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JUDICIAL SPEECH AND THE OPEN JUDICIARY

*Stephen Reinhardt**

There is a great deal of controversy over whether judges should speak outside the courtroom and, if so, what limits should apply. A strong, and I believe appropriate, consensus exists among judges that we should not speak about the cases before us, express views on specific issues on which we are likely to be asked to rule, or seek to promote ourselves while presiding over highly publicized trials. Concerns about fairness and the appearance of fairness far outweigh any benefits that might result from such speech: We should not promote judicial expression at the expense of the individuals whose rights we are sworn to protect. At this point, however, opinions tend to diverge. In recent years there has been a noticeable trend toward more judicial speech; at the same time, there remains a firmly entrenched view within the federal judiciary that judges should remain wholly “above the fray” and avoid revealing any of their beliefs or fundamental values to the public, except to the extent that they are necessarily disclosed in published opinions. It is this concept of judicial abstinence that needs careful examination—and ultimately puncturing.

I have a more generous view than many of my colleagues regarding the issues on which judges may speak and the fora in which they may properly present their views. I think that we have an obligation to help educate not just the legal community but the public at large about matters concerning which we have particular knowledge or experience. I also believe that we have a duty to be open and forthcoming with the public, and, correlatively, to subject ourselves to criticism just like all the other members of a democratic society. We must open the courts to public inspection and play our part in the educational process. We cannot stand above the public dialogue that is so essential to the proper functioning of a true democracy.

It is, of course, impossible to draw clear lines between what speech is appropriate and what is not. Like the many other categories we invent in legal decision making, the boundaries are unclear and imprecise—perhaps more so. Almost all judges agree that we may

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talk to the public about the Constitution and the Bill of Rights in the abstract—discussions that often amount to little more than self-congratulatory flag waving. There is also a general belief that we should not provide specific or detailed public answers to previously unresolved questions regarding those rights, because we may be faced with deciding those very questions in subsequent judicial proceedings. What is controversial is what lies “in between” the acceptable platitudes and the forbidden particularities. It requires sophistication and, more important, common sense to avoid taking positions that will seem to be prejudging certain cases while still contributing something worthwhile to the dynamic discussion surrounding this country’s developing conception of rights and liberties.

I believe that judges should venture boldly into this in-between area—that we should speak forthrightly about the role of the courts in American society, about the relationship between law and justice, about the true meaning of the Constitution and some of its principal provisions, and about our own personal visions of justice and judging. We should do so in specific as well as general terms. We should not hesitate to tell the American people what the consequences are when a president fails to make judicial appointments to an overburdened judicial system or consistently appoints judges with a grudging or narrow vision of federal jurisdiction and individual liberties. We should reveal to the American public how the courts handle death penalty cases and just what the impact is on the judicial system.¹ We should be willing to acknowledge that the Fourth Amendment is being sacrificed in our eagerness to fight the war against drugs, and that such a sacrifice is inconsistent with our constitutional heritage. Similarly, if we believe that drugs should be decriminalized (I happen not to share that view) and that the failure to do so is adversely affecting the operation of the courts, we should feel free to say so. These are controversial issues indeed. But I do not think that we should shy away from speaking about them for that reason. In fact, I think it is precisely because these issues are controversial and difficult that we should share our special knowledge and experience with the public.

I strongly believe that judges should speak directly to the public about such issues, but should do so selectively and with dignity. 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.

1. See, e.g., Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A15 (op-ed section).

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.

Some believe that opinion writing provides a sufficient opportunity for judges to communicate with the public. While it is true that on some occasions one can glean much information concerning a judge's philosophy from an opinion, opinions do not ordinarily provide a satisfactory forum for the expression of individual views. Nor do they provide an opportunity to discuss issues in context or in all of their perspectives and ramifications. In an appellate opinion, a judge can only speak for the court, and his statements must be agreed upon by at least one other judge, preferably two, and sometimes more. Moreover, opinions must be confined to the specific question at hand and are further limited to the consideration of those aspects of that question that are both relevant to the particular case and are left open by prior decisions. If a judge wishes to set forth a cohesive expression of his personal views on a subject of any importance, he will have to find a far better vehicle for doing so than writing an opinion for the court on which he sits.

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Those who believe that judges should remain silent about their judicial views or their broader visions of justice are motivated in large part by a desire to maintain the aura of tradition and mystery surrounding judicial decision making. They seek to cloak judicial deliberations with secrecy and to conceal the fact that individual judges have different judicial philosophies. Many judges are afraid that, by speaking openly and honestly about their concerns and beliefs, they will leave themselves vulnerable to criticism and censure; the myth of the judge as the detached, neutral decision maker can only be main-

tained from afar. Usually, however, these fears are not expressed so bluntly. Instead, the argument is brought forward that the judiciary should avoid anything that associates it with the "political." That argument, like the underlying argument it masks, appears to be more weighty than it actually is.

If, by political, proponents of judicial silence mean that the judges who express opinions on issues of public import appear to be beholden to or unduly influenced by partisan concerns, then they are simply dead wrong. What is special and unique about the federal judiciary is that Article III immunizes judges against precisely that type of influence.² Indeed, our ability to uphold the Constitution, and especially the Bill of Rights, depends upon our being insulated from majoritarian pressures.

