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TIME, PLACE, AND MANNER RESTRICTIONS ON EXTRAJUDICIAL SPEECH BY JUDGES

*J. Clark Kelso**

I. INTRODUCTION TO THE PROBLEM

Imagine this: Two days prior to the November 1994 election in California, without the benefit of briefing or argument, each member of the California Supreme Court releases a personal statement opposing Proposition 187,¹ the "Save Our State" illegal immigration initiative, on the grounds that (1) the initiative is bad public policy, and (2) portions of the initiative violate the United States and California Constitutions. The personal statements naturally make banner headlines throughout the State, but notwithstanding the opposition, Proposition 187 is overwhelmingly approved.

Does anyone believe that the supreme court justices in this hypothetical have not seriously compromised their own integrity and the integrity of the court? Does anyone believe that the supreme court justices in this hypothetical have not violated some of the most basic norms of judicial conduct?²

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1. CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1995).

2. I acknowledge the theoretically interesting question of whether California would be better served by permitting the supreme court to issue advisory-type opinions regarding the wisdom and constitutionality of ballot measures prior to their submission to the voters, particularly in view of the fact that over half of the voter initiatives in California in the past 30 years have ultimately been held unconstitutional in one regard or another. See J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 367-68 (1992). Preelection review is not the norm, however, and the limited preelection review that is available in California presupposes ordinary judicial processes, including briefing and argument. See *American Fed'n of Labor-Congress of Indus. Orgs. v. Eu*, 36 Cal. 3d 687, 696-97 n.11, 686 P.2d 609, 615 n.11, 206 Cal. Rptr. 89, 95 n.11 (1984) (directing Secretary of State not to submit initiative measure to voters which "exceeds the initiative power").

There is precedent for permitting California judges to take public positions on certain ballot measures. A 1986 ethics committee opinion approved of judges joining together in a political action committee to defeat a ballot measure that would have reduced the salaries of public officials, including judges. See CALIFORNIA JUDGES ASS'N, CALIFORNIA JUDICIAL CONDUCT HANDBOOK II-47 to II-48 (David M. Rothman compiler, 1990) [hereinafter CALIFORNIA JUDICIAL CONDUCT HANDBOOK]. This conduct falls within a well-recognized

On the other extreme, consider a speech by an intermediate appellate justice, delivered at a symposium or at a bar meeting, on the subject of Justice Scalia's attempts over several years to convince his colleagues on the Court to apply a plain meaning approach to statutory construction. I refer to a humorous and thought-provoking speech by Judge Alex Kozinski titled, "My Pizza With Nino."³

Many—I hope most—would agree that something is wrong with supreme court justices actively opposing a ballot proposition in an attempt to influence the vote. Nearly everyone would also agree that Judge Kozinski's speech is perfectly proper—as well as entertaining. But developing a clear, useable rule or principle to assess the propriety of particular instances of extrajudicial, law-related speech has proven to be problematic.

Commentators have repeatedly identified the various interests, many of them overlapping and interconnected, that may be affected by extrajudicial activities.⁴ Those interests include separation of powers, the independence of the judiciary, the appearance and reality of impartiality, public confidence in the judiciary, and respect for the Rule of Law. The devil is in the details, not in the general principles.

A natural source for those details is the American Bar Association's 1990 Model Code of Judicial Conduct. However, the Code is not particularly helpful. Canon 4 encourages judges to "speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and non-legal subjects."⁵ The primary limit in Canon 4 is that such activities must not "cast reasonable doubt on the judge's capacity to act impar-

exception to the general proscription against political activity by judges. Pursuant to that exception, judges may engage in political activities regarding legislation that directly affects judicial administration.

3. 12 CARDOZO L. REV. 1583 (1991).

4. See, e.g., WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 177-82 (1964) (examining ethical and prudential limits on judicial speech); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 15 (1992) (citing arguments against judges campaigning for office); Drew E. Edwards, Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071, 1072-76 (1987) (reviewing history of judicial activity by judges); Nathaniel L. Nathanson, *The Extra-Judicial Activities of Supreme Court Justices: Where Should the Line Be Drawn?*, 78 NW. U. L. REV. 494 (1983) (reviewing BRUCE ALLEN MURPHY, AN INQUIRY STIMULATED BY THE BRANDEIS/FRANKFURTER CONNECTION—THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982)).

