcript available at <https://bol.bna.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech/> [https://perma.cc/9T6H-7YUK]); Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/?utm_term=.2e3c6c5fa2f6 (interview with Judge Mark Bennett of Iowa); Carrie Johnson & Marisa Penaloza, *Judge Regrets Harsh Human Toll of Mandatory Minimum Sentences*, NAT'L PUB. RADIO (Dec. 16, 2014), <http://www.npr.org/2014/12/16/370991710/judge-regrets-harsh-human-toll-of-mandatory-minimum-sentences> [https://perma.cc/2MFM-9NQ9] (interview with Judge Gleeson in which he states that mandatory minimums are "wrong" as a policy matter).

wave of judicial speeches outside the courtroom.³⁰ Justice Sotomayor has traveled around the country speaking to a wide range of audiences, and a recently-released film about Justice Ginsburg, the “Notorious RBG,” includes commentary from the Justice about a range of issues, notably sexism by her “brethren.”³¹ District and appellate court judges have been slow to follow the lead of the public presence of Supreme Court justices. But public commentary by lower court federal judges is on the rise, in great measure because of the lead set by the Supreme Court. Most recently, Judge Frederic Block, citing instances of intentional misconduct by prosecutors that resulted in criminal convictions for innocent people, called for an end to prosecutorial immunity in a post on the Marshall Project.³² Nevertheless, most judges are still reluctant to step outside the perceived boundaries of their role.³³

These judges, whose decisions, speeches, and writings address the difficult issues of the day, represent a small minority of the nearly 700 federal district court judges. They are willing to step outside the safety of the narrow view of their role, at the risk of significant public criticism, threats, and other unwelcome consequences. These judges act well within their authority, yet few federal court judges follow their lead.

Many years ago, Judge Frank Johnson said in defense of promoting civil rights, “Judicial activism is a duty—not an intrusion.”³⁴ Despite such commentary, the majority of federal district court judges do not follow suit. This essay asks: Why don’t all federal district court judges engage in such action? After all, they have lifetime tenure and can therefore afford to be bold and carry out a broad

30. Jeffrey Rosen, *Packing the Courts*, N. TIMES (May 10, 2013), <https://www.nytimes.com/2013/05/12/books/review/the-federalist-society-by-michael-avery-and-danielle-mclaughlin.html> [<https://perma.cc/JQU5-VKN2>] (reviewing MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013)); Jonathan Turley, Opinion, *Justice Scalia is a Political Popstar – and That’s Bad for the Supreme Court*, WASH. POST (Jan. 21, 2011, 7:00 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923.html>.

31. Ryan Reed, *Watch Ruth Bader Ginsburg Talk Sexism, Equality in New Doc Trailer*, ROLLING STONE (Mar. 7, 2018, 9:49 PM) <https://www.rollingstone.com/movies/news/ruth-bader-ginsburg-reflects-on-gender-equality-in-new-doc-w517572> [<https://perma.cc/NG6S-9EMX>].

32. Frederic Block, *Let’s Put an End to Prosecutorial Immunity*, MARSHALL PROJECT (Mar. 13, 2018 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity> [<https://perma.cc/95UW-QW9L>].

33. *Id.*

34. Frank M. Johnson, Jr., *Judicial Activism Is a Duty—Not an Intrusion*, 16 JUDGES’ J. 3, 4 (1977).

view of justice. This essay calls for an “Engaged Judge” model and examines the various factors that prevent many judges from acting in such fashion. It concludes that judicial philosophy, distinctions between law and politics, individual personalities, and a range of other factors affect the willingness of judges to adopt a bold view of their role.

THE ENGAGED JUDGE MODEL

Professor Jessica Roth identifies the judges who adopt a broader view of their role as “new activists” despite her hesitation about using the term “activist.”³⁵ Currently, activism is a loaded and pejorative term, implying that a judge follows a certain political or ideological agenda and shapes decisions to fit that agenda, no matter what the law says.³⁶ Furthermore, the term “new activist” has become primarily associated with Cass R. Sunstein’s use of the term to describe a specific group of conservative federal judges, in his book *Radicals in Robes*.³⁷ Under the “veil of law” and a claim of a return to the original Constitution, Sunstein’s “new activist” judges have transformed constitutional rights and rendered numerous citizens’ claims nonjusticiable.³⁸ These “new activist” judges purport to revere history, and sometimes they are faithful to it. But, all too often, they read the Constitution in a way that fits their political views.³⁹ Sunstein and others argue that these justices are the “activist” judges and that President Trump’s appointees to the federal bench are likely to fit within this mold of activism.⁴⁰ Thus, while the term “activist” can be used to describe judges who engage in criminal justice and civil rights reform, it can also be used to describe judges who make determinations based upon partisanship.

35. Roth, *supra* note 14 at 190 (noting that “activists” is often used to disparage an opinion a commentator disagrees with).

36. *Id.* But the term “activism” actually refers to the mindset of the judge more than the nature of the opinion itself. These often overlap but it should not be presumed that these are synonymous.

37. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

38. *Id.*

39. *Id.* at xiv.

40. *Id.*; See also Jason Zengerle, *How the Trump Administration is Remaking the Courts*, NY TIMES MAG. (Aug. 22, 2018); Donald Trump’s administration had 2 Supreme Court, 30 appellate court and 53 District court Judges confirmed. As of January 2, 2019, 70 additional judicial nominations are pending. The process has been conducted in close concert with the Federalist Society. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, NY Times (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>.

