

## THE SPECIAL PROFESSIONAL CHALLENGES OF APPELLATE JUDGING

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Toward the end of the Twentieth Century, the American public developed a fascination with trial court proceedings. Courtroom dramas and comedies—from *L.A. Law* through more recent series such as *The Practice*, *Law and Order*, *Judging Amy*, and *Ally McBeal*, to name only a few—became entertainment staples. Cameras in real courtrooms and pseudo-courtrooms (as in the many spin-offs of Judge Wapner’s so-called *People’s Court*) have made us a nation of armchair litigators.<sup>1</sup>

Appellate court decision-making occupies the public stage in a different way. Until recently, only a relatively small number of highly publicized appellate opinions received public attention. On a national scale, case names such as *Brown v. Board of Education*,<sup>2</sup> *Miranda*,<sup>3</sup> and *Roe v. Wade*<sup>4</sup> have become part of our cultural vocabulary. The names of landmark state cases are less well-known; nonetheless, citizens are accustomed to a steady stream of news about significant appellate court decisions on hot topics such as police roadblocks<sup>5</sup> and the authority of high school student athletic associations.<sup>6</sup>

Until recently, appellate courts necessarily operated mostly in the shadows, with their opinions sometimes widely reported but their inner workings shielded from scrutiny. The year 2000 changed that in dramatic ways, as I explain in Section I below. Public interest in appellate court dynamics has now heightened to the point that two television networks have developed series “that promise a peek behind the [U.S. Supreme Court’s] heavy red curtains and into the lives of the nine justices and their staffs.”<sup>7</sup>

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1. See Mike Farrell, *There’s Disorder in the Court—and Television Stands Accused*, L.A. TIMES, May 31, 2000, at B9 (editorial by television actor and member of the California Commission on Judicial Performance, criticizing shows like *Judge Judy* for giving the public a negative and misleading impression of the judiciary).

2. 347 U.S. 483 (1954).

3. *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. 410 U.S. 113 (1973).

5. See, e.g., *State v. Gerschoffer*, 738 N.E.2d 713 (Ind. Ct. App. 2000), *transfer granted, opinion vacated by* 753 N.E.2d 6 (Ind. 2001).

6. See, e.g., *Ind. High Sch. Athletic Ass’n v. Martin*, 741 N.E.2d 757 (Ind. Ct. App. 2000), *transfer granted, opinion vacated by* 753 N.E.2d 18 (Ind. 2001); *Ind. High Sch. Athletic Ass’n v. Carlberg*, 694 N.E.2d 222 (Ind. 1997).

7. *Nets Making Shows About High Court*, *Indiatimes Legal News* (Apr. 12, 2001), <http://www.indiatimes.com/120401ap/12ente9.htm>. One series features Sally Field “as a left-leaning justice”; the other, James Garner “as an aging lion of a chief justice.” *Id.* The producer of one series discussed his plans with Chief Justice Rehnquist, who expressed “very direct” opposition. *Id.* (quoting Rob Scheidlinger, producer of ABC’s *The Court*).

This increased interest in appellate court workings, both real and fictional, has made it more important than ever that actual appellate judges strive to maintain a very high level of ethical behavior. This article begins by reviewing some events during the year 2000 that placed appellate judges in the limelight. I then explore several special ethical challenges which appellate judges face and suggest standards that we should observe.

### I. LAST YEAR'S HEADLINERS

The first appellate court drama to attract national attention in the year 2000 was the impeachment of Chief Justice David Brock of the New Hampshire Supreme Court.<sup>8</sup> Chief Justice Brock endured an eight-month ordeal that culminated in a three-week trial in the state senate.<sup>9</sup> Though the senate acquitted Brock, the court sustained a terrible battering, prolonged by debate over who should pay the two million dollars in legal costs.<sup>10</sup>

Later in the year, two dramatic election contests drew the media's attention to the extremely difficult role of elected judges. In Ohio, the business community made a major effort to replace state supreme court Justice Alice Robie Resnick in a struggle the *Columbus Dispatch* called "the dirtiest judicial race in Ohio history."<sup>11</sup> During the same election cycle, plaintiffs' lawyers in Michigan launched an expensive campaign to oust three members of that state's supreme court.<sup>12</sup> That campaign turned especially ugly after the chair of the Michigan Democratic Party attacked one of the incumbents, implying that he was a traitor to his race.<sup>13</sup> Both of these efforts failed.

The Florida election crisis brought further uninvited attention to both the appellate product and the process behind it. When Election Day 2000 arrived, one might safely have wagered that most Floridians could not name even one of their state supreme court justices. By late fall, a new wave of court-watchers could not only name names, but also could debate the conventional wisdom

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8. See John DiStaso, *Brock Impeached; Chief Justice Faces Historic Senate Trial*, UNION LEADER (Manchester, N.H.), July 13, 2000, at A1.

9. See Shirley Elder, *No Longer Business as Usual as Brock Returns to Courthouse*, BOSTON GLOBE, Oct. 15, 2000 (New Hampshire Wkly.), at 1.

10. See Lois R. Shea, *Three Justices Sue N.H. for Legal Fees*, BOSTON GLOBE, Mar. 14, 2001, at A1.

11. Joe Hallett, *Officials Ponder a Vaccine for Vicious Judicial Campaigns*, COLUMBUS DISPATCH, Jan. 31, 2001, at 2B.

12. See Amy Lane, *Battle Supreme Brews for Top Court in State; Big Money Will Fuel Struggle for Parties' Nominations*, CRAIN'S DETROIT BUS., Apr. 3, 2000, at 1.

