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To Speak or Not to Speak: Musings on Judicial Silence

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TO SPEAK OR NOT TO SPEAK: MUSINGS ON JUDICIAL SILENCE

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There are three branches of government in the American system, but only two branches may speak forthrightly to the public and participate in the political dialogue. The executive and the legislature criticize each other, and their third branch, the judiciary, virtually without limitation. The judiciary, more reticent by temperament and rule, is supposed to speak only through formal opinions, general discourses on the administration of justice, and the occasional scholarly talk or article.

In the past, this arrangement made institutional sense. The executive and the legislature were elected, and directly accountable to the public. They had to participate in the political process, with all the tools at their disposal. The federal judiciary, appointed for life, did not have to speak outside of its usual channels of communication.[1] The pressures to "announce" one's views on a host of legal views—pressures which elected judges felt—were or should be irrelevant to federal judges with life tenure.

The arrangement even made political sense: While judges have been criticized, even attacked throughout our history, it is fair to say that the institution as a whole and surely individual judges were respected, for the most part. That respect was obviously essential; the legitimacy of the institution rested on it.[2]

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1. Elected judges obviously involve a different problem. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that Minnesota Supreme Court's canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment).

2. The power of judges, Alexis de Tocqueville observed, "is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 90 (J. Mayer & M. Lerner eds. 1966).

Recent trends, however, challenge old approaches to judicial speech. I offer a few preliminary observations although my evidence is anecdotal; more research and more data is necessary to test whether the apparent changes are real. The media has dramatically changed. There is unparalleled interest in trials, indictments, and sentencings, and "24/7" coverage. Judicial decisions have become the subject of political campaigns; criminal justice issues—who is "soft on crime," who is not—are fodder for politicians as well as for the hosts of talk shows. And the gloves are off in these discussions. There are unbridled attacks on judges not only by the media, but by legislators, outraged by this or that decision. Bills are proposed whose sole purpose is to strip the courts of power. Judicial selection—even in states that do not elect their judges—has become more and more politicized.[3]

Historians may say that there is nothing new here.[4] There were the "Impeach Earl Warren" stickers, Roosevelt's court packing, etc., and historians may well be right. The differences I describe may not be qualitative, but quantitative.[5] Changes in the media may provide a megaphone to the usual debates about judges, now to a degree and at a decibel level never before seen. New outlets, the internet for one, may well exacerbate the trend.[6]

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3. *See* Gerald E. Rosen, *Distinguished Brief Award Speech: Remarks of Judge Gerald Rosen, Thomas M. Cooley Law School Distinguished Brief Award Banquet: Judicial Independence in an Age of Political and Media Scrutiny (July 19, 1997)*, 14 T.M. COOLEY L. REV. 685, 691 (1997) (noting "judges, with our guarantee of life tenure, financial security, and no obligation to reflect public opinion, make a choice target for political spinmeisters, radio talk show hosts and attack ad operatives, particularly since the Cannons [sic] of Ethics prohibit us from joining in the political fray and fighting back.").

4. Roscoe Pound stated in his 1906 speech, "Dissatisfaction with the administration of justice is as old as law." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), *reprinted in* 8 BAYLOR L. REV. 1, 6 (1956). Indeed, even the Federalist Papers predicted public criticism of federal judges. Hamilton writes that judges would sometimes be plagued by "the effects of those ill humors, which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves." THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. *See generally* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997). *See also* Andrew Cohen, *The Dangers of Holding Judges in Contempt*, WASH. POST, July 7, 2002, at B02 ("It's hard to remember a time in our recent history when federal judges were subjected to so much disrespect and vitriol from virtually every corner of America. It's not a good sign."); ABA COMM. ON SEPARATION OF POWERS AND JUD. INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997) (describing the tenor of recent attacks on judges and the courts as characterized by "an unfortunate shrillness"), *available at* www.abanet.org/govaffairs/judiciary/report.html (1997).

6. As one commentator noted, improvements in technology means that attacks on judges spread more quickly and reach further. Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 PA. B.A. Q. 60, 62 n.15 (2001) (citation omitted).