Ultimately, few judges think of themselves as activists and many judges despise the term.⁴¹ I suggest that given the ambiguity and controversy surrounding the term “activist,” the judicial aspiration should be that of the “Engaged Judge”—that is, a judge who acts in the best traditions of the role by engaging in creative and often bold solutions in order to advance a “justice mission.” That “justice mission” is to acknowledge that the constitution is a living, breathing document that must be interpreted to promote civil and constitutional rights and fairness to all. The contours of such a mission are subject to challenge for being overbroad and without clear focus, but the longstanding views of scholars, such as Laurence Tribe, provide its contours.⁴² Although this “justice mission” will be subject to ongoing controversy, this essay is premised upon a belief that all judges should aspire toward this form of judicial engagement in carefully restrained contexts, both in judicial opinions and, in a more limited fashion, in public discourse outside of the courtroom. The term “Engaged Judge” does not include judges who substitute their own morality for the law or “result-oriented judging by tailoring legal principle to fit the judge’s prior convictions about how he wants the case to come out.”⁴³

Engaged decision-making in criminal matters is essential for many aspects of a case, including pretrial detention, plea-bargaining, and discovery practices. It is noteworthy that state court judges in jurisdictions around the country have undertaken such an engaged role in individual cases and have influenced changes in their states’ respective criminal justice systems.⁴⁴ The majority of federal

41. STERLING HARWOOD, *JUDICIAL ACTIVISM: A RESTRAINED DEFENSE* 47-52 (rev. ed. 1996) (providing quotations from various judges who disdain the term activist).

42. See Laurence H. Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 300-01 (2001).

43. David Luban, *Judicial Activism vs. Judicial Restraint: A Close Look at the Bork Nomination*, 7 PHIL. & PUB. POL. QUART. 4, 10 (1987); CHARLES GARDNER GEYH, *WHAT’S LAW GOT TO DO WITH IT?* 4 (2011).

44. Greg Berman & John Feinblatt, *CENTER FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS 1* (2002), <https://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf> [<https://perma.cc/F6CR-ZM8Q>] (documenting the “growing number of judges around the country [who] have begun to test new ways of doing justice, re-engineering the ways that state courts address such everyday problems as mental illness, quality-of-life crime, drugs and child neglect. These innovators are united by a common belief: that judges have an obligation to attempt to solve the problems that bring people to court, whether it be as victims, defendants, litigants or witnesses.”). A recent symposium, *Judicial Responsibility for Justice in Criminal Courts*, promoted the best practices of courts around the country that have engaged in a judicial mission to change and improve the quality of justice delivered in state criminal courts. Symposium, *Judicial Respon-*

court judges are more moderate and cautious,⁴⁵ a phenomenon that cannot be wholly explained by the fact that most state court judges are elected and federal judges are appointed.⁴⁶

Sentencing in criminal cases is another context in which judges should act as Engaged Judges and should utilize their discretion to impose a sentence that the court believes to be fair. Sentencing is quintessentially a judicial function, bounded as it is by the Sentencing Guidelines.

Beyond issues pertaining to the criminal justice system, judges should be ardent protectors of individuals' constitutional rights. This is, perhaps, the primary context for the Engaged Judge model. Issues arising under common law and certain other legal matters may call for less judicial engagement because there is less room to exercise discretion. But, as Ronald Dworkin has argued, the "difficult clauses of the Bill of Rights" are ripe for judicial interpretation.⁴⁷ Consequently, the broader context of constitutional and civil rights is where the Engaged Judge model should predominate.⁴⁸ Judges, legal scholars, historians, political scientists, and philosophers have long debated the fundamental and varied reasons why such engagement is essential to preserving and expanding democracy.⁴⁹ Consequently, the broader context of constitutional and civil rights is where the Engaged Judge model should predominate. Assuming that a significant number of federal judges may believe that the judiciary is tasked with preserving and expanding democracy, why do so few act upon it?

FACTORS COUNSELING AGAINST JUDICIAL ENGAGEMENT

One of the most prevalent reasons why the majority of judges cannot be described as "Engaged Judges" is judicial philosophy. For all judges, the overriding concern is, of course, maintaining the respect for the judiciary. Thus, the bedrock of judicial ethics is dignity, impartiality, and independence, because these principles preserve the public's trust in the judiciary.⁵⁰ These principles are

sibility for Justice in Criminal Courts, 46 HOFSTRA L. REV. 21 (2017). These state courts presume the judicial "activist" posture that is controversial in federal courts. *Id.*

45. See CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2007) (exploring factors driving federal judiciary decision-making).

46. U.S. Const. art. II, § 2, cl. 2.

47. Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* 147 (1978).

48. Roth, *supra* note 14, at 252.

49. Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 168 (2001).

50. *See id.*

essential to maintaining the rule of law and for protecting individual rights in a democracy.⁵¹ In order for judges to maintain independence and impartiality, they must be perceived to adjudicate matters based upon an application of what is viewed as “law” to the facts presented and not based upon ideological or personal perspectives. “Judges have no weapons, no armies. They depend on their moral authority.”⁵² If the public believed that judicial outcomes are not the result of independent and impartial reasoning, and thus are not objective resolutions, judicial opinions would lose their moral authority. Respect for the independence of the judiciary may rest upon an unacknowledged slender reed of trust, and judges, well aware of the tenuous nature of public trust, may resist the Engaged Judge model for fear that they will be perceived as partisan, rather than as objective adjudicators.

