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SPEECH MAY BE FREE, AND TALK CHEAP, BUT JUDGES CAN PAY A HEAVY PRICE FOR UNGUARDED EXPRESSION

*Gregory C. O'Brien, Jr.**

I. INTRODUCTION

In Washington political lore, a senior member of Congress, who has long since passed on to his eternal reward, used to advise newcomers, "Just remember, you will never have to explain what you meant by what you do not say." So compelling is the wisdom of this advice that a judge friend of mine maintains a shorthand version of it printed on index cards placed strategically on his bench for his own viewing: "Shut up, shut up, shut up"

Any review of judicial discipline cases will reveal that the greatest single category of offenses by judicial officers pertains to things they have said: in the courtroom, in chambers, in public, in private—usually spoken, but occasionally even written. No other public officials are as restricted in the things they may say,¹ a circumstance lamented on First Amendment grounds by Justice Stanley Mosk of the California Supreme Court.²

All elected officials, of course, are well advised against using speech that is racist, sexist,³ or offensive to any cognizable class of citizens. From the lowest to the highest levels of government, politicians occasionally have had to pay a heavy price with the voters for insensitive remarks. Cabinet members and baseball executives have likewise discovered the perils of making such ill-chosen comments. Judges, from whom the public has traditionally expected an even

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1. It has indeed been said that "[j]udges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993).

2. See *In re Stevens*, 31 Cal. 3d 403, 406-07, 645 P.2d 99, 101, 183 Cal. Rptr. 48, 49-50 (1982) (Mosk, J., dissenting); see discussion *infra* note 19.

3. Sexual harassment, "unacceptable by any member of society[, is] particularly intolerable by an attorney and abhorrent for a member of the judiciary." *Office of Disciplinary Counsel v. Campbell*, 623 N.E.2d 24, 27 (Ohio 1993).

higher degree of circumspection,⁴ nevertheless seem no more immune to the career-ending utterance.

This Essay reviews a variety of situational speech that has met with private censure at best and removal from office at worst.⁵ It also discusses what is generally considered appropriate and inappropriate judicial speech, including formal comments made from the bench, casual conversations, news releases, press interviews, judicial book reviews, and solicitations for private causes.⁶ This Essay is not intended to be exhaustive. For examples of misconduct, it draws heavily from the record of judicial discipline in California, which in 1928 was among the first states to adopt the American Bar Association (ABA)'s Canons of Judicial Ethics.⁷ Although this Essay frequently refers to the California Code of Judicial Conduct, adopted for use by the California Judges Association, the reader should be cautioned that as a result of the recent passage of Proposition 190, the state supreme court will hereafter be vested with the authority to write new canons.⁸ Nevertheless, there is no reason to believe that the court would stray substantially from the ABA Model Code, on which the present California canons are based.

II. PRIVATE SPEECH: THE WALLS NOT ONLY HAVE EARS, THEY TALK

Some of the most politically troublesome speech—to which Justice Clarence Thomas, Senator Robert Packwood, and President Bill Clinton can all attest—allegedly occurs behind closed doors. For those in public life, little is truly private.⁹

4. "Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue." Brian L. McDermott, *The Constitutionality of Canon 7(B)(1)(c) of the Code of Judicial Conduct: Free Speech Rights of Judges*, 25 CREIGHTON L. REV. 855, 881 (1992) (quoting Sir Francis Bacon).

5. See *infra* notes 9-20 and accompanying text.

6. See *infra* notes 21-23 and accompanying text. Not considered are judicial campaign speech and Canon 7B(1)(c) of the ABA Model Code of Judicial Conduct.

7. CAMERON E. ANDERSEN, *THE STORY OF THE CALIFORNIA JUDGES ASSOCIATION: THE FIRST SIXTY YEARS* 94-95 (1992).

8. Proposition 190, as passed by the voters on November 8, 1994, amends Article VI, Sections 8 and 18 of the California Constitution and adds Section 18.5, effective March 1, 1995. Assembly Constitutional Amendment 46, Res. ch. 111, 1994 Cal. Stat. (Aug. 31, 1994) (enacted as Proposition 190 Nov. 8, 1994).

9. Judge Joe G. Riley, Presiding Judge of the Court of the Tennessee Judiciary, asks rhetorically, "Is there any reason to require judges to meet ethical standards both on and off the bench? Are we going too far?" Joe G. Riley, *Ethical Obligations of Judges*, 23

At age twenty-nine Judge Richard J. Ryan of the Placer County Municipal Court was surely one of the youngest judicial officers ever elected to the California bench. Ten years later he was, no doubt, one of the youngest ever removed. Among the charges leading to his removal was the allegation that he told off-color jokes in chambers to two female attorneys, to whom he later apologized.¹⁰ Although the special masters investigating his case found that his conduct was not prejudicial to the administration of justice, the Commission on Judicial Performance disagreed.¹¹ In affirming the Commission's finding, the state supreme court said:

It is sometimes difficult to determine the line between "extremely poor taste" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Nevertheless, we believe the fact that the judge was acting in his official capacity when he told the Caesar salad joke^[12] provides ample support for the Commission's determination that the judge committed prejudicial conduct. . . .