I do not make these observations because I believe for a moment that judges should not be criticized. Far from it. We are public figures; we are accountable to the public.[7] Nor do I address in this piece very important concerns about the impact of these developments on judicial independence.[8] Finally, this is not a paean for judicial entitlement to the same "free speech" rights as other officials. Plainly, the unique obligations of the judicial role require unique restrictions on speech and association.

Rather my focus here is simply on the impact of judicial silence on the public debate in a host of areas, especially given the cacophony of other speakers. Judicial silence in the face of public "vitriol"[9] not only has an impact on the respect given to the institution, but also on legislation dealing with the administration of justice in general, on criminal justice issues in particular. I postulate the following scenario: If you don't trust the judge, you don't trust what he or she decides; if you don't trust what he or she decides, you either will not obey it[10] or, more likely, you will turn to the political branches to change the rule on which that decision was based, or keep judges entirely away from the issue. One result—changes in legislation, often with broad ranging implications like ever more punitive criminal punishments,[11] efforts to restrict the rights of classes of individuals, more and more court stripping bills.[12]

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7. As Justice Brandeis noted: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Cynthia A. Williams, *The Securities & Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1212 (1999) (quoting RICHARD M. ABRAMS, INTRODUCTION TO LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1967)).

8. For a discussion of the impact of this trend see Rosen, *supra* note 3.

9. Cohen, *supra* note 5.

10. As President Andrew Jackson was reported to have said, as to a decision of the Supreme Court, "John Marshall has made his decision. Now let *him* enforce it." ARCHIBALD COX, THE COURT AND THE CONSTITUTION 14 (1987).

11. In a symposium, I suggested that federal mandatory minimums and sentencing guidelines were a direct result of judges not being accountable or explaining their reasoning for imposing particular sentences. *See* Nancy Gertner, Address at University of Southern California Law School's Judicial Independence and Accountability Symposium, Program & Webcast Archive, *available at* http://www.usc.edu/dept/law/symposia/judicial/program.html (last modified Nov. 21, 1998).

12. *See, e.g.*, Rosann Greenspan, *Gaining Public Trust in the Criminal Legal Process*, 66 S. CAL. L. REV. 2199, 2100 (1993) (arguing for an affirmative obligation of judges to educate the public about "constitutional values" and the "limits of punishment"); Tyler, *supra* note 5, at 874 (arguing that public dissatisfaction with the legal system leads to efforts to take authority away from the legal system, including such efforts as the "three strikes you are out" initiative, which limited judicial sentencing discretion). Nevertheless, I do not mean to suggest that popular punitiveness has

I want to consider how judges can contribute to the public debate and in so doing, to reexamine the rules governing judicial speech. It may well be argued that respect for the judiciary now must be earned; it can no longer be assumed. The issue is not *whether* judges should speak—we plainly have to—but *when* and more importantly *how*. The old ways of speaking by judges and courts cannot compete with the new ones. We have to do more. Precisely what, is the question.

I will first describe the disciplinary rules and statutes that impact on judicial speech. For the most part, judges are supposed to speak through their opinions. With certain limitations I describe, they are supposed to eschew speaking directly to the public. I will then describe the changes in the media coverage of legal issues, and their impact on the public and political debate. I conclude that the rules and statutes have not only failed to reflect the changing times, but recent judicial practices have exacerbated the problems: At the district court level, there is a premium on alternative dispute resolution rather than adjudication and writing decisions. At the appellate level unpublished decisions proliferate; there is continuing judicial resistance to cameras in the courtroom; and these trends are exacerbated by the application of the federal sentencing guidelines, which has transformed the public ceremony of criminal sentencing into the judicial equivalent of announcing a software code.

One caveat and one admission at the outset. The caveat: I have no concrete proposals. I wish only to focus a new debate in the face of these new realities. The admission: I speak from personal experience. I have spoken to the press in a number of settings, with mixed results.[13]

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stemmed only from a decline in the legitimacy of courts or an anti-judge bias. Its causes are more complex.