5. MODEL CODE OF JUDICIAL CONDUCT Canon 4(B) (1990).

tially as a judge.”⁶ As a practical matter, this is usually not much of a limitation since judges can quite plausibly argue that their personal views on legal issues expressed outside of the courtroom do not prevent them from applying the law in the courtroom. For example, a judge may express hostility to punitive damages in a speech or article yet still be able to apply existing law regarding punitive damages in resolving particular cases.⁷

An additional limit on extrajudicial speech is found in Canon 2 which requires judges to “act *at all times* in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁸ Like the limit in Canon 4, however, this language in practice imposes few restraints. Impartiality is already covered in Canon 4, and the “integrity” of the judiciary is a difficult characteristic to measure. Integrity does not mean uniformity, so judges are free to express disagreement with the law as it currently stands or with the views of other judges. In fact, the expression of such disagreements is a positive feature of our system, since it promotes rethinking and growth of the law. Thus, the honest expression of different points of view *promotes* the integrity of the judiciary.

Finally, pursuant to Canon 5, political activity is generally frowned upon.⁹ But Canon 5(D) explicitly provides that its general proscription against engaging in political activity does not apply to any activity “authorized under any other Section of this Code,” which the commentary makes clear includes activities under Canon 4.¹⁰ Thus,

6. *Id.* Canon 4A(1). (Canon 4A(2) and (3) add that these extrajudicial activities may not “demean the judicial office” or “interfere with the proper performance of judicial duties”).

7. On the eve of a civil bench trial, a judge would cross the line by stating that the judge will not impose punitive damages upon the defendant no matter what the evidence shows; but short of this sort of focused declaration, it is difficult to imagine a successful challenge to the judge’s impartiality based upon extrajudicial speech that evidences an inability to act impartially. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986) (stating “general hostility towards insurance companies” is insufficient basis for disqualification); *Federal Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 702-03 (1948) (noting that judge’s opinion whether certain conduct was prohibited did not necessarily violate procedural due process); *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (explaining “mere fact that a judge has previously expressed an opinion on a point of law” is insufficient to warrant disqualification (citing *Leaman v. Ohio Dep’t of Mental Retardation*, 825 F.2d 946, 949 n.1 (6th Cir. 1987))).

8. MODEL CODE OF JUDICIAL CONDUCT Canon 2A (emphasis added).

9. *Id.* Canon 5.

10. *Id.* Canon 5D. The California Code of Judicial Conduct is similarly generous with respect to political activity. It provides that “[e]xcept as otherwise permitted in this Code, judges should not engage in any political activity, other than on behalf of measures to improve the law, the legal system or the administration of justice.” CALIFORNIA JUDGES

the bar against political activity would not prevent a judge from speaking, lecturing, or teaching on political matters so long as it concerns the law, the legal system, and the administration of justice pursuant to Canon 4. As previously indicated, the only limit on Canon 4 activities is to avoid creating doubt as to a judge's capacity to decide cases impartially.

Given the operational vagueness¹¹ of the terms "integrity" and "impartially," it is no surprise that different people come to differing conclusions regarding particular examples of extrajudicial public speech.¹² As mentioned above, the devil is in the details.

The simplest rule, a flat ban on public, extrajudicial speech by judges on legal topics, makes no sense. A flat ban would have the virtue of clarity and ease of application, but the vice of overinclusiveness. On the whole, judges are the cream of the legal profession, and it would be a great waste to limit their contribution to the development of law and society unless such limitations served overwhelmingly important interests.¹³ As I hope to make clear below, there are less restrictive means than an all-out ban.

An equally simple rule, permitting all public, extrajudicial speech, is, in my view, equally problematic. The judiciary is the most fragile of

ASS'N, CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 7A(3) (1992) (current version at Canon 5D (1992)), reprinted in STATE BAR OF CAL., CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY (Jan. 1994). Does Proposition 187 (codified at CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1995)) or the "Three Strikes" initiative (codified at CAL. PENAL CODE § 1170.2 (West Supp. 1995)) improve the law, the legal system, or the administration of justice? Arguably yes, and Canon 7(A) would thus permit California judges to take public positions regarding these and other proposed initiatives and legislation. The *California Judicial Conduct Handbook* accurately notes that "Canon 7 is imprecise" and "open to broad interpretation." CALIFORNIA JUDICIAL CONDUCT HANDBOOK, *supra* note 2, at II-47.

11. By "operational vagueness" I mean that although the terms may be readily definable in theory, there exists a substantial gray area in which it is difficult to know whether impartiality and integrity are truly threatened.

12. For example, several years ago, I criticized Judge Kozinski for delivering a speech at a bar function in which he was harshly critical of certain aspects of California tort law. J. Clark Kelso, *Kozinski Steps Out of Line in His Tort-Bashing Crusade*, L.A. DAILY J., July 9, 1991, at 7. Professor Norman Karlin of the Southwestern University School of Law completely disagreed with this assessment, observing that "if [Judge Kozinski] provokes controversy, that is to the good, because that is how the law will grow." Norman Karlin, *It's a Judge's Duty to Stir Up Controversy on Legal Issues*, L.A. DAILY J., Sept. 24, 1991, at 16.

