

# JUSTICE IS BLIND, BUT DOES IT HAVE TO BE MUTE?

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**44<sup>TH</sup> ANNUAL**  
**ADVANCED CRIMINAL LAW**  
July 23-26, 2018  
San Antonio

**CHAPTER 49**

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## JUSTICE IS BLIND, BUT DOES IT HAVE TO BE MUTE?

### I. INTRODUCTION

The basic role of the judiciary and that of the media are clear, but where these paths cross has not been clearly understood or defined. There are many facets to study, and even in this paper, there is a pull to cover varying angles. The first in mind would be the ever-growing public incursion into the media realm due to social media, the internet, viral stories, blogs, and reality television. These outlets challenge the traditional definition of what or who comprises the media and begs the questions of how this overwhelming shift may affect the judiciary. Another assessment, which only arrived after some review of the Codes of Judicial Conduct, delves into this mysterious call on judges to educate the public on the law. In further deliberation, where do judges feel this pinch in dealing with criminal law cases? This paper will balance through these lenses with a quick highlight of the code to which judges commit, the overlying theory and practices in effect regarding speech, and some recent past examples of where the intersection of the media and judiciary led to well-publicized controversies. The paper will conclude with discussion of heightened political pressure in both recent removal cases and operating in the age of social media generally.

### II. WHAT GOVERNS JUDGES

Judges adhere to codes of conduct that few licensed attorneys would be able to recite. In Texas, the Texas Code of Judicial Conduct was first implemented in 1974. Similarly, the Code of Conduct for United States Judges was originally adopted in 1973; both codes were adopted and fashioned after the Model ABA Canons.

The first Canon of the Texas Code of Judicial Conduct holds the judiciary to integrity and independence, noting that an independent and honorable judiciary is “indispensable to justice in our society.”<sup>1</sup> That one central premise is the backbone of the judiciary. From this high point, which casts vision and purpose, the code continues so as to give practicals to further the one lofty objective and exhorts not only the judiciary as a whole but the judges within to personally observe high standards of conduct.

The second Canon calls judges to avoid impropriety and the appearance of impropriety. This canon requires that judges act *at all times* in a matter that promotes public confidence in the integrity and

impartiality of the judiciary.<sup>2</sup> Similarly, the third Canon calls for the performance of judicial duties with impartiality and diligence.<sup>3</sup> Specifically, it declares that a judge “shall not be swayed by partisan interests, public clamor, or fear of criticism” in his/her adjudicative responsibilities. Canon 3(B)(10) instructs Texas state judges to “abstain from public comment about a pending or impending proceeding which may come before the judge’s court in a manner which suggests to a reasonable person the judge’s probable decision on any particular case.”<sup>4</sup> Meanwhile, Canon 3(B)(6) of the Code of Conduct for United States Judges requires that federal judges not make “public comments on the merits of a matter pending or impending in *any* court.”<sup>5</sup> The same canon presents exceptions, such as when a judge makes comments for “scholarly presentations made for purposes of legal education.”<sup>6</sup>

Of equal importance, the fourth Canon outlines permitted extra-judicial activities with an aim to minimize the risk of conflict with judicial obligations.<sup>7</sup> The canon expressly permits judges to engage in activities to improve the law, which includes teaching, speaking, lecturing, writing and participating in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects.<sup>8</sup> Lastly, Canon five mandates that judges and judicial candidates refrain from inappropriate political activity.<sup>9</sup> Specifically, judges and candidates for judicial office must avoid making pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases or litigants, or propositions of law that would lead a reasonable person to believe the judge is predisposed to a probable decision in cases within the scope of the pledge.<sup>10</sup> Ultimately, this code of ethics requires judges to take appropriate action when presented with information that clearly establishes that another judge has committed a violation of the Code.<sup>11</sup>

### III. INTERACTION WITH MEDIA – PHILOSOPHY AND PRACTICE AT ODDS WITH EDUCATION

The image of a serene and noble court has kept the judicial system in a posture of austere silence. Lower courts take their lead from the highest court in

<sup>2</sup> TEX. CODE JUD. CONDUCT Canon 2.

<sup>3</sup> TEX. CODE JUD. CONDUCT Canon 3.

<sup>4</sup> TEX. CODE JUD. CONDUCT Canon 3(B)(10).

<sup>5</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(B)(6).

<sup>6</sup> *Id.*

<sup>7</sup> TEX. CODE JUD. CONDUCT Canon 4; *see also* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4.

<sup>8</sup> TEX. CODE JUD. CONDUCT Canon 4(B)(1).

<sup>9</sup> TEX. CODE JUD. CONDUCT Canon 5.

<sup>10</sup> *Id.*

<sup>11</sup> TEX. CODE JUD. CONDUCT Canon 3(D).

<sup>1</sup> TEX. CODE JUD. CONDUCT Canon 1; *SEE ALSO* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1.

the land, and some argue that the strategy of silence as modeled by the Supreme Court is “flawed and cannot be justified as a controlling principle of judicial behavior by legal doctrine, democratic theory, or practical politics.”<sup>12</sup> While the executive and legislative branch have a history of quickly interacting with the press when an issue arises, the judiciary remains largely quiet during media storms. To this end, the American Bar Association formed a select commission to evaluate the increased attacks on the judiciary and to propose solutions.<sup>13</sup> The commission proposed that the state and local bar associations work on uncovering mechanisms to do that evaluation; furthermore, the state and local bar associations would be responsible for responding as appropriate when faced with misleading criticism of federal or state judges and judicial decisions within their respective districts.<sup>14</sup> The commission did not make mention as to whether the affected judge was to respond.<sup>15</sup>

### A. Supreme Court

It is widely accepted that Supreme Court Justices prefer to reserve substantial speech for written opinions. Interviews, speeches, and commentary on cases veer from normal practice. When presented with the opportunity to opine on extrajudicial legal commentary by members of the judiciary, the Supreme Court denied certiorari of a case in which the New Jersey supreme court effectively barred a municipal court judge from appearing on television.<sup>16</sup> The denial can reasonably be explained by the fact the United States Supreme Court simply did not want to speak on the matter at the time. As one writer put it: “the assumption of reticence is bolstered by the common belief that the dignity of the Supreme Court, that essential requirement of judicial legitimacy, depends on a certain perception of detachment from the rolling waters of American political life.”<sup>17</sup> So we observe the detachment that is judicious conduct, which would make interaction with mainstream media border on impropriety.