MEM. ST. U. L. REV. 507, 509 (1993) (emphasis added). He answers his own question as follows:

It is of utmost importance that the public see the judicial branch of government as being independent and honorable. Not only must judges be independent, fair, competent, and honorable, but these qualities must be apparent to the public. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. Thus, all ethical mandates set forth in the [ABA Model] Code of Judicial Conduct are based upon the premise that any violation diminishes the public's confidence in the judicial branch of government. For this reason, a judge must observe high standards of conduct and must accept restrictions upon his or her conduct that might be viewed as burdensome by the ordinary citizen.

Id. (footnotes omitted).

10. *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 544, 754 P.2d 724, 739, 247 Cal. Rptr. 378, 393-94 (1988).

11. *Id.* at 544-45, 754 P.2d at 739, 247 Cal. Rptr. at 394.

12. Judge Ryan asked both women "if they knew the difference 'between a Caesar salad and a blow job.' When the attorneys responded that they did not know the difference, the judge said, 'Great, let's have lunch.'" *Id.* at 544, 754 P.2d at 739, 247 Cal. Rptr. at 394 (quoting Hon. Richard J. Ryan). On another occasion the judge, in chambers, told the same attorneys an equally tasteless joke about Adam and Eve, which the court likewise found to have constituted prejudicial conduct. *See id.* 754 P.2d at 739, 247 Cal. Rptr. at 393.

Nevertheless, had it not been for other more serious charges involving conduct undermining the fair administration of justice, it is doubtful that Judge Ryan would have received more than public reproof for these apparently isolated incidents. Compare, for example, letters of *private* reproof that have been sent to judges, in which judges were admonished for: (1) "tacitly permitt[ing] an attorney to make vulgar, offensive, gender-biased remarks during a chambers hearing"; (2) "call[ing] an attorney an 'asshole' at a settlement conference"; and (3) making "rude remarks that suggested bias against a certain ethnic group. For instance, with no basis other than a defendant's ethnicity, the judge said

The fact that the hearing was conducted in Judge Ryan's chambers makes little difference; his conduct was just as improper as if he had told the joke from the courtroom bench.¹³

The disciplinary precedent against making tasteless, derogatory comments and telling vulgar stories to attorneys and court personnel was by then well established in California. Just a few years earlier, at a Christmas party attended mostly by court personnel, Judge Mario Gonzalez of the East Los Angeles Municipal Court had asked a female, Jewish district attorney, "[W]ith all the inbreeding your people do, aren't you afraid that they will produce a race of idiots[?]"¹⁴

Among the more memorable lines attributed to Judge Noel Cannon's removal from the Los Angeles Municipal Court was the statement to her bailiff that she was going to punish a traffic officer who had stopped her earlier that morning: "[W]hen I find him, I'm going to cut off his balls and have them hang over my bench; . . . I'm going to give him a vasectomy with a .38."¹⁵ Judge Cannon's notorious

the defendant probably was not legally in the United States." CALIFORNIA COMM'N ON JUDICIAL PERFORMANCE, 1992 ANNUAL REPORT 15-16 (1993).

13. *Ryan*, 45 Cal. 3d at 545, 754 P.2d at 739-40, 247 Cal. Rptr. at 394 (quoting CAL. CONST. art. VI, § 18(c)). Despite this pronouncement it is interesting to compare, for example, treatment by Judge Harry R. Roberts, Mono County Superior Court, of an attorney whom he caused to cry, accusing her in chambers of incompetency and demanding that she recite her professional experience. *Roberts v. Commission on Judicial Performance*, 33 Cal. 3d 739, 745, 661 P.2d 1064, 1067, 190 Cal. Rptr. 910, 913 (1983). Here, the court said such conduct "standing alone, might not warrant censure." *Id.* at 749, 661 P.2d at 1069, 190 Cal. Rptr. at 915.

Similarly, although the court removed him from office for far more serious conduct, it considered the tasteless private statements of Justice Court Judge Jerrold L. Wenger of the El Dorado Judicial District to be less serious precisely because they were privately made: In that case Judge Wenger told an attorney that his client was a puke and a psychopath. *Wenger v. Commission on Judicial Performance*, 29 Cal. 3d 615, 635, 630 P.2d 954, 965, 175 Cal. Rptr. 420, 431 (1981). The court pointedly noted, however, that "[t]he words were not uttered from the bench, but in one-to-one conversation," and therefore "[did] not warrant discipline for 'rude and profane conduct.'" *Id.*

14. *Gonzalez v. Commission on Judicial Performance*, 33 Cal. 3d 359, 376, 657 P.2d 372, 382, 188 Cal. Rptr. 880, 890 (1983) (quoting Hon. Mario P. Gonzalez). Also attributed to Judge Gonzalez in this case, which led to his removal, were racial remarks made in a colleague's chambers, *id.*, as part of a pattern of conduct that the court found "persistent and pervasive," *id.* at 378, 657 P.2d at 383, 188 Cal. Rptr. at 891.