The quest to maintain judicial independence and impartiality is closely related to another rationale for why judges may avoid adopting the Engaged Judge model: the desire to maintain the distinction between law and politics. A judge who adopts a broad view of her role and expresses her views about a particular matter may be concerned that she will be perceived as acting akin to a politician, who is seeking to achieve a specific goal, rather than as a fair adjudicator.

The extent that this concern plays a significant role in judicial opinions is unclear. Political scientists and legal scholars have studied and opined about judicial decision-making for decades. Recent empirical research finds that the influences on judicial decision-making are “complex and multivariate.”⁵³ This literature examines various models of judicial decision-making, all of which point to mixed motives for the court’s opinions. Judicial philosophy is one of many variables.

The belief that judges merely follow the “law” was the predominate theory of judicial decision-making for many years. This theory was derived from the formalist view of the role and operation of the law, which was known as the “legal model.” The legal model posited that judges “bracketed out extraneous influences on their decision-making . . . to base their decisions upon applicable facts and law.”⁵⁴ The notion was that judges decide cases solely in accordance with legal rules that are uncontroversial principles.

51. *See id.*

52. Mark Alcott, *Defending Judges, Standing Up for the Rule of Law*, 90 N.Y. St. B. Ass’n J. 20, 20 (2018).

53. Geyh, *supra* note 43 at 4.

54. *Id.*

Flaws in the logic of the legal model became apparent because, for example, “[s]tatutes and constitutions are riddled with ambiguous language.”⁵⁵ Over time, the legal realist movement debunked formalism (and, thus, the legal model) and scholars acknowledged that judges use what are considered “extralegal factors,” such as a judge’s own ideology and personal characteristics in deciding cases.⁵⁶ Legal scholars worked with behavioral psychologists and developed an “attitudinal model” of decision making.⁵⁷ Its premise is that when judges say that they are merely following the law, the reality is that their decisions are actually influenced by their individual attitudes or ideological views. This attitudinal model was challenged, in turn, by the “strategic choice model.” This model theorized that judges seek to have their policy views implemented and recognize that this can only be accomplished with the support of other institutional actors.⁵⁸ Thus, judges’ opinions are strategic to accomplish long term policy goals. In other words, as Charles Gardner Geyh notes, judges’ “impulse to act upon their attitudes is tempered by savvy for the politically possible.”⁵⁹

Other theories of judicial decision-making abound. For example, some social psychologists argue that judges are driven by social acceptance and thus judicial decision-making is driven by the audiences that a particular judge seeks to convince or impress—i.e., fellow judges, higher courts, the bar, the public, or the media.⁶⁰ Another model, the economic model, suggests that judges are self-interested and seek to maximize their power, prestige, influence, income, and leisure. Thus, some judges may structure their decisions to increase their appointment to higher office.⁶¹

Perhaps the most cogent view explaining judicial decision-making is Judge Richard Posner’s view that judges are pragmatists; that is, they balance their discretion with pursuing traditional legal model

55. Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC’Y REV. 135, 137 (2006).

56. Frank B. Cross, *Law Is Politics*, in *WHAT’S LAW GOT TO DO WITH IT?* 92, 93 (Charles Gardner Geyh ed., 2011).

57. Geyh, *supra* note 43, at 5.

58. Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. OF L. & POL. 1 (2004); THOMAS H. HAMMOND ET AL., *STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT* (2005).

59. Geyh, *supra* note 43, at 2.

60. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR*, 21-24 (2006).

61. Geyh, *supra* note 43, at 3.

standards.⁶² The pragmatist judges seeks the “best” outcome which is a combination of common sense, respect for precedent, and an appreciation of society’s needs.⁶³

Needless to say, these varied theories do not provide a consensus that explains how and why judges decide cases as they do and why certain judges tend to be engaged judges or speak out more than others. But this research clearly demonstrates that external factors, in addition to “law,” play a role in judicial decision-making. Furthermore, these competing models are intertwined with an effort to discern what judges mean by law and how law differs from politics and political decisions. This fundamental issue—how is law different from politics—drives a good deal of the scholarly discussion about the role of judges and the perspectives of members of the judiciary. Scholars acknowledge that law cannot readily be separated from politics because politics is the “art and science of government” and the judiciary is a part of the government.⁶⁴ As Judge Posner noted, “law is shot through with politics.”⁶⁵ And other scholars note that “[b]ecause the judicial system is part of our government, it is a central part of our politics.”⁶⁶

The relationship between law and politics is blurry and often context-dependent.⁶⁷ Laws are often written broadly so that discretion is inevitable. Consequently, ideological or other influences are embedded in judicial decision-making.⁶⁸ But, acknowledging that the exercise of judicial discretion has political aspects does not infer that judges lack independence, nor does it diminish the importance of adjudicating disputes based on “law.” This is because judges are a different kind of “political” than legislators, and their decisions are subject to different constraints. So long as the judge exercises discretion within a reasonable range as defined by rules and norms of the courts and decides the case based on applying the

62. RICHARD A. POSNER, *HOW JUDGES THINK* 230 (2008).

63. Geyh *supra* note 43, at 105-06.

64. Cross, *supra* note 56, at 91.

65. Posner, *supra* note 62, at 9.

66. Cross, *supra* note 56, at 92-93. Some argue that law is simply a subset of politics, that is, law incorporates room for judicial discretion and the discretion judges engage in is influenced by their political ideology. In such case, judicial discretion permits judges to be pragmatic and make decisions they believe to be sound.