There are a few diversions from the trained silence. The following story is a complete outlier of any current or practical understanding of the interaction between the Supreme Court and members of the media, but it serves as a welcome one. In 1932,

upon retiring, Justice Oliver Wendell Holmes received a letter of congratulations and further gratitude for an incident that occurred sixteen years earlier.<sup>18</sup> George Garner, a young reporter, serving the *Louisville Courier-Journal* at the time, felt puzzled by Justice Holmes’ recently issued opinion and decided to go to the source – the Justice, who was found at his residence.<sup>19</sup> Mr. Garner reports that upon arriving at the front door, Justice Holmes first explained that he was entertaining guests at tea and invited the young correspondent to return later, but then after second thought, the Justice graciously invited young Garner to enter then.<sup>20</sup> For an hour, Justice Holmes:

patiently and clearly spelled out the story to the scribe, literally dictating much of the article in newspaper language. It ran, as one recalls, a couple of columns in the *Courier-Journal* and was esteemed as a clear and intelligible newspaper story. Never has the correspondent forgotten that great kindness and courtesy by Justice Holmes. Often he has related it to friends.<sup>21</sup>

One unforgettable interlude with the media took place after the Senate confirmed Hugo L. Black to the United States Supreme Court in 1937. While Black was traveling in Europe, the press ran a story that early in his career, Black had been a member of the Ku Klux Klan in Alabama.<sup>22</sup> Justice Black cut his travel short to confront the accusations on a nationally broadcast radio address in which he admitted he had been but was no longer a member of the Klan and asserted his record in the Senate as well as his personal relationships with blacks, Catholics, and Jews showed that he was not a bigot.<sup>23</sup> Black’s public relay of the facts head-on worked to dispel the outrage. Even so, after this national spectacle, Justice Black retreated from the public spotlight for two decades until he finally agreed to give a lecture on the Bill of Rights at New York University in February 1960.<sup>24</sup> His assertion within the speech that the Bill of Rights contains ‘absolutes’ was deemed provocative and caused a stir thanks to the *New York Times* running the story on the

<sup>12</sup> Stephen J. Fortunato, Jr., *On a Judge’s Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 679 (1999).

<sup>13</sup> *Id.* at 681–82.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 682.

<sup>16</sup> *In re Broadbelt*, 683 A.2d 543 (N.J. 1996), *cert.denied*, 520 U.S. 118 (1997).

<sup>17</sup> Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI-KENT. L. REV. 487, 510 (2013).

<sup>18</sup> Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1559–60 (1996).

<sup>19</sup> *Id.* at 1560.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (citing Letter from George Garner to Justice Holmes (Jan. 13, 1932) (available in Oliver Wendell Holmes, Jr., Papers at Harvard Law Library)).

<sup>22</sup> Schmidt, *supra* note 17 at 487.

<sup>23</sup> *Id.* (citing *Justice Black’s Speech*, N.Y. TIMES, Oct. 2, 1937, at 1).

<sup>24</sup> Schmidt, *supra* note 17 at 487–88; *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

front page.<sup>25</sup> Accordingly, he was soon out in public again expounding on his views of jurisprudence.<sup>26</sup> In 1968, Justice Black sat in his home study for a television interview, making him the first Justice to sit for a feature-length television interview.<sup>27</sup> Suffice it to say, Justice Black only agreed to the interview after consulting with Chief Justice Warren and Justice Douglas, and given the increased attacks on the Court in the midst of the Nixon presidential campaign, the Court may have had its own motivating factors for approving the interview.<sup>28</sup>

## B. High Call to Educate the Public

### 1. Expressly Provided For

Each Judicial Code of Conduct expressly provides that judges may teach regarding areas of the law, jurisprudence, administration of justice, and on extra-judicial topics.<sup>29</sup> These propositions undoubtedly come from a realization of the unique role of insight judges have and the value afforded those more removed from the judicial system if judges took on education as part of their activities. In the above discussion of Justice Black's airtime, it would be remiss not to highlight one emotional piece of the segment in which Justice Black, an 82-year-old justice, "picked up a volume of the U.S. Reports to read the concluding lines of *Chambers v. Florida*, which left him wiping tears from his eyes."<sup>30</sup>

Justice Black had delivered the opinion in *Chambers v. Florida*, which reversed convictions of four African American men for the murder of a white man pursuant to the due process clause on account of the use of coerced confessions.<sup>31</sup> The interview struck a deep resonance with public viewers and was awarded an Emmy for best cultural documentary; similarly, the *Boston Globe* wrote it "should be shown again and again."<sup>32</sup> In the interview, a Supreme Court Justice evoked the hearts of the American public by demonstrating the sincerity with which he and the judiciary fulfill their crucial role in defending the rights of individuals and promoting justice. Sharing one criminal case that dearly impacted Justice Black, he with the help of the Fourth Estate instantly brought the large and removed judicial system into the American home. The audience saw with images and voice that a distant appointed body reviewed facts of the weak and strong alike and implemented protections to safeguard the innocent and obliterate bias in the criminal system.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 489.

<sup>27</sup> *Id.* at 489–90.

<sup>28</sup> *Id.* at 490.

<sup>29</sup> See e.g. TEX. CODE JUD. CONDUCT Canon 4; see also CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4.

<sup>30</sup> Schmidt, *supra* note 17 at 491 (referring to ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 586 (1994)).

<sup>31</sup> 309 U.S. 227 (1940).

<sup>32</sup> Schmidt, *supra* note 17 at 491.