13. I, along with a number of other judges, have spoken out on the federal sentencing guidelines. *See, e.g.*, Thanassis Cambanis, *Sentencing Law Targets U.S. Judges in Massachusetts*, BOSTON GLOBE, May 30, 2003, at A1. I have also spoken out on the drug war. *See* Nancy Gertner, Remarks at Volunteer Committee of Lawyers Forum, *Is the Drug War Forever?* (Jan. 29, 1999) *available at* http://www.vcl.org/Judges/Gertner_J.htm. I have written "op-ed" pieces, most recently one on community confinement. *See* Nancy Gertner, Editorial, *Too Little Second Chances for Prisoners*, BOSTON GLOBE, Jan. 25, 2004, at H11. At the same time, my efforts to correct a factual error in public statements made by counsel in a case before me were less successful. *See In re* Boston's Children First, 244 F.3d 164, 167-71 (1st Cir. 2002). To make certain that I do not skew this account, I quote from the Court's description of the facts:

> [O]n July 26, the Boston Herald printed an article in which counsel for petitioners decried the district court's failure to immediately certify a class. Counsel made the provocative claim that "if you get strip-searched in jail, you get more rights than a child who is of the wrong color," a reference to the facts of the Mack case. Dave Wedge, Lawyer Fights School Ruling, Boston Herald, July 26, 2000, at 5. The article said that:
>
> According to [counsel's] motion, Gertner refused to hear arguments to expand the

> school suit to a class action because the affected students may no longer have standing in the case. But in the strip-search case [Mack], Gertner held just the opposite opinion.

Id. The article then noted that "Gertner could not be reached for comment." Id.

In a July 28, 2000 letter to the Herald (with copies sent to both parties), Judge Gertner responded to what she viewed as inaccuracies in the July 26 article. She noted, correctly, that she had not denied class certification, but had postponed ruling on class certification until further discovery had occurred. She also noted that, as of the date of the reporter's interview with counsel, counsel for petitioners had not yet filed the motion in question. She included with the letter a copy of her procedural order providing for a hearing on class certification after the issue of standing had been resolved.

On August 4, 2000, the Herald published a follow-up article, which, based on a telephone interview with Judge Gertner, quoted her as saying:

> In the [Mack] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. This is a more complex case.

Dave Wedge, Race-based Admissions Case To Be Heard, Boston Herald, Aug. 4, 2000, at 24. . . .

Based on Judge Gertner's comments as reported in the August 4 article, petitioners then moved that the judge recuse herself because her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

In re Boston's Children First, 244 F.3d at 165-66. The Court agreed in a split decision. *Id.* at 167-71. The original decision was withdrawn following a motion for rehearing. *See In re* Boston's Children First, 239 F.3d 59, 59 (1st Cir. 2001). The reissued opinion indicates that the Court split three-to-three on rehearing, thereby allowing the panel decision to stand. Again, rather than characterize the decision, I quote another's description of it:

> [T]he First Circuit Court of Appeals granted counsel's petition for a writ of mandamus (a step the court noted was reserved for rare occasions) and required Judge Gertner to recuse herself from any further proceedings in the case. The court based its decision on its concerns that the public defense made by Judge Gertner of her own order created the appearance of partiality. . . .
>
> But the case, which involved issues of assignment of elementary school students based on race in the Boston school system, potentially affected a large number of people, and, therefore, the effectiveness of an ultimate judicial resolution of the issues depended on the respect and cooperation of those affected. Leaving the comments made by counsel, which impugned the integrity of the court, unanswered could jeopardize the public's willingness to accept the judicial resolution, causing a disregard of judicial authority. Judge Gertner was not willing to take that risk and took steps to correct the record. As a consequence, she was removed from the case because the very action of defending the bench was seen as a threat to the public's perception of it. This case highlights the dilemma created by such an interpretation of the code of ethics: any attempt to positively change the public's perception of the judiciary in individual circumstances risks forced recusal if a higher court detects a hint of prejudgment of an issue. If judicial independence means maintaining an impartial judiciary, including the appearance of such, disqualifying judges who respond to attacks on their integrity may be a cure worse than the ailment.

James L. Morse, *A Declaration About Judicial Independence*, 20 QUINNIPIAC L. REV. 731, 742-43 (2001).