15. *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 701 n.19, 537 P.2d 898, 914 n.19, 122 Cal. Rptr. 778, 794 n.19 (1975) (quoting Hon. Noel Cannon). Indeed, this case contains far-ranging examples of impermissible judicial speech, allegedly uttered in public and private. *See id.* at 699-705, 537 P.2d at 912-17, 122 Cal. Rptr. at 792-97. Judge Cannon was condemned for both her conduct and her words, the latter being recorded in rich detail throughout the opinion. Viewed in their entirety, however, her actions appeared to indicate a general mental state incompatible with judicial—or for that

colleague, Judge Leland W. Geiler, suffered a similar fate only two years earlier. Among his most common offenses were his "[i]ndiscreet use of vulgar, unjudicial and inappropriate language directed toward court attaches and lawyers," as well as his "crude and offensive conduct in public places."¹⁶

Among the numerous bad habits leading to the removal of Judge David Kennick, also of the Los Angeles Municipal Court, was his tendency to address female attorneys and employees as "sweetie," "sweetheart," "honey," "dear," and "baby"—terms he later defended as having been intended as warm and friendly greetings.¹⁷ The court was not inclined to be as forgiving of such private conduct as it had been only eight years earlier when Los Angeles Superior Court Judge Charles S. Stevens "repeatedly and persistently used racial and ethnic epithets, and made racially stereotypical remarks to counsel and court personnel."¹⁸ Most of these remarks occurred during chambers conferences rather than in open court; Judge Stevens

matter, any public—office. Although her conduct was aptly delineated "bizarre," the court stopped short of commenting on the judge's general sanity. *See id.* at 703, 537 P.2d at 915, 122 Cal. Rptr. at 795.

16. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 274, 515 P.2d 1, 3, 110 Cal. Rptr. 201, 203 (1973), *cert. denied*, 417 U.S. 932 (1974). Judge Geiler's private comments included the following incidents: As his court clerk was leaving his chambers, he asked the men present, "'How would you like to eat that?'" *Id.* at 277 n.6, 515 P.2d at 5 n.6, 110 Cal. Rptr. at 205 n.6 (quoting Commission on Judicial Qualifications (quoting Hon. Leland W. Geiler)). On another occasion he telephoned his clerk and said of the morning's cases, "'Get the mother fuckers ready. I will be there shortly.'" *Id.* (quoting Commission on Judicial Qualifications (quoting Hon. Leland W. Geiler)). Yet another time he asked her, "'Did you get any last night?'" *Id.* (quoting Commission on Judicial Qualifications (quoting Hon. Leland W. Geiler)). The court found such comments to be an established pattern of conduct. *See id.* at 286, 515 P.2d at 11, 110 Cal. Rptr. at 211.

17. *Kennick v. Commission on Judicial Performance*, 50 Cal. 3d 297, 324, 787 P.2d 591, 604-05, 267 Cal. Rptr. 293, 306-07 (1990) (quoting Hon. David M. Kennick). In rejecting Judge Kennick's explanation, the court stated:

We agree with the commission that petitioner's use of these terms in addressing women under those circumstances was unprofessional, demeaning and sexist, and violated canon 3A(3) [—now 3A(4)—] of the California Code of Judicial Conduct ("Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity . . .").

Id. at 325, 787 P.2d at 605, 267 Cal. Rptr. at 307. Canon 3B(5) of the California Code of Judicial Conduct has been amended to indicate specifically that judges should not manifest bias based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. CALIFORNIA JUDGES ASS'N, CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 3B(5) (1992), *reprinted in* STATE BAR OF CAL., CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY (Jan. 1994) [hereinafter CALIFORNIA CODE OF JUDICIAL CONDUCT].

18. *In re Stevens*, 31 Cal. 3d 403, 403, 645 P.2d 99, 99, 183 Cal. Rptr. 48, 48 (1982).

was publicly censured, but not removed from office.¹⁹ A mere decade later, however, one must seriously question whether such conduct would result in the same outcome, particularly in light of the Califor-

19. *Id.* In a concurring opinion, Justice Kaus indicated that he felt compelled to set forth in some detail the private conduct to which the majority referred but obliquely: "Judge Stevens, during his term in office, referred to black persons as 'Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny.'" *Id.* at 404, 645 P.2d at 99, 183 Cal. Rptr. at 48 (Kaus, J., concurring) (quoting Hon. Charles S. Stevens). Judge Stevens also referred to Latinos in such derogatory terms as "cute little tamales," 'Taco Bell,' 'spic,' and 'bean.'" *Id.* at 405, 645 P.2d at 100, 183 Cal. Rptr. at 49 (Kaus, J., concurring) (quoting Hon. Charles S. Stevens). Justice Kaus admonished the majority, stating:

It is beyond me how it can be argued that such behavior is not "conduct prejudicial to the administration of justice" simply because Judge Stevens otherwise performed his judicial duties "fairly and equitably." "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." (*Rex v. Sussex Justices* (1924) 1 K.B. 256, 259 (Lord Hewart)). The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court's judgments and orders.