### 2. Clear Public Misunderstanding Through Education

Justice Antonin Scalia, one of the greatest advocates for free speech, expressed deep doubt and criticism of electronic news media. Justice Scalia gave many speeches to the public, but "often insisted that TV cameras and radio mics be banned from the room, something about it not being a good idea to draw justices too deeply into the public sphere."<sup>33</sup> In one of many interviews with C-SPAN's Brian Lamb, Mr. Lamb asked about a recently-aired, rather flattering *60 Minutes* special covering Justice Scalia (his first major television interview) and *The Daily Show* mock review of the same *60 Minutes* story.<sup>34</sup> In response to *The Daily Show*, Justice Scalia commented that it is good that such politically-charged humor can occur yet continued to say "it is bad when it is the means of spreading inaccuracy. I mean, it seems to me you can be humorous and accurate at the same time."<sup>35</sup>

In July 2012, on another talk show with Mr. Lamb, Justice Scalia asserted that contrary to public belief, cameras in the court would not serve to educate the public about the workings of the court, noting that the 30-second or 15-second sound bite taken from arguments would "not be characteristic of what we do."<sup>36</sup> Another commentary on Justice Scalia, however, illustrated how well he embodied the role of educating the public. One biographer wrote: "Scalia's willingness to talk about constitutional issues and express moral judgments in public forums outside the Court—and his ability to do it with clarity and fervor—separated him from other justices."<sup>37</sup>

The onus to educate seems to have taken root in Supreme Court Justices. Justice Black encouraged his audiences to read the Constitution, Justice Scalia exhorted all to read the Constitution and Federalist Papers, and Justice Breyer wrote a book with a stated objective "to increase the public's general understanding of what the Supreme Court does."<sup>38</sup> Many justices have written about American history, the history of past justices, great cases, and general political and legal history with a general audience in

<sup>33</sup> Harry A. Jessell, *Scalia's Media Legacy: More Good than Bad*, TVNEWSCHECK: JESSELL AT LARGE (Feb. 19, 2016), <http://www.tvnewscheck.com/article/92469/scalias-media-legacy-more-good-than-bad>.

<sup>34</sup> Brian Lamb, *Q & A with Antonin Scalia*, C-SPAN (May 2, 2008), <https://www.c-span.org/video/?205000-1/qa-antonin-scalia>.

<sup>35</sup> *Id.*

<sup>36</sup> Jessell, *supra* note 33.

<sup>37</sup> Schmidt, *supra* note 17 at 519 (quoting JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 274 (2009)).

<sup>38</sup> *Id.* at 500 (quoting STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGES VIEW ix (2010)).

mind.<sup>39</sup> More recently, Justice Sotomayor appeared on *Sesame Street* teaching dispute resolution and providing career advice targeted towards a young female audience.<sup>40</sup> So while the Supreme Court maintains a lofty, formal venue and a healthy resistance to media dialogue, justices also show some responsibility in accepting a microphone when it comes to educating the public about the U.S. Constitution, the judicial system, as well as personal subjects of value and public interest.

#### IV. INCIDENTS THAT RAISE QUESTIONS

Judges may convict individuals, but they are not free of reprimand or removal for violating the law or the Code of Judicial Conduct. Some violations have been brought to the public's attention for various reasons. Each of these matters deal with the observation of the Code to which judges commit in taking office and implicate the question of free speech. Moreover, the media is often involved in the speech element that brought about the investigation.

##### A. Campaign Trail – Public Endorsement & Impartiality?

The backing of candidates on the campaign trail is one area fraught with peril. Mere endorsements can result in sanctions. The New Mexico Supreme Court considered the constitutionality of the prohibition in its respective Code of Judicial Conduct against public endorsement of a political candidate by a judge and referred to the First Amendment and the United States Supreme Court's opinion in *Republican Party of Minnesota v. White*.<sup>41</sup>

At issue was San Juan County Magistrate Judge William A. Vincent, Jr.'s wide and public endorsement of Bill Standley, the incumbent mayor of Farmington, New Mexico, for re-election.<sup>42</sup> Judge Vincent had also permitted the use of his name in an endorsement in the local newspaper.<sup>43</sup> The Commission filed a petition for discipline, and Respondent contested, relying on

federal and state constitutions.<sup>44</sup> The court found Respondent's conduct to be in clear violation of the Code of Judicial Conduct.<sup>45</sup>

Then in considering the constitutionality of the Code, the court made mention of *In re Schenck* in noting that the restriction on political speech of a judge "does not fit neatly into the existing analytical framework for First Amendment analysis."<sup>46</sup> The court cited a recent opinion from the Supreme Court of Iowa, noting that Iowa's highest court had "correctly recognized" that:

The strength of our judicial system is due in large part to its independence and neutrality. These twin qualities help remove outside influences from judicial decision-making, and promote public respect and confidence in our system of justice. Yet, judicial independence does not come without some personal sacrifice by judges. Judicial independence and neutrality require judges to limit or abstain from involvement in a variety of activities commonly enjoyed by others in the community, including politics.<sup>47</sup>

In concluding that the compelling state interest of judicial impartiality and its appearance were at issue, the court accepted that *White* required a determination as to whether the endorsement clause was narrowly tailored to serve that compelling interest.<sup>48</sup> In finding that the endorsement clause was narrowly drawn to promote impartiality and the appearance of impartiality, the Court formally reprimanded Judge Vincent for violating the Code of Judicial Conduct and warned that "Respondent should remain mindful of this formal reprimand whenever he is tempted to enter the political fray in the future."<sup>49</sup>

##### B. Microsoft Litigation – Extrajudicial Comments From Sitting Judge

Many judges have made the mistake of commenting on pending litigation, especially when dealing with newsworthy cases. The Honorable Thomas Penfield Jackson, United States District Judge for the District of Columbia, sat on a bench trial of the United States' civil antitrust prosecution of Microsoft

<sup>39</sup> *Id.* at 500–01 (noting Chief Justice John Marshall's five-volume biography on George Washington, Justice Frankfurter publishing and speaking of past justices, Justice Burton lecturing on "reconstructions" of past cases, and Justice Rehnquist's published political and legal history books, and Justice Breyer's coverage of major moments in Supreme Court history in one book).