13. "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice." MODEL CODE OF JUDICIAL CONDUCT Canon 4(B) commentary (1990).

the three branches and depends upon public and political acceptance of its processes and judgments. It simply would not do to have judges publicly engaging in the sort of freewheeling debate that routinely takes place on the floor of the House of Representatives, for example.

Once it is admitted that *some* extrajudicial speech by judges on legal topics is both permissible, desirable, and necessary, but that not *all* such speech is advisable, it becomes problematic to draw a line to distinguish the acceptable from the unacceptable. Conceivably, we could attempt to make subject-matter or content-based distinctions. Judges should not talk publicly about abortion, or the death penalty, or three strikes, or Proposition 187, or other controversial topics. These sort of distinctions are ultimately unsatisfactory, however, since those who make the distinctions—such as commissions on judicial performance, commentators, and other judges—will themselves necessarily be drawn into the political thicket. Content-based distinctions in this context are just as unacceptable as they are under First Amendment jurisprudence.¹⁴

Although I shy away from content-based discriminations, I will embrace in the remainder of this Essay time, place, and manner restrictions. Under this approach, it will be permissible for a judge to express views on even the most politically sensitive issues so long as those views are expressed at the proper time, in the proper place, and in an appropriate manner.

II. TIMING IS EVERYTHING

There is a right time and a wrong time for virtually all human activities. The same is true of extrajudicial speech by judges. For example, the wrong time to comment publicly upon the merits of a particular case is on the eve of trial or just prior to oral argument. Indeed, the better practice is not to make any public comments upon the merits of an individual case outside of court until the case is no longer within the court's jurisdiction and, if a judge is being exceptionally careful, no longer has any possibility of returning to that same court.

14. See, e.g., *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2458 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

This timing principle seems relatively well-accepted by judges. It is worth exploring the reasons why this specific proscription should continue to be observed, particularly since I want to suggest a slight extension of the proscription.

When people are appointed or elected to judgeships, there tends to be a blurring of their personal identity with their official identity—at least in the eyes of the general public. All but close friends and colleagues refer to judges as “Judge X,” whether they are on or off the bench. Their credit cards may identify them as “Judge X” or “The Honorable X.” They carry some of the power of their office with them wherever they go.

At the same time, we know that judges have additional societal roles other than being a judge. They are spouses, parents, teachers, writers, and community leaders, and society can ill afford to lose their talents simply because their job requires them to serve as judges. That is why the Canons of Judicial Conduct encourage judges to engage in extrajudicial activities to promote improvements in law and the legal system.

When judges serve in their roles as judges—symbolically speaking, when a judge is wearing the robe—the constitutional obligations of the office limit their freedom of speech. Judges speak not for themselves, but for the court and for the state. The Law is their master, not their own predilections.¹⁵ Trial judges should not issue rulings based upon their own views if those views are contrary to settled law. When that happens, we count on the appellate courts to set matters straight.¹⁶ And, since one of our basic principles of due process is the right to a full and fair hearing, trial judges should not announce *final* decisions in court prior to presentation of evidence and argument.¹⁷

15. To some readers, this may seem like a rather quaint, outdated notion. Haven't the legal realists debunked the notion that judges follow Law or that Law even exists? See, e.g., Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 244-45 (1970); Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, Monsanto Lecture, 28 VAL. U. L. REV. 821, 821-23 (1994). I may be somewhat old-fashioned in my views, but cynics should read the plurality opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2808-16 (1992), for a modern example of how respect for the Law as embodied in a particular court's institutional history can influence decision making.

16. See J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 434 (1993-1994).

17. It should be clear from the emphasis of the word “final” in the text that different rules apply to tentative rulings issued after briefing or presentation of evidence but prior to oral argument. Those sort of tentative rulings are both permissible and desirable since they tend to focus attention at oral argument upon points that really might make a difference.

That is why, in the example above, it is inappropriate for a judge to announce at the beginning of a civil trial that the defendant will not have to pay any punitive damages, no matter what the evidence and law require.