Id. (Kaus, J., concurring).

In a separate dissent Justice Mosk stated:

I must admit that I am morally offended by racial epithets, whether uttered in a courtroom or in a locker room. But under the constitutional prohibition against curbing freedom of expression, I am not permitted to allow my sensibilities to govern the speech, however uncouth, of any other person. . . .

. . . . [T]he Commission on Judicial Performance is seeking to impose . . . its self-determined standard of appropriate taste and style in language. In so doing it reveals an imperious disregard for constitutional guarantees.

Id. at 406-07, 645 P.2d at 100-01, 183 Cal. Rptr. at 49-50 (Mosk, J., dissenting).

Nevertheless, Justice Mosk appeared to be a lone voice. Most other decisions ignored entirely the First Amendment implications of disciplined judicial speech—excepting those involving speech on behalf of judicial candidates for election. *E.g.*, *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991). Indeed, a number of courts have found that rules pertaining to professional conduct are a "historically established exception" to freedom of speech. *E.g.*, *In re Fadeley*, 802 P.2d 31, 38-39 (Or. 1990). This exception is recognized by the United States Supreme Court, which decided that relatively significant limitations on protected First Amendment rights "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*).

In another Stevens case, this one pertaining to Judge Robert S. Stevens of the Los Angeles Superior Court, the jurist was publicly censured for private conversations that began three and one-half years before he took judicial office and carried over into his term on the bench. *In re Robert S. Stevens*, 28 Cal. 3d 873, 873, 625 P.2d 219, 219, 172 Cal. Rptr. 676, 676 (1981). In those conversations Judge Stevens attempted to persuade a husband and wife—each employed by the state legislature, of which the judge had been a member—to engage in sexual activities with himself and others, discussing his own fantasies and experiences with them in explicit and vulgar detail. *Id.* Despite their continuing objections Judge Stevens persisted, ultimately resulting in wide press coverage when they finally filed a complaint. *Id.* at 874, 625 P.2d at 219, 172 Cal. Rptr. at 676. Although, in a one-line dissent, Justice Richardson urged his colleagues to consider more severe sanctions, the court handled the matter with a brief, unsigned, memorandum of censure. *Id.* (Richardson, J. dissenting).

nia Supreme Court's more severe, recent pronouncements on the much tamer expressions of gender bias by Judge Kennick.²⁰

III. PUBLIC SPEECH: JUDGES, BITE THY TONGUES

Although a number of judges have been severely rebuked—and even removed—for the insulting, inflammatory, or outrageous things they have said—or shouted—in court, few can match, for pure juvenile rudeness, the conduct of William D. Spruance. Among other things, Judge Spruance once gave “a raspberry” to a witness in order

20. The California courts have recently undertaken extensive surveys on the subjects of ethnic and gender bias in the judicial system. After 13 days of public hearings conducted by the Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, it was clear that there is a deeply held perception within minority communities that the judicial system, including judges, is hostile to racial and ethnic groups. JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS, 1991-92 PUBLIC HEARINGS ON RACIAL & ETHNIC BIAS IN THE CALIFORNIA STATE COURT SYSTEM at vii (1993). Rightly or wrongly, speaker after speaker described judges as “‘arrogant,’ ‘unapproachable,’ and ‘insensitive,’ [or that they] ‘hold stereotypic negative views of minorities.’” *Id.* at 6 (quoting speakers at public hearings).

For example, Judge Veronica McBeth, an African-American member of the Los Angeles Municipal Court, testified:

“We are all targets [of racially opportunistic election campaigns], and there isn’t a Black judge I know or a Spanish-surnamed judge who doesn’t know that, who doesn’t talk about it, and doesn’t . . . feel let down about it. And that [situation] is not respected by the bar and by our peers in any way.”

Id. at 48 (emphasis added) (second alteration in original) (quoting Hon. Veronica McBeth).

In addition to hearing public testimony, the Advisory Committee conducted telephone and mail surveys in 1993. See CALIFORNIA JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS: A SURVEY OF THE PUBLIC, ATTORNEYS AND COURT PERSONNEL 2-1 to -9 (1994). While the California courts apparently enjoy more public confidence overall than either the national news media or the Internal Revenue Service, perhaps surprisingly the public—including minorities—rate their local police departments and the United States Supreme Court more favorably. See *id.* On a scale of one to 10, with 10 representing the highest measure of fairness, African-Americans gave California courts a rating of 4.7—as compared, for example, with a 5.3 rating for the police among the same respondents. *Id.* at 4-57.