<sup>40</sup> *Id.* at 500; see also *Sesame Street: Sonia Sotomayor: "The Justice Hears a Case"* (PBS 2012),

<sup>41</sup> *In re a Judge (Vincent)*, 172 P.3d 605, 605 (N.M. 2007)(citing 536 U.S. 765 (2002)) (using a strict scrutiny analysis in holding that a Minnesota judicial conduct "announce clause" violated the First Amendment by prohibiting judicial candidates from making known views on disputed legal or political issues).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 608 (citing *In re Schenck*, 870 P.2d. 185, 204 (Or. 1994)).

<sup>47</sup> *Id.* at 610 (citing *In re McCormick*, 639 N.W.2d 12, 15 (Iowa 2002)(citations omitted)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 609–11 (acknowledging that a "judge's private contribution or private support for a candidate does not risk damaging the appearance of impartiality in the same way that a public endorsement does").

Corporation, which received a tremendous amount of public attention. On appeal, Microsoft raised the issue of whether the extrajudicial statements made to the press by Judge Jackson required the judgment be reversed.<sup>50</sup> In fact, Judge Jackson had agreed to a series of interviews with the *New York Times* to be recorded while the case was pending but aired only after the testimony phase ended.<sup>51</sup> In one such interview, Judge Jackson candidly stated while considering an order that would require the computer giant to break-up their company: “I am not sure I am competent to do that... I just don’t think that is something I want to try to do on my own. I wouldn’t know how to do it.”<sup>52</sup> This comment flies against the grain of inspiring trust in the judiciary.

An interview with *The Wall Street Journal* similarly reported Judge Jackson referring to Microsoft in saying “if someone lies to you *once*, how much else can you credit as the truth?”<sup>53</sup> Again in discussing Microsoft, Judge Jackson noted “[t]hings did not start well for them” and asked whether the Japanese were permitted to propose the terms of their surrender in World War II.<sup>54</sup> Clearly, Judge Jackson went beyond explaining procedure and discussed the merits of the case, as well as the judge’s impression. In his defense, Jackson argued that he had not violated the Code of Judicial Conduct, because the interviews were off the record until after the case had been decided.<sup>55</sup> However, Canon 3A(6) and the accompanying comment clarifies that a case is pending until it finishes the appellate process. Additionally, there lies concern as to whether publicly commenting about a pending matter leads the commentator (the judge in this case) to make conclusions and decisions before all facts are presented or weighed. Thus, Microsoft’s concerns were not unfounded.

### C. The O.J. Simpson Murder Trial

The O.J. Simpson trial gained such fanfare that television networks appeared unsatiated as they provided live coverage of the police chase and throughout the entire trial. Countless media stories unraveled from the trial and investigation of the

murder. We may even forget the news headlines surrounding Judge Lance Ito, the presiding criminal judge. In particular, Judge Ito was put to the test when his own wife, Los Angeles Police Captain Margaret York, initially denied knowing Detective Mark Fuhrman and the prosecution’s tapes later revealed that they did know each other. On these tapes, Fuhrman ridiculed Captain York, who was, in fact, his superior.<sup>56</sup> Fuhrman, as many will recall, was a key officer in the case and at the murder scene, and the possible introduction of these tapes into evidence nearly forced Judge Ito to step down, which raised the question of a potential mistrial.<sup>57</sup> In response, Judge Ito stepped down from a portion of the proceeding to permit another judge to determine whether the Fuhrman tapes should be presented and whether Captain York would be deemed a material witness.<sup>58</sup> For this decision, Judge Ito cited to the Judicial Code of Conduct, the Rules of Civil Procedure, and acknowledged a concern about appearances should he decide to stay on as judge.<sup>59</sup>

#### 1. TV Interview

In the midst of the murder trial of O.J. Simpson, Judge Ito granted an exclusive interview to a local CBS station.<sup>60</sup> The November 1994 interview was broken down into a five-part series and broadcasted over the course of a week on the 11 pm news.<sup>61</sup> The public interest and outrage bled to media outlets and into the courtroom with jurors asserting that they had seen the coverage.<sup>62</sup> In Judge Ito’s defense, news anchor Tritia Toyota confirmed that Judge Ito would not agree to the interview until discussion of the O.J. Simpson trial was removed from the table.<sup>63</sup> A significant portion of the interview focused on Judge Ito’s family background.<sup>64</sup> As a third-generation American, Judge Ito shared how

<sup>56</sup> David Margolick, *Prosecutors Drop Demand That Ito Step Down In Case*, N.Y. TIMES (Aug. 17, 1995), <https://www.nytimes.com/1995/08/17/us/prosecutors-drop-demand-that-ito-step-down-in-case.html>.

<sup>57</sup> *See id.*

<sup>58</sup> *Ito Steps Aside on Fuhrman Tapes Issue*, CNN (Aug. 15, 1995), [http://www.cnn.com/US/OJ/daily/8-16\\_PM/](http://www.cnn.com/US/OJ/daily/8-16_PM/).

<sup>59</sup> *Id.*

<sup>60</sup> *Lance Ito: Face to Face* (CBS television broadcast Nov. 13-18, 1994) (Local news station KCBS-TV broadcasted the interviews with local anchorwoman Tritia Toyota).

<sup>61</sup> Joel Achenbach, *Ito Blinks in Spotlight*, WASH. POST (Nov. 19, 1994), [https://www.washingtonpost.com/archive/politics/1994/11/19/it-o-blinks-in-spotlight/b0a3f3d5-eab5-46e1-994b-ddf1a8b6222e/?utm\\_term=.55ef821e0bd1](https://www.washingtonpost.com/archive/politics/1994/11/19/it-o-blinks-in-spotlight/b0a3f3d5-eab5-46e1-994b-ddf1a8b6222e/?utm_term=.55ef821e0bd1).

<sup>62</sup> *Id.*; Bill Boyarsky, *Ito Succumbs to the Sirens of Celebrity*, L.A. TIMES: THE SPIN (Nov. 15, 1994), [http://articles.latimes.com/1994-11-15/news/mn-62986\\_1\\_judge-ito](http://articles.latimes.com/1994-11-15/news/mn-62986_1_judge-ito).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>50</sup> Brief of Microsoft, Jurisdictional Statement to U.S. Supreme Court, *Microsoft Corp v. United States*, 530 U.S. 1301 (2000) (No. 00-139).