So when judges actually wear their robes, they must adhere to the letter and spirit of the Law—that is their oath. But now let's assume the following hypothetical:

Just before donning her robes to preside over a civil bench trial, Judge Smith calls a press conference in the hallway outside her office where she announces that, based on what she has read in the newspapers, she thinks the defendant is a good-for-nothing tortfeasor who should be mulcted for every penny. When asked by a courteous reporter whether she thinks she can still sit as judge in the upcoming case, Judge Smith replies, "Of course. This was just my personal view and has nothing to do with what I will do as a judge. When I put my robes on, I act responsibly for the court and the state, and I will base my decision solely upon what I hear in the courtroom and in light of the law."

Should Judge Smith preside over the trial? I think not, even if her statement is true that she can separate her personal views from her professional views and conduct on the bench. The timing of her statement is obviously critical to this conclusion. If she had held her press conference *after* entering a judgment in conformity with the law in favor of the defendant, and had announced her displeasure at having had to enter that judgment because she believes the defendant is a tortfeasor, it would be much easier to credit her assertion that she keeps her personal views separate from her professional conduct. But by making her announcement prior to trial, she has hopelessly compromised the integrity and impartiality of the court for which she works. Pretrial or preargument statements by judges regarding matters that are coming up in the near future are mistimed.

I now want to propose a slight extension of this timing principle that is less obvious. Even *after* a case has been heard and decided, there should be a cooling-off period before judges who were involved speak publicly about the case and its resolution. Consider Judge Smith again. Let's suppose that in her civil case, she entered a seven-figure judgment against the defendant, notwithstanding precedents from the highest court in the jurisdiction that strongly suggested a pro-defense verdict would have been required. Immediately after entering judgment, Judge Smith removes her robes and steps up to the hallway microphone. Smiling triumphantly, Judge Smith announces that

she is glad the defendant has been hit with a big judgment, because Judge Smith thought from the very beginning that the defendant was a tortfeasor and that the precedents were wrong. When asked by the courteous reporter whether she was speaking for the court or for herself, Judge Smith replies, "These are just my personal views now. My ruling as a judge was controlled by and fully consistent with the law." The reporter follows up, "So when you ruled as a judge, you were ruling consistently with your view of what the law is rather than simply ruling consistently with your personal views." Judge Smith replies, "Correct."

The timing of Judge Smith's public statement, following immediately upon the heels of her judicial ruling, undermines the credibility of her assertion that her ruling was based upon her view of what the Law required rather than upon her personal views. The temporal proximity of her ruling and her press conference conveys the image that there is little difference between Smith, the Judge, and Smith, the person-who-holds-press-conferences, and implies that the law in Smith's court is whatever Smith happens to say it is.¹⁸

The practical result of Judge Smith's postverdict news conference is to convey the message that judges decide cases based upon their personal views and not upon their good faith interpretation of the Law. That is a bad message to send the public. We are supposed to be a country of laws, not of people, even if those people happen to be judges. If the law is nothing more than what a few individuals say the law is, there is little reason for the public to respect the Rule of Law.

This timing principle does not mean that judges should never comment upon cases that have passed before them. To the contrary, judicial postmortems can contribute to the development of law.¹⁹ By observing a reasonable cooling-off period, the temporal link between judge-as-commentator and judge-as-judge becomes attenuated, and there is less likelihood of the public confusing those two very different roles.

18. The fact that her ruling appears to be contrary to law is obviously important in deciding what inference to draw from her posttrial statements. See *Brown v. Doe*, 2 F.3d 1236, 1248-49 (2d Cir. 1993) (stating judicial disqualification not required when judge emphasized conviction in post-trial campaign literature), *cert. denied*, 114 S. Ct. 1088 (1994).

19. See, e.g., BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 77-78 (1924) (commenting on *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

The editorial written by Judge John Noonan²⁰ and speeches given by Judge Stephen Reinhardt²¹ in the aftermath of the Robert Alton Harris debacle are examples of poorly timed extrajudicial speech. I will not recount here the flurry of late-night, early-morning arguments and judicial orders for temporary stays and reversals. Suffice it to say that the Ninth Circuit and Supreme Court disagreed about which court properly could exercise jurisdiction in the circumstances. In the end, the Supreme Court won,²² primarily because the justices were willing to stay up all night.

Having lost the battle, the judges on the Ninth Circuit who were involved should have observed a reasonable cooling-off period. There plainly was a need *sometime* after the event to discuss openly and publicly the legal issues that arose that night and to work towards their resolution in a manner which would forestall similar confusion in the future. But any public discussion on the legal questions should have been delayed somewhat so that everyone involved had some time to cool down and to reflect.²³ For example, some four months after Harris's execution, the Ninth Circuit judges held their annual meeting of the court attended by Justice O'Connor. That meeting would have been an ideal setting for an initial public discussion by the judges of the difficult jurisdictional issues raised by the *Harris* appeal.²⁴ By responding so quickly, so publicly, and with such hostility in nonjudicial forums,²⁵ these Ninth Circuit judges conveyed such a high level of personal frustration with the issues and their resolution that the public could easily conclude the judges did not impartially follow the law in resolving the *Harris* case. Worse, the public might

20. See John T. Noonan, *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992, at A17; Henry Weinstein, *Dissension over Death Penalty Flares Again Among Judges*, L.A. TIMES, July 5, 1993, at A3, A25.

