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## Note

### Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases

Michael D. Schoepf\*

Diminished public confidence in the judiciary has become one of the most important issues facing American courts.<sup>1</sup> United States District Judge Nancy Gertner said at a September 2007 congressional hearing that judges need to show the public they can act competently and without prejudice.<sup>2</sup> She observed, “[j]udges in one sense have to prove their legitimacy . . . it’s no longer assumed by the public. And I would rather prove that legitimacy in my own voice with my own face and my own words than have my words described by a late night TV anchor.”<sup>3</sup> In many states, though, codes of judicial conduct make that impossible outside of the bounds of the courtroom; not only do the rules prevent judges from “speaking in their own words,” they prevent judges from speaking about active cases at all.<sup>4</sup> The rules in Illinois and Massachusetts, for example, prohibit

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\* J.D. Candidate 2009, University of Minnesota Law School; B.A. 2004, University of Minnesota. The author thanks Professor Jane Kirtley for her help with topic selection and comments on an earlier draft. He would also like to thank the editors and staff of the *Minnesota Law Review* for their invaluable feedback and expert editing. Finally, the author thanks Valerie for her constant support. Copyright © 2008 by Michael D. Schoepf.

1. Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 875–76 (2007) (“[C]oncern for flagging public confidence in the courts dominates contemporary discourse on the administration of justice.”).

2. *Sunshine in the Courtroom Act of 2007: Hearing on H.R. 2128 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Hearing*] (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts). The bill would increase the number of cameras allowed in federal courtrooms by allowing federal judges to permit electronic media into courtroom proceedings. *Id.*

3. *Id.*

4. See, e.g., ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (barring judges from speaking about “pending or impending” cases outside the courtroom); MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (same).

*all* speech about pending or impending cases outside of a judge's official courtroom duties.<sup>5</sup>

The speech restrictions, coupled with criticism in the popular press, have led to a rise in defamation suits filed by judges against newspapers and corresponding outrage in the media.<sup>6</sup> Judges alone filed ten percent of defamation suits nationwide in 2005.<sup>7</sup> Judges say they need a forum to respond to criticism. After all, the judicial system should be open to all Americans.<sup>8</sup> But members of the press argue that the system is stacked against media organizations when judges file lawsuits as litigants in the same jurisdictions where they sit as judges.<sup>9</sup> Removing the code of silence and allowing judges, as Gertner said, to speak in their "own voice[s]"<sup>10</sup> would help restore public trust in the judiciary.

This Note argues that increased communication between judges and the public will restore confidence in an institution the founders believed would bridge the gap between Congress and the people.<sup>11</sup> Part I explains that the press will not, and should not, stop criticizing the judiciary. But unless judges are given the opportunity to respond, the alarming number of judicial defamation suits will continue to rise. Part II explains current restrictions on judicial speech in the American Bar Associ-

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5. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6); MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

6. Adam Liptak, *A Judge at the Plaintiff's Table Tips the Scales*, N.Y. TIMES, June 25, 2007, at A12 ("Libel lawsuits by judges, which have spiked in recent years, put an unusual strain on the justice system."); Tony Mauro, *Press Frets as More Judges Claim Libel*, LEGAL TIMES, June 18, 2007, at 8 (noting the increase in judicial libel suits and corresponding calls for changes in the press).

7. Mauro, *supra* note 6.

8. *See id.* (quoting a lawyer for a judge as noting that judges have the same Seventh Amendment right to a jury trial as other citizens); Defendants' Memorandum in Support of Motion to Dismiss, *Shaw Suburban Media Group v. Thomas*, No. 07 CV 03289 (N.D. Ill. Aug. 8, 2007), 2007 WL 2435795 (arguing it does not violate constitutional due process for the Chief Justice of the Illinois Supreme Court to bring suit in state court and call several other supreme court justices as witnesses in the trial).

9. *See* Mauro, *supra* note 6.

10. *Hearing*, *supra* note 2 (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts) (arguing that permitting cameras in the courtrooms would cause judges to prove their legitimacy through their in-court actions).

11. *See* THE FEDERALIST NO. 78, at 506 (Alexander Hamilton) (Modern Library 1937) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.").

ation's Model Code and selected states. It also discusses the constitutionality of those restrictions under the First Amendment. Part III argues that most states cling to overbroad restrictions on what judges can say about pending cases in violation of the First Amendment. Part IV proposes a new system to regulate judicial speech intended to create a public discussion about the judiciary in which the judges themselves are important participants.

## I. JUDGES V. THE MEDIA: THE RISE IN JUDICIAL DEFAMATION SUITS

### A. JUDGE MURPHY AND THE *BOSTON HERALD*

On February 13, 2002, the *Boston Herald* published the first in a series of articles criticizing Massachusetts Superior Court Judge Ernest B. Murphy for doling out lenient "pro-defendant" sentences and "heartlessly demean[ing]" victims.<sup>12</sup> The article reported that prosecutors confronted Murphy after he sentenced a rapist to probation, and Murphy said of the victim: "She can't go through life as a victim. She's 14. She got raped. Tell her to get over it."<sup>13</sup> Reporters Dave Wedge and Jules Crittenden cited "several courthouse sources" as having heard Murphy's comment, but did not name the sources of the information.<sup>14</sup> The next day, February 14, the *Herald* ran another story about Murphy.<sup>15</sup> The story called Murphy a "criminal-coddling judge" who sentenced a rapist to eight years of probation despite a state guideline calling for five-and-a-half to seven years in prison and the tearful testimony of the fourteen-year-old victim.<sup>16</sup> Wedge caught Murphy on his way to lunch, but the judge "turned down the chance to explain his judicial philosophy."<sup>17</sup> The story recorded Murphy's comment:

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12. Dave Wedge & Jules Crittenden, *Murphy's Law: Lenient Judge Frees Dangerous Criminals*, BOSTON HERALD, Feb. 13, 2002, at 1.

13. *Id.*

14. *Id.* Wedge continued to report on Murphy, *see, e.g.*, Dave Wedge, *Judge Sentenced to 'Rookie School'*, BOSTON HERALD, Feb. 16, 2002, at 1, but Crittenden moved on to other stories, *see, e.g.*, Jules Crittenden, *Local Nukes Prepped for Tighter Regs on Security*, BOSTON HERALD, Feb. 15, 2002, at 7. Crittenden was not a party to the defamation suit. *See* *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007).

15. Dave Wedge, *Rape Victim's Mom Pleads . . . Dump the Judge*, BOSTON HERALD, Feb. 14, 2002, at 1.

16. *Id.*

17. *Id.*

“I really can’t talk about the situation,’ he said. ‘I have no comment.’”<sup>18</sup> Wedge had also tried to talk with Murphy before the first story ran, but a court clerk had turned him away.<sup>19</sup> According to his deposition testimony, Wedge even offered to leave a note with Murphy’s clerk, but to no avail.<sup>20</sup>

The *Herald* continued to run articles critical of Murphy.<sup>21</sup> On March 6, 2002, Murphy finally responded; he granted an interview with the *Herald*’s competitor, the *Boston Globe*.<sup>22</sup> Murphy told the *Globe* that he had a lobby conference relating to the sexual assault trial but insisted that he had nothing but sympathy for the victim and had never said that she should “get over it.”<sup>23</sup> Murphy suggested that the series of stories in the *Herald* were the result of the District Attorney’s campaign to discredit him.<sup>24</sup> Despite reading Murphy’s denial, Wedge appeared on *The O’Reilly Factor*, a national television program, the next day and affirmed that he was absolutely certain that Murphy had said the fourteen-year-old victim should “get over it.”<sup>25</sup>

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18. *Id.*

19. *Murphy*, 865 N.E.2d at 755–56 (noting Wedge’s testimony at trial and in deposition were somewhat contradictory as to his effort to get Murphy’s comments before the story ran, but confirming that Murphy refused to comment the day the first story ran based on the prohibition of speech about active cases).