13. See Charlie Cain, *High Court Race Will Be Nasty, Pricey; Interest Groups Pump Millions Into Races for Three Seats on State Supreme Court*, DETROIT NEWS, June 23, 2000, at 1 (reporting that Democratic Party activists circulated fliers at an NAACP fund-raiser that stated that Robert Young, Jr., the only African-American justice, was a "staunch believer" that *Brown v. Board of Education* was wrongly decided).

regarding the philosophical bent of each member of that court.<sup>14</sup>

Our federal cousins shared in the uninvited attention. As the Bush versus Gore election controversy unfolded, the U.S. Supreme Court felt the heat of intense and unwelcome scrutiny from court head-counters and handicappers.<sup>15</sup>

When the dust finally began to settle on *Bush v. Gore*,<sup>16</sup> still another federal appellate court occupied the front pages. While still presiding over the Microsoft antitrust case, District Judge Thomas Penfield Jackson gave media interviews in which he compared Bill Gates to Napoleon and other company executives to drug gangs.<sup>17</sup> Judge Jackson also accused the D.C. Court of Appeals of “making up [ninety] percent of the facts on their own” in an earlier Microsoft ruling, and described the circuit judges as “supercilious” and lacking in trial experience.<sup>18</sup> On appeal, the D.C. Circuit became the top story of the day when it held unanimously that Judge Jackson committed “deliberate, repeated, egregious and flagrant” ethical violations that created an appearance of judicial bias and necessitated Jackson’s removal from the case on remand.<sup>19</sup>

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14. See Joan Biskupic & Martin Kasindorf, *Deadline Looks Doubtful as Legal Knot Tightens; Courts Schedule Hearings for Friday on Fla. Vote Disputes*, USA TODAY, Nov. 16, 2000, at 3A (profiling Florida’s Supreme Court justices); *NBC Nightly News* (NBC television broadcast, Nov. 20, 2000) (discussing “Who are these men and women who have such a pivotal role in history?”).

15. See *Bush v. Gore*, 531 U.S. 98 (2000). The Court notes that [n]one are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

*Id.* at 111; see also Joan Biskupic, *Election Still Splits Court: Friction Over Justices’ Ruling on Ballot Count in Florida Continues to Cause Hard Feelings, Draw Angry Letters, Even Spark Talk of at Least One Imminent Retirement at High Court*, USA TODAY, Jan. 22, 2001, at 1A (describing the U.S. Supreme Court justices as “uncomfortable with their role in such a high-stakes political contest”).

16. See 531 U.S. at 98; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

17. See *Excerpts From Second Day of Arguments in Appeal of the Antitrust Case*, N.Y. TIMES, Feb. 28, 2001, at C6; *Judge’s Comments May Affect Appeal of Microsoft Decision*, CHARLESTON GAZETTE, Feb. 26, 2001, at P3D [hereinafter *Judge’s Comments*]; Stephen Labaton, *Judges Voice Doubt on Order Last Year to Split Microsoft*, N.Y. TIMES, Feb. 28, 2001, at A1.

18. James V. Grimaldi, *Microsoft Judge Lashes Out; Jackson Says Panel That Will Hear Appeal “Made Up” Facts*, WASH. POST, Jan. 9, 2001, at E11 (also quoting Judge Jackson as accusing the Court of Appeals of “‘embellish[ing]’ the law with ‘superficial scholarship’”); *Judge’s Comments*, *supra* note 17.

19. Stephen Labaton, *Appeals Court Voids Order for Breaking Up Microsoft but Finds It Abused Power*, N.Y. TIMES, June 29, 2001, at A1; John Schwartz, *A Judge Overturned by an Appearance of Bias*, N.Y. TIMES, June 29, 2001, at C1.

## II. WHY OUR CODES OF CONDUCT ARE NOT ENOUGH

When we appellate judges find ourselves thrust into the spotlight in this manner, our first reaction is to look to the codes of conduct designed to give us guidance on ethical issues.<sup>20</sup> The problem is that none of the canons in the Model Code of Judicial Conduct speaks specifically to appellate judges. Caveats against financial conflicts<sup>21</sup> and ex parte communications<sup>22</sup> certainly help all judges stay on the straight and narrow, but they do not address some of the unique challenges that appellate judges confront.

Appellate courts routinely deal with broad issues and set precedents that significantly affect many lives. The high stakes in these cases inevitably create heightened ethical responsibility. Many observers question whether we are living up to that responsibility.<sup>23</sup>

In 1998, Paul Carrington of the Duke University School of Law said, "Among our political institutions, none are more troubled than many of our highest state courts."<sup>24</sup> The public record suggests some foundation for this assertion. During the year 2000, justices from no fewer than five state high courts faced various accusations of ethical misconduct,<sup>25</sup> and at least three state

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20. See, e.g., IND. CODE OF JUDICIAL CONDUCT (2000).

21. See IND. CODE OF JUDICIAL CONDUCT Canon 4(D) (2000).

22. See IND. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (2000).

23. See, e.g., Fred Bayles, *N.H.'s High Court Teeters on Edge of a Great Fall*, USA TODAY, Apr. 7, 2000, at 4A (reporting that one of New Hampshire's five justices had resigned and that the state legislature had taken steps toward impeachment of one or more of the remaining justices, and describing the state of affairs as "a constitutional crisis . . . [that] could affect state courts around the country"); *Corrupting Influences Grow in Contests for Judgeships*, USA TODAY, Nov. 2, 2000, at 16A (noting that high-stakes judicial elections are "spawning questionable tactics"); Bill Hume, *Political Influence on the Law Lies in the Eye of Beholder*, ALBUQUERQUE JOURNAL, Aug. 13, 2000, at B2 (describing controversial New Mexico Supreme Court decisions in 1995 and 1999 and noting, under the heading "Politics or the Law?", that all the justices who decided those cases were Democrats); Joe Stephens, *Judges Ruled on Firms in Their Portfolios; Appeals Jurists Attribute Participation to Innocent Mistakes*, WASH. POST, Sept. 13, 1999, at A1 (citing eighteen 1997 cases in which federal appeals court judges ruled in matters involving companies in which either the judges or their family members had equity interests).

24. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 79 (1998).

25. See Jo Becker, *Lawyers Demand Justices' Recusal*, ST. PETERSBURG TIMES, Mar. 25, 2000, at 1A ("Conversations with lawmakers should disqualify [two Florida Supreme Court justices] from ruling on the death row appeals law, the attorneys argue."); James Bradshaw, *Complaint Alleges Ohio Chief Justice Violated Canons*, COLUMBUS DISPATCH, Apr. 25, 2000, at 4D (reporting chief justice of Ohio Supreme Court charged with making impermissible public endorsement of candidate opposing another incumbent justice); John DiStaso, *Judges Tried to Influence, Horton Says*, UNION LEADER (Manchester, N.H.), Apr. 6, 2000, at A1 (reporting statement by state supreme court justice that high court judges who were disqualified from cases

appellate court judges were publicly censured or reprimanded by their state supreme courts.<sup>26</sup> Some of these judges were ultimately exonerated,<sup>27</sup> but often the public remembers only the scandal.

Just as people who do no wrong may be sued, of course, judges who do no wrong may be accused. Still, as professionals, we must promote judicial integrity out of respect for the institutions we inhabit, even when our written codes of conduct do not speak directly to all of the situations we encounter. The recent sagas in New Hampshire, Ohio, Michigan, Florida and Washington, D.C.<sup>28</sup> have made that duty more important—and more challenging—than ever.

In the following Sections, I offer thoughts on ethical concerns that are unique, or at least particularly important, to appellate judges. These are panel decision-making, published written opinions, oral arguments, recusal, communications with legislators, and the use of judicial clerks.

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due to conflicts of interest sometimes offered input to other justices on those cases); William Glaberson, *States Rein in Truth-Bending in Court Races*, N.Y. TIMES, Aug. 23, 2000, at A1 (“For the first time in its history, Alabama’s judicial discipline panel has filed charges against an incumbent justice of the State Supreme Court[]” for allegedly making false campaign statements); Maurice Possley & Matt O’Connor, *Three Justices Questioned on Judicial Vacancies; Appointment Process Probed by U.S. Agents*, CHI. TRIB., Apr. 27, 2000, at N1 (“Federal agents have interviewed three Illinois Supreme Court justices in Cook County as part of a grand jury investigation of appointments to fill judicial vacancies . . .”).

26. See James Bradshaw, *Female Chief Justice a First for Court*, COLUMBUS DISPATCH, Aug. 31, 2000, at 4C (reporting that Ohio appeals court judge was sanctioned for using free labor from jail inmates and welfare recipients to construct campaign signs); *In re Schwartz*, 755 So. 2d 110 (Fla. 2000), *infra* note 49; *In re Frank*, 753 So. 2d 1228 (Fla. 2000) (reprimanding former appellate judge for making false or misleading statements during attorney discipline proceeding and for failing to disclose that an attorney appearing before him was representing a member of his immediate family in highly contentious domestic litigation).

27. See, e.g., William Glaberson, *Court Rulings Curb Efforts to Rein in Judicial Races*, N.Y. TIMES, Oct. 7, 2000, at A9 (reporting that Alabama Justice Harold F. See, Jr., won a temporary injunction barring his removal from office by disciplinary officials, on the basis that his argument that the Alabama ethics rule was too broad was likely to prevail at trial); *Injudicious: Some High Court Rivals Stray Out of Bounds*, COLUMBUS DISPATCH, Sept. 26, 2000, at 8A (reporting that the complaint against Ohio’s Chief Justice Moyer was dismissed by a three-judge disciplinary panel); Ralph Ranalli, *N.H. Senate Acquits State’s Chief Justice*, BOSTON GLOBE, Oct. 11, 2000, at A1.

28. Similar judicial problems have occurred in Idaho and Alabama. See William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1 (reporting that Idaho judge Daniel Eismann defeated an incumbent Supreme Court justice for the first time since 1944 after a ferocious campaign in which he was unusually open in expressing views such as his belief that the theory of evolution cannot be true); Glaberson, *supra* note 25 (reporting that Alabama’s judicial panel charged that an incumbent state supreme court justice “falsely said in television advertisements during [a] campaign . . . that his opponent ‘let convicted drug dealers off’ at least 40 times”).

### III. THE PERILS OF DECISION-MAKING BY COMMITTEE

#### A. *Panel Opinions: Good News, Bad News*

As a former trial judge, I can say that the best and worst thing about the trial bench is the fact that you fly solo. The freedom of not having to confer with anyone else carries with it the isolation that flows from always acting alone.

Though each appellate judge must decide individually whether to concur or dissent in a given case, appellate panels function as a group. We have an opportunity that trial judges do not enjoy: to debate the issues among ourselves and to draw from our colleagues' wisdom as we arrive at our own conclusions.