21. See, e.g., George M. Kraw, *Beyond Published Opinions*, RECORDER, Aug. 11, 1993, at 10-11 (discussing speeches given by Judge Stephen Reinhardt at Yale Law School and at Golden Gate University).

22. *Gomez v. United States Dist. Court*, 112 S. Ct. 1652 (1992) (vacating orders staying execution of Robert Alton Harris).

23. Private discussions with colleagues and friends would obviously be appropriate and useful during this cooling-off period. Those sort of discussions would in fact be part of the process of reflection that should precede a more public debate.

24. The issue was in fact discussed at the Ninth Circuit's annual meeting in August. See Steve Albert, *A Lecture from O'Connor: Habeas Limits Stir up Acrimony on 9th Circuit*, LEGAL TIMES, June 14, 1993, at 8, 9.

25. For example, on the New York Times Op-Ed page, Noonan, *supra* note 20, and a speech at Yale Law School, Kraw, *supra* note 21.

thereafter assume that these judges would not be able to resolve similar cases in the future impartially.²⁶

In a thoughtful article, George M. Kraw offers the following defense of Judges Noonan and Reinhardt:

These outspoken judges are part of an important continuing debate concerning the role of our courts and the consequences of our laws. So long as these judges continue to apply the law regardless of their personal opinions, no harm is done to our judicial system. The greater danger lies in stopping the debates and aspiring to a judiciary of uniformly bloodless functionaries.²⁷

The second sentence is of course the problem. Given their quick public reaction, how likely is it that the public will believe that Judges Noonan and Reinhardt are capable of impartially applying the law to death penalty cases? It is a matter of timing. I do not propose stopping the debate, but the debate should be conducted in a way that does not subject the judiciary to public scorn. A few days after Harris's execution was perhaps the wrong time.

III. PROPER PLACES

The place where judicial speech occurs is just as important as the timing. Most judicial speech occurs in the halls of justice. In that context, and while performing judicial functions, judges, with extremely rare exceptions, observe traditional norms of behavior. There are the occasional outbursts of temperament or incidents of inappropriate speech from the bench, but these events are unusual, and commissions on judicial performance are empowered to deal with such incidents.

In one sense, judges remain judges twenty-four hours a day. Even when not wearing judicial robes, judges have the ability to exercise judicial power whenever and wherever necessary. Emergency petitions and writs may be acted upon by a judge sitting comfortably at home in the middle of the night. If this view were taken too seriously, there would be no place where judges could speak without observing

26. I want to make clear that I do not pretend to know which court was right in the resolution of the jurisdictional dispute in the *Harris* case. In a rather simplistic sense, the Supreme Court was right because it is the Supreme Court. There certainly are, however, very strong arguments that the Ninth Circuit judges were correctly trying to protect a litigant's right to petition for en banc review and that the Supreme Court trampled upon those rights. The point here is not who was right, but rather whether the Ninth Circuit judges should have attempted to litigate that issue in the court of public opinion so soon after the event.

27. Kraw, *supra* note 21, at 10, 11.

the limits placed upon them while performing judicial functions in court.

But judges are people too, and becoming a judge does not mean the sacrifice of all one's personal life and opinions. We should expect judges to express their own views about politics and public policy. Indeed, it would be shocking if judges did not hold strong views on such matters. Many judges have been significantly involved in public policy issues prior to assuming the bench, and major public policy issues routinely come before the courts for review.

The problem is not that judges hold personal views on controversial matters of public policy. It is, rather, a question of *where* such views can be appropriately expressed.

We should expect judges to discuss pressing issues of public policy with family, friends, and colleagues. These discussions take place at home, at work, over lunch or dinner, and in the hallways. Extrajudicial speech on legal topics in these locations is ordinarily proper.

Traditionally, we have accepted judges in the classroom as teachers, and in law reviews or books as scholars. For example, several Justices on the United States Supreme Court have continued to teach law classes even after their appointments.²⁸ Teaching law is a noncontroversial extrajudicial activity primarily because professors in typical law classrooms ask more questions than they answer. It is quite common for students to complete an entire semester with a professor and not have a very clear idea about that professor's views on many issues of law.²⁹ The classroom atmosphere is designed for an open exchange of tentative views and possible arguments. This is an appropriate setting for judges to contribute to the development of the next generation of lawyers and law.