1. CURRENT RULES ON JUDICIAL FREE SPEECH

The Code of Conduct for United States Judges[14] like all codes of judicial conduct, focuses on maintaining judicial impartiality, the appearance of justice and assuring public confidence in the judiciary. Its premise is that the judicial power derives only from the respect given judicial decisions, which in turn derives from the public's trust in a judge's impartiality.[15]

Thus, the Code expressly precludes a federal judge from participating in "political activity."[16] At the same time, a judge is permitted to speak generally about the administration of justice. She may "speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice."[17] But while the commentary expressly recognizes that "a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice," these activities are only suggested; they are not considered essential to the enterprise of judging.[18] At best, to many judges, contribution to the improvement of the law means giving an occasional talk to a bar association, or at a judicial conference, or to organizations dedicated to the improvement of the law.[19] Too often, the audience is relatively narrow: other legal professionals, or a scholarly audience.

The public, of course, is also concerned with broad issues—the drug war, sentencing policy—but often its attention is focused on a given case. The reporter will say: "It is well and good to talk about X,

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14. The Code was initially adopted by the Judicial Conference on April 5, 1973, and has been revised periodically by the Judicial Conference. It derives from the 1972 Model Code of Judicial Conduct. The American Bar Association ("ABA") adopted the first Canons of Judicial Ethics in 1924. These Canons were unenforceable. In 1972, however, the ABA promulgated the Model Code of Judicial Conduct, which, unlike its predecessor, specifies a mandatory and enforceable standard of conduct and behavior. *See* James R. Noseda, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*, 36 DEPAUL L. REV. 519, 519 n. 4, 521-22 (1987), *citing* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 43 (1972).

15. Noseda, *supra* note 14 at 529.

16. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 7.

17. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4.

18. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4C. Indeed, in the ABA Model Code of Judicial Conduct, this is described as "avocational." MODEL CODE OF JUDICIAL CONDUCT Canon 4(b) (1990).

19. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4C. Indeed, he or she may even "express opposition to the persecution of lawyers and judges anywhere in the world" so long as the judge has determined that that was occasioned by a conflict between the professional responsibilities of the judge or lawyer and the government policy. MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1999).

but what about the woman sentenced yesterday?" Or, "give me an example of your concerns." Television interviews typically stress the concrete, the immediate, the cases that dramatize the issue.

Talking about a particular case, however, is problematic for a judge, particularly a pending case. The judge is to "avoid" making a "public comment on the merits of a pending or impending action,"[20] although the presumption against public statements about a pending or impending action "does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education."[21] Judge Hiller Zobel, for example, in a widely covered trial of the so-called "Newton Nanny"[22] explained court procedures to the foreign press after each court session, with counsel present. But while the rules are presumptive—not mandatory—the case law and the culture largely keep judges entirely silent. The upshot is that the information on the administration of justice is not in a form best suited for the public palate.[23]

Judicial speech is also limited through the rules of disqualification. Disqualification rules are broader than the ethical rules, through the provisions of 28 U.S.C. § 455(a): Any judge "shall" disqualify herself

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20. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(6) (1999). Reading Canons 3 and 4 together suggests that the very same comment made in court (such as that one case is "more complicated than another") or a law review article would not lead to disqualification, while they would if said in an "extrajudicial forum." *See* Noseda, *supra* note 14 at 546-47.

21. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(6) (1992). Canon 3B(9) of the ABA Model Code of Judicial Conduct is worded slightly differently: "A judge *shall* not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."* (emphasis added). MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1999). In effect, this is an impact test—not simply "avoid making public comments on a pending case," but do not make comments that have a substantial impact on the fairness of the proceeding, or might reasonably be expected to do so. Canon 3(A)(6) of the Code of Conduct for United States Judges derives from an earlier version of the ABA Model Judicial Code.