I firmly believe that this process of give-and-take has great value, although I admit that it does not always feel like a blessing on days when a case conference goes into the judicial equivalent of triple overtime. My colleague Justice Brent Dickson sometimes tells his staff as he walks out the door, "I'm off to wage conference." Anyone who has served on a committee would surely agree that group decision-making can be an intensely frustrating process.

#### B. *The Proper Judicial Temperament*

Maintaining civility in times of conflict may require judicial restraint in the purest sense of the phrase, but it is absolutely imperative if we are to maintain public respect for the judiciary. In 1996, Justice Anthony M. Kennedy said: "The collegiality of the judiciary can be destroyed if we adopt the habits and mannerisms of modern, fractious discourse. Neither in public nor in private must we show disrespect for our fellow judges."<sup>29</sup> Justice Kennedy's colleagues appear to share these sentiments. In the aftermath of the election controversy, the United States Supreme Court has gone public in an unprecedented effort to counter rumors of personal animosity among the justices.<sup>30</sup>

Still, tensions occasionally flare into public view. In 1991, Ohio Justices Craig Wright and Andrew Douglas actually came to fisticuffs in court offices.<sup>31</sup> Elections can create especially hard feelings, as when four members of the Wisconsin Supreme Court joined the effort to replace Chief Justice Shirley Abrahamson,<sup>32</sup> or when Chief Justice Moyer and Justice Resnick ended up on

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29. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996).

30. See Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1; see also Helen Thomas, *Justices Engage in Spin*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2001, at C5 (reporting that the Supreme Court has "launched a public relations campaign by fanning out to college campuses and law schools and other forums to put the best spin on [*Bush v. Gore*]").

31. See Catherine Candisky, *Court Hearing for Lawyer Sparks Old Feud Between Justices*, COLUMBUS DISPATCH, Nov. 29, 2000, at 6B.

32. See David Callender, *Court's Path Unlikely to Change; Sykes Wins by Landslide Over Butler*, CAPITAL TIMES (Madison, Wis.), Apr. 5, 2000, at 3A.

opposite sides of Ohio's 2000 election.<sup>33</sup> The federal judiciary also has experienced some particularly harsh examples, such as Judge A. Leon Higginbotham, Jr.'s extended public campaign against Justice Clarence Thomas.<sup>34</sup>

### C. Civility Is a One-to-One Effort

Personal challenges demand personal solutions.<sup>35</sup> My former colleague, Justice Roger DeBruler, habitually used our official titles when addressing other members of the court, even in the most casual situations. He might say, "Justice Dickson, can you go to lunch today?" or, "Justice Selby, I failed to record your vote in this case; what was it?"

For a long time I believed that Justice DeBruler spoke so formally as a way of maintaining his distance. Eventually, I came to understand that he was not being aloof, but instead was subtly reaffirming, on a day-to-day basis, his respect for the office and for each officeholder.

Other courts have turned to more overt methods of building personal ties. In the aftermath of the Wisconsin election, for example, that state's supreme court scheduled a joint seminar with court of appeals judges designed, as one newspaper reported, "to help them learn to get along with each other."<sup>36</sup>

The Indiana Court of Appeals has gone a step further by institutionalizing the practice of a regular court retreat. There is nothing magic about their formula: they find a congenial setting away from telephone and e-mail interruptions, devise an agenda that covers major problem areas, and hire a capable facilitator. The participants reported so enthusiastically on the effectiveness of these retreats that they convinced our court to adopt the same practice.

### D. Confidentiality Within the Court

One final risk that is unique to decision-making by committee deserves mention. Appellate courts face unique issues when it comes to confidentiality among the judges. The zone of confidentiality shielding a court's pre-decision adjudicative activities from the outside world is a familiar part of the landscape

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33. In April 2000, the *Columbus Dispatch* reported allegations that Ohio's Chief Justice had violated the prohibition against speeches or public endorsement for political candidates by judges. Chief Justice Moyer reportedly told state Republican Party officials that they could "restore balance" to a court that had overturned certain legislation four-to-three by supporting incumbent justice Alice Robie Resnick's opponent. Bradshaw, *supra* note 25.

34. See, e.g., A. Leon Higginbotham, Jr., *Disinvitation: Talking Back to Thomas*, NAT'L L.J., Aug. 3, 1998, at A23.

35. Justices Antonin Scalia and Ruth Bader Ginsburg, who frequently find themselves on opposite sides of issues, have for years enjoyed New Year's Eve dinner together, along with their spouses. They continued their tradition this year, less than three weeks after the curtain fell on *Bush v. Gore*. See Greenhouse, *supra* note 30, at A18.

36. Cary Segall, *Justices to Have Seminar on Getting Along*, WIS. ST. J., June 9, 1999, at 5C.

with accepted boundaries. Last year's impeachment of New Hampshire Chief Justice David Brock and two of his fellow justices raised a different question: that of internal confidentiality.<sup>37</sup> The instrument of impeachment charged, among other things, that Chief Justice Brock routinely "allowed" his fellow justices to comment on cases from which they had been disqualified.<sup>38</sup> The state senate exonerated all three justices on all charges, but the closest vote occurred on this allegation.<sup>39</sup>

One can easily imagine how this practice came into being. Sometimes judges do not make recusal decisions until late in a case, especially in cases without oral argument, and it would be considered rather ordinary to circulate drafts of everything to every judge. Then, some non-participating judge sends a note about a factual error, and so on.

A free flow of information within the court is invaluable, because it helps maintain a collegial atmosphere conducive to frank discussion and compromise. Still, appellate judges must defend the credibility of their promise of confidentiality, and sharing information with those not participating may cause litigants to lose confidence in the integrity of the process.