Scholarship by sitting judges is also a time-honored tradition. In theory, judicial scholarship could create great concerns. Authors, unlike teachers, are much less likely to conceal their personal views, and the views expressed are less likely to be tentative. Indeed, one of the main purposes of scholarship is to convey one's views in a way that will convince readers. Yet judicial scholarship does not seem to be an

28. Justice Kennedy, for example, taught constitutional law at the McGeorge School of Law as an adjunct professor while serving on the Ninth Circuit. He continues to teach in McGeorge's summer international program held at Salzburg, Austria.

29. In fact, many professors deliberately take the opposite position to that of a majority of the class for the sole purpose of providing balance.

easy target for criticism.³⁰ The reason probably has much to do with the medium of legal scholarship. Most legal scholarship is written for a narrow audience of persons interested in the details of law. There is a tradition of citing sources in support of propositions. Authors attempt to lay out arguments with the hope that readers will be able to evaluate the soundness of the argument based upon the reasoning employed. Hyperbole and extravagance are the exception rather than the rule. In sum, scholarship by judges should be encouraged.

Greater concerns surface when judges venture into more overtly political forums. Thus, except on matters of judicial administration, we do not expect to see judges wandering around legislative hallways pigeon-holing legislators and lobbyists over pending legislation. For similar reasons, we are also surprised when we see judges using television, radio, newspapers, and magazines—instruments of mass media—to discuss issues of public policy.

Judicial lobbying is risky business. It tends to blur the distinction between the legislative and executive branches, which are constitutionally involved in enacting and enforcing positive law, and the judicial branch, which is constitutionally involved only in interpreting, applying, and reviewing positive law. This blurring of constitutional functions can undermine separation of powers and the independence of the judiciary.

It is clear that judges are permitted to appear before legislative committees and to lobby legislation that directly affects the administration of justice. Last year, when the California legislature considered whether to propose a constitutional amendment unifying the superior, municipal, and justice courts,³¹ it was perfectly appropriate for judges individually and collectively to present their views to legislators, the Governor, and lobbyists. The same is true about last year's successful effort to reform the Commission on Judicial Performance.³²

30. The scholarship of nominees to the Supreme Court of the United States and to Cabinet or sub-Cabinet positions seems to be an exception, but the politics of the confirmation process is no doubt responsible. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); Krista Helfferich, Comment, *The Stress, the Press, the Test, and the Mess with the Lani Guinier Smear: A Proposal for Executive Confirmation Reform*, 28 *LOY. L.A. L. REV.* 1139 (1995).

31. Senate Constitutional Amendment No. 3 (1994). See Trial Court Unification: Constitution Revision (SCA 3), 24 *CAL. L. REVISION COMMISSION REP.* 1 (1994); J. Clark Kelso, *Trial Court Unification: Proposed Constitutional Amendments and Commentary as Amended and Adopted by the Judicial Council*, 25 *PAC. L.J.* 239 (1994) (Judicial Council's report on SCA 3).

32. Proposition 190 (codified at *CAL. CONST.* art. VI, § 8) (proposition approved at Nov. 8, 1994, general election).

It was appropriate for the California Judges' Association to appear before legislative committees to express concern about some of the reform provisions. Judges are directly affected by legislation regarding the administration of justice, and it is imperative that judges have the opportunity to comment upon such legislation.

A much more difficult issue arises when judges draft or lobby for or against legislation that does not directly affect the administration of justice. This level of direct involvement in legislative activities is inconsistent with the judiciary's limited role in our constitutional structure. It appears to compromise that judge's ability to sit in review of such legislation in a judicial capacity. It may create an appearance of legislative and judicial cooperation which is incompatible with a judiciary that is truly independent of the legislative and executive branches.

Arguably, so long as lobbying by judges remains private, there is little cause for concern. Private lobbying may seem to be less objectionable if our primary concern is the appearance of impartiality and public confidence in the judiciary. But private lobbying almost invariably becomes widely known. For example, the lobbying activities of Justices Brandeis and Frankfurter were well known by Washington insiders.³³ Even this level of public knowledge—that is, knowledge only by other governmental actors—can be harmful because it reinforces in the legislative and executive branches the idea that judges are political animals. This may encourage those two branches to treat the judicial branch as just another unit of government instead of as a co-equal and independent branch. Judicial independence ultimately may be sacrificed.