22. Commonwealth v. Woodward, No. 97-0433, 1997 Mass. Super. LEXIS 213 (Mass. Super. Ct. Nov. 10, 1997).

23. *See generally*, Republican Party of Minn. v. White, 536 U.S. 765, 773 (2002) ("construing the clause [Canon 3(A)(6)] to allow 'general' discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "'strict constructionist.'" But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution.") (citations omitted).

from any proceeding in which her "impartiality might reasonably be questioned."[24]

The critical question for judicial speech is how strictly this rule is enforced: Does the rule limit speech insofar as there are any consequences to it, however ephemeral? Will courts be appropriately cautious about the reasonable man or woman test, understanding its impact on judicial speech?[25] The test is not, or should not be, whether anyone, with a modicum of knowledge about the case, the judge, or the situation, or having seen only television sound bites or news captions, "might" believe the judge to be partial. Rather, it is whether a reasonable person, knowing "all the circumstances, would harbor doubts about the judge's impartiality."[26] Does a standard that is so vague do more harm—by dissuading judges from speaking at all—than good?

2. CHANGES IN THE MEDIA, THE RULES GOVERNING LAWYER SPEECH AND THE POLITICAL CLIMATE

We now see "24/7" news coverage of trials and any other court proceedings that capture the attention of the public. The coverage is national in scope because of the reach of cable and satellite television. The media is often proactive, more intrusive than in the past. It is not

24. 28 U.S.C. § 455(a) (2004).

25. As one commentator observed, "appearance of impropriety" standards are "subjective and immeasurable." They can shift with time, the decisionmakers, etc. *See* Noseda, *supra* note 14, at 532-533. Noseda cites *In re* Bonin as an example of the risk of the enforcement of these provisions. *Id.* at 535, *citing In re* Bonin, 378 N.E.2d 669 (1978). The Supreme Judicial Court of Massachusetts suspended and censured Chief Judge Bonin following his attendance at a controversial public lecture, "Sex and Politics in Massachusetts." Proceeds from ticket sales were to benefit a group of criminal defendants indicted for their alleged involvement with an illicit homosexual sex ring. *See In re* Bonin, 378 N.E.2d 669, 672 (1978). The case was pending before the Supreme Court. Noseda cites to criticism of Bonin's censure, suggesting that it was linked more to his proposed court reforms, than to his attendance at the lecture. Noseda, *supra* note 14 at 536.

Likewise, Noseda points to the controversy surrounding Judge Abner Mikva's activities on behalf of the American Bar Association's Individual Rights and Responsibilities section. Specifically, Judge Mikva sought to recruit women, minority and politically liberal lawyers in the Bar Association. A complaint from the Washington Legal Foundation, alleging that Judge Mikva's activities "compromise the appearance of impartiality by identifying him with the controversial aims of the section," led to his decision to terminate his involvement with the section's recruitment efforts. *Id.* at 537-538. *See also* James Robertson, *A Distant Mirror: The Sheppard Case From the Next Millennium*, 49 CLEV. ST. L. REV. 391, 398 (2001) ("[A]ppearance of impropriety' is a dangerous genie; it can be released from its lamp by anyone who calls its name.").

26. *See* El Fenix de Puerto Rico v. M/Y Johanny, 36 F.3d 136, 140 (1st Cir. 1994) (quoting Home Placement Serv., Inc. v. Providence Journal Co., 739 F.2d 671, 675 (1st Cir. 1984)).

unheard of for witnesses to be paid to publicize their stories.[27] Lawyer commentators shape the public's view of the case. The content of television or radio shows is often the functional equivalent of the tabloid press.

There are appropriately few limitations on what the press can publish and say about a pending case. In *Nebraska Press Association v. Stuart*,[28] for example, the Court reversed, as a prior restraint, a gag order that had been entered in connection with a highly publicized murder trial. The Court noted that such an order was subject to a substantial burden of justification, notably "that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."[29]

Likewise, ethical constraints on lawyer speech have been relaxed in the face of First Amendment challenges. In *Chicago Council of Lawyers v. Bauer*, the Seventh Circuit struck down Disciplinary Rule 7-107 of the ABA rules, because it did not require a showing of serious and immediate harm.[30] In *Gentile v. State Bar of Nevada*, the Supreme Court found unconstitutional ABA Model Rule of Professional Conduct 3.6 (1981) as that Rule had been applied and interpreted in the State of Nevada. Five Justices concluded that lawyer speech in connection with the representation of clients in pending cases may be regulated under a "substantial likelihood of material prejudice" standard so long as it punishes "only speech that creates a danger of imminent and substantial harm."[31] The Rule was unconstitutional, however, because it was vague as interpreted by the Nevada Supreme Court. Four Justices disagreed,

27. Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 99-100 n.17 (1995).