67. See Baum, *supra* note, 60, at 118-27 (arguing that law and policy are too intertwined to disentangle and to attempt to do so is misdirected).

68. See Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT’S LAW GOT TO DO WITH IT?* (Charles Gardner Geyh ed., 2011).

law to the facts, the judge acts within the scope of his or her authority. A judge's decision may advance a particular ideological commitment, but adjudicating a dispute is a presumptively fact-driven evaluation. Ultimately, what matters, or should matter, is "whether implementing an ideological preference is the judge's conscious motive or is simply a subconscious effect of decision-making."⁶⁹

Thus, a judge can write or speak out about an issue as long as the expression of that view does not determine the outcome of the case. For example, if the law is clear, judges are duty-bound to follow precedent. Judges may express their disagreement with applicable precedents, but they are nevertheless required to uphold these precedents. Famously, in the antislavery cases noted by Professor Roth, judges made plain their personal views about the abhorrence of the fugitive slave laws, but nevertheless followed the law.⁷⁰ In one of the more remarkable judicial speeches, Judge Joseph Rockwell Swan enforced fugitive slave laws even as he advocated against them:

As a citizen I would not deliberately violate the Constitution or the law by interference with fugitives from service; but if a weary, frightened slave should appeal to me to protect him from his pursuers, it is possible I might momentarily forget my allegiance to the law and the Constitution and give him a covert from those who were upon his track. There are, no doubt, many slaveholders who would follow the impulses of human sympathy; and if I did, and were prosecuted, condemned and imprisoned, and brought by my council before this tribunal on a habeas corpus, and were there permitted to pronounce judgment in my own case, I trust I should have the moral courage to say, before God and country, as I am now compelled to say, under the solemn duties of a judge, bound by my official oath to sustain the supremacy of the Constitution and the law, **THE PRISONER MUST BE REMANDED.**⁷¹

More recently, Judge Jack B. Weinstein defended the "unredeemable" even though he was required to send them to prison.⁷² Case law is replete with such cases.⁷³

There is certainly a consensus that the lack of fidelity to existing law and the tailoring of judicial decisions to a judge's ideolog-

69. Geyh, *supra* note 43, at 5.

70. Roth, *supra* note 14, at 229.

71. *Ex Parte Bushnell*, 9 Ohio St. 77, 188-89 (1859).

72. Alan Feuer, *This Judge Defends 'Unredeemables' Even as He Sends Them to Prison*, NY TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/nyregion/this-judge-defends-unredeemables-even-as-he-sends-them-to-prison.html>.

ical convictions are outside the bounds of acceptable judicial decision-making. But in many cases, laws are ambiguous, and judges are required to exercise discretion in interpreting the ambiguous language. This is where judicial philosophy matters. When exercising judicial discretion, the degree to which a judge's individual decision is bound by other factors is often a matter of degree, and "empirical research has clearly demonstrated that judicial ideology is a statistically significant determinant of judicial outcomes."⁷⁴

Judges need to ensure that they do not act akin to politicians by letting political ideologies dictate the outcome of cases. But judges may state their opinion about a law, as exemplified by Judges Swan and Weinstein, without crossing the law-versus-politics boundary. Furthermore, when judges exercise discretion they must do so within the confines of applicable constraints. If done properly, opining about social issues and exercising judicial discretion do not undermine impartiality and independence. Nevertheless, the vast majority of judicial decisions are confined to the discussion of legal principles and existing law, even though empirical data establishes that individual judicial proclivities play an important role when the law is less determinate. A key example is that after the Sentencing Guidelines provided clarity, inter-judge variations in sentencing dropped because judges were required to follow the guidelines, even though many judges disagreed with the Sentencing Guidelines.⁷⁵ Expressing a viewpoint about the Sentencing Guidelines would not undermine a judge's objectivity in applying the guidelines, but the perceived need to maintain the veil that outcomes are driven solely by "law" prevails. Legitimacy is perceived to depend upon it. This perception influences judicial philosophy and may weigh against "judicial engagement."

In addition to judicial philosophy and the need to maintain the distinction between law and politics, judges may avoid becoming "Engaged Judges" because of their personalities. Judges are a particularly cautious group. Judges are people who have "perfected the art of avoiding controversy."⁷⁶ As former Judge Nancy Gertner candidly acknowledges, judges are timid and driven more by calen-

73. For example, Bernard Meyer wrote an extraordinary opinion in *Engel v. Vitale*. 191 N.Y.S.2d 453 (1959). See David M. Schimmel, *The Battle over School Prayer: How Engel v. Vitale Changed America*, 116 AM. J. EDUC. 453, 455 (2010).

74. Cross, *supra* note 56, at 92.

75. Cross, *supra* note 56, at 110.

76. Nancy Gertner, *Opinions I Should Have Written*, 110 N.W. U. L. REV. 423, 432 (2016).

dar control than fairness. “The notion is to decide matters as narrowly as possible” Such a cautious approach may enhance judges’ reputations and the role of the courts.⁷⁷

Of course, in addition to judicial philosophy, personality, and other factors, a judge’s predisposition toward the facts may be determinative in a case. Credibility evaluation of witnesses is affected by a judge’s background, personality, and various individual factors. As an anonymous district court judge said: “Give me some ambiguous facts and I will tell you what the justice is.” Most judges, however, are not this forthcoming or do not adopt a similar view. It is unclear whether individuals with cautious temperaments are more likely to pursue a career as a judge, or whether restrained decision-making is a byproduct of the role of being a judge. Nevertheless, the judiciary is not the home of changemakers.