#### IV. THE LURE OF THE POISON PEN

I next turn to the channel of communication that is the hallmark of appellate courts: the published opinion. Opinion authorship is both exhilarating and risky. New appellate judges experience great excitement at seeing their words in print—permanent print, advance sheet print, hardbound print, electronic print, and disk print. We dream that generations to follow will read our wisdom.<sup>40</sup>

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37. See Elder, *supra* note 9.

38. *Id.* Most appellate judges view the responsibility for such practices as falling on the court as a whole, not solely on the chief judge.

39. *Id.*

40. As Justice Oliver Wendell Holmes told a group of Harvard undergraduates in 1886:

No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.

G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65



Alas, it is not usually so.<sup>41</sup>

On the other hand, there is tangible risk that the words will come back to haunt authors. When a trial judge rules a given way on Monday, then has a change of heart and rules differently on Wednesday, with a little luck, no one notices. When a written appellate opinion is permanently archived, it is much more likely that someone eventually will notice either the inconsistencies or other problems.

My focus here, however, is on a different risk: the temptation of intemperate words. In writing about the professionalism of judges, I once laid out the problem as directly as possible: "Explication of the law, even when in dissent, cannot be personal, political, or preferential, lest the rule of law be undermined."<sup>42</sup>

Venomous language obscures the law and erodes civility in our profession. It is a problem that affects even the United States Supreme Court. An electronic search of the last dozen years reveals that at least five different Supreme Court Justices have characterized a colleague's opinion as either "foolish"<sup>43</sup> or "absurd"<sup>44</sup> at one time or another. If the judiciary is to act as one of society's

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N.Y.U. L. REV. 1409, 1430-31 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 28-31 (M. Howe ed. 1962)).

41. When Judge Sol Wachtler was sworn in as Chief Judge of the New York Court of Appeals, he and his family and friends went up to the office of that court's most famous member. Wachtler observed to his wife that it was amazing to consider that he would be working at the desk of Benjamin Cardozo. She replied, "Yes, and 50 years from now it will still be known as Cardozo's desk." See David Margolick, *For Those Who Knew Him, a Different Wachtler Legacy for New York's Top Court*, N.Y. TIMES, Nov. 13, 1992, at B16.

42. Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621, 624 (1997). I have not been alone in expressing concern about the language of written opinions. Chief Judge Judith Kaye of the New York Court of Appeals urges judges to speak through their rulings in comprehensible and accessible language. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 723 (1997). Lawyers then have a corresponding duty, she asserts, to study decisions carefully before criticizing them. *Id.* at 724. One commentator said it this way: "The most dangerous aspect of the apparent growth of sarcastic majority opinions, peevish concurrences, and stinging dissents is not so much that they erode the legitimacy of appellate courts, as that they confuse the law by interjecting a high level of contentiousness and verbosity into judicial opinions . . . ." William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism By Judges of Other Judges*, 51 FLA. L. REV. 957, 961 (1999).

Carefully crafted decisions are absolutely essential to avoiding allegations of political decision-making or abuse of power. The restraint inherent in careful writing carries double benefits: it both promotes the orderly advancement of the law and puts a damper on extraneous, emotional language.

43. See *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 984 (1984) (Rehnquist, J., dissenting).

44. See *Hill v. Colorado*, 530 U.S. 703, 756 (2000) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting); *Nordlinger v. Hahn*, 505 U.S. 1, 36 (1992) (Stevens, J., dissenting); *Michael H. v. Gerald D.*, 491

stabilizing forces, we must use the delete button on such verbal sniping.

Most appellate judges I have known care very deeply about doing justice, but passionate commitment to justice cannot manifest itself in toxic opinion language. Words that belittle or impugn the integrity of other judges serve no purpose, and they undermine respect for all courts.

#### V. POSTURING AT ORAL ARGUMENT

Some of these same concerns apply to another forum with special meaning for the appellate judge: the oral argument. Vigorous exchange in open court is part of America's common law heritage; the tradition of Anglo-American courts has always been intensely verbal. Dynamic interchange is always appropriate and frequently necessary to develop issues and help the court reach a sound decision. Even when the verbal fur is flying, however, appellate judges must maintain and enforce civility toward litigants and toward their colleagues on the bench.

Oral arguments can easily exceed the boundaries of civility. We should not tolerate such excesses. In a recent Massachusetts incident, an employee sought to overturn a labor relations commission's conclusion that his union had fulfilled its duty of fair representation.<sup>45</sup> During oral argument on appeal, one judge declared that the union, which was not a party in the action, had "gone amok."<sup>46</sup> He also accused the union president and his family of squandering member dues.<sup>47</sup>

The Massachusetts Supreme Judicial Court publicly reprimanded the judge, saying,

[a]n impartial manner, courtesy, and dignity are the outward signs of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. . . . When a judge berates or acts discourteously to those before him—even if he cannot affect their interests as litigants—he abuses his power and humiliates those who are forbidden to speak back.<sup>48</sup>

In a second example, a Florida appellate judge verbally abused law student interns during the presentation of arguments that he considered frivolous.<sup>49</sup> He cut one student's presentation short by walking off the bench before the argument had concluded.<sup>50</sup> He interrupted another student, telling her to save her remaining time for rebuttal, "if there is rebuttal."<sup>51</sup> He also made gratuitous,

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U.S. 110, 141 (1989) (Brennan, J., dissenting).

45. See *In re Brown*, 691 N.E.2d 573 (Mass. 1998).

46. *Id.* at 574.

47. *Id.* at 574-75.

48. *Id.* at 576.