28. 427 U.S. 539 (1976).

29. *Id.* at 569. In fact, one commentator suggests that what the Court is really saying is that the speech at issue in *Nebraska Press Ass'n* is effectively political speech. While media reporting of facts about a high-profile court case has the potential to influence the case's outcome; the speech at issue in the case had the affect of influencing public policy, as was an important "handmaiden of effective judicial administration." *Id.* at 559-60 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)); *see generally* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004). Peters distinguishes between political speech, which is intended to influence public policy, and adjudicative speech, which is intended to influence the outcome of a given proceeding. *Id.* at 753-76.

30. *See* Chicago Counsel of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975).

31. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1036 (1991).

holding that even the standard of justification in the Rule ran afoul of the First Amendment.[32]

Obviously, there are no legal limits on what legislators and officials say about judges. Within the past decade, attacks on sitting judges have been widely reported.[33] They have ranged from vitriolic criticism, to suggestions that the judges should resign or face impeachment proceedings.

The chorus of attacks on judges from all quarters is not without consequences as many others have noted.[34] And apart from their impact on judicial decision-making, they have a direct impact on the public discourse in a variety of areas, and specifically on legislation involving crime and sentencing.[35] So long as judges do not participate in these debates, their outcome will be more and more skewed. Two phenomenon have been widely reported. On the one hand, studies suggest the public links courts to increases in crime, and believes that increasing punishment and limiting procedural protections is essential.[36] At the same time, studies also suggest that "when the public is informed about or experienced with the criminal process, they care deeply about procedural values and do not consider the courts 'soft' on crime."[37] The enterprise then is to make certain that the courts reach out to the public to "nurture respect for constitutional values and understanding the limits of punishment."[38]

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32. *See id.* at 1054.

33. *See* Judge Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CTS. L. REV. 4, *11, *citing* Christopher P. Banks, *The Politics of Court Reform in the U.S. Courts of Appeals*, 84 JUDICATURE 34, 37 (2000); Richard Carelli, *ABA President Shestack Addresses Attempts at Judicial Intimidation*, LEGAL INTELLIGENCER, Feb. 3, 1998, at 4; Bob Herbert, Editorial, *A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29; Herman Schwartz, *One Man's Activist: What Republicans Really Mean When They Condemn Judicial Activism*, WASH. MONTHLY, Nov. 1997, at 10. In 1996, President Clinton and some Senators and Congressman publicly discussed the impeachment or resignation of Judge Harold Baer because of a suppression decision. Friedman, *supra* note 33, at *18.

34. *See* Friedman, *supra* note 33, at *12; Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711 (1997).

35. *See* Gertner, *supra* note 11; Greenspan, *supra* note12.

36. *See* Greenspan, *supra* note 12, at 2199.

37. *Id.* at 2200; *see also* PETER H. ROSSI & RICHARD A. BERK, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 97 (1997) (finding that public opinion on the appropriate sentence moderated as more mitigating facts about the offense and the offender were disclosed)

38. *See* Laura Storto, *Getting Behind the Numbers: A Report on Four Districts and What They Do Below the Radar Screen*, (manuscript on file with author).

3. THE INADEQUACY OF THE JUDICIAL RESPONSE

If, according to the ethical rules, judges are mostly to speak through their opinions, recent trends are especially troubling. Professor Judith Resnik reports on the decline of judicial adjudication, in favor of mediation, a low visibility resolution of cases.[39] At a recent forum of judges in the First Circuit, judges were told, in effect, that "if you have to write a decision about the case," you have failed in your obligations as a judge. In judicial education seminars, one half day—an optional one at that—is reserved for judicial opinion writing; the sessions on case management, mediation, alternative dispute resolution are mandatory and considerably longer. Courts of appeals have exacerbated the trend with unpublished decisions, resolving the case at bar but not for wider circulation.[40]

Opinions—even when written and published—are rarely drafted with a view to the public's understanding. To a degree, computer assisted research has exacerbated the problem. It is far easier to simply "cut and paste" one complex and obtuse quote from one case onto another, than it is to recharacterize the issues in terms that the public will understand.