<sup>51</sup> Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions- A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611, 619 (2001).

<sup>52</sup> *Id.* (citing Joel Brinkley & Steve Lohr, *Retracing the Missteps of the Microsoft Defense*, N.Y. TIMES (June 9, 2000), at A1 (emphasis added)).

<sup>53</sup> *Id.* at 620 (citing John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really was the Issue in an Interview, Jackson Says Microsoft Did the Damage to Its Credibility in Court*, WALL ST. J. (June 8, 2000), at A3).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 623.

his parents' shame about being placed at an internment camp in Wyoming during World War II with other Americans of Japanese descent affected his life decisions.<sup>65</sup> Judge Ito also commented on important influences in his life, his views on what makes a good judge, and what it felt like to be an instant celebrity.<sup>66</sup> The last segment presented an interview of Judge Ito's parents by Tritia Toyota.<sup>67</sup>

## 2. Ito Backlash

Critics had two main protests with Judge Ito's television debut: (1) it was inappropriate for a judge in a pending case to give the press an interview and (2) it was hypocritical of Judge Ito to accept media glory. Notably, a judge is free to share about his personal life and background; the ethical concern centered on the fact that a judge was making statements while the case was pending. The Model Code of Judicial Conduct Canon 3B(9) prohibits judges from making statements about pending cases that "might reasonably be expected to affect its outcome or impair its fairness."<sup>68</sup> However, in this instance, the interview did not give the public a sense of partiality or prejudice as to the outcome of the case, so there was no violation of this canon.

As to the charge of hypocrisy, Judge Ito was known for calling out the media for the frenzy surrounding the murder case, so the label of hypocrite trailed quickly when he agreed to a media-hyped interview that spanned a week and provided the public more insight into the television drama that was already the trial.<sup>69</sup> Even more to the point, after sitting on the bench during the high-profile Keating trial, Judge Ito had taught a course for other judges on how to handle such cases. Commentators were quick to remind Judge Ito of his own teachings:

Rule One: Be cautious, be careful, and when in doubt, keep your mouth shut.

Rule Two: When tempted to say something, take a deep breath and refer to Rule One.

Rule Three: The sirens of mythology pale in comparison to the allure of seeing yourself

on CNN. The results, however, can be about the same.<sup>70</sup>

Given Judge Ito's words of wisdom, how does one explain his actions? One cannot know for sure, but Judge Ito may have seen an opportunity to demystify the judiciary, to share about the Japanese-American internment camp history or perhaps to educate the public generally.

## D. Judges in Trouble Recently

### 1. In re Schenck

Publication of language that poses a serious and imminent threat to the public's confidence in the integrity and impartiality of the judiciary does not find leniency with the courts. The Commission on Judicial Fitness and Disability of Oregon found that the Honorable Ronald D. Schenck, a judge of the circuit court of the State of Oregon for Union and Wallowa Counties, had violated Canons 1, 2A, 3A(4), and 3(A)(6) of the Oregon Code of Judicial Conduct when he initiated *ex parte* communications concerning pending or impending cases and when he made public comments about the District Attorney of Wallowa County.<sup>71</sup> Among many other extra-judicial comments, including his refusal to disqualify himself, the court considered a letter the judge had written to a newspaper editor, which contained vehement criticism of the only criminal prosecutor in Wallowa County.<sup>72</sup> Judge Schenck wrote: "[u]nfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her position..."<sup>73</sup> Schenck subsequently sent an extended essay for a guest editorial on the supposed lack of competence, experience, professional demeanor, and personal maturity of this same prosecutor.<sup>74</sup>

An objective person would not read these editorials and believe that Judge Schenck could maintain impartiality in cases being presented by this attorney. The Judicial Fitness Commission had recommended Schenck be suspended from office for three months without pay.<sup>75</sup> The Supreme Court noted:

There are important lessons to be learned from this case,<sup>76</sup> and we are all convinced that a suspension of the Judge without pay is the only way to ensure that he will learn those lessons. We also are convinced that a

<sup>65</sup> Erwin Chermersky, *Is it the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 Loy. L. A. L. Rev. 831, 831-32 (1995); Boyarsky, *supra* note 62.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9).

<sup>69</sup> David Margolick, *Prosecutors Drop Demand That Ito Step Down In Case*, N.Y. TIMES (Aug. 17, 1995), <https://www.nytimes.com/1995/08/17/us/prosecutors-drop-demand-that-ito-step-down-in-case.html>.

<sup>70</sup> Achenbach, *supra* note 61.

<sup>71</sup> *In re Schenck*, 870 P.2d 185 (Or.), *cert. denied*, 513 U.S.871 (1994).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 200.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 187.

<sup>76</sup> *See In re Gustafson*, 756 P.2d 21 (Or. 1988).



suspension of the Judge without pay is necessary to maintain public confidence in the integrity and impartiality of the judiciary that demands adherence to standards of conduct it has set for itself and for the fair administration of justice.<sup>77</sup>

In reviewing the record *de novo*, the Supreme Court of Oregon suspended Judge Schenck for a period of 45 days.<sup>78</sup>

## 2. *In re Lamdin*

The Maryland Court of Appeals reviewed the record of the Maryland Commission on Judicial Disabilities regarding the Honorable Bruce S. Lamdin, Associate Judge of the District Court of Maryland, which included a long list of statements that Judge Lamdin himself admitted violated Canons 1, 2A, 3A, 3B(4), 3B, 6A, and others.<sup>79</sup> The record shows statements made by the judge to include “What’s the big rush to get back to Pennsylvania? It’s an ugly state,” “Would you like some cheese with that whine because I’ve heard about all that I wish to hear,” “You must be the slowest study known to man,” and “I don’t have any mercy. You haven’t heard about me? I am a merciless SOB. You haven’t heard that? I thought everybody knew that.”<sup>80</sup>

In part of the opinion, the court of appeals asserted that the “use of vulgar and profane language erodes the public trust and confidence in the Judiciary.”<sup>81</sup> The court also pointed out that the judge had disparaged not only individuals before him, but fellow members of the judiciary, and the Division of Corrections.<sup>82</sup> The court of appeals found the Commission’s recommendation of suspension for thirty days without pay to be appropriate.<sup>83</sup>