Moreover, with the special privileges of Article III comes a special responsibility—a responsibility to adhere to the law to the best of one's ability. Principles of *stare decisis*, canons of statutory construction, and the plain language of the statutes we interpret prevent us from simply following our own personal whims. We presume, indeed we must presume, that judges generally look beyond their personal views and biases and attempt to apply the law to the facts of a particular case as best they can. Indeed, the courts as an institution have repeatedly reaffirmed their confidence that individual judges will set aside the positions they have taken outside the courtroom when deciding the merits of the case before them.³

It is true that by speaking about our views we implicitly acknowledge that we do not approach the bench bereft of all notions regarding the nature of judicial decision making or of justice itself. By speaking, we reveal what the public already knows anyway—that most judges have a vision of the world, and of what is fair and right. Any individual who comes to the bench without a set of values and principles, or who tells the Senate Judiciary Committee that he has no views on fundamental constitutional issues, is not worthy of confirmation. When we put on our robes, we do not erase from our memories

2. See U.S. CONST. art. III, § 1.

3. See, e.g., *Laird v. Tatum*, 409 U.S. 824, 838-39 (1972); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982). I believe that Judge Craven stated this point most eloquently:

I do not believe that a judge has a duty of loyalty to a political administration with respect to any particular policy of that administration—international or domestic. Nor do I believe that he must pretend to believe that all policies or even all laws are wise and just. But I do believe that he must read, interpret and apply laws as written without regard to whether he would like to see them changed.

Lawton v. Tarr, 327 F. Supp. 670, 672 (E.D.N.C. 1971).

all of the ideals in which we believed before we became judges; we do not cast aside the vision that enabled us to attain our lofty position. Rather, we implement those views, but only within the constraints of law and precedent.

The fact that judges come to the bench with ideals and values in no way suggests that we are subject to political influence. Nor should public disclosure of our views cause the public to question our integrity or to lose respect for us—or for our decisions. To the contrary, we would be providing the people with reason to admire our honesty and our forthrightness, as well as our values. What we say to the public may reveal our vision of judicial decision making; it does not, however, suggest that our decisions will be influenced by anything, or anyone, that can be labelled partisan or political.

There is no good reason for judges to attempt to conceal the fact that we approach the law with differing judicial philosophies or the fact that those differences may lead to differences in our interpretations of the law.⁴ Even if this were not so obvious from our opinions, I believe that it would be our duty to share our respective visions of the law with the public. The public should know what approach we as individuals take from the bench; it should be aware that we are not carbon copies of each other; and it should be aware that some decisions are indeed influenced by the philosophies and values that judges bring to the bench.

Judicial philosophies are as diverse as the judges themselves. Some judges believe that every case should be decided on the most narrow grounds possible; others believe that our role is to articulate the broader constitutional theories that underlie our decisions. Some judges are obsessed with questions of procedural default, preferring whenever possible to avoid reaching the merits of a particular case. Others believe that it is our duty, to the extent that the law permits, to grant all parties a fair adjudication on the merits. Some judges are extremely deferential to the legislative process; others place greater emphasis on the duty to limit the excesses of majoritarianism. Some

4. As Justice Douglas observed:

Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

judges serve as nothing more than judicial technicians; others' decisions are infused with a broader understanding of justice. It is important for the public to understand the differences in how we approach our jobs. The people have a right to know what may result when their president appoints a judge or when their senators vote to confirm a nominee. And their right to know does not terminate the day we assume office.

* * *

If the existence of differing judicial philosophies does not mean that we are influenced by political concerns or partisan interests, and if the public is already aware that differing judicial philosophies can lead to different results, why do we so persistently refuse to acknowledge the differences in our approaches, and why are we so anxious to prohibit judges from discussing controversial subjects in public? As I suggested earlier, I believe that the real impulse that lies behind our code of silence is a strange combination of arrogance and fear. We prefer to hold ourselves above censure, and the only way to do so is to provide the people with no basis for criticizing us. If the judicial decision-making process is no longer cloaked in mystery, we are revealed for what we are—human beings, with weaknesses and biases, struggling to do our best to interpret and apply the law as we see it. Thus, we cloak the process by which we arrive at our decisions in a shroud of secrecy. We prefer to assume a godlike status, meting out justice from above. Just as Article III insulates us from political pressures, our silence insulates us from public criticism.

Moreover, the myths surrounding the judicial process make it all too easy to both run and hide. If we adhere to the role that the myths create for us, we can render our decisions without fear of confrontation or censure. As long as we appear to be acting like the mythical figures that our jurisprudential tradition has created, we may invoke the full powers of that tradition and infuse our decisions with a sometimes unwarranted air of legitimacy.

But the myth is terribly confining. It forces us to maintain an absurd legal fiction: We are forced to pretend that we hold no views on any issues, that we have no distinct judicial philosophy—no broad vision of social justice, on the one hand, or no obsessively strong attachment to the rights of property owners on the other—all in the name of reassuring the public that we are nonpartisan decision makers.