Nor are courts attentive to the demands of the media. Decisions are released when the courts are ready to release them. This could well mean the publication of a lengthy and complex opinion, just at the time of the media's deadlines, eliminating any chance to carefully review and analyze it.

Some courts have retained public relations officers, or official response teams to respond to articles about judges and cases. The problem is training and timing. Unless these representatives take into account the exigencies of the news cycle, the response will either not make the papers, or be ignored.[41]

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39. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) ("As managers, judges learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.").

40. *See* Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003).

41. Office of the United States Courts, *High-Profile Cases in District Court: How to Work With the Media*, accessed by author at http://jnet.ao.dcn/highprofiledc/details.htm (internal court website). The Office of Public Affairs ("OPAF"), at the Administrative Office of the U.S. Courts,

Nor is it enough to leave the responsibility for dealing with the public to lawyers and bar associations. First, the response time of lawyers or bar associations is frequently too slow, again out of the news cycle. Second, to the extent that the lawyers are litigants before the court, particularly the court being criticized, their responses may be discounted by a skeptical public.[42]

Finally, following the O.J. Simpson case, the Judicial Conference terminated the "experiment" on cameras in the courtroom. While state courts from around the country have had televised proceedings of trials that are far more controversial than the usual federal court fare, the Conference prohibited cameras because of their deleterious effect on the participants.[43]

4. SUGGESTED RESPONSES

As I noted at the outset, I do not have answers or concrete proposals. There are the obvious general guidelines: Judges should not speak when to do so would directly undermine the rights of the litigants before them, or the integrity of the office. The expression of judicial opinions—judicial "free speech"—is less important than the fairness of the proceedings, and the oath of office. But even with this overall constraint, there are broad and important areas about which judges must speak because they have a unique contribution to make to the public debate, because of the consequences of their silence. The line is not easy

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serves as a liaison between federal courts and the media, responding to news reporters' questions about the courts, advising courts on media-related matters, and fielding media inquiries forwarded by judges and court managers. The AO also advises district and appellate courts on dealing with high profile cases.

For example, the AO has suggested:

> Some courts have found it useful to set aside a certain time each day of a protracted or complex proceeding for handling news media questions or for dealing with logistical problems. Managing Notorious Trials advises that these meetings help "prevent dissemination of incorrect or misconstrued information and might include such matters as an explanation of a procedural matter or an explanation of a delay or recess. . . . The ground rules—whether all comments are "off the record" or "not for attribution" and whether questions regarding the substance of the case are prohibited—should be repeated at the start of every informal meeting.

Id.

42. Indeed, Judge Friedman describes the bar's response to criticisms of the D.C. Circuit, criticisms which he believed threatened judicial independence, as "disappointing." Friedman, *supra* note 33, at *21.

43. *See* Nancy Gertner, The Sunshine Act: Hearings on S. 721 Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts, (Sept. 6, 2000) (Transcript available at 2000 WL 23832336).

to draw—between what Judge Reinhardt describes as "the acceptable platitudes and the forbidden particularities."[44] It is not materially different from the lines we are obliged to draw in cases throughout our docket. I have suggestions of two sorts—suggestions within the traditional parameters of the judicial role, and suggestions which change that role.

Within the traditional parameters of the judicial role: Judges have to write opinions that are accessible both to the public and to the media,[45] to be attentive to the news cycle on their release. Nothing should prevent the courts from responding—albeit within the four corners of a decision—so long as Canon 4 is unchanged—to a factual error in press coverage of a case, or to address the issue in open court.[46] After the *Boston Children's* decision when the First Circuit disapproved of something I had said to the press—which would have been entirely appropriate if uttered in court—I began to consider a new form of judicial opinion, beginning, "*In re* Yesterday's Globe."[47] There are obvious risks to this approach—that the court may look like it is coveting publicity, that its judgments are influenced by the prospect of

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44. Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 806 (1995).

45. *See Robertson*, *supra* note 25, at 398 ("Continuing public confidence in the courts depends upon our making ourselves and our decisions accessible and understandable to the people. Citizens want judicial decisions to be rendered by fellow citizens—not by Druids.").