20. *Id.*

21. *See, e.g.*, Editorial, *Berating Victims Way Over the Line*, BOSTON HERALD, Feb. 14, 2002, at 26 (“New Bedford Superior Court Judge Ernest B. Murphy is acquiring a reputation as the kind of guy who makes the phrase criminal justice system an oxymoron.”); Doug Hanchett, *Victim’s Mother Files Complaint Against Murphy*, BOSTON HERALD, Feb. 17, 2002, at 9 (repeating the “get over it” comment); Wedge, *supra* note 14 (repeating the “get over it” comment and suggesting Murphy needs intensive training); Dave Wedge, *Lawmakers Taking Aim at Wrist-Slapping Judge*, BOSTON HERALD, Feb. 15, 2002, at 2 (calling Murphy’s comments to victims “heartless” and repeating the allegation that he said a rape victim should “get over it”).

22. Brian C. Mooney, *Judge Accuses DA of Character Assassination: Murphy Breaks Silence and Hints at Intimidation*, BOSTON GLOBE, Mar. 6, 2002, at B1.

23. *Id.*

24. *Id.* The district attorney, Paul F. Walsh Jr., denied any involvement in a campaign to discredit Murphy. *Id.* However, at a later defamation trial it was revealed that Walsh was Wedge’s source of information on the “get over it” quote. *Murphy*, 865 N.E.2d at 757.

25. *The O’Reilly Factor* (Fox News Network television broadcast Mar. 7, 2002). The host asked Wedge: “Are you absolutely 100 percent sure that Judge Murphy said that the rape victim should get over it?” Wedge responded: “Yes, he said this—he made this comment to three lawyers. He knows he said it, and everybody else that knows this judge knows that he said it.” *Id.*

Gagged by the Massachusetts Code of Judicial Conduct,<sup>26</sup> Murphy did nothing for three months. According to his lawyers, formerly a “proud, gregarious man, he became diminished, scared, and sad.”<sup>27</sup> In June 2002 he filed a complaint in the Massachusetts Superior Court, the same court in which he was a judge, alleging that the newspaper articles and public comments from Wedge and the *Boston Herald* were false and defamatory.<sup>28</sup> After a twenty-day trial, a jury awarded Murphy \$2.09 million in compensatory damages.<sup>29</sup> According to the court, Murphy never said: “She’s [fourteen]. She got raped. Tell her to get over it.” He said something more like: “She’s got to get on with her life. She needs to get over it.”<sup>30</sup> Murphy expressed concern for the victim; he did not demean her or show a lack of sympathy.<sup>31</sup> The whole incident arose from a miscommunication between Murphy and a young prosecutor and the carelessness of a reporter.<sup>32</sup> The veil of secrecy cast over the judiciary by the Code of Judicial Conduct only served to aggravate the situation.<sup>33</sup>

On appeal, a unanimous Massachusetts Supreme Judicial Court affirmed in May 2007,<sup>34</sup> but the incident did not end well for either party. Murphy is seeking early retirement—with a full pension—claiming the incident damaged his reputation and emotional stability to such an extent that he cannot continue as a judge and deserves disability payments.<sup>35</sup> He also faces a public reprimand for violations of the code of judicial conduct related to a post-trial incident in which he sent the *He-*

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26. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (“Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending Massachusetts proceeding in any court, and shall require similar abstention on the part of court personnel.”).

27. *Murphy*, 865 N.E.2d at 750.

28. *Id.* at 751.

29. *Id.* The judge later ruled that some of the defendants’ allegedly defamatory statements “qualified as protected statements” as a matter of law and reduced the verdict to \$2.01 million. *Id.*

30. *Id.* at 756–57.

31. *Id.* at 757–58.

32. *See id.*

33. *See* MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

34. *Murphy*, 865 N.E.2d at 749.

35. Scott Van Voorhis, *Judge’s Disability Plea Rejected: Says Herald Suit Led to Stress Disorder*, BOSTON HERALD, Aug. 3, 2007, at 6. While Murphy may pursue other pension options, Massachusetts Governor Deval Patrick rejected Murphy’s disability pension request two days after he filed it. *Id.*

*rald's* publisher a threatening note on judicial stationery.<sup>36</sup> For its part, the *Herald* claims to be the victim of a biased judiciary and a vengeful judge,<sup>37</sup> and the publisher remains steadfast in his support of the stories and reporter Wedge.<sup>38</sup>

Public fights, like the one between Murphy and the *Herald*, are unusual, but judges' defamation suits increasingly are not. Since 2000, more judges have turned to the courts in response to criticism in the popular press.<sup>39</sup> Victories mean vindication for the individual judges, but the effects on the judicial institution are not so positive.<sup>40</sup>

#### B. THE SCOPE OF THE CONFLICT BETWEEN THE PRESS AND THE JUDICIARY

Cases like the one in Massachusetts leave both sides unhappy and fail to enhance public support for the judiciary or ensure its "independence, integrity, and impartiality."<sup>41</sup> Although still uncommon, judges are moving from behind the bench to a seat at the plaintiff's table with increasing regularity. Judges filed ten percent of libel cases nationwide in 2005.<sup>42</sup> A case filed by Chief Justice Robert Thomas of the Illinois Supreme Court grew so contentious that the newspaper's lawyers filed an additional Section 1983 civil rights suit against ten current and former Illinois Supreme Court justices.<sup>43</sup> The newspaper claimed the justices violated its civil rights when they testified as character witnesses in the trial but refused on

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36. Raja Mishra, *Judge Who Won Libel Suit Faces Ethics Charges: Commission Says He Tried to Bully Herald*, BOSTON GLOBE, July 11, 2007, at B3.

37. Petition for Rehearing of Defendants/Appellants Boston Herald, Inc. and David Wedge at 1, 4-5, 9, *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007) (No. SJC-09782) (arguing the court got the facts wrong, and the author of the opinion, Justice John M. Greaney, was biased); see also John M. Greaney & Rudolph Kass, Op-Ed., *Judging Judges: It's Not That Easy*, BOSTON HERALD, July 16, 1997, at 21 (arguing the press should "examin[e] judicial performance with a lens rather than a hand grenade").

38. See Raja Mishra & Andrew C. Ryan, *SJC Upholds Judge's Libel Victory over the Herald: Judgment of \$2m Stands for '02 Articles*, BOSTON GLOBE, May 8, 2007, at B1 (noting *Herald* president and publisher Patrick J. Purcell's continuing support for Wedge).

39. See Mauro, *supra* note 6.

40. See, e.g., Liptak, *supra* note 6 (noting problems with litigating a libel suit in a court run by the plaintiff).

41. MODEL CODE OF JUDICIAL CONDUCT R. 2.10 cmt. 1 (2007) (explaining why the rules restricting judicial speech are necessary).

42. Mauro, *supra* note 6.

43. See Amended Complaint, *Shaw Suburban Media Group v. Thomas*, No. 07 CV 03289 (N.D. Ill. July 26, 2007), 2007 WL 2227640.

cross-examination to discuss deliberations.<sup>44</sup> The lawsuit also claimed that the \$4 million verdict—reduced from \$7 million by a trial court judge—violated the newspaper’s due process rights because it denied an appeal to the state’s highest court due to the lack of a quorum.<sup>45</sup>

The lawsuit arose out of an opinion column alleging that Justice Robert Thomas’ political connections affected the outcome of a high profile case.<sup>46</sup> Thomas chose to respond to the allegations in the column with a lawsuit rather than a letter to the editor or a public statement defending his reputation.<sup>47</sup> The suit settled in October 2007,<sup>48</sup> but the ultimate costs, in terms of credibility and public trust in the judiciary, are difficult to compute. A more cautious response from Thomas could have produced a better outcome for the court, the public, and the newspaper.<sup>49</sup> But as in Illinois, any response related to a “pending, or impending case,” would have been prohibited by the state’s Code of Judicial Conduct.<sup>50</sup> The Illinois code discourages almost *all* speech about active cases.<sup>51</sup>

Incidents like those in Massachusetts and Illinois continue to erode public confidence in the judiciary at an alarming rate.<sup>52</sup> Dwindling public trust due to the perception of dimi-

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44. *Id.* ¶ 5.

45. *Id.* ¶¶ 6–9 (noting the justices who testified recused themselves, denying the newspaper the possibility of an appeal to the high court).

46. Plaintiff’s Complaint at Law ¶¶ 21–40, *Thomas v. Page*, No. 04 LK 013 (Kane County, Ill., Cir. Ct. June 9, 2004), 2004 WL 5050801.

47. *See Thomas v. Page*, 837 N.E.2d 483, 486 (Ill. App. Ct. 2005).