## 3. *Scott v. Flowers*

*Scott v. Flowers* dealt with Justice of the Peace James M. Scott, Jr., of Fort Bend County, Texas, who wrote a public letter in which he candidly relayed issues he saw in regards to the county judicial administration relating to a systematic practice of permitting traffic offenders to clear their record and pay dramatically reduced fines upon appealing the citation.<sup>84</sup> Local press picked up Scott’s letter, and on March 19, 1984, the Texas Commission on Judicial Conduct issued a public reprimand of Scott’s

“insensitivity” in written and oral communication, which “cast public discredit upon the judiciary.”<sup>85</sup>

In March 1986, Scott filed a civil rights action pursuant to 42 U.S.C. §1983 in district court against the members of the Commission, individually and in their official capacity, alleging the open letter and comments to reporters related to the letter were protected speech for which he could not be disciplined.<sup>86</sup> Members of the Commission introduced identical affidavits asserting that Scott’s open letter was a “substantial factor” in that affiant’s vote for reprimand in support of their summary judgment motion, the, but claimed it was “by no means the controlling factor” and listed examples of Scott’s “insensitivity” to litigants in his court.<sup>87</sup> The district court granted summary judgment in favor of the Commission without deciding whether Scott’s speech was protected.<sup>88</sup> Scott appealed, and the Fifth Circuit concluded it had jurisdiction upon noting that Scott’s only vehicle for review was a civil rights suit, which could have been filed in either state or federal court.<sup>89</sup> The Fifth Circuit first determined that Scott spoke as “an informed citizen regarding a matter of great public concern.”<sup>90</sup> Then in weighing the state’s interest in suppressing Scott’s critiques, the court pointed out that Scott is not a typical public employee, but rather an elected official, one who would exercise independent judgment and be willing to speak out against what “he perceived to be serious defects in the administration of justice in his county.”<sup>91</sup> So while the state may restrict the speech of elected judges in ways other elected officials are not restrained, the Fifth Circuit concluded that the Commission had failed to show how “Scott’s public criticisms would impede the goals of promoting an efficient and impartial judiciary, [the court was] unpersuaded that they would have such a detrimental effect.”<sup>92</sup> The court further stated: “we believe that those interests are ill-served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote.”<sup>93</sup>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 205.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 206.

<sup>89</sup> *Id.* at 208–09.

<sup>90</sup> *Id.* at 211.

<sup>91</sup> *Id.* at 212.

<sup>92</sup> *Id.* at 213.

<sup>93</sup> *Id.* (holding that the Commission could not have constitutionally reprimanded Scott for his critical public statements and thereby remanding the matter for the district court to direct the Commission to expunge the reprimand dealing with those statements and to enter a declaratory judgment as requested by Scott).

<sup>77</sup> *Id.* at 201, 203.

<sup>78</sup> *Schenck*, 870 P.2d at 185.

<sup>79</sup> *In re Lamdin*, 984 A.2d 54, 68 (Md. 2008).

<sup>80</sup> *Id.* at 58–59.

<sup>81</sup> *Id.* at 66.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 68.

<sup>84</sup> *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

#### 4. *In re Broadbelt*

As noted in the case *In re Schenck*, discussing pending litigation can ensnare a judge in serious trouble. Inevitably, the practice of judges serving as legal commentators on television or radio shows presents another potential ethical limitation for judges to consider. Judge Evan W. Broadbelt, a “well-respected municipal judge” in New Jersey, appeared on *Court TV* “in excess of fifty times since 1992” as a guest commentator.<sup>94</sup> In 1994, Judge Broadbelt appeared on CNBC three times to comment on the O.J. Simpson case; these and all local television appearances were offered free of compensation.<sup>95</sup> In December 1994, municipal judges were asked to notify the assignment judge, Judge Lawson, before making television appearance; after the approval of two appearances on *Geraldo Live*, Judge Lawson asked Judge Broadbelt to refrain from further appearances.<sup>96</sup> Judge Broadbelt expressed his disagreement, and Judge Lawson referred the issue to the Advisory Committee.<sup>97</sup>

The Commission reprimanded Judge Broadbelt for violations of Canon 2 and Guideline IV.C.1 of the Guidelines for Extrajudicial Activities for New Jersey Judges.<sup>98</sup> Judge Broadbelt petitioned the court for review, although not the focus of the Committee’s decision, the New Jersey Supreme Court considered Broadbelt’s commentary in violation of Canon 3A(8).<sup>99</sup> Judge Broadbelt argued that Canon 3(A) language did not apply to his televised legal commentary because it was extra-judicial and he pointed to a Guideline which prohibited comments on cases pending in New Jersey Courts.<sup>100</sup> Regardless, the court interpreted the phrase “any court” in Canon 3A(8) to broadly refer to absolutely “any court” as opposed to “any court in the judge’s respective jurisdiction.”<sup>101</sup> The court also concluded that Judge Broadbelt had violated Canon 2B by regularly appearing on commercial television, and although Canon 4 states that a judge may engage in activities improving the law, legal system, and administration of justice, the canon does not excuse the violations of other canons.<sup>102</sup> In considering the constitutional challenge, the court found the restrictions on the judge’s speech as imposed by the canons to be no greater than necessary.<sup>103</sup>

<sup>94</sup> *In re Broadbelt*, 683 A.2d 543, 544 (N.J. 1996).

<sup>95</sup> *Id.* at 544–45.

<sup>96</sup> *Id.* at 545.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 545.

<sup>99</sup> *Id.* at 545.

<sup>100</sup> *Id.*

<sup>101</sup> *Broadbelt*, 683 A.2d 543 at 546.

<sup>102</sup> *Id.* at 548–50.

<sup>103</sup> *Id.* at 552.