46. For example, I responded in a footnote of a sentencing memorandum to a newspaper article, *see* J.M. Lawrence, *Deported Drug Dealer Jailed for U.S. Return*, BOSTON HERALD, May 28, 2003, that mischaracterized the sentence I had handed down.

> The article notes that the Court rejected the government's call for a "stiffer sentence," without bothering to mention that the Court in fact granted the government's motion for an upward departure and imposed a sentence above the ordinary range under the Sentencing Guidelines (which are, themselves, far from lenient). Nor does the article note that the Court rejected the defense argument for a sentence within the Guidelines at the low end of the applicable range. To read the article, one would assume that the sentencing was all about the defendant's eight-year-old state conviction for mayhem and assault and battery, for which he was sentenced—and served—8-9 years at the maximum security Massachusetts state prison, MCI Cedar Junction. The sentence I handed down for the offense in the case before me most assuredly was not just about that prior crime, as this Memorandum describes. And even in discussing the prior offense, the article makes no mention of the reasons articulated in open court for not increasing the criminal history "points" attributable to that offense. In short, the article is a selective, if not skewed, account of a public sentencing that conveys an impression entirely at odds with reality. . . .

United States v. Pena, 268 F. Supp. 2d 65, 65 n. 1 (2003) (citations omitted).

47. *See* discussion *supra* note 13.

favorable coverage in the media.[48] The judiciary may want to develop standards as to when a response is appropriate—e.g. when there has been a factual error in the reporting—and when there has not—e.g. when the reporter simply disagrees with the court's opinion.

Outside of the traditional judicial role: Education of the public and officials has to move from an avocational aspect of the job to part of its central mission. Our court has innovated a "School for Journalists" to discuss typical errors in the coverage of court proceedings. The Massachusetts Supreme Judicial Court has a "bench-bar" committee. Members of the press are invited to discuss issues of general concern with our court to maximize the depth of their understanding and to hear their concerns about the judges. We should not shrink from speaking directly to the public on precisely the issues that we would otherwise speak to law schools or bar associations: Judge Stephen Reinhardt summed it up when he noted:

> Some are of the view that it is acceptable to speak to legal audiences—to write law review articles, lecture at bar associations, and teach law school classes—but that judges should not appear in less erudite fora. Personally, I do not think that we can justify an ethical code that prevents us from saying to the general public that which we are willing to say to the legal elite. I believe that judges may write not only for the Loyola of Los Angeles Law Review but also for the Los Angeles Times opinion section; that they may speak not only to state or county bar associations or to the Federalist Society, but may also participate in lecture series open to the public or even engage in televised discussions or other public affairs programs. At the same time, judges should have enough sense not to write for the National Enquirer or to appear on a program conducted by Geraldo Rivera, Howard Stern, or Rush Limbaugh. If we can trust judges enough to make decisions that affect every critical aspect of our lives, we can trust them to make these judgments as well. In my opinion, no Judicial Speech Code is necessary; if an individual judge abuses his discretion on occasion, so be it. The Republic will survive.[49]

Recent technological innovations makes the task of communicating with the public easier. Electronic Case Filing, now is in courts across the

48. *See* United States v. Microsoft Corp., 253 F.3d 34, 117-120 (D.C. Cir. 2001); *cf.* Evan P. Schultz, *Behind the Bench: Is the problem with Judge Jackson that he appeared to be biased? Or that he appeared to be human?*, LEGAL TIMES, Apr. 2, 2001, at 50 (discussing criticism of Judge Jackson's public statements during the Microsoft trial).

49. Reinhardt, *supra* note 44, at 806-07.

country, places the court docket on the internet, with pleadings and transcripts available to the interested public with a click of mouse. There is no physical or technological impediment to the public knowing precisely what the courts are doing and why. Indeed, nothing I have suggested here would even run afoul of the existing rules.

The judiciary's approach to communicating with the public it serves has to change. If it does not, if our voice remains silent in debates on public policy, and we become irrelevant to the process, we have only ourselves to blame. As Oliver Wendell Holmes observed:

> I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. . . . But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it.[50]

50. Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 651 (1987) (quoting OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS, 167, 170, 194 (1920)).

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