Unlike the majority of federal judges, Engaged Judges are not afraid to express their viewpoints about social issues and help advance social change. Their individual reward systems play a significant role in their approaches to judicial decision-making. For example, Judge Weinstein, who serves as perhaps the iconic and legendary Engaged Judge, does what he considers the right thing, no matter the consequences. He notes that virtue is its own reward.⁷⁸ Many Engaged Judges seemingly appear to adopt this perspective and exercise discretion as they deem necessary and appropriate.⁷⁹ They are not the judges, described by former Judge Gertner, who seek to duck, evade, or avoid deciding cases. Engaged Judges are willing to take positions and speak out, even at the risk of reversal or public disapproval. Even though others may view these judges as pathbreakers, for better or worse, Engaged Judges believe that they are doing justice. For example, Judge John Coughenour of the Western District of Washington, who presided over the trial of the Ahmed Ressam, the “Millennium Bomber,” sentenced him to twenty-two years.⁸⁰ During Ressam’s sentencing, Judge Coughenour, a Reagan appointee, made an emotional speech unleashing “a broadside against secret tribunals” and other war on terrorism tactics that abandoned “the ideals that set our na-

77. *Id.*

78. Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, NY TIMES (May 28, 1991), <https://www.nytimes.com/1991/05/28/nyregion/jack-weinstein-creative-us-judge-who-disdains-robe-and-high-bench.html>.

79. In part, this may be that these judges do not seek to, or they recognize that they will not, be appointed to the appellate bench.

80. U.S. v. Ressam, No. CR99-666C-001, 2005 Westlaw 6582294 (W.D. Wash. 2005).

tion apart.”⁸¹ The sentence issued by Judge Coughenour was ultimately reversed and remanded by the Ninth Circuit because, under the Sentencing Guidelines, Ressam should have received at least sixty-five years. On remand, Judge Coughenour again imposed a sentence of twenty-two years to the ire of the government.⁸² The sentence was appealed and remanded for a second time, and this time the case was remanded to a different judge for resentencing.⁸³ While Judge Coughenour’s initial sentence did not stand, his critique of secret tribunals endured because he was willing to assert his independence despite the Circuit Court’s disapproval.

Similarly, Judge Shira Scheindlin, in a much-criticized series of actions by the Second Circuit, was removed from the “stop and frisk” case, ostensibly for improper application of a “related case” rule and because of a series of newspaper articles that were not even in the record before the Second Circuit.⁸⁴ The Second Circuit opined that interviews she gave to the media, even though they did not discuss the case, cast doubt upon her impartiality.⁸⁵ The case was perceived to be a political football, with the New York City Mayor’s Office and its counsel consistently casting aspersions on the judge.⁸⁶ Judge Scheindlin, with support of counsel and various lawyers and law professors, clashed with the Circuit over its findings and remedy.⁸⁷ She remained an Engaged Judge.

Justice, not mere “law,” drives the decisions of Engaged Judges. But these judges do not rule based on ideology alone. Their deci-

81. Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, SEATTLE TIMES (July 28, 2005), https://web.archive.org/web/20070101213103/http://seattletimes.nwsourc.com/html/localnews/2002406378_ressam27m.html [<https://perma.cc/333S-8BZ5>]. Judge Coughenour then wrote an op-ed criticizing former judge and Attorney General appointee Michael Mukasey’s view that the U.S. Courts are not a safe and proper forum in which to try terrorism cases. See John C. Coughner, *How to Try a Terrorist*, NY TIMES (Nov. 1, 2007), <https://www.nytimes.com/2007/11/01/opinion/01coughenour.html>.

82. Kirk Johnson, *New Sentence is Imposed in Bomb Plot from 1999*, NY TIMES (Oct. 24, 2012) <https://www.nytimes.com/2012/10/25/us/millennium-bomber-sentenced-to-37-years-in-prison.html>.

83. *U.S. v. Ressam*, 679 F.3d 1069 (9th Cir. 2012).

84. *Ligon v. New York City*, 538 F. App’x. 101 at 102-03 (2d Cir. 2013).

85. *Id.*

86. Benjamin Weiser; *Shira Scheindlin, Judge Behind Stop-and-Frisk Ruling, Will Step Down*, NY TIMES (Mar. 23, 2016) <https://www.nytimes.com/2016/03/24/nyregion/shira-scheindlin-judge-behind-stop-and-frisk-ruling-will-step-down.html>.

87. Benjamin Weiser, *Departing Judge Offer Blunt Defense of Ruling in Stop-and-Frisk*, NY TIMES (May 2, 2016) <https://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html>.

sions are well-reasoned and are based on law.⁸⁸ They maintain judicial independence and act impartially while also advancing their justice missions.

JUDICIAL ENGAGEMENT THROUGH PUBLIC DISCOURSE

Judges also have the opportunity to effectuate change through their role as public figures. While judges often speak outside the courtroom, at conferences and at other professional events, most of these talks do not involve advocacy of particular causes or positions. For example, Judge Learned Hand often gave talks, but most of his talks were about judicial restraint and not advocacy of various positions. Aside from certain restrictions, such as the prohibition against commentary in pending and impending cases,⁸⁹ a judge's role does not prevent engagement in the causes and controversies of the day. For example, Judge Louis Pollak made numerous speeches and participated on panels about issues of importance, including the role of religion and religious institutions in public life.⁹⁰ Furthermore, judges who are locally elected often run for reelection based upon their previous opinions, and their electioneering often consists of speeches advocating for the righteousness of their decisions.⁹¹

One factor that may deter federal judges from engaging in such advocacy is the concern with the public's perception about the impartiality of judges. But, there is no clarity about the extent to which a judge's public discourse has a harmful effect upon that perception. In fact, such public discourse may enhance the public's

88. See Frank Sullivan, Nancy Vaidik, & Sarah Evans Barker, Three Views from the Bench, in *WHAT'S LAW GOT TO DO WITH IT?* 328 (Charles Gardner Geyh ed., 2011).