Simply put, legislative drafting and lobbying is the wrong place for judges to exercise their rights of expression in an effort to improve the law, apart from issues dealing with judicial administration. A judge who wishes to contribute to legal development has to choose the proper forum, such as a law review article or a speech before a bar group. In that forum a judge can safely present a general idea for legal reform and others can then fashion the idea into proposed legislation. Judges must avoid close proximity to the actual politics of law reform.

33. See, e.g., BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION—THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982); Bruce Allen Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 *GEO. L.J.* 101 (1980-1981).

Just last year in California we saw an example of the dangers involved in judges drafting controversial legislation. After the three strikes initiative³⁴ had been approved for the ballot and just before the vote, the press discovered that three state court judges from the Fresno area had been involved in drafting the initiative.³⁵ Two of the judges served on the Fresno Municipal Court.³⁶ One of them, Judge R.L. Putnam, was quoted as saying, "I think it's important that judges are a part of the law."³⁷ Asked about whether he could serve impartially in three-strikes cases, he explained that, "Judges have opinions, 'but when you go into court to hear a case, you're neutral.'³⁸ One of the other drafters, Justice James Ardaiz of the Fifth District Court of Appeal, explained that, "My motivation is very simple. I want to see [California] be a better place to live. I want it to be a safer place to live."³⁹

With all due respect, these explanations do not provide a sufficient justification for what plainly seems to be judicial overreaching. Judge Putnam's explanation that he could be neutral in applying and reviewing the three strikes law, notwithstanding his role in drafting, is similar to my hypothetical Judge Smith's claim that she could be neutral despite her pretrial announcement that the defendant should win.⁴⁰ That explanation simply defies common sense and experience, even if it may be true in Judge Putnam's case.

While I can sympathize with Justice Ardaiz's desire to make California a safer place, one wonders whether it was necessary for him to become personally involved in drafting Proposition 184. Were there not other lawyers in the state who could have drafted the initiative? Was it necessary to put a judge's imprimatur upon the language? In that regard it is important to note that prior to the election voters

34. Proposition 184 (codified at CAL. PENAL CODE § 1170.12 (West Supp. 1995)).

35. Tom Kertscher, *Fresno Judge Opts Not to Hear Three Strikes Case in Courtroom*, FRESNO BEE, Nov. 7, 1994, at B1.

36. *Id.* at B1, B3.

37. *Id.* at B1 (quoting Judge R.L. Putnam).

38. *Id.* (quoting Judge R.L. Putnam).

39. Dan Morain, *Judge Admits His Role in '3 Strikes' Law*, L.A. TIMES, Nov. 3, 1994, at A3 (quoting Justice James Ardaiz).

40. One excuse proffered was that municipal court judges would not apply three strikes since they do not perform sentencing in felony cases. This excuse does not wash. First, municipal court judges are subject to cross-assignment to serve as superior court judges and may, in that capacity, handle felony matters. CAL. GOV'T CODE § 68546 (West Supp. 1995). Second, municipal court judges can be elevated to the superior court bench, and the two municipal court judges involved in drafting Proposition 184 may therefore find themselves handling felony cases in the future. Elevation can occur by appointment, CAL. CONST. § 16(d) (West Supp. 1995), or by election, *id.* § 16(b).

were assured that the initiative was well drafted precisely because judges had been involved in the drafting. By participating in the drafting process, the three judges gave proponents of Proposition 184 the chance to convey to the voters a preelection judicial seal of approval.

All in all, judges should simply restrain themselves from becoming too closely associated with legislative reform efforts except legislation which directly affects the administration of justice. Judges who want to be legislators should resign their judicial office in order to devote themselves entirely to the political process. Judges should not moonlight as legislators.

IV. GOOD MANNERS

Finally, even if a judge has found the proper place and proper time for extrajudicial expression on legal topics, that expression should be conveyed in a manner worthy of the respect due to the judiciary. We hold our judges to high standards of impartiality, neutrality, and independence. We expect them to be temperate, wise, and judicious.

Not so long ago, the entire profession was more civil than it is today. Lawyers could rely upon each other for a minimal level of professional courtesy in the practice of law. There is a widespread sentiment among practitioners that those "golden days" are gone. The profession has become more of a business in the last two decades, and professional civility has, in many cities, increasingly disappeared in favor of thinly disguised hostility and litigation warfare. It is no longer enough simply to win a case; opponents and the lawyers who represent opponents must be demonized. Motions to dismiss or for summary judgment are more routinely accompanied by motions for sanctions against opposing counsel.