48. Agreed Stipulation for Dismissal with Prejudice, *Shaw Suburban Media Group v. Thomas*, No. 07 CV 3289 (N.D. Ill. Oct. 23, 2007), 2007 WL 3340326. The parties agreed to a \$3 million settlement, and the newspaper apologized to Thomas, but the reporter insists that he reported accurate information from confidential sources. Russell Working, *Defamation Suit Settled: Kane County Paper to Publish Apology to Illinois Chief Justice*, CHI. TRIB., Oct. 12, 2007, Metro, at 1.

49. *See Mauro*, *supra* note 6 (noting the appearance of bias when judges become plaintiffs); Working, *supra* note 48 (quoting an attorney for the Illinois newspaper saying the civil rights suit “may persuade the next judge” with a complaint “that the better approach may be to bring that complaint to the public or bring that complaint to the publisher”).

50. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (“A judge should abstain from public comment about a pending, or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge’s direction and control.”).

51. *Id.*

52. *See Hearing*, *supra* note 2 (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts) (stating that modern judges need to prove their “legitimacy”); Liptak, *supra* note 6 (noting that a spike in

nished integrity has become the most critical issue facing the judiciary today.<sup>53</sup> More judicial speech, not less, could change that tide. Opening channels of communication between the judiciary, the press, and consequently the public, will help slow the erosion of public confidence.<sup>54</sup>

The popular press will continue reporting on judicial actions, and it should.<sup>55</sup> But as more information comes directly from judges rather than secondhand sources, the reporting will be increasingly accurate.<sup>56</sup> Stories incorporating comments from judges will not always praise the courts, but opening a dialogue between the press and the judiciary will allow judges to show their skills to the public.<sup>57</sup> The media will expose a few incompetent judges along the way, but that seems to weigh in favor of increasing speech rather than against it. Judicial speech restrictions were never intended to hide incompetence.<sup>58</sup> As Justice Brandeis wrote, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>59</sup>

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lawsuits filed by judges has put a “strain” on the judicial system); Mauro, *supra* note 6 (noting that judges filing lawsuits in courts where they also preside creates the appearance of impropriety).

53. See ABA COMM’N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 51 (2003) [*hereinafter* ABA COMM’N] (“The continuing ability of the courts to function then depends upon public acceptance of their institutional legitimacy; without it, the courts can and will be ignored or obliterated.”); Geyh, *supra* note 1, at 875–76 (arguing that flagging public confidence dominates discourse about the judiciary).

54. *But see* Greaney & Kass, *supra* note 37 (arguing in an editorial that the media should be more thoughtful in their critiques of the bench).

55. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[The] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

56. See Evelle J. Younger, *Fair Trial, Free Press and the Man in the Middle*, 56 A.B.A. J. 127, 128–30 (1970) (“The muzzling of responsible sources of information creates a vacuum that will be filled by irresponsible sources.”).

57. See *Hearing*, *supra* note 2 (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts) (arguing that allowing media into the courtroom will allow the public to see judges in action).

58. MODEL CODE OF JUDICIAL CONDUCT R. 2.10 cmt. 1 (2007) (explaining the purpose of the speech restrictions is to promote fairness and impartiality).

59. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).



## II. THE FIRST AMENDMENT AND JUDICIAL SPEECH

In 2007, the American Bar Association (ABA) adopted new model rules governing judicial speech.<sup>60</sup> This Section examines those rules under the First Amendment. The ABA's rule-makers have pushed the limits of speech restrictions seeking to outlaw as much judicial speech as the Constitution will allow.<sup>61</sup> This Note proposes that the proper question, from both a constitutional and public policy perspective, is not how much regulation the Constitution will allow, but how much regulation an impartial judiciary actually requires. The proper remedy for what ails the American judiciary is more speech, not less.

### A. THE MODEL CODE OF JUDICIAL CONDUCT: RESTRICTIONS ON JUDICIAL SPEECH

The ABA recommends a set of rules to govern judicial conduct.<sup>62</sup> Inherent in the rules is the understanding that judges "must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."<sup>63</sup> While vesting substantial discretion in individual judges,<sup>64</sup> the rules remain remarkably all-encompassing, regulating aspects of judicial conduct both on and off the bench.<sup>65</sup> For example, the speech restrictions regulate what a judge can say about pending cases, government hearings, and elections.<sup>66</sup>

Rule 2.10 restricts judicial speech concerning active cases, stating as a general rule that judges should make no public or private statements that might "affect the outcome or impair the fairness" of a case.<sup>67</sup> Before 2007, the rule prohibited all speech

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60. See MODEL CODE OF JUDICIAL CONDUCT.

61. See U.S. CONST. amend. I; MODEL CODE OF JUDICIAL CONDUCT.

62. See MODEL CODE OF JUDICIAL CONDUCT.

63. *Id.* pmb1.

64. See *id.* (noting the canons provide guidelines for interpreting the rules, and that "may" and "should" provisions indicate that the judge must determine for herself whether to abide by the recommendations).

65. See, e.g., *id.* R. 2.1 ("The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.") (cross-references omitted); *id.* R. 3.13 (placing restrictions on judges, and their families, accepting gifts and requiring judges to report certain gifts in accordance with Rule 3.15).

66. *Id.* R. 2.9—2.10.

67. *Id.* R. 2.10. Paragraph (A) states in full: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." *Id.* (cross-references omitted). Paragraph (B) states: "A judge shall

about an active case regardless of whether it was likely to impair fairness.<sup>68</sup> Some states, including Illinois and Massachusetts, continue to follow this model.<sup>69</sup> The modern Model Code extends the restriction to “court staff, court officials, and others subject to the judge’s direction and control.”<sup>70</sup>

The Model Code has always contained several exceptions to Rule 2.10’s general speech restrictions.<sup>71</sup> For example, “a judge may make public statements in the course of official duties [and] may explain court procedures.”<sup>72</sup> But history has shown that many judges fail to read beyond “[a] judge shall not” speak.<sup>73</sup> Uncertain about what they can or cannot say, judges choose to say nothing at all.

The ABA adopted the current rule in 2007 after four years of study and debate.<sup>74</sup> Among the changes, the ABA approved additional exceptions to the judicial speech restrictions.<sup>75</sup> For example, new Model Rule 2.10 allows a judge to respond to allegations in the media concerning judicial conduct.<sup>76</sup> However, that allowance is subject to the rule’s fairness requirements.<sup>77</sup> Thus, the change adds almost nothing new; a judge may respond to allegations of misconduct only if the response does not

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not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” *Id.* (cross-references omitted).

68. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (1990), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1990 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 346 (1990).

69. See ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6); MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

70. MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007).

71. *Id.*

72. *Id.*

73. *Id.*; see Gary A. Hengstler, *Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 SYRACUSE L. REV. 419, 424 (2006) (commenting on the previous version of the rule and arguing most judges interpret it to mean they cannot talk to reporters about active cases at all).

74. See ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, OVERVIEW OF MODEL CODE OF JUDICIAL CONDUCT AS ADOPTED FEBRUARY 12, 2007, available at [http://www.abanet.org/judicialethics/Overview\\_GAK\\_030707.pdf](http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf).

75. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10.

76. *Id.* Paragraph (E) states: “Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.” *Id.*

77. *Id.*

impair fairness.<sup>78</sup> Although still restrictive, the model rule provides substantially more room for judicial speech than many states' rules.

Both Illinois and Massachusetts, where Thomas and Murphy recently prevailed on their defamation claims, restrict judicial speech concerning pending cases almost without exception.<sup>79</sup> The Illinois code uses "should" rather than "shall" language, which changes the rule from an absolute prohibition to a general guideline, but still discourages judicial speech.<sup>80</sup> Furthermore, both codes allow judges to speak publicly when they are actually in the courtroom, and to explain legal procedures.<sup>81</sup> Minnesota and Oklahoma, on the other hand, two states that have recently reviewed their codes,<sup>82</sup> employ more permissive language analogous to the ABA's Model Rule 2.10—that a judge should not engage in extrajudicial speech that will impair the fairness of a trial—but neither state's code contains an exception for judges responding to media criticism.<sup>83</sup> Like Illinois, Oklahoma employs "should" rather than "shall" language, potentially leaving judges with discretion to speak in other circumstances.<sup>84</sup>

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78. *See id.*

79. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6) ("A judge should abstain from public comment about a pending or impending proceeding . . . This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."); MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (prohibiting judges from speaking about "pending or impending" cases except where the judge is speaking as part of the judge's official duties, participating in a legal education program, or the judge is a litigant).

80. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6); *see also* Hengstler, *supra* note 73, at 424 (arguing judges tend to focus on the restrictive portion of the rule).

81. ILL. CODE OF JUDICIAL CONDUCT Canon 3(A)(6); MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9). Massachusetts's code also allows judges to speak at educational events or if they are themselves litigants. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

82. AM. BAR ASS'N, STATUS OF STATE REVIEW OF ABA MODEL CODE OF JUDICIAL CONDUCT (2007), [http://www.abanet.org/cpr/jclr/jud\\_status\\_chart.pdf](http://www.abanet.org/cpr/jclr/jud_status_chart.pdf) (last visited Nov. 12, 2008).

83. MINN. CODE OF JUDICIAL CONDUCT Canon 3(A)(8) ("A judge shall not . . . make any public comment [about a proceeding] that might reasonably be expected to affect its outcome or impair its fairness . . ."); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) ("A judge should not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect the outcome or impair its fairness . . .").

84. *See* OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(8).

Every state has the authority to adopt its own rules to govern the conduct of judges and lawyers. Historical evidence suggests that even if states decide to adopt the new Model Code of Judicial Conduct, it will take years before it achieves widespread acceptance.<sup>85</sup> Furthermore, states adopt the rules they like and reject others, making the ABA's recommendation that states change restrictions on judicial speech years away from implementation.<sup>86</sup> The slow pace of adoption, coupled with the states' ability to change the rules as they choose, makes meaningful exceptions to Rule 2.10 possible.

#### B. THE FIRST AMENDMENT AND CONTENT-BASED PRIOR RESTRAINTS

The Supreme Court distinguishes between content-based and content-neutral restrictions on speech.<sup>87</sup> Content-neutral restrictions—those that regulate the time, place, or manner of speech—are valid so long as they are reasonable.<sup>88</sup> Content-based restrictions, like the restrictions imposed by the judicial codes, are presumptively invalid.<sup>89</sup> To withstand First Amendment strict scrutiny, the government must prove that the content-based restrictions further a compelling state interest and that there are no less restrictive means available to further that interest.<sup>90</sup>

In deciding whether a specific law is content-based or content-neutral, courts look to the government's motives in adopting the law. If the government adopted the regulation as a way to limit a certain class of speech based on the idea, message, or viewpoint it contains, courts should generally apply strict scrutiny.<sup>91</sup> Laws that restrict the time, place, or manner of speaking

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85. See AM. BAR ASS'N, *supra* note 82 (stating that thirty-three states have formed committees to review the new rules for judicial conduct); ABA, STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES, [http://www.abanet.org/cpr/jclr/ethics\\_2000\\_status\\_chart.pdf](http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf) (last visited Nov. 12, 2008) (noting that thirty-five states have adopted the model rules for attorney conduct recommended by the ABA in 2003).

86. See Am. Bar Ass'n, Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules, <http://www.abanet.org/cpr/jclr/charts.html> (last visited Nov. 12, 2008) (providing links by individual state to charts comparing the state's rules to those proposed by the ABA).

87. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980).

88. *Consol. Edison*, 447 U.S. at 536.

89. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

90. See *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

91. *Turner Broad.*, 512 U.S. at 642–43.

are less suspect and merit lesser scrutiny because they are unlikely to “excis[e] certain ideas or viewpoints from the public dialogue.”<sup>92</sup> Thus a law that restricts posting signs on *all* public property withstands First Amendment scrutiny because it is silent on what the signs may or may not say.<sup>93</sup> A law limiting sales and solicitations at a state fair to certain areas on the fair grounds faces lesser scrutiny because it applies evenhandedly to all sales people and solicitors.<sup>94</sup> But a law that restricts political speech near a polling place must face strict scrutiny because the statute depends on whether the speech is political, not just where it occurs.<sup>95</sup>

C. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*: THE CONSTITUTIONALITY OF CONTENT-BASED RESTRICTIONS ON JUDICIAL SPEECH

In 1996 Gregory Wersal sought election to the Minnesota Supreme Court, but withdrew after a complaint was filed with the Office of Lawyers Professional Responsibility alleging that he violated the Code of Judicial Conduct by distributing literature that criticized Minnesota Supreme Court decisions.<sup>96</sup> Two years later, again running for judicial office, he filed a complaint seeking declaratory relief in U.S. District Court. Wersal argued that a provision of the code that prevented judicial candidates from stating their views on legal issues violated his First Amendment right to free speech.<sup>97</sup> The case eventually reached the U.S. Supreme Court where five justices agreed with Wersal and struck down the provision as unconstitutional.<sup>98</sup>

In a decision authored by Justice Antonin Scalia, the majority noted that content-based restrictions on speech by candidates for public office must stand up to strict scrutiny.<sup>99</sup> Strict scrutiny requires that the challenged provision be “(1) narrowly

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92. *Id.* at 642.

93. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816–17 (1984).

94. *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

95. *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

96. *Republican Party of Minn. v. White*, 536 U.S. 765, 768–69 (2002).

97. *Id.* at 769–70; *see* MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (making it a violation for a candidate for judicial office to “announce his or her views on disputed legal or political issues”).

98. *Republican Party of Minn.*, 536 U.S. at 788.

99. *Id.* at 774.

tailored, to serve a (2) compelling state interest.”<sup>100</sup> The majority did not decide whether the state had a compelling interest in an impartial judiciary; instead, the majority rested its decision on the absence of narrow tailoring.<sup>101</sup> According to Justice Scalia, a restriction that stifles judicial speech without effectively advancing the purported interest in an impartial judiciary is “woefully underinclusive” because it allows judges to state positions on issues prior to declaring their candidacy and after election, but prohibits such speech while running for office.<sup>102</sup> The decision also emphasized the importance of political speech and the Court’s longstanding insistence that protecting the ability to disseminate information to the electorate about candidates is one of the core purposes of the First Amendment.<sup>103</sup> The Court, however, did not say that content-based restrictions on judicial speech outside the context of elections lie beyond the scope of the First Amendment. *All* content-based restrictions on speech are presumptively invalid,<sup>104</sup> and can only be upheld if they are the least restrictive means of achieving the desired outcome.<sup>105</sup>

#### D. RESTRICTIONS ON ATTORNEY SPEECH CONCERNING PENDING OR IMPENDING CASES

The U.S. Supreme Court has never explicitly evaluated restrictions on judicial speech concerning active cases, but in the 1991 case *Gentile v. State Bar of Nevada*, the Court considered attorney speech about active cases.<sup>106</sup> Dominic Gentile, a Nevada attorney, represented Grady Sanders in a 1988 proceeding in which Sanders was accused of stealing nearly \$300,000 in traveler’s checks and nine pounds of cocaine from the Las Vegas Police Department.<sup>107</sup> The same day Sanders was indicted, Gentile held a press conference at which he refuted the accusations in the indictment, questioned the credibility of the prosecution’s witnesses, and suggested the real culprit was Las Vegas Police Detective Steve Scholl.<sup>108</sup> Sanders later said that he

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100. *Id.* at 775.

101. *Id.* at 775–88.

102. *Id.* at 779–80.

103. *Id.* at 781–82.

104. *Davenport v. Wash. Educ. Ass’n*, 127 S. Ct. 2372, 2381 (2007); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 65 (1983); *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

105. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

106. 501 U.S. 1030 (1991).

107. *Id.* at 1039–41.

108. *Id.* at app. A, 1059–60.

held the conference to prevent the “poison[ing]” of the jury pool due to inaccurate pretrial publicity.<sup>109</sup>

A Nevada jury eventually acquitted Sanders,<sup>110</sup> but the State Bar Association filed a complaint against Gentile alleging the press conference violated Nevada Supreme Court Rule 177.<sup>111</sup> The Southern Nevada Disciplinary Board issued a private reprimand to Gentile finding that his comments at the press conference violated the Nevada rule prohibiting any “extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>112</sup>

The Nevada Supreme Court affirmed, holding that the rule did not violate Gentile’s First Amendment rights, but a divided U.S. Supreme Court reversed.<sup>113</sup> Separate opinions authored by Chief Justice Rehnquist and Justice Kennedy, held that Nevada Supreme Court Rule 177 was void for vagueness because the Nevada Supreme Court failed to give lawyers proper notice of the types of speech that were allowed, but the underlying language could stand up to constitutional scrutiny if properly interpreted.<sup>114</sup> The disputed rule prevented attorneys from issuing public statements that “the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>115</sup> Because attorneys have a special duty to the clients and the courts, Chief Justice Rehnquist held, the Constitution permits greater restrictions on attorney speech concerning active cases than speech by the press and the public.<sup>116</sup> Although judges and attorneys play different roles in trials, it seems the same rationale could apply to place greater limits on judicial speech.