It seems likely that the Commission and the courts are listening to such comments, and that continued instances of racial and ethnic slurs by members of the judiciary are going to be treated much more seriously than they were in *In re Stevens*. It is therefore especially noteworthy that among the reported transgressions of Judge Kennick were racially demeaning and derogatory statements made in the courtroom. In a city with a large Asian population, it is nothing less than shocking that Judge Kennick often “used a demeaning tone of voice to Asian-surnamed defendants appearing on fish and game violations and uttered such statements as, ‘You were catching fishy, fishy in the harbor here and you weren’t supposed to? Were you a bad boy?’” *Kennick*, 50 Cal. 3d at 325, 787 P.2d at 605, 267 Cal. Rptr. at 307 (quoting Hon. David M. Kennick); see discussion *infra* part III.

to get even with a public defender, and on another occasion gave "the finger" to a defendant arriving late to traffic court.²¹

The modern quantitative record, however, seems to belong to former Judge Kenneth Lynn Kloefer of the San Bernardino Municipal Court, who was charged with "five acts of wilful misconduct and twenty acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute."²² In addition to making inappropriate private comments, Judge Kloefer intimidated parties and witnesses and humiliated and insulted counsel on the record and in front of clients and the public.²³ Of such conduct, the court stated: " 'It is fundamental that the trial court . . . must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias.' "²⁴ While noting that there was considerable testimony attesting to Judge Kloefer's legal knowledge, work ethic, and honesty, the court found that the record suggested "an inability to appreciate the importance of, and conform to, the standards of judi-

21. See *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 789, 532 P.2d 1209, 1216, 119 Cal. Rptr. 841, 848 (1975). Nevertheless, because the finger incident was apparently an isolated act, the court found that notwithstanding a loss of courtroom dignity, "it was not done in bad faith and hence cannot be deemed to have been wilful misconduct." *Id.* at 797, 532 P.2d at 1222, 119 Cal. Rptr. at 854.

22. *Kloefer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 831, 782 P.2d 239, 240, 264 Cal. Rptr. 100, 101 (1989).

23. See *id.* at 842, 782 P.2d at 247-48, 264 Cal. Rptr. at 108-09. On one occasion Judge Kloefer said to the deputy district attorney in front of a packed courtroom, " 'Miss Bartell, you are an embarrassment to the People of the State of California and it's frightening to think that you represent their interests.' " *Id.* at 782 P.2d at 247, 264 Cal. Rptr. at 108 (quoting Hon. Kenneth Lynn Kloefer). Another time he asked an attorney in front of her client, " 'Isn't it true you are psychologically afraid to take a case to trial?' " and demanded that she recite by name the cases she had tried in court. *Id.* at 843, 782 P.2d at 248, 264 Cal. Rptr. at 110 (quoting Hon. Kenneth Lynn Kloefer). To a witness, he said, " 'First of all, stop, and don't say anything . . . First rule is you keep your mouth shut.' " *Id.* at 844, 782 P.2d at 249, 264 Cal. Rptr. at 110 (quoting Hon. Kenneth Lynn Kloefer). The case contains many more such incidents, including a number of instances where Judge Kloefer threatened to hold courageous parties who spoke up in contempt of court. See *id.* at 854-58, 782 P.2d at 256-60, 264 Cal. Rptr. at 117-21.

24. *Id.* at 845, 782 P.2d at 250, 264 Cal. Rptr. at 111 (quoting *People v. Carlucci*, 23 Cal. 3d 249, 258, 590 P.2d 15, 21, 152 Cal. Rptr. 439, 446 (1979)).

It is also considered inappropriate in California for a judge to criticize a jury at the conclusion of a verdict or a mistrial. Although not a rule of court per se, this principle is incorporated in section 14 of the Judicial Administration Standards. CAL. CT. R. § 14. At least one judge has received public reproval from the Commission on Judicial Performance for criticizing a jury. CALIFORNIA COMM'N ON JUDICIAL PERFORMANCE, 1992 ANNUAL REPORT 9 (1993).

cial conduct that are essential if justice is to be meted out in *every* case."²⁵

IV. JUDICIAL SPEECH AND THE CIVIC, CHARITABLE, OR POLITICAL CAUSE

Among the less-noticed restrictions on public judicial speech are those that pertain to political endorsements and charitable solicitations. California Canon 5 prohibits judges from (1) making speeches for or against a political organization or candidate for nonjudicial office, (2) personally soliciting funds for nonjudicial candidates, and (3) engaging in any political activity, other than on behalf of measures to improve the law, the legal system, or the administration of justice.²⁶ The commentary to the rule indicates that judges may nevertheless sign initiative petitions without use of the judicial title, attend political gatherings so long as such would not constitute an endorsement, and otherwise allow their family members to have complete political freedom.²⁷

Canon 2B indicates that a judge should not "lend the prestige of judicial office to advance . . . private or personal interests."²⁸ According to the *California Judicial Conduct Handbook*,

[w]ere judges allowed to solicit for civic and charitable causes, potential donors could well feel coerced, especially those who might come before the judge. Judges are obliged

25. *Kloepfer*, 49 Cal. 3d at 866, 782 P.2d at 263, 264 Cal. Rptr. at 124.

26. CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 5 (1992).

27. Although the commentary to this canon suggests complete political freedom for spouses and other family members, the Ethics Committee of the California Judges Association has recently indicated that "[a] judge may not have a sign supporting a nonjudicial candidate placed in front of the home of judge and spouse." CALIFORNIA JUDGES ASS'N, CALIFORNIA JUDICIAL CONDUCT HANDBOOK (David M. Rothman compiler, 1990) [hereinafter CALIFORNIA JUDICIAL CONDUCT HANDBOOK] (Judicial Ethics Update § IIIC (Feb. 1994)). Query: What if the home is the spouse's separate property? Indeed, what if the spouse is the candidate for whom the sign is placed in the front window? The rule seems susceptible to the criticism that it is better suited to the age of *Father Knows Best*.

28. CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 2B. In Illinois, which has adopted the same canon, a commentator noted:

If a judge writes a favorable review of a book authored by another person, it is possible that the author or publisher might use the review to promote sales of the book. It has been argued that this amounts to using the prestige of office to advance the private interests of others, which is prohibited by Canon 2 of the [Illinois] Code.

Jeffrey M. Shaman, *The Illinois Code of Judicial Conduct and the Appearance of Impropriety*, 22 LOY. U. CHI. L.J. 581, 593 (1991). As the author concedes, this argument seems too restrictive, see *id.* at 594, unless a purely improper motive could somehow be demonstrated.

to use their power only in pursuit of the administration of justice in court. Abuse of this limitation outside of court erodes the independence of the judiciary.²⁹

Although, for example, a judge in California "is prohibited from signing a letter appealing for funds for a battered women's shelter program sponsored by the YWCA,"³⁰ a judge "may serve on an Advisory Council of a national nonpartisan organization whose stated objective is to improve the status of women and, in particular, to secure the passage of the 'Equal Rights Amendment.'"³¹ The difference between the two is not in the civic support of each activity, but rather that the former involves personal solicitation of funds.³²

V. THE BENCH AND THE MEDIA: "DON'T QUOTE ME ON THIS, BUT . . ."

Of all the settings for judicial speech that should stimulate an innate sense of judicial caution, it is the one in which a statement must

29. CALIFORNIA JUDICIAL CONDUCT HANDBOOK, *supra* note 27, at II-36. Nevertheless, the Ethics Committee of the California Judges Association indicated that it would be unduly restrictive . . . to prohibit judges who are associated with the management of charitable or civic groups through service as director, officer, trustee or the like, from carrying out those activities, including assisting in fund-raising, which does [sic] not feature their role as a fund-raiser, nor bring them in direct public contact with the appeal for, or receipt of contributions.

....

The judge is ultimately responsible for structuring his or her participation to avoid the appearance of increasing donations by lending the prestige of office, and at all times to promote public confidence in the integrity of the judiciary.

California Judges Ass'n Comm. on Judicial Ethics, Op. 41, at 2-3 (1989).

30. CALIFORNIA JUDICIAL CONDUCT HANDBOOK, *supra* note 27, at 1 (Judicial Ethics Update, Fall/Winter 1982).

31. *Id.*

32. Included in the list of impermissible activities for judges in California are the following: (1) serving as a member of a fund-raising committee; (2) serving as a member of a dinner committee for a fund-raising event; (3) engaging in any activity that makes the judge a drawing card; (4) being the featured speaker or guest of honor at a fundraiser; (5) being the featured entertainer or celebrity server; (6) serving as an auctioneer; (7) signing a letter appealing for funds; (8) serving as a judge in a mock-trial or mock-bail setting to raise money; and (9) engaging in any activity that could reasonably be expected to increase donations. *Id.* at II-37.

Judges may, however, do the following: (1) serve on a fund-raising committee, as long as the judge's name is not listed on solicitations; (2) work in a booth or serve food at a fund raiser; (3) work in a kitchen at a fundraiser; (4) organize or work in a phone bank, but not make the calls; (5) make introductions or work as an announcer; (6) speak at a fundraiser, as long as the judge is not the honoree or the speech is not fund raising in nature; (7) lead an invocation; (8) entertain, as long as the judge is not featured on advertisements for the event; (9) attend fund-raising events; and (10) contribute money for charitable causes. *Id.*

be given to the press.³³ Even a noncontroversial statement can be a source of controversy, as is well known by Judge Lance Ito of the Los Angeles Superior Court.³⁴ Over the years the California Judges Association has attempted to facilitate a mutual understanding and respect between bench and bar, with periodic conferences and excellent publi-

33. The following statement by Judge Patrick J. Morris, past president of the California Judges Association, defines the problem:

Despite their mutual dependence judges and reporters often find themselves at odds with each other. Reporters are in search of news and comment to share with the public. Cases pending in the courthouse are full of interesting social and political issues. Judges are barred, however, by their Judicial Code of Conduct from making any comment on pending cases, lest they be seen as pre-judging or taking sides.