89. MODEL CODE OF JUD. CONDUCT, r. 2.10 ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."); see also *Republican Party v. White*, 536 U.S. 765, 788 (2002) (holding that a Minnesota rule limiting campaign speech violates the First Amendment).

90. See, e.g., Symposium, *Brown v. Bd. of Educ.*, 61 *FORDHAM L. REV.* 19 (1992), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2996&context=flr>; Samuel J. Silverman, *Louis H. Pollak*, 127 *U. PA. L. REV.* 311, 311 (1978); Dennis Hevesi, *Louis H. Pollack, Civil Rights Advocate and Federal Judge, Dies at 89*, *NY TIMES* (May 12, 2012), <http://www.nytimes.com/2012/05/13/us/louis-pollak-judge-and-civil-rights-advocate-dies-at-89.html> [<https://perma.cc/UFP2-9AFT>].

91. Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Anti-Democratic Myths*, in *WHAT'S LAW GOT TO DO WITH IT?*, 226 (Charles Gardner Geyh ed., 2011).

view about the role of the court and about its independence and impartiality. Judge Jed Rakoff's statement that it is the judiciary's responsibility to end mass incarceration and his various published essays engage and educate the public.⁹² Judge Block's recent call to end prosecutorial immunity spotlighted a longstanding and key issue in the country's quest to address wrongful convictions of the innocent.⁹³ None of these public opinions necessarily have an impact upon any of these judges' ability to be impartial in future cases and to apply facts to law. The type of public advocacy that Judge Rakoff and Judge Block have engaged in does not undermine the public's respect for the judiciary and is consistent with the letter and spirit of the Code of Judicial Conduct.

However, if a vast majority of the federal judiciary consistently gave such speeches and published opinion pieces about their ideological views, the perception of the judicial role is likely to shift. Perhaps it will shift in a positive direction with the public having a greater respect for the judiciary and the role of law, but the fear is otherwise. The judiciary, the bar, and some scholars worry that greater public advocacy will call the judiciary's legitimacy into question.⁹⁴

Of course, one must ask: what is legitimacy, and whose view of legitimacy matters? Legitimacy is the "political capital" that institutions need "in order to be effective to get their decisions accepted by others and be successfully implemented."⁹⁵ Respect for the judiciary hinges upon a "veil of law" where the public has a reservoir of good will for the courts because the public believes that the institution has the right to make certain decisions.⁹⁶ Courts are generally perceived to be weak institutions because they have neither the power of the sword (police agencies) nor the power of the purse (the treasury).

The core of the judiciary's legitimacy is the judiciary's social contract with the public. In accordance with this social contract, the

92. Joel Cohen, *Do Judges Contribute To Injustices? A Conversation with Judge Jed Rakoff*, ABA JOURNAL (April 13, 2017) http://www.abajournal.com/news/article/judge_jed_rakoff_joel_cohen_broken_scales [<https://perma.cc/6N2F-BAD5>].

93. Frederic Block, *Opinion, Prosecutors Aren't Above the Law: Gov. Cuomo Must Sign Legislation Creating an Oversight Commission*, NY DAILY NEWS (July 30, 2018) <http://www.nydailynews.com/opinion/ny-oped-prosecutors-arent-above-the-law-20180726-story.html>.

94. Roth, *supra* note 14.

95. James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT'S LAW GOT TO DO WITH IT?* 281, 283 (Charles Gardner Geyh ed., 2011).

96. Gibson, *supra* note 95, at 283-84.

public trusts the judiciary to rely on its expertise in rendering decisions by carefully considering the facts and applying law to those facts.⁹⁷ Thus, the judiciary relies upon the public's perception that courts are fair, impartial, and act in accordance with the rule of law. This perception that judges are impartial is in part dependent upon the view that judges are independent from the political branches of government.⁹⁸ However, it is unclear whether the public would in fact lose trust in the judiciary if judges were to engage in advocacy through public discourse.

Typically, the bar and the bench are self-referential and view their own perception of judicial legitimacy as the benchmark for the system's legitimacy. Thus, the aforementioned fear associated with increased judicial public advocacy may reflect judges' views, but the public may believe otherwise. Extensive data reveals that the public has mixed views of judges as arbiters of the law or as political actors influenced by their ideology.⁹⁹ Citizens have diverse understandings and expectations of courts that do not mirror the way in which lawyers and judges perceive judicial legitimacy. In a 2006 study, citizens of Kentucky were asked about their expectations of a good Supreme Court justice. The results of this study indicated that the public expected a good judge to protect people without power (72.9% of respondents), strictly follow the law (71.8%), and state policy positions during campaigns (64.2%).¹⁰⁰

This study demonstrates that citizens have a confused and inconsistent view of judges and their roles. For example, "strictly following the law" is not always consistent with "protecting people without power."¹⁰¹ Interestingly, these results did not vary based upon the respondents' educational backgrounds or their knowledge about the judicial function.¹⁰² However, one significant variance based on the education level of the respondents was the extent to which judges should be "more than politicians in robes."¹⁰³ Respondents with lower levels of education believed that

97. Gibson, *supra* note 95, at 284.

98. Gibson, *supra* note 95, at 283-84.

99. Keith Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in *WHAT'S LAW GOT TO DO WITH IT?* 306, 307, 312-14 (Charles Gardner Geyh ed., 2011); Gibson, *supra* note 95, at 281.