Unfortunately, this sort of intemperate conduct seems to be infecting the judiciary as well as the bar. It is no longer enough simply to disagree with a majority of the court by filing a reasoned dissenting opinion. The dissenting opinion must be laced with sarcasm and irony about the reasoning employed in the majority opinion with the strong suggestion that the judges in the majority have lost their sense of reason, if they had any to begin with. Courts at all levels seem to be prone to this form of judicial "dissing." One only needs to read a few

dissenting opinions from Justice Scalia to get a sense of the current state of the art.⁴¹

Given what is happening in these sort of judicial decisions, we should expect to see judges using similarly intemperate language and scornful tone in public speeches and editorials. I offer as proof: (1) Judge John Noonan's *New York Times* editorial which indirectly accused a majority of Supreme Court Justices of committing "treason to the Constitution";⁴² (2) Judge Stephen Reinhardt's speech at Yale Law School in which he asserted that the "Supreme Court 'has made

41. Justice Scalia certainly is not the only judge to engage in the practice, but he is one of the most visible and one of the best. Some may find his barbs to be cute or humorous or to liven up otherwise dull reading. But to many his remarks often seem to be simply insulting, and surely there are less confrontational ways of expressing disagreement with colleagues. See, e.g., *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting) ("Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display—a modest price, surely—is that most of the opinion is quite irrelevant to the case at hand."); *Lee v. Weisman*, 112 S. Ct. 2649, 2678-79 (1992) (Scalia, J., dissenting) ("In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the *Durham* rule did for the insanity defense. Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." (citation omitted)); *Georgia v. McCollum*, 112 S. Ct. 2348, 2364-65 (1992) (Scalia, J., dissenting) ("I agree with the Court that its judgment follows logically from *Edmonson v. Leesville Concrete Co., Inc.* For the reasons given in the *Edmonson* dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. Justice O'CONNOR demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider *Edmonson* distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion." (citation omitted)).

42. Noonan, *supra* note 20, at A17. The editorial was carefully drafted so as to avoid directly accusing the Supreme Court justices of treason. Instead of the direct accusation, Judge Noonan wrote that, as a result of the Supreme's Court order, "[a] federal court must even commit 'treason to the Constitution' and abstain from exercising its jurisdiction." *Id.* Plainly, if the Supreme Court's order requires the court to which it is directed to commit treason, then the Justices signing the order have themselves committed treason. An ordinary reader would come away from the editorial linking the word "treason" to the Supreme Court and not to the Ninth Circuit.

it plain that the Bill of Rights is no longer its primary concern'";⁴³ (3) Judge Terry Hatter accused " 'young Anglo' federal attorneys" of advancing their careers by using federal drug laws to prosecute minorities;⁴⁴ (4) Judge Jon Newman urged President Clinton to withdraw Justice Thomas's name from nomination in an editorial;⁴⁵ and (5) Judge Leon Higginbotham published a public letter to Justice Thomas after his confirmation which, in this author's opinion, patronizingly and insultingly purported to give Justice Thomas advice on his new role.⁴⁶

These judicial outbursts are inexplicable. What were they supposed to have accomplished by being public? Did Judges Noonan and Reinhardt believe that their criticisms would really change public opinion or the Supreme Court's opinion? Are they that out of touch with public sentiment or the views of an overwhelming majority of the Supreme Court? Did Judge Hatter hope to stop drug prosecutions of minorities in Los Angeles? Did Judge Higginbotham truly believe his open letter would somehow "educate" Justice Thomas?

I assume that each judge intended in good faith to advance debate on important legal issues, but whatever the motivation, the fact remains that the *methods and manners* employed—the use of editorials, hyperbole, sarcasm, and scorn—tend to undermine public respect for the judiciary and public respect for law. These judges owe it to their colleagues and to our constitutional system to find a less controversial, self-centered method of raising and discussing these important issues.

V. CONCLUSION

We want judges to participate in discussions and debates about the law and about society. Judges have unique perspectives and experiences, and we need their contributions. But judges also have unique responsibilities, none so important as safeguarding public respect for the Rule of Law. It is possible to disagree with someone and to engage in debate without resorting to name-calling, bomb-throwing, or deliberate, emotional provocation. It is possible to advance public policy and public debate without employing means designed to garner headlines that trumpet judicial intemperance, impatience, and

43. Weinstein, *supra* note 20, at A25.

44. Kraw, *supra* note 21, at 10.

45. Jon O. Newman, *A Replacement for Thomas*, N.Y. TIMES, Oct. 10, 1991, at A27.

46. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

frustration. We should avoid the temptation to follow the lead set by talk-show hosts and talk-radio. Judges and lawyers have an obligation to set a better example for society of the proper methods for reasoned discourse.