CALIFORNIA JUDGES ASS'N, *THE COURTS AND THE NEWS MEDIA* at v (6th ed. 1993).

Judge Roderic Duncan of the Alameda Superior Court, who recently organized a bench-media workshop in San Francisco, recalls a conversation with a prominent television anchor: The newsman said, "If I were a judge and a reporter wanted to talk to me, I'd have to consider carefully whether it was to my advantage. Sometimes I wonder seriously about why you ever let us in your chambers." Roderic Duncan, *Covering the Courts*, CAL. CTS. COMMENTARY, Spring 1994, at 1, 1 (quoting unidentified television anchor).

34. In accepting an invitation to be interviewed nightly by Los Angeles television anchor Tritia Toyota during jury selection in the O.J. Simpson trial, Judge Ito was no doubt guided by the following premise:

There is no reason for a judge not to accept invitations to appear in the media. For example, a judge may appear on television to discuss the programs of the court, answer questions about the justice system, and even take calls from the audience, as long as pending cases are not discussed. . . . The judge should avoid interpreting questions based on specific facts.

CALIFORNIA JUDICIAL CONDUCT HANDBOOK, *supra* note 27, at I-41.

Nevertheless, some commentators expressed grave reservations about the wisdom of his action. See, for example, the following statement made by University of San Diego law professor Robert C. Fellmeth:

The problem is that the neutrality of a judge in reality or public perception, may be influenced by more than financial reward; for many the notoriety outweighs all other inducements.

....
I want a judge who . . . will say "no comment" and do his job, disgusted that anyone would use a human tragedy for entertainment. I don't want to know a damned thing about Judge Ito except that he is going to be angry as hell if his jury is messed with, if the attorneys lie to him or if the media interfere with a fair trial on the merits. . . . [W]e . . . do not need to expand this circus into the chambers of the court.

Robert C. Fellmeth, *Just Another Nice Guy? Phooey!*, L.A. TIMES, Nov. 16, 1994, at B7.

To be sure, Judge Ito was well defended. Appearing on the same day's editorial pages of *The Los Angeles Times*, University of Southern California law professor Erwin Chemerinsky's counterpoint commentary noted:

The reality is that the Simpson trial is, and has been, and will continue to be a major news story. More people will learn about the law and the legal system from this case than from any other single event in American history. Rather than criticize or ignore this reality, [these] TV interviews use the press spotlight to an important benefit: helping people see judges as human beings.

Erwin Chemerinsky, *It's Good to Put a Human Face on a God-Like Role*, L.A. TIMES, Nov. 16, 1994, at B7.

cations for the use of each. Nevertheless, judges have managed to find themselves in a good deal of hot water for things said to the press.

Some judges, however, cannot seem to resist the lure of a good headline. Judge Mario Gonzalez, for example, "[i]n an almost farcical misapplication of [the] law,"³⁵ wrote an "opinion" in the form of a press release, "declar[ing] that the local dog leash/license ordinance violated the [E]qual [P]rotection [C]lause of the Fourteenth Amendment because it applied to dog owners, but not to owners of "(a) Canaries, (b) Chinchillas . . . (k) Mynah birds . . . (o) Squirrel monkeys, (p) Steppe legal [sic] eagles, (q) Toucans . . . ' and so on."³⁶ The court noted that while such a press release earned him a certain political notoriety, it also undermined public esteem for the judiciary and therefore constituted willful misconduct as a matter of law.³⁷

Judge Richard Ryan likewise took occasion to share a decision with the press, albeit not a farcical one. While the matter was still under submission, he shared a draft opinion with a newspaper reporter and discussed his rationale for deciding the case. As a result Judge Ryan's statements appeared in the newspaper before the parties received copies of his decision. The court found this incident, as well as several others in which Judge Ryan contacted the press with proceedings pending, to be prejudicial conduct in violation of then-Canon 3A(6)—now slightly revised as 3B(9)—of the California Code of Judicial Conduct: "'Judges should abstain from public comment about a pending or impending proceeding in any court . . . ' "³⁸

35. *Gonzalez v. Commission on Judicial Performance*, 33 Cal. 3d 359, 374, 657 P.2d 372, 380, 188 Cal. Rptr. 880, 888 (1983).

36. *Id.* (alteration in original) (quoting Hon. Mario P. Gonzalez).

37. *Id.*

38. *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 542-43, 754 P.2d 724, 738, 247 Cal. Rptr. 378, 392 (1988) (quoting CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 3A(6) (current version at Canon 3B(9) (1992))). The cited canon has been revised, based upon the new ABA Model Code of Judicial Conduct, and now provides clear guidance for matters such as the Ito television interview:

A judge should not make any public comment about a pending or impending proceeding in any court, and should not make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . . This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court

CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 3B(9) (1992).