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109. *Id.* at 1042–43.

110. *Id.* at 1047.

111. *Id.* at 1033.

112. *Id.*

113. *Id.* at 1033, 1058.

114. *Id.* at 1048, 1074–75.

115. *Id.* at app. B, 1060.

116. *Id.* at 1074–75.

### III. STATE REGULATIONS OF JUDICIAL SPEECH AND THE CONSTITUTION

An effort to discern whether state regulations of judicial speech concerning active cases violates the Constitution must begin with a closer look at the specific language of those restrictions. Massachusetts's restrictive language may infringe on First Amendment rights, while Oklahoma's more permissive language may not.<sup>117</sup> This Section begins with a discussion of the most restrictive codes, specifically the Massachusetts's code. Next, it considers whether changes implemented by the ABA, and in states like Oklahoma, make the prohibitions sufficiently narrow to withstand First Amendment scrutiny.

#### A. THE MASSACHUSETTS CODE OF JUDICIAL CONDUCT

##### 1. An Outline of the Statutory Language

Massachusetts's code prohibits all "public comment about a pending or impending Massachusetts proceeding in any court."<sup>118</sup> It contains three subsections outlining exceptions to the broad general rule. First, a judge may comment publicly from the bench in the course of the judge's official duties, explain general legal principles and procedures for public information, and state information contained within the public record for the case.<sup>119</sup> Second, a judge may discuss in "legal education programs . . . cases and issues pending in appellate courts" so long as the discussions do not "interfere with a fair hearing of the case."<sup>120</sup> Third, judges may discuss cases in which they are a party.<sup>121</sup>

Due to its scope and the textual limitations of the exceptions, the rule functions as a virtual gag order on judicial speech about active cases. Judge Murphy seems to have read the rule this way. He refused to speak to reporters, saying "I really can't talk about the situation."<sup>122</sup> Adding to the problem,

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117. Compare OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (employing "should" language as a suggestion that judges should not speak about "pending or impending" cases in a way that "might reasonably" impede a fair trial), with MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (prohibiting all speech, whether it is likely to impair a fair trial or not, and using "shall" language).

118. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

119. *Id.* Canon 3(B)(9)(a).

120. *Id.* Canon 3(B)(9)(b).

121. *Id.* Canon 3(B)(9)(c).

122. Wedge, *supra* note 15.



the Massachusetts Supreme Judicial Court has never reviewed Canon 3(b)(9)'s restrictions on judicial speech to offer guidance on what judges may say. Together, these factors chill judicial speech even in areas where the code would technically allow public comments.<sup>123</sup>

This chilling effect was apparent with Judge Murphy. Even if restrictions were in effect with regard to his comments about the sexual assault victim because of a pending appeal, Murphy still could have discussed with reporters the general legal procedures regarding lobby conferences and sentencing, or referred reporters to a public record that would have helped reporters to better understand the case.<sup>124</sup> His eventual comments to the *Boston Globe* indicate that some speech was permitted, but the restrictive rules required careful consideration of exactly how much speech was allowed.<sup>125</sup>

## 2. The Massachusetts Code Prohibits Speech Based on its Content

The Massachusetts Code, like laws that target political speech near polling places,<sup>126</sup> regulates speech based on its content and the speaker.<sup>127</sup> The code targets a specific type of speech uttered by specific speakers, and completely prohibits it. Under the code, judges, and only judges, can reveal almost nothing about their own thoughts and ideas as they relate to an active case.<sup>128</sup> “[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>129</sup> The statute is content-based because it focuses on the subject matter of the speech, an active case, and prohibits it. A content-neutral statute would entirely prohibit public comment by active judges about cases, the law, or anything else. While such a statute would seem destined for failure due to overbreadth because it forecloses an entire class of speech, content-neutral restrictions work in other situations.<sup>130</sup>

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123. *See id.*

124. *See* MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

125. *See* Mooney, *supra* note 22.

126. *See* *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

127. *See* MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

128. *Id.*

129. *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

130. *See* *Burson*, 504 U.S. at 197 (holding that a statute that specifically targets speech near a polling place targets political content, ignoring “other categories of speech, such as commercial solicitation, distribution, and dis-

Proponents of judicial speech restrictions may contend that the Massachusetts rules are valid “time, place, and manner” restrictions under the First Amendment.<sup>131</sup> After all, the code does not restrict judicial speech indefinitely, but only as long as the matter is “pending or impending” before a state court.<sup>132</sup> Thus the restriction does not perpetually prohibit discussion about cases, but it postpones the discussion until the case is no longer active. However, this argument ignores the rule that a “valid time, place, and manner restriction [on First Amendment rights] . . . ‘may not be based upon either the content or subject matter of speech.’”<sup>133</sup> Any restriction, even if temporary, still prohibits speech based on its content.

### 3. Application of Strict Scrutiny to the Massachusetts Code of Judicial Conduct

The First Amendment makes content-based regulations presumptively invalid.<sup>134</sup> To withstand a constitutional challenge, the government must prove that the regulations are narrowly tailored to serve a compelling interest.<sup>135</sup> However, the Massachusetts code applies content-based restrictions without discriminating against a specific viewpoint; it restricts all judicial speech related to an active case.<sup>136</sup> The Supreme Court held that content-based restrictions that do not favor a particular viewpoint should receive less exacting scrutiny than viewpoint-based restrictions.<sup>137</sup> But more recent cases evaluating content-

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play”); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (upholding a restriction banning all signs from city property for aesthetic reasons and noting that a less restrictive ordinance, like one allowing only political signs, may run into more severe constitutional problems for basing its restrictions on content); *Mosley*, 408 U.S. at 95 (noting that the statute at issue allowed picketing related to labor issues, but prohibited all other picketing, thus targeting the information on the picket signs rather than the act of picketing itself).

131. See, e.g., *Taxpayers for Vincent*, 466 U.S. at 817 (holding that a “content-neutral, impartially administered prohibition” against posting signs did not violate the First Amendment).

132. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

133. *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (citing *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980)).

134. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

135. See *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

136. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

137. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 557, 564 (1973) (upholding federal restriction on political activities of federal employees after applying something less than strict scrutiny and emphasizing the importance of selecting federal employees based on merits and not

based restrictions applied strict scrutiny even in the absence of viewpoint discrimination.<sup>138</sup>

In *Republican Party of Minnesota*, the Supreme Court declined to decide whether the government had compelling interests in a fair and impartial judiciary or the appearance of a fair and impartial judiciary.<sup>139</sup> Instead, the Court relied on Minnesota's failure to tailor its law restricting judicial candidates from announcing their views on issues to narrowly serve either of those interests.<sup>140</sup> Here too, that a state's interest in fair trials conducted by an independent and impartial judiciary is compelling is beyond debate. The question is whether the Massachusetts code is narrowly tailored to serve that interest.

The Massachusetts code restricts substantially more speech than necessary. It assumes that judicial speech about an active case is likely to affect the outcome or otherwise impair the fairness of that case. The opposite is more likely true. Communication furthers knowledge and understanding. Judges have a unique ability, due to their education, experience, and familiarity with the facts of a given case, to inform the public about what they do and how the judiciary operates. This is presumably the reason that the ABA's Model Code allows judges to speak publicly about court procedures and general principles of law.<sup>141</sup> During boxer Mike Tyson's high profile 1992 rape trial, Judge Patricia Gifford of Indiana instructed her law clerk to answer the media's procedural questions following each day of testimony.<sup>142</sup> Those question and answer sessions helped reporters, even those more used to boxing arenas than courtrooms, to report fairly and accurately on the criminal trial.<sup>143</sup>

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politics).