#### 5. *The Harris County Bail Bonds Controversy*

In February 2018, the *Houston Chronicle* reported Harris County magistrates had been instructed to deny cash-free bail bonds upon initial appearances, a practice allegedly violating state judicial conduct rules.<sup>104</sup> In covering this controversy, the media has focused on comments made by the Honorable Michael McSpadden, 209<sup>th</sup> Criminal Court, Harris County, Texas, regarding the “influences” on “young black men” that would make them inappropriate candidates for the bail bonds.<sup>105</sup> As a result of these comments, in March 2018, McSpadden was asked to recuse himself from an ongoing appeal in the death penalty conviction of George Curry; upon his refusal, another judge subsequently recused Judge McSpadden.<sup>106</sup> Newspaper titles covering this story include: “Judge gets booted from death-row case: McSpadden’s racial comments cited in removal from black defendant’s appeal.”<sup>107</sup> Defense counsel reportedly said “[a]lthough Mr. Curry does not contend that Judge McSpadden harbors actual bias or prejudice concerning any party,” the appearance of bias in the comments demands recusal for the appearance of an impartial tribunal.<sup>108</sup> The judge’s comments when discussing his no-bond policy included “[a]lmost everybody we see here has been tainted in some way before we see them... they’re not good risks.”<sup>109</sup> Judge McSpadden also reportedly expressed concern that defendants would be released on bond, obtain an arrest on another offense, and maintain a casual attitude about showing up for court.<sup>110</sup> The ACLU of Texas has since asked Judge McSpadden, Harris County’s longest-serving felony court judge, to resign.<sup>111</sup>

### V. RISING POLITICAL PRESSURE

As mentioned briefly above, the Supreme Court has come under heated political scrutiny over the years. The appointments are life-long, and the checks made on the system by the highest court often reverberate throughout the country. In a long history of taking the

<sup>104</sup> Gabrielle Banks, *Harris County Judges Told Hearing Magistrates to Deny No-cost Bail*, HOUS. CHRON. (Feb. 23, 2018) [https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-judges-told-hearing-magistrates-to-12704731.php?utm\\_campaign=email-premium&utm\\_source=CMS%20Sharing%20Button&utm\\_medium=social](https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-judges-told-hearing-magistrates-to-12704731.php?utm_campaign=email-premium&utm_source=CMS%20Sharing%20Button&utm_medium=social).

<sup>105</sup> *Id.*

<sup>106</sup> Keri Blakinger, *Judge Gets Booted From Death-row Case: McSpadden’s Racial Comments Cited in Removal from Black Defendant’s Appeal*, HOUS. CHRON. (May 22, 2018), <https://www.chron.com/news/houston-texas/article/Race-has-no-place-in-the-courtroom-Judge-12934316.php>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Banks, *supra* note 104.

<sup>110</sup> *Id.*

<sup>111</sup> Charles Kuffner, *ACLU Goes After Judge McSpadden*, OFF THE KUFF (MAR. 1, 2018), <http://offthekuff.com/wp/?p=85196>.

high road and not giving an accusation the dignity of a response, the Court has also gone to bat to defend itself and the judiciary at large.<sup>112</sup> The lower trial courts seldom come under attack, but there are instances where individual judges or decisions receive immense heat. With the current media status and related social media established movements, judges may potentially face greater public and political pressure.

## A. Removal Cases

### 1. Judge Persky – Sentencing of Stanford sexual assault case

Currently, Santa Clara Superior Court Judge, Judge Aaron Persky appears at the top of the list of judges facing attack. Judge Persky sat on the bench during the high profile criminal case of Brock Turner, a Stanford University swimming star, who the jury found guilty of three counts of felony sexual assault of an unconscious and intoxicated woman.<sup>113</sup> The public watched the newsreel about the swimming accolades of a 19-year-old white male sports jock, who posted \$150,000 bail the same day he was accused of sexually assaulting a female at a powerful and well-respected school, only fueling the conversation of campus safety at American universities.<sup>114</sup>

The victim gave her impact statement in a long stream of consciousness, in which she recounts deciding at the last minute to go with her younger sister to a college party near her home, the horror of waking in the hospital to find out she had been sexually assaulted, and discovering the facts of the incident with the rest of the world in a news article she came across while at work.<sup>115</sup> The letter she read to the defendant came to life not only in the courtroom but went viral.<sup>116</sup> *BuzzFeed* published the article in full, and within four days, the victim's statement was viewed eleven million times.<sup>117</sup> Although there were two witnesses and convictions carried a maximum of

14 years (prosecutors recommended six), on June 2, 2016, Judge Persky sentenced Turner to six months in county jail (of which he served half) and three years of probation.<sup>118</sup> Public outrage ensued. To fuel matters further, the defendant's father complained in a statement read to the court that his son's 20 plus years of life had been ruined for "20 minutes of action," and Judge Persky commented in sentencing: "A prison sentence would have a severe impact on him. I think he will not be a danger to others."<sup>119</sup>

In a heated effort led by a Stanford professor, California voters initiated a campaign to remove Judge Persky under California's ballot initiative process.<sup>120</sup> This constitutes the "first judicial recall in any state to get on a ballot since 1982."<sup>121</sup> The petition garnered around 95,000 voter signatures.<sup>122</sup> The website established for the recall claims Judge Persky does not understand violence of women, or comprehend who the victim is in the situation [for his justification of a light sentence]; the website also asserts that Persky communicated that "campus rape is not 'real' rape" when he opted for probation instead of prison while noting that "Turner was an elite athlete at a top university and ... alcohol was involved."<sup>123</sup> Ultimately, the public outrage stems from the real or apparent bias and leniency of Judge Persky's sentencing as it seemingly relates to "white male or elite privilege."

In a thoughtful counter response, Stanford law graduates (fifty-three of the 180 in the graduating class) sent an open letter to Professor Dauber, who led the recall, to discuss the double-edged sword of removing judges based on public opinion.<sup>124</sup> In the letter, the students express their reservations and state:

<sup>118</sup> Andrew Buncombe, *Stanford rape case: Read the impact statement of Brock Turner's victim*, INDEPENDENT (Sep. 2, 2016), <https://www.independent.co.uk/news/people/stanford-rape-case-read-the-impact-statement-of-brock-turners-victim-a7222371.html> (noting he served three months for the assault despite the "powerful written statement," which the article contains).

<sup>119</sup> Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016) <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html>.