In the long run, of course, our attempt to pretend that we are philosophical eunuchs, to perpetuate the illusion that a connection ex-

ists between judicial silence and neutral decision making, may compromise our integrity in the eyes of the people. It is clear that the public recognizes that judges possess values, ideals, and philosophies; indeed, people appear to be most suspicious of those who deny this fact.⁵ Perhaps in this regard the public is ahead of the judiciary; the public appears to be concerned with the decisions that judges make inside the courtroom, not outside. I cannot recall an occasion on which any significant number of people became upset over the content of a judicial statement made in any other forum. Surely Judge Craven's famous opinion in *Lawton v. Tarr*,⁶ acknowledging his strong personal views on certain controversial issues but affirming his commitment to uphold even the laws with which he most vehemently disagreed, is more likely to gain the public trust than a denial of the very existence of such views.⁷

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I believe we sacrifice too much in our attempts to preserve the rule of judicial silence—our own private judicial gag rule. More is to be gained, both for the judiciary and for our democracy, if we judges engage in vigorous and unfettered judicial speech.

In my opinion, the benefits of openness far outweigh the costs. Robust debate and the unfettered exchange of ideas and information play a central role in our democracy and in our judicial system; the legitimacy of both depend upon honesty and candor. It simply does not make sense for us, vested with the duty of upholding these worthy ideals, to refuse to take part in the national debate over fundamental legal issues or to seek to shield ourselves from public scrutiny.

Judicial silence denies the public an opportunity to hear from an entire branch of the federal government. We are the experts on judicial decision making and the host of legal problems that directly affect the lives of all Americans. I believe it is our obligation to share our knowledge and insights, controversial or not, with our fellow citizens.

I do not believe that our speech will be mistaken as a sign that we disrespect the law or that we will not uphold it when we render our decisions. As Oliver Wendell Holmes observed:

5. See David G. Savage, *In the Matter of Justice Thomas*, L.A. TIMES, Oct. 9, 1994, at 14 (Magazine).

6. 327 F. Supp. 670.

7. Justice Antonin Scalia apparently is an adherent of the Craven philosophy. See, for example, his recent speech at the University of San Diego School of Law, in which he discussed abortion, capital punishment, and interpretive approaches to the Constitution. See Kate Callen, *High Court Jurist Mixes Insight and Humor at USD*, SAN DIEGO DAILY TRANSCRIPT, Oct. 21, 1994, at 1A.

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.⁸

Just as our democracy would benefit from the perspectives of its judges, so too would the judiciary benefit from the perspectives of the people. We should open ourselves and our courts to the public, for it is such openness, I believe, that will ultimately make us better judges and that will assure the legitimacy of the judicial system in the eyes of the American people.

Our attitudes about judicial silence lead to a lack of openness in other areas. Because we are often isolated from public debate, we are disturbed when others, particularly lawyers, criticize us. We tend to forget that the cases we are deciding have broader implications outside the courts, that the cases being litigated often represent small battles in a larger war that the parties are fighting on a far broader front. Thus, we should give attorneys the freedom to speak freely about cases outside the courtroom; we should also give them the freedom to criticize us openly when they believe that such criticism is deserved.

Similarly, too often we close off the public from judicial proceedings. The recent decision of the Judicial Conference of the United States to prohibit television cameras in the federal courts is one notable example.⁹ The public has an overriding interest in knowing what is happening in its courtrooms, and we, as judges, have no right to ban the medium which provides the public with the vast majority of its information. Without deciding the issue, I would predict that some day, perhaps far in the future, this question will be resolved on First Amendment grounds—if the judiciary does not first abandon its wholly unjustifiable position. Another example lies in our refusal to reveal how individual judges voted on en banc calls or even the numerical breakdown of these votes. Here, too, our actions reflect an inexplicable lack of openness—a stubborn resistance to full public dis-

8. Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS, 167, 170, 194 (1920), quoted in Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 651 (1987).

9. Joan Biskupic, *U.S. Judges Vote to Keep Cameras Out of Federal Court*, L.A. TIMES, Sept. 21, 1994, at A13.

closure. How can a branch of government, the one charged with protecting the rights of the people against arbitrary governmental authority, say to the people: We will tell you that we have taken an action but we will not tell you what the vote was or which public officers voted which way, because you might misunderstand the basis for their votes? To me, once again there is no possible justification for our refusal to permit the public full and fair access to information which is of public significance.

Instead of condoning these types of silence, we should encourage judicial openness. Openness can take many forms. For example, we should publish detailed opinions as often as possible. All courts should make tapes of oral arguments available to the public upon request. Again, the recent controversy over this question, though satisfactorily resolved, is indicative of the judiciary's attitude toward the public's right to know, when the object of the information it seeks is an action of the judiciary itself. Most important of all, however, we judges should speak out in public fora on the issues of the day that are relevant to the important work we perform.

Judicial openness, I believe, will provide a stronger foundation for our legitimacy. Under a truly democratic system, the public's confidence in our decisions should be based upon its knowledge rather than upon its ignorance, upon openness, not mystery. We are in a position of public trust; there is no justification for hiding from public scrutiny.