More recently, judges have received private letters of admonishment from the Commission for making a statement to the press about an attorney's conduct in a trial and writing an article about an appellate decision before the decision was final. *See* CALIFORNIA COMM'N ON JUDICIAL PERFORMANCE, 1993 ANNUAL REPORT 18-19 (1994). Another judge was privately admonished for responding to public criticism of a criminal sentence by

Judges who desire to be cooperative with the press, but are concerned, for example, about statements that might become public prematurely, should consider the advice of television anchor Anna Chavez, who cautioned: "When you go off the record, it must be an explicit, clearly understood arrangement. It's very important [that the judge and the reporter] not take each other for granted, even if [they] have established a good rapport. You have to be very specific about attribution." ³⁹

Said Chavez,

"I think it is invaluable when people in high places take the time to educate the public about their areas of expertise. I recently hosted an hour-long 'Town Hall on Crime.' We had 100 people in the audience, all of them experts and very passionate in their views. [A judge] was on the panel speaking as a judge, but not representing her court. She spoke at length. She was powerful and she was eloquent and she helped the viewers understand some things that no one else could have clarified nearly as well." ⁴⁰

Perhaps the least forgiving review of a judge who spoke errantly to the press occurred in Vermont, where the court censured a member of the trial bench for the following statement to a newspaper reporter: "A plea of guilty shows that the defendant has some kind of repentance for what he did that would not hold true in a trial. In that case he would not be dealt with as leniently." ⁴¹ While foolish, and obviously erroneous, the comment appears to have been made in good faith. Nevertheless, the Vermont Supreme Court said this statement violated the state's code of ethics because of the negative inference it created as to the judge's ability to apply impartially a defendant's Sixth Amendment right to a jury trial. ⁴²

The common thread in discipline cases involving judicial comments made to the press seems to have been—with the above-noted exception—a desire by the disciplined judges to gain personal notoriety. In contrast, the judge who speaks only with a genuine interest in

sending an explanation to the news media. See CALIFORNIA COMM'N ON JUDICIAL PERFORMANCE, 1992 ANNUAL REPORT 16 (1993).

39. *What to Do when the Media Call: How to Survive a Television Interview*, CAL. CTS. COMMENTARY, Spring 1994, at 6, 6 (quoting television anchor Anna Chavez from interview with Jeanne Haynes).

40. *Id.* at 7 (quoting television anchor Anna Chavez).

41. *In re Mandeville*, 481 A.2d 1048, 1049 (Vt. 1984) (quoting Hon. Theodore S. Mandeville, Jr.).

42. *Id.*

an educated and informed citizenry in mind would seem less likely to cross over the line, if only because such circumstances do not invite colorful speech or sensational disclosures.

VI. ANALYSIS

This Essay has examined some of the more flamboyant examples of disciplined judicial speech, which common sense should have prevented. It has also considered some of the closer questions of permissible speech in the context of a modern informational society, in which public officials are expected to be accessible and informative.

Some restrictions on judicial speech seem especially inflexible, particularly in the area of fund raising for nonpolitical programs. But for the canons, for example, a judge might be the most appropriate featured speaker at either a law school endowment luncheon or a minority scholarship foundation dinner. Assuming the event is dignified and worthy of public support, it is hard to see why a judge should not be involved in something more than a behind-the-scenes capacity.

In the area of criminal sentencing, there is a great deal of public distrust and misapprehension as to the motivations of judicial officers. When a judge is criticized by the press, it seems appropriate to provide a dignified explanation to inquiries from journalists. Silence is too often seen as an admission of error. In these areas, among others, the various judicial canons deserve continuing debate and renewal.

Nevertheless, public support for the judiciary can only improve with continued vigilance by the courts and agencies called upon to enforce a state's judicial canons. In this respect a certain inflexibility, while hard on any particular member of the bench, is arguably good for all.

VII. CONCLUSION

It has been observed that "[m]ore often than not, judges do not intentionally violate a canon of judicial ethics. Judicial codes are often vague and susceptible to varying interpretations, and, therefore, judges frequently violate their code out of ignorance and inattention."⁴³ It should be the fervent hope of all that the new emphasis on the ABA Model Code, and frequent public discussions about judicial ethics, will raise the consciousness of each sitting judge sufficiently that "ignorance and inattention" will not be the source of a violation

43. Nancy L. Sholes, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 400 (1992) (footnote omitted).

that causes damage either to public esteem for the courts or a jurist's own career.

While judges need not, and should not, feel muzzled to the point of placing my friend's "shut-up" cards around their benches, they must develop the habit of considered expression and remember the advice of the old congressman. Above all, however, judges must remember who they are and what they represent. Public confidence in the judiciary depends upon it.