49. *In re Schwartz*, 755 So. 2d 110, 111-12 (Fla. 2000).

50. *Id.* at 111.

51. *Id.* at 112.

discourteous remarks to a professor who was in the courtroom supervising the interns.<sup>52</sup> It is hard to imagine what lessons the judge was trying to impart.

Florida's Supreme Court took disciplinary action, asserting that the position of appellate judge

demands the very highest in trust and confidence from the people who are served by our court system. Nothing less than the rule of law is jeopardized when a person in such a high position breaches that trust and reduces the people's confidence that justice will be fairly administered in an impartial manner.<sup>53</sup>

One subspecies of oral argument—the law school moot court—can be more difficult than we usually give it credit for. The impulse toward toughness is difficult to resist. A judge may say to himself or herself: “So these are the best; let's see how good they are,” “It's only fair that I engage all four of them,” or “Am I putting on a good enough show to attract good clerk applicants out of the audience?” Such thoughts frequently lead to a higher level of aggression in moots than most judges typically display during actual oral arguments. I sometimes wonder whether we impart the right values on these occasions.

The practice of choosing hot legal topics for moot court arguments can also pose special problems. Moot courts, of course, are purely hypothetical. Occasionally, however, a topic comes too close for comfort, especially with more people than ever reading judicial tea leaves. Two friends on the bench recently declined moot court invitations because the topic was the Fourth Amendment and police roadblocks. The issues were pending in their courts, and they rightly worried about appearing to prejudge.

## VI. TO RECUSE, OR NOT TO RECUSE

The breadth of issues facing both state and federal appellate courts increases the likelihood that any given decision will affect the appellate judge or someone close to the judge. We are accustomed to situations involving financial interests, but many cases are more complicated.

To take the recent example of the Bush versus Gore election, a good many people no doubt believed that any judge who had voted for either Bush or Gore could no longer make an impartial decision.<sup>54</sup> Analysts amplified these concerns

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52. *Id.* at 111-12.

53. *Id.* at 115. The decision to pursue this as a disciplinary matter was completely correct. It is a good deal more difficult to know what to do if such misconduct occurs and you are sitting as a member of the panel. I once had this experience and elected to follow up the other judge's tirade by offering the student a compliment.

54. See Warren Richey, *Fairly or Not, Court Takes on Political Hue*, CHRISTIAN SCI. MONITOR, Dec. 14, 2000, at 1. Richey quotes Michael Dorf, a Columbia University law professor and former law clerk for Justice Kennedy, as saying:

I would hope that none of the justices consciously thought, “What can I do to benefit the candidate I voted for?” I don't think that actually occurred, but I do think that

by breaking down each ruling in terms of which way Democrat and Republican appointees voted.<sup>55</sup>

The problem, of course, is that recusal was not a viable option at either the state or federal level, because it would have left no one to make these urgent decisions. Still, the public perception lingers that the various state and federal rulings were politically motivated.

What, then, is an appellate judge to do? The Indiana Court of Appeals found a sensible solution when called upon to decide whether Indiana University Foundation's records were open to inspection under Indiana's Public Records Act.<sup>56</sup> All three assigned panel members had one or more degrees from Indiana University and/or other relationships with the University and the Foundation, and considered recusal.<sup>57</sup> Recusal would not have solved the problem, however, as a quick survey revealed that each of the court's other judges had some link to the either University or the Foundation, such as an Indiana University degree, a relative employed by or attending I.U., or past financial contributions to the Foundation.

The panel sought to resolve this dilemma by issuing an order disclosing its own connections and offering to appoint another panel to decide the case if either party filed a motion to disqualify. Neither party moved for disqualification, and the original panel served ably and without any controversies except those related to the merits of the case.

This solution is not a panacea for every impartiality puzzle, but it is worth considering in future cases. Recusal is a recurring theme in the life of an appellate judge, and it sometimes requires creative solutions.

## VII. JUDGES AND LEGISLATION

I move now to some of the ethical issues that arise from the policy role of appellate courts. Hornbook law says that senators and representatives write statutes, but judges do not. In the real world, however, there are certainly instances in which judicial input could help avoid unintended consequences, or

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political considerations in a narrow sense must have played at least some subconscious role, given what, in my view, is an inconsistency between the Rehnquist Court's general solicitousness for states and the outcome in this case.

*Id.* (quoting Michael Dorf).

55. *See id.* Richey also posits that

[m]any Bush supporters question whether Florida's seven Supreme Court justices, all appointed by Democratic governors, were acting more as political operatives than neutral jurists. . . . The high court, with seven justices appointed by Republican presidents and with a five-justice conservative majority, became a target of criticism from Gore supporters, who accused the justices of acting out of political self-interest rather than judicial necessity.

*Id.*

56. *See State Bd. of Accounts v. Ind. Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995).

57. *Id.* at 345 n.1.

at least bring them to light before the legislature casts its votes.

To cite a case in point, the 1995 meeting of Indiana's legislature increased the presumptive sentence for murder to fifty-five years.<sup>58</sup> Neither the legislature nor our court anticipated one consequence of this revision. At the time, a provision in the Indiana Constitution granted a right of direct appeal to the Indiana Supreme Court to those sentenced to more than fifty years in prison.<sup>59</sup> The legislature's decision to increase the standard sentence for murder suddenly permitted most murderers to bypass our court of appeals and take a spot on the supreme court docket.