100. Gibson, *supra* note 95, at 289.

101. *Ex Parte Bushnell*, *supra* note 71; Feuer, *supra* notes 72. Years ago, Judge Rockwell made plain his contempt for fugitive slave laws even though he was constrained to enforce them. Similarly, Judge Weinstein criticized the treatment of an indigent criminal defendant even though he was required to send him to prison.

102. Gibson, *supra* note 95 at 294.

103. *Id.*

judges should represent majority opinions, implement majority ideology, and perhaps reflect their own partisanship.¹⁰⁴ Conversely, respondents with higher levels of education believed that the judiciary is worthy of respect when it exercises discretion in making independent and principled judgments.¹⁰⁵

Given this important disparity in the respondents' perspectives, disagreement about the effect that public commentary by judges will have on the legitimacy of the judiciary is likely. As scholar James L. Gibson notes, "to the extent that popular confidence in the judiciary is a standard for evaluating the behaviors of judges, we must be aware that the sources of confidence are disparate and perhaps even contested, and that popular and elite expectations of judges may not be consonant."¹⁰⁶ Some citizens may prefer to know a judge's views. Additionally, some citizens may view Judge Judy or similar television personae as the embodiment of a legitimate judge. For some, Judge Judy is the face of the law and she expresses her views clearly.

But "legal elites" perceive independence and impartiality from a different vantage point. "Legal elites" likely believe that if judges were to engage in public advocacy, there will be a tendency for the public to perceive that judges are merely acting as another branch of politics by seeking to implement their political views. Furthermore, "legal elites" likely fear that if lawyers and judges were to explain the nature and process of judicial decision-making, and the effects that various external factors have upon a court's decision, respect for the courts will be eroded. Because "legal elites" have these beliefs and because there is not a clear consensus among citizens, there is not a definitive approach to whether judges should publicly acknowledge their ideological predispositions and views. To some, judges' speeches and articles may promote the long-term legitimacy of the federal judiciary, but to others, judicial public advocacy may produce the opposite effect.

CONCLUSION

Overall, increased public education about the role of the judiciary is essential. It is important for judges to educate the public about the legal system and the role that the judiciary plays in our democracy. Public awareness about the significant impact judicial decisions can have upon daily lives is essential. Justice Sotomayor's

104. Gibson, *supra* note 95 at 295.

105. *Id.*

106. Gibson, *supra* note 95, at 299.

numerous talks about the legal system have been inspirational to young and old alike, especially about her background, career, and role on the bench.¹⁰⁷ Judges can also educate the public about the meaning of “impartiality.” Our judicial system is predicated on the notion that judges do not decide cases based upon ideology, but there is little, if any, public acknowledgement that ideology plays a role in decision-making. This lack of public awareness can lead to public cynicism, because the public may believe, upon finding out that ideology does play a role in judicial decision-making, that judges are influenced solely by ideology and are therefore not impartial. Consequently, the public needs to understand the difficult task of judging and the role played by various factors including ideology. Impartiality is not the absence of ideology. It is a recognition that ideology may influence a judge, but that the court is cognizant of that influence and can render a fair decision upon the matters presented, regardless of ideological proclivities.¹⁰⁸

Beyond public education about the role of courts and judicial decision-making, judges need to carefully evaluate the extent to which they should offer their ideological perspectives. Judges must consider the extent to which public advocacy might be perceived as having an impact upon a future case. Some members of the public may view both Judge Rakoff’s statements about judicial responsibility to end mass incarceration and Judge Block’s opinion piece about prosecutorial immunity, as compromising their independence. Despite the fact that both judges can and would render fair decisions, there may be a perception that they lack impartiality in cases that relate to their public advocacy. This would be unfortunate because their discourses serve an important purpose. Judges should not feel constrained to educate the public, but the decision to do so and the content of the public discourse must be carefully tempered in light of the potential perception that a judge has prejudged a particular matter in accordance with the judge’s viewpoint.

Encouraging a more engaged judiciary in the public sphere is likely to be controversial in the current political and judicial climate. Nevertheless, there is certainly a need to reevaluate the traditional model of discouraging judicial advocacy within and outside

107. See, *e.g.* Justice Sonia Sotomayor, Associate Justice for the United States Supreme Court, NYU Commencement Speech (May 16, 2012).