138. See, e.g., *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) (upholding a content-based but viewpoint-neutral restriction because there was no possibility that the government was trying to limit ideas); *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004) (requiring the government to show a narrowly tailored restriction to further a compelling interest in order for a content-based but viewpoint-neutral restriction to withstand First Amendment scrutiny); *Republican Party of Minn.*, 536 U.S. at 768, 774–75 (applying strict scrutiny to content based but viewpoint-neutral restriction on judicial speech while noting the particular importance of campaign speech).

139. See *Republican Party of Minn.*, 536 U.S. at 775–81.

140. *Id.* at 776.

141. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(D) (2007); see also ABA COMM'N, *supra* note 53, at 51.

142. Hengstler, *supra* note 73, at 425.

143. See, e.g., William Nack et al., *A Gruesome Account*, SPORTS ILLUSTRATED, Feb. 10, 1992, at 24 (providing a detailed account of the Tyson trial). Nack includes a brief discussion of "Indiana case law," despite being a horse

In a high-profile tort case, like Judge Murphy's defamation suit in Boston,<sup>144</sup> the public—and the litigants—would benefit from a reasonable, even-tempered explanation of what exactly the plaintiff must prove to prevail. The judge presiding over the case, or one of her law clerks, is in the best position to provide it. Such an explanation would help to temper the agitated tone of the controversy created by the media and instill public confidence in the judiciary. Judges make such comments to juries; why prohibit them from making the same comments to the public? It is inappropriate for a judge to comment about the credibility of the witnesses or a party's likelihood of success, but the current Massachusetts code prohibits substantially more speech than necessary, making it overinclusive.<sup>145</sup>

In addition to being overinclusive, the Massachusetts provision is underinclusive because it fails to restrict a substantial amount of speech that is just as important to a fair trial and impartial judiciary.<sup>146</sup> Assume the following hypothetical: On day one a judge in Boston publicly states his opinion that all juvenile murder suspects should stand trial as adults. At that time there are no juvenile murder defendants with active cases in Massachusetts. On day two the local district attorney charges a juvenile with murder, and the judge's day one comments receive extensive coverage in the popular press. The Boston judge has not violated a single rule.<sup>147</sup> But if the judge

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rating and boxing beat writer by trade. University of Colorado, Sixtieth Annual Conference on World Affairs Participants—William Nack, <http://www.colorado.edu/cwa/bios.html?id=526&year=2005> (last visited Nov. 12, 2008).

144. *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007).

145. *Cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231–32 (2003) (striking down a federal statute that prohibited minors from contributing to political campaigns because some parents made contributions in their children's names in order to increase their total contribution as overinclusive); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534–35, 584–85 (2001) (striking down a Massachusetts law restricting the advertising and promotion of tobacco products as overinclusive).

146. *See Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002) (calling a Minnesota statute that restricts the speech of a judicial election candidate “woefully underinclusive” because the restrictions do not start until the candidate announces her candidacy); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (stating that underinclusiveness “diminish[es] the credibility of the government's rationale for restricting speech”); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in judgment) (noting that underinclusive laws cannot be seen to “protect[] an interest of the highest order” (internal quotations omitted)).

147. The judge may be required to disqualify herself if the case came before her. MASS. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (requiring judges to disqualify themselves in cases where “the judge's impartiality might reasona-

were to make the same public comment on day two, he would have violated Canon 3(B)(9).<sup>148</sup> Although there is a distinction between the two comments, it is unreasonable to think the day one comment will not affect the defendant's right to a fair trial or the impartiality of the judiciary, but the day two comment will affect that right.<sup>149</sup>

Moreover, the Massachusetts restriction fails because it is not the least restrictive means of furthering the government's interest in fair and impartial trials. As the Supreme Court has repeatedly stated, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."<sup>150</sup> Narrow tailoring requires that if there is a way to uphold fairness and impartiality without completely prohibiting judicial speech about active cases, that alternative must be adopted. As has already been shown, the ABA's Model Code does exactly that.<sup>151</sup> It only restricts judicial speech about an active case when it "might reasonably be expected to affect the outcome or impair the fairness of a matter . . . ."<sup>152</sup>

Under a lesser degree of scrutiny that balances the state's interest in regulating speech against the speaker's First Amendment interest in free communication,<sup>153</sup> the Massachusetts rule remains so poorly tailored that it is unlikely to withstand even intermediate constitutional scrutiny. The state's policy burdens "substantially more speech than necessary" to ensure that litigants and criminal defendants receive a fair trial.<sup>154</sup> Massachusetts's restrictions on judicial speech violate the First Amendment.

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bly be questioned").

148. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

149. *Republican Party of Minn.*, 536 U.S. at 779–80 (noting a similar absurdity in Minnesota's Code makes "belief in that purpose a challenge to the credulous").

150. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

151. MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007).

152. *Id.* R.2.10(A).

153. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557, 564 (1973) (upholding federal restriction on political activities of federal employees after applying something less than strict scrutiny and emphasizing the importance of selecting federal employees based on merits and not politics).

154. *Turner Broad. Sys.*, 520 U.S. at 189.

B. APPLICATION OF STRICT SCRUTINY TO THE ABA'S MODEL  
CODE OF JUDICIAL CONDUCT

Part III.A.3 discussed the availability of the ABA's Model Code as a less restrictive means of achieving Massachusetts's purpose of insuring that litigants and criminal defendants receive a fair trial before an impartial judiciary. The next question is whether the Model Code does enough to ease restrictions on judicial speech.

Rule 2.10(A) of the Model Code of Judicial Conduct states that "[a] judge shall not make any public statement that *might reasonably be expected* to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."<sup>155</sup> The phrase "might reasonably be expected" gives the statute potentially broad application while at the same time creating substantial ambiguity.<sup>156</sup> "Might" indicates that some probability of impact on fairness will trigger the rule and prevent judges from speaking.<sup>157</sup> But the rule offers no guidance,<sup>158</sup> and will likely lead many judges to refrain from speaking about active cases at all.<sup>159</sup> Still, despite the ambiguity, the Model Code remains much more respectful of First Amendment considerations than the Massachusetts rule. Properly construed by a judge, it could avoid some of the problems in the Massachusetts rule.<sup>160</sup>

First, it limits the overinclusiveness of the rule to an acceptable level.<sup>161</sup> Here, the statute only prohibits speech that

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155. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A) (emphasis added) (cross-references omitted).

156. *Id.*

157. "Might" is an auxiliary verb used "to express permission, liberty, probability, possibility." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 787 (11th ed. 2003). Sometimes it is used to denote "less probability or possibility than *may*." *Id.*

158. Some other statutes and rules that use the same phrase include examples in an effort to lend clarity to the phrase. *See, e.g.*, 12 C.F.R. § 226.9 (2008) (using the phrase as part of a "Truth in Lending" regulation and listing examples). *But see* 15 U.S.C. § 3806 (2000) (using the phrase in law regarding methane transportation, but providing no examples).

159. *See* Hengstler, *supra* note 73, at 424.

160. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A).

161. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 231–32 (2003) (striking down a federal statute that prohibited minors from contributing to political campaigns because some parents make contributions in their children's names in order to increase their total contribution as overinclusive); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534–35, 584–85 (2001) (striking down a Massachusetts law restricting the advertising and promotion of tobacco).

“might reasonably be expected” to affect the fairness of a trial, while the Massachusetts rule prohibited all speech, regardless of whether it would affect fairness. Under the ABA rule, a judge presiding over Murphy’s trial could explain the complexity of defamation suits by public-figure plaintiffs to the media.

Second, the ABA’s model rule also eliminates the underinclusiveness problem. Subsection (B) states that “[a] judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”<sup>162</sup> Thus, the ABA’s Model Code prohibits speech, whether about an active case or not, that calls into question the judge’s ability to impartially consider and decide cases.<sup>163</sup> A judge in a jurisdiction governed by a code that substantially follows the ABA’s Model Code is prohibited from stating that all juvenile murder suspects should stand trial as adults whether or not there are currently any juveniles in the jurisdiction charged with murder.

Third, subsection (E) of the ABA’s rule explicitly allows a judge to respond to criticism from the “media or elsewhere” so long as she complies with the restrictions in subsection (A).<sup>164</sup> This rule, while still fairly restrictive, brings the Model Code of Judicial Conduct more in line with the Model Rules of Professional Conduct governing attorneys. Those rules, which govern attorneys rather than judges, encourage protected and valuable speech rather than chill it.<sup>165</sup>

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co products as overinclusive).

162. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(B) (cross references omitted).

163. The ABA’s rules also eliminate the problem of defining “impartial,” which Justice Scalia has commented on at length. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–82 (2002). According to the Model Code, “impartial” means “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” MODEL CODE OF JUDICIAL CONDUCT terminology.

164. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(E) (“Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.”).

165. See MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. (2002) (“[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.”). The Model Rules only prohibit speech that “will have a substantial likelihood of materially prejudicing” an active case, and also provide a nonexhaustive list of statements that an attorney may make to the public. *Id.* R. 3.6.

The rules also allow an attorney to pursue a claim or defense against a client even if the claim requires that the attorney reveal some information that would otherwise be confidential.<sup>166</sup> Furthermore, a broad reading of the word “controversy” would allow an attorney to reveal confidences when attacked publicly by a client or third party even if the controversy did not enter the judicial system.<sup>167</sup> Although the Supreme Court held that limited restrictions on attorney speech concerning active cases can withstand First Amendment scrutiny,<sup>168</sup> the language of the Model Rules shows that the ABA decided to allow more attorney speech than would be constitutionally required.

Unlike the rules governing attorneys, the rules governing judges do not allow them to speak up in their defense if the speech “might reasonably be expected” to impair the fairness of an active case.<sup>169</sup> Because of the limitations imposed by the judicial code, Judge Murphy in Massachusetts and Justice Thomas in Illinois may still feel compelled to respond to allegations with lawsuits rather than public comment, interviews

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166. *Id.* R. 1.6(b)(3) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer’s representation of the client . . . .”); see *Stone v. Satriana*, 41 P.3d 705, 710 (Colo. 2002) (en banc) (“When a client brings a malpractice allegation, the attorney-client privilege is deemed impliedly waived.”); *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 609 (Fla. Dist. Ct. App. 2004) (holding that a corporate counsel’s whistleblower claim qualified as a “controversy” under an analogous professional conduct rule, thus allowing the lawyer to divulge information that would otherwise be confidential); *Mancheski v. Gabelli Group Capital Partners*, 802 N.Y.S.2d 473, 475 (N.Y. App. Div. 2005) (allowing a corporation’s former counsel to proceed in a shareholder action against the corporation despite duty to preserve confidences); *Nesenoff v. Dinerstein & Lesser, P.C.*, 786 N.Y.S.2d 185, 186 (N.Y. App. Div. 2004) (“[A] lawyer should preserve the confidences and secrets of a client . . . . However, an attorney may reveal confidences and secrets to defend against an accusation of wrongful conduct.”); *Spratley v. State Farm Mut. Auto Ins. Co.*, 78 P.3d 603, 609 (Utah 2003) (discussing the claim or defense exception to Rule 1.6 and allowing former in-house counsel to go forward with a suit for retaliatory discharge).

167. “Controversy” means “a discussion marked esp. by the expression of opposing views.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 272 (11th ed. 2003). However, in legal terms “controversy” has a more narrow meaning, and refers only to matters that are or can be litigated. BLACK’S LAW DICTIONARY 354 (8th ed. 2004).

168. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071–72 (1991).

169. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A) (making the right to respond to criticism dependent on the understanding that the response, whatever it may be, will not impair the fairness of an active case).



with reporters, or letters to newspapers. Judges filing lawsuits in the jurisdictions they control does more to harm the judiciary than any speech—whether it “might reasonably be expected” to impair the fairness of an active case or not. For these reasons, even if the ABA’s Model Code passes constitutional muster by avoiding the underinclusiveness and overinclusiveness problems of Massachusetts’s code, there must be a better way.

C. ANALYSIS OF OKLAHOMA’S RULE: THE USE OF “SHOULD” RATHER THAN “SHALL”

One option is to replace “should” with “shall” and let judges decide for themselves what to say.<sup>170</sup> The Oklahoma Code states that judges “should not . . . make any public comment” that may impair the fairness of an active case.<sup>171</sup> The choice of the word “should” instead of “shall” carries significant weight in determining the meaning of Oklahoma’s rule. “Shall” generally means that the rule is mandatory;<sup>172</sup> “should” generally defines an aspirational goal.<sup>173</sup> In contrast, Oklahoma retains a procedure for disciplining judges who fail to comply with the rules,<sup>174</sup> and the Oklahoma Supreme Court reads the “should” language to be more than a mere guideline for interpretation by individual judges.<sup>175</sup> But the code does not have to operate that way. The ABA, and individual states, could change the “shall” restrictions to “should” restrictions and leave in place the current language that makes clear what each word means.<sup>176</sup>

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170. *Id.* pmb1.; see OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(8).

171. OKLA. CODE OF JUDICIAL CONDUCT Canon 3(B)(8).

172. See *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (“The defendant ‘shall’ be dealt with in a stated way; it is the language of command, a test significant, though not controlling.” (citing *Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930))); BLACK’S LAW DICTIONARY 1407 (8th ed. 2004) (defining shall as “[h]as a duty to; more broadly, is required to . . . . This is the mandatory sense that drafters typically intend and that courts typically uphold”).

173. See MODEL CODE OF JUDICIAL CONDUCT scope (“Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and *no disciplinary action should be taken* for action or inaction within the bounds of such discretion.” (emphasis added)).

174. Oklahoma provides for a “Council on Judicial Complaints” with the ability to discipline judges. OKLA. RULES GOVERNING COMPLAINTS ON JUDICIAL MISCONDUCT R. 3.

175. See *Pierce v. Pierce*, 39 P.3d 791, 797 (Okla. 2001) (interpreting the “should” language in Canon 3 to be binding).

176. See MODEL CODE OF JUDICIAL CONDUCT scope (explaining that “should” is a “permissive term”).

“Shall” would define a mandatory rule; “should” would create discretionary guidelines.

Such a system would solve the constitutional problems with the current rule, but it would create new problems of its own. Making the rules governing judicial speech discretionary would both overregulate and underregulate speech. The system would overregulate by perpetuating the tradition of judicial silence that some commentators have labeled “judicial lock-jaw.”<sup>177</sup> That tradition of silence is exactly what a new rule intended to restore public confidence in the judiciary should seek to avoid. A discretionary rule would also underregulate speech by removing the mechanism to punish violations, and consequently allowing speech that could be harmful to the judiciary, litigants, criminal defendants, prosecutors, and the public. A better system remains available.<sup>178</sup>

#### IV. A PROPOSAL FOR RESTORING PUBLIC CONFIDENCE IN THE JUDICIARY BY ENCOURAGING MORE JUDICIAL SPEECH

This Note proposes a modification to the ABA’s Model Code of Judicial Conduct intended to add meaningful exceptions to judicial speech restrictions and promote an accessible, vocal judiciary that remains respected by the public; a judiciary that “strives to maintain and enhance confidence in the legal system.”<sup>179</sup> This Note argues that judges should be encouraged to comment publicly, even about pending and impending cases, so long as those comments do not impair the fairness of the proceedings. Why begin a judicial speech rule with “judges shall not . . .” when ideally judges *should* speak? Remove the “not.” Rather than discourage speech, encourage speech. Remove the code of silence surrounding the judiciary and let judges speak for themselves.

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177. See generally Leslie B. Dubeck, Note, *Understanding “Judicial Lock-jaw”: The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569 (2007) (noting that judges tend toward self-censorship even where constitutional and statutory law do not mandate it).

178. But see Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 807 (1995) (“If we can trust judges enough to make decisions that affect every critical aspect of our lives, we can trust them to make these judgments as well. In my opinion, no Judicial Speech Code is necessary; if an individual judge abuses his discretion on occasion, so be it. The Republic will survive.”).

179. MODEL CODE OF JUDICIAL CONDUCT pmbl.

## A. REMOVE THE “NOT”: JUDGES SHOULD SPEAK

Justice Black once declared that “[a]n unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.”<sup>180</sup> The statement was not then, nor is it now, the law, but it presents a broad view of speech rights emphasizing the First Amendment’s underlying policy. Speech should be encouraged. Public affairs should be out in the open and broadly discussed. Public affairs include matters “pending or impending” before American courts. The judges presiding over those matters, individuals uniquely situated to speak knowledgably about them, should be encouraged to contribute to the public discourse.<sup>181</sup> When difficult decisions must be made in the courtroom, the judge’s voice should be just as loud as the editorial writer and tabloid reporter.