These cases quickly dominated our caseload, to the disadvantage of other parties seeking to be heard.<sup>60</sup> This predicament was ultimately resolved in November 2000, when Indiana's voters amended the constitution to limit the direct appeal right to those sentenced to death.<sup>61</sup>

I cannot say that legislators would or should have made a different policy choice had they considered the direct appeal implications of the sentencing change. I do suggest, however, that this was a situation in which both our court and the General Assembly would have been more fully informed had we communicated beforehand.

To be sure, such consultation can create role conflict. Florida Supreme Court Chief Justice Major Harding and Justice Charles Wells experienced this potential recently, when two inmates challenged a new death penalty law designed to limit appeals and speed up executions.<sup>62</sup> The inmates demanded disqualification of the two justices, claiming that conversations with legislators who drafted the law created a "cloud of impropriety."<sup>63</sup> The inmates cited scheduled meetings between the justices and the Speaker of the Florida House of Representatives. They also cited a letter from the Speaker thanking Chief Justice Harding for his "suggestions and input into our deliberations" and outlining the legislature's position on the proposed law.<sup>64</sup>

Both Harding and Wells denied providing any substantive input into the

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58. 1995 Ind. Acts 148, § 4 (codified at IND. CODE § 35-50-2-3 (2000)).

59. IND. CONST. art. VII § 4.

60. See Kevin Corcoran, *Measure Could Ease Court Docket: Indiana Justices Urge Voters to Have Criminals' Bench-Clogging Appeals Start at Appellate Level*, INDIANAPOLIS STAR, Nov. 2, 2000, at B3 (reporting that a proposed amendment limiting direct appeals to death penalty cases "could divert about 110 cases a year from the Supreme Court's docket, making room for lawsuits that raise significant legal questions").

61. See David Rohn, *Voters Back Rerouting of Criminals' Appeals*, INDIANAPOLIS STAR, Nov. 8, 2000, at A13 ("Voters lopped off nearly two-thirds of the Indiana Supreme Court's caseload Tuesday.").

62. Jo Becker, *Lawyers Demand Justices' Recusal*, ST. PETERSBURG TIMES, Mar. 25, 2000, at 1A.

63. *Id.*

64. *Id.*

legislation,<sup>65</sup> and declined to recuse.<sup>66</sup> Soon thereafter the court struck down key portions of the law as unconstitutional.<sup>67</sup> The allegations of bias proved unfounded, inasmuch as Chief Justice Harding wrote the opinion for a unanimous court.<sup>68</sup>

Many judges would take a relatively pure position on legislative consultations, saying, in effect, “They don’t write opinions and I don’t write laws.” I argue that neither history nor current law requires such purity and that such isolationism is not always prudent.

First, even in the history of the federal system, it is apparent that judges and legislators occasionally interacted with one another on pending business. An early example centered on one of the most famous enactments of all time, the Judiciary Act of 1801,<sup>69</sup> which set in motion the events leading to *Marbury v. Madison*.<sup>70</sup> Newspapers of the day reported that, as Congress was meeting in Philadelphia to consider the measure, “the federal judges being now in town, they of course are consulted.”<sup>71</sup>

65. *Id.*

66. Jo Becker, *Justices Refuse to Step Down From Death Law Review*, ST. PETERSBURG TIMES, Mar. 31, 2000, at 1B.

67. Jo Becker, *Limits to Death Row Appeals Rejected*, ST. PETERSBURG TIMES, Apr. 15, 2000, at 1A.

68. *Id.*

69. Act of February 13, 1801, ch. 4, 2 Stat. 89.

70. 5 U.S. (1 Cranch) 137 (1803).

71. Wythe Holt, *Separation of Powers?: Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S, at 183, 184 (Kenneth R. Bowling & Donald R. Kennon eds., 2000). Holt goes on to say:

The justices of the Supreme Court in the 1790s understood “separation of powers” in terms of the relations of power. They saw it as a matter of balancing power against power, not as a matter of strict separation. . . . First, [separation] required interaction between branches when circumstances made interaction necessary in order to prevent encroachment. Second, when there was no danger of encroachment, nothing prevented members of the branches from acting together, and such might even be necessary in order to engage in an equally important endeavor: protecting the government against its enemies. It would be up to the judgment of the members of any branch as to which circumstances constituted encroachment and which circumstances provoked a need to work together.

*Id.* at 186; see also Anthony Taibi, Note, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913, 958. Taibi notes that

[t]hroughout American history, judges have acted in overtly political roles. During the early national period, Supreme Court Justice Samuel Chase, for example, actively campaigned for President John Adams while on the Court. John Jay served as envoy to resolve the continuing British-American dispute at the same time that he also served as Chief Justice. John Marshall also served as Secretary of State during his tenure on the bench. While President, George Washington freely consulted with sitting Justices

Second, many state governments function under constitutions that contain explicit definitions of the division of responsibility among the branches which are hardly driven by jurisprudential theories about federal “separation of powers.” The Indiana Constitution, for example, does not even use the term “separation.” It says that powers are “divided” among the branches.<sup>72</sup> Provisions like these suggest that appropriate inter-branch behavior rightly varies from place to place.<sup>73</sup>

Third, some conversations between judges and legislators plainly do no harm and much good. A few years ago, a member of Indiana’s General Assembly (who has since risen to a high position of leadership) came to see whether I could answer a question. He assured me that he would understand if I were not at liberty to talk with him. He explained that the legislature was considering a bill that would affect the authority of high school athletic associations. This issue had been before our court before and was likely to reappear.

This member asked if I could explain a term the lobbyists and legislators kept bandying about: “state action.” He knew that it was an important part of the debate, but it was not a part of his own lexicon. I answered his fairly straightforward question by providing a brief explanation of this bedrock Fourteenth Amendment concept.