108. MODEL CODE OF JUDICIAL CONDUCT Terminology (2011) (defining impartiality as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before a judge”).

the courtroom. Perhaps the United States has entered a new era where the federal judiciary will be significantly changed and seemingly hopelessly politicized. The cynical and disturbing failure of the Senate to appoint Merrick Garland, by all accounts a fair and open-minded jurist,¹⁰⁹ was shocking. Judge Garland was universally applauded as a person of impeccable integrity and fairness who:

[i]s obviously brilliant but lacks arrogance and that is refreshing. . . . What makes him uniquely well qualified is that he has tried cases both as a prosecutor and as a defense attorney. It is an important qualification for service on the Supreme Court. . . . The fact that Judge Garland has tried cases makes him unique. He writes thoroughly reasoned opinions whether you agree with him or not.¹¹⁰

Despite his remarkable qualifications, Senator Mitch McConnell blocked consideration of Judge Garland's nomination.¹¹¹ Instead, Leonard Leo, the conservative legal activist who is the executive Vice President of the Federalist Society and an adviser to the Trump Administration on court appointments, led the conservative movement to quickly appoint a stunning number of federal judges, to date: two Supreme Court appointments and eighty-three lower court appointments to the bench of jurists.¹¹² The conservative movement calls this a "promising reorientation of the judiciary."¹¹³ The American Bar Association ("ABA"), on the other hand, gave four recent federal court nominations an unqualified rating, including Leonard Grasz for the Eighth Circuit.¹¹⁴ The ABA

109. Greg Jaffe, *ABA Endorsement Suggests Merrick Garland May Be 'The Perfect Human Being,' Republicans Raise Doubts.*, WASH. POST (June 21, 2016).

110. STATEMENT OF KAROL CORBIN WALKER ON BEHALF OF THE STANDING COMMITTEE ON THE FEDERAL JUDICIARY AMERICAN BAR ASSOCIATION CONCERNING THE NOMINATION OF THE HONORABLE MERRICK B. GARLAND TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES TO THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE (June 21, 2016).

111. Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, NY TIMES MAG. (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html>.

112. *The Judicial Puppet Master*, U.S. NEWS (Oct. 27, 2017), <https://www.usnews.com/news/the-report/articles/2017-10-27/leonard-leo-is-calling-the-shots-on-judicial-appointments>; Edward Whelan, *Trump's Stellar Judges*, NAT. REV. (Jan. 22, 2018), <https://www.nationalreview.com/magazine/2018/01/22/trumps-stellar-judicial-nominations/> [<https://perma.cc/B5L8-ZQFR>].

113. Edward Whelan, *Trump's Stellar Judges*, NAT. REV. (Jan. 22, 2018), <https://www.nationalreview.com/magazine/2018/01/22/trumps-stellar-judicial-nominations/> [<https://perma.cc/B5L8-ZQFR>].

114. Editorial Board, *Some of Trump's Judicial Nominees May Be Unfit. The Senate is Rushing Them Through Anyway.*, WASH. POST (Nov. 8, 2017), <https://>

questioned whether Grasz would follow the law and said that he would be unable “to separate his role as an advocate from that of a judge.”¹¹⁵ The ABA noted that: “Mr. Grasz’s passionately-held social agenda appeared to overwhelm and obscure the ability to exercise dispassionate and unbiased judgment. In sum, the evaluators found that temperament issues particularly bias and lack of open-mindedness were problematic.”¹¹⁶

This is unparalleled. The notion that federal judges will be appointed, who are rated unqualified because they do not follow the law, is disturbing.¹¹⁷ Fair-mindedness seems to be an unimportant characteristic in today’s political climate, and therefore federal trial courts around the country may become filled with ideologues.¹¹⁸ Perhaps some of these newly appointed jurists will be more than “radicals in robes,” who alter constitutional values and tradition and uphold the principles of *stare decisis*. That remains to be seen.

Engaged Judges have played an important role in advancing liberty and equality for all. Furthermore, increased judicial engagement may help the public realize that judicial decisions have important implications for criminal and civil liberties and may garner support for the preservation of these rights.

Overall, the legitimacy of the judiciary and the preservation of the tenuous balance between the branches of government requires the judiciary to reaffirm its commitment to the role of law and to the impartiality of its judges. Within these constraints, judges should adopt the model of the Engaged Judge and promote greater democracy and respect for civil and constitutional rights within

www.washingtonpost.com/opinions/many-of-trumps-judicial-nominees-may-be-unfit-the-senate-is-rushing-them-through-anyway/2017/11/08/358ccd50-c4c2-11e7-aae0-cb18a8c29c65_story.html?utm_term=.ac5425a7bf20.

115. SUPPLEMENTAL STATEMENT OF PAMELA A. BRESNAHAN, CHAIR, CYNTHIA E. NANCE, EIGHT CIRCUIT REPRESENTATIVE, AND LAURENCE PULGRAM, NINTH CIRCUIT REPRESENTATIVE ON BEHALF OF THE STANDING COMMITTEE ON THE FEDERAL JUDICIARY AMERICAN BAR ASSOCIATION CONCERNING THE NOMINATION OF LEONARD STEVEN GRASZ FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT SUBMITTED TO THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE 6 (Nov. 13, 2017).

116. *Id.*

117. See generally Seung Min Kim, *ABA Deems Another Trump Judicial Nominee ‘Non-Qualified’*, POLITICO (Oct. 30, 2017), <https://www.politico.com/story/2017/10/30/aba-trump-judicial-nominee-not-qualified-244327> [<https://perma.cc/4F9B-8D8U>].

118. Erwin Chemerinsky, Opinion, *Many of Trump’s Judiciary Picks Have No Business Being Judges. Can Senate Republicans Say No?* SACRAMENTO BEE (Nov. 20, 2017), <http://www.sacbee.com/opinion/california-forum/article185689663.html> [<https://perma.cc/ED5M-P25D>].

their opinions. Outside of the courtroom, judicial speeches and articles can have immense value, but must be conducted carefully. The judiciary has a critical role to play in enhancing the public's understanding of the judiciary's role and the meaning of impartiality, which affect the public's respect for the judicial system.