To that end, the ABA should promulgate a new Model Rule 2.10, and the states should adopt it. The new rule should read:

RULE 2.10<sup>182</sup> Judicial Statements

(A) A judge should make public statements that explain legal procedures and contribute to public understanding of the law and the American legal system.

(B) Paragraph (A) shall not apply, and a judge should refrain from making any public or nonpublic statement, if the judge reasonably believes that the statement would create a substantial likelihood of material prejudice for any party to a matter pending or impending in any court.<sup>183</sup>

(C) A judge shall require that court staff, court officials, and others subject to the judge’s direction and control comply with Paragraphs (A) and (B) of this rule.<sup>184</sup>

(D) It shall not be a violation of Paragraph (B) if a judge responds to allegations in the media or elsewhere concerning the judge’s conduct in a matter pending or impending in any court. The judge should balance the value of a public response to the allegations, in terms of

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180. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring).

181. Reinhardt, *supra* note 178, at 806 (maintaining that judges should avoid giving thorough responses regarding unanswered constitutional issues, but, because of a judge’s “special knowledge and experience,” encouraging more judicial speech about controversial issues, such as the death penalty and the war on drugs, and their effect on the judicial system).

182. See *supra* Part II.A (discussing the current model rule).

183. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (establishing the “substantial likelihood of material prejudice” standard to govern the regulation of attorney speech about active cases); MODEL CODE OF JUDICIAL CONDUCT R. 2.10(B).

184. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(C).

its ability to enhance public confidence in an impartial and independent judiciary, against the harm to a fair disposition of a matter pending or impending before any court the judge reasonably believes would result from disclosure.<sup>185</sup>

The proposed rule may seem like a radical change, but in reality it simply represents a shift in priorities. Rather than emphasizing judicial silence, it emphasizes judicial dialogue. The proposed rule still prohibits judicial speech about an active case if the judge “reasonably believes” that such speech would “impair the fairness” of that case. The proposed rule does not require anything different from judges. It makes a policy judgment in favor of open communication by making clear that judges have a right, but not necessarily an obligation, to participate in public discussions about the judiciary. It simply removes the word “might,” and with it ample ambiguity.

Perhaps the greatest change is the provision allowing a judge to respond to criticism in the media. The proposed rule would allow the judge to respond even if the judge believes a response would impair the fairness of an active case. The rule asks the judge to balance the potential harm to the judiciary and the public’s perception of the judiciary against the potential harm to impartial justice. It seems judges are well suited to such tasks. “If we can trust judges enough to make decisions that affect every critical aspect of our lives, we can trust them to make these judgments as well.”<sup>186</sup>

Critics might argue that the proposed rule values speech over due process; public discourse over the right to a fair trial. Due process, especially for criminal defendants, is entrenched in our constitutional system and embodies the idea “that it is better a hundred guilty persons should escape, than that one innocent person should suffer . . .”<sup>187</sup> If a rule encouraging judicial speech prejudices a single criminal defendant, the critic might argue, it goes too far. But the critic’s argument ignores the availability of other remedies. A judge can sequester the jury to ensure prejudicial media coverage is avoided or, as a last resort, declare a mistrial and retry the case.<sup>188</sup>

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185. See *id.* R. 2.10(E), pmbl.

186. Reinhardt, *supra* note 178, at 807.

187. Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in *WORKS OF THE LATE DOCTOR BENJAMIN FRANKLIN* 246, 247 (1793).

188. See Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a “Media Circus,”* 26 *SUFFOLK U. L. REV.* 1063, 1080–92 (1992) (describing potential remedies for prejudice that media coverage of a trial may cause).

Furthermore, judicial speech is more likely to promote fairness than impair it. Remember Judge Murphy? The newspaper reports that started the public fiasco in Boston criticized Murphy for sentencing a rapist to probation rather than prison and for saying that the fourteen-year-old victim should “get over it.”<sup>189</sup> The reporter attempted to ask Murphy about his decision and the judge responded truthfully;<sup>190</sup> he said he could not talk about the case, as the Massachusetts Code of Judicial Conduct requires.<sup>191</sup> A simple response explaining the rationale of his decision would have furthered public understanding of the law and respect for the judiciary. Providing context for his statement about the victim would have enabled the reporter to get the story right. It could have kept Murphy out of the tabloids or even led to reform if some loophole in the law forced him to issue a lenient sentence.

#### B. IMPLEMENTING THE NEW RULE GOVERNING JUDICIAL SPEECH

The ABA adopted the current Model Code in February 2007, and is unlikely to consider changes in the near future.<sup>192</sup> However, each state decides on its own how to regulate judicial conduct. Committees in ten states have issued proposed revisions, but few states have formally adopted changes.<sup>193</sup> Thirty-three states have formed committees to review their codes and will make recommendations to the rule making authority in those states.<sup>194</sup> Even though the ABA failed to recommend real changes in the judicial speech restrictions, ultimately the states have the power to make those changes, not the ABA. The states should consider real changes that would encourage judges to speak to the media and the public about their jobs. The rules committees in thirty-three states are in session now<sup>195</sup> and could easily implement real changes in the near future.

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189. Wedge & Crittenden, *supra* note 12.

190. Wedge, *supra* note 15.

191. MASS. CODE OF JUDICIAL CONDUCT Canon 3(B)(9).

192. MODEL CODE OF JUDICIAL CONDUCT intro. (2007). Before the 2007 amendments, the code had most recently been amended in 1990. *Id.*

193. See AM. BAR ASS'N, *supra* note 82.

194. *Id.*

195. See *id.* (naming many of the committees and providing links to the draft rules in some jurisdictions).

## CONCLUSION

The time has arrived for judges to shed “the aura of tradition and mystery surrounding judicial decision making.”<sup>196</sup> Judges must protect the integrity of the judiciary, open a dialogue with the press and the public, and stop filing questionable lawsuits to protect their personal interests.<sup>197</sup> Most judges understand the influence and importance of their office and have traditionally exercised restraint associated with their prestigious positions.<sup>198</sup> But with the rise of alternative news sources and increased competition for readers and advertising dollars, judges have become more frequent targets of critical reports and editorials.<sup>199</sup> Rather than respond to criticism with lawsuits, judges should respond directly to the media and the public. They should explain their judicial philosophies and the reasoning behind their decisions.

Whether judges have a constitutional right to speak publicly about their ideas is an open question, but whether they should do so is not. The American public will no longer accept the traditional secrecy of the judiciary.<sup>200</sup> It is time for judges at all levels to open their mouths, take out their pens, and speak to the public. Not just through formal opinions, but through opinion pieces in local newspapers, interviews on the radio and television, and roundtable discussions with other judges, scholars, and the public. The First Amendment “presupposes that right conclusions are more likely to be gathered

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196. Reinhardt, *supra* note 178, at 807; *see also* *Hearing*, *supra* note 2 (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts) (arguing that diminished respect for the judiciary means judges must “prove” themselves); Geyh, *supra* note 1, at 875–76 (“[C]oncern for flagging public confidence in the courts dominates contemporary discourse on the administration of justice.”); Liptak, *supra* note 6 (noting the increase in lawsuits filed by judges); Mauro, *supra* note 6 (noting the risk that judges filing lawsuits in courts where they also provide creates the appearance of impropriety).

197. Mauro, *supra* note 6 (“Supreme Court Justice Antonin Scalia once said judges should adopt a ‘rope-a-dope’ posture when criticized, taking the hits passively until their adversaries wear themselves out. But with 25 judges suing for libel in 2005 alone—nearly 10 percent of all libel suits filed nationwide—that form of judicial restraint is fading . . .”).

198. *See generally* Reinhardt, *supra* note 178, at 808.

199. *See* Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1148–49 (2004) (noting the changing media climate and the importance of judicial speech to maintaining the integrity of the judiciary).

200. *Hearing*, *supra* note 2 (statement of Judge Nancy Gertner, U.S. District Court for the District of Massachusetts).

out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”<sup>201</sup> It is time for judges to join the conversation.

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201. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.), *aff'd*, 326 U.S. 1 (1945).