Whether or how this legislator ever put the information to use, I do not know. What I do know is that he left my office more knowledgeable about an important issue with statewide implications. I think that our conversation was ethically appropriate, and I would like to believe that it led to a more informed legislative decision. I also know that the legislator was grateful for the chance to obtain a neutral answer in a private setting.

The Model Code of Judicial Conduct does not offer specific guidance on such encounters.<sup>74</sup> We must trust our own instincts to avoid conflicts and simply

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of the Supreme Court, treating them as he did his other informal advisors. Although not entirely without controversy at the time, these examples show that the Framers expected federal judges to be engaged in the formulation and implementation of policy.

*Id.* (citations omitted).

72. “The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” IND. CONST. art. III, § 1.

73. See Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997). Peters observes that

even though state constitutional provisions may textually resemble those found in the federal Constitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts. Far from being arbitrary departures from a superior federal model, these interpretations have the legitimacy of differences rooted in the past and adaptable for the future.

*Id.* at 1553.

74. Nearly all states have adopted some version of this Code. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 60 (1998).

do our best to serve all of our diverse constituencies.

### VIII. "PERKS" FOR JUDICIAL CLERKS

One ethical issue of fairly recent vintage involves judicial clerks. In Texas, large law firms have customarily recruited state supreme court clerks with promises of \$35,000 bonuses, payable when they move from the court to the firm.<sup>75</sup> The Texas court has accounted for problems such as potential favoritism by disqualifying clerks from cases involving their future employers, but the policy is informal and the court does not keep any records of such situations.<sup>76</sup>

Attorneys from smaller firms that cannot afford to be as generous have cried foul. One large Texas firm has discontinued the bonuses; others have continued and defended the practice, and a prolonged controversy has ensued.<sup>77</sup>

Other forms of payment may also come under question. Last year, Arizona's Judicial Ethics Advisory Committee banned law firms from paying clerks' bar association dues, "to avoid any appearance that the payment is related to the service as a law clerk."<sup>78</sup>

It seems likely that states will move toward more formal policies on what appellate judicial clerks may accept. Incentives can take many forms, and it is important to handle situations consistently and to provide clear guidance to firms, judges, and clerks.

### IX. A NOTE ABOUT JUDICIAL ELECTIONS

Volumes have been written on the problems that judicial elections create with respect to judicial independence, and I will not attempt comprehensive treatment here.<sup>79</sup> Still, I would be remiss if I failed to re-emphasize that states with appointed judges avoid some of the most serious ethical issues, such as whether a judge should recuse herself if a campaign contributor is significantly affected by a case, and where free speech stops and impermissible promises begin.

It is relatively easy to posit examples of the judge who succumbs to the powerful and inevitable pressure to take a position on issues during an election campaign. When a judicial candidate says, "Fathers should get custody more often," a mother who later loses custody of her child is unlikely to believe that she received a fair hearing from that judge.

It seems abundantly clear that, if judicial ethics are the primary consideration, states that elect appellate judges should rethink the relative advantages and disadvantages.

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75. Elizabeth Amon, *DA Probes Clerk Signing Bonuses*, NAT'L. L.J., Jan. 29, 2001, at A1.

76. *Id.*

77. *Id.*

78. Ariz. Sup. Ct. Judicial Ethics Advisory Comm. Opinion 00-03 (May 3, 2000), available at <http://www.supreme.state.az.us/cjc/ethics/00-03.pdf>.

79. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).



## CONCLUSION

Judges too seldom talk to each other in formal ways about ethical issues. One noteworthy exception to the norm is the Seventh Circuit's *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*.<sup>80</sup> The last page of this document is titled "Courts' Duties to Lawyers."<sup>81</sup> The Seventh Circuit has adopted twelve principles, one of which is: "We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses."<sup>82</sup> All appellate judges would do well to adhere to such ethical standards which go beyond the letter of the code of conduct.

Judge Learned Hand wrote in 1935: "Let [judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand."<sup>83</sup> The problem, in this age of sound bytes and channel surfing, is that we cannot always count on the public to take the trouble to understand the complexities of judicial life.

It is easy enough to blame our woes on the media or on the modern political climate. As Professor Paul Carrington points out, "[t]he journalism profession now maintains a reward system directed primarily at revealing alleged misdeeds of public persons and to punish any of its members who speak well of public persons."<sup>84</sup>

But is this a really a recent phenomenon? In Roscoe Pound's famous 1906 speech to the American Bar Association he opined that public dissatisfaction with the administration of justice was due in part to "public ignorance of the real workings of courts due to ignorant and sensational reports in the press."<sup>85</sup> *Plus ça change, plus c'est la même chose*.

Regardless of the climate of the times, we must summon up our own resources to bolster the integrity of the appellate judiciary. Clothes, it has been said, make the man (or the woman). I suggest that, for a judge, the opposite is true. It is the judge who brings honor to the garment and the institution that it represents. We earn the privilege of wearing the robe through respect for our colleagues and all those who have come before us, and by diligent impartiality. If we live by that credo, we never need to fear being burned by the heat of the public spotlight.

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80. Available at <http://www.ca7.uscourts.gov/conduct.pdf>.

81. *Id.*

82. *Id.*

83. Learned Hand, *How Far Is a Judge Free in Rendering a Decision?* (1935), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 103, 110 (Irving Dilliard ed., 3d ed. 1960).

84. Carrington, *supra* note 24, at 107.

85. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, Address at the Convention of the American Bar Association* (Aug. 26, 1906), in 35 F.R.D. 273, 289 (1964).