<sup>120</sup> Andrew Strickler, *Judges Face Tough Choices In Fighting Political Attacks*, LAW360 (Apr. 25, 2018) <https://www.law360.com/articles/1037245/judges-face-tough-choices-in-fighting-political-attacks>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> RECALL JUDGE AARON PERSKY, <https://www.recallaaronpersky.com/about> (last visited May 24, 2018).

<sup>124</sup> See Greg Piper, *Stanford Law Grads Rebuke Professor Leading Recall Against Brock Turner Judge*, THE COLLEGE FIX (June 23, 2016), <https://www.thecollegefix.com/post/27934/>.

<sup>112</sup> See, e.g., Schmidt, *supra* note 17.

<sup>113</sup> See *People v. Sentencing Memorandum in People v. Turner*, No. B1577162 (Cal. Sup. Ct., Cty. Santa Clara), <http://documents.latimes.com/people-v-brock-allen-turner-59/>.

<sup>114</sup> Matt Hamilton, *Former Stanford Swimmer Accused of Raping Unconscious Woman on Campus*, LA TIMES (Jan. 27, 2015), <http://www.latimes.com/local/lanow/la-me-ln-former-stanford-swimmer-accused-of-rape-20150127-story.html>.

<sup>115</sup> Katie J.M. Baker, *Here is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker*, BUZZFEED (June 3, 2016), [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.eeWvBNO0y#.lcqY5XaVy](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.eeWvBNO0y#.lcqY5XaVy)

<sup>116</sup> *Id.*

<sup>117</sup> Alia E. Dastagir, *Emily Doe's Letter to Brock Turner: 1 Year Later, 5 Survivors Speak out on the Letter that Inspired Millions*, USA TODAY (June 2, 2017), <https://www.usatoday.com/story/news/2017/06/02/emily-does-letter-brock-turner-1-year-later-5-women-speak-out/354824001/>.

As we've learned during our time at the law school, judicial independence is a cornerstone of due process and an essential prerequisite of a fair criminal justice system... After decades of mass incarceration driven by mandatory minimums and other punitive sentencing regimes, we believe that judicial leniency is already too scarce, even though we strongly disagree with how it was applied to Turner. And in a world where judges believe they are one unpopular sentencing decision away from an abrupt pink slip, it will only grow scarcer.<sup>125</sup>

Thus, while the short-term effect of removing Judge Persky may be gratifying to some and though he may continue to award sentences that others may not agree with in the long term, the precedent the removal would have could be very damaging to the judiciary and criminal system at large. If falling out of line in sentencing with the social values of those with political power or loud voices calls for removal, what judge would feel free to exercise his or her own leniency when the time presents. Moreover, as the United States has the largest prison population of any nation, one might ask if judicial leniency is the hand that should be punished.

Judge Persky filed a temporary restraining order against the petition for recall, which Judge Kay Tsenin lifted on August 28, 2017, a couple weeks after the restraining order had been approved.<sup>126</sup> The case then went before a three-judge panel of California's 6<sup>th</sup> District Court of Appeal on the grounds that the recall campaign should have been filed with the California Secretary of State, as opposed to the Santa Clara County Registrar of Voters because Persky is a state employee, but the justices of the appellate court disagreed with Judge Persky.<sup>127</sup> Finally, the California Supreme Court rejected Persky's final appeal in efforts to stop the recall.<sup>128</sup> On June 5, 2018, Santa Clara

<sup>125</sup> *Id.*

<sup>126</sup> Aaron Persky Recall, *Santa Clara County, California* (2018), BALLOTPEdia (May 22, 2018), [https://ballotpedia.org/Aaron\\_Persky\\_recall,\\_Santa\\_Clara\\_County,\\_California\\_\(2018\)](https://ballotpedia.org/Aaron_Persky_recall,_Santa_Clara_County,_California_(2018)).

<sup>127</sup> Courtney Douglas & Claire Wang, *Following Appeal Denial, Persky Recall Measure Remains on June Ballot*, STAN. DAILY (Mar. 26, 2018), <https://www.stanforddaily.com/2018/03/26/following-appeal-denial-persky-recall-measure-remains-on-june-ballot/>, last visited May 22, 2018.

<sup>128</sup> Tracey Kaplan, *California's Top Court Deals Fatal Blow to Brock Turner Judge's Bid to Stop Recall*, MERCURY NEWS (May 1, 2018), <https://www.mercurynews.com/2018/05/01/californias-top-court-deals-fatal-blow-to-brock-turners-judges-bid-to-stop-recall/>.

County voters will decide whether Judge Aaron Persky becomes the fourth judge in California history and the first in 86 years to be removed before his term expires.<sup>129</sup>

## 2. Pennsylvania Justices – Unconstitutional Gerrymander

Earlier this year, politics stirred when the Pennsylvania Supreme Court held that the state's congressional map was an unconstitutional gerrymander.<sup>130</sup> In swift response, Pennsylvania legislators entered impeachment resolutions against the four state Supreme Court judges who made the ruling; all four entered office after being elected as Democrats.<sup>131</sup> These justices even received threats of impeachment from U.S. senators and representatives.<sup>132</sup> Partisan efforts become law, and when courts decide matters involving politics, there is no denying it can come back to them. However, how is a judiciary to remain independent with the impending threat of removal and political pressure?

### B. Heightened Social Media

As noted above, judges receive criticism and threat of removal for their decisions based on alleged bias and partisanship. This is not entirely new, but the two cases above became politicized, and well-covered stories in an age where multiple generations plug into electronic news feeds and social media movements like #MeToo or #BlackLivesMatter catch like wildfire.<sup>133</sup> They become household conversations and conjure deep emotions among the majority of citizens one way or another.

For example, Judge Persky, probably faces an unlikely chance of receiving more votes to keep him on

<sup>129</sup> Tracey Kaplan, *After death threats, new rape laws, voters to finally decide if Brock Turner judge keeps job*, MERCURY NEWS (May 18, 2018),

<https://www.mercurynews.com/2018/05/18/judge-persky-recall-after-death-threats-new-rape-laws-voters-to-finally-decide/>.

<sup>130</sup> Strickler, *supra* note 120 (referring to *League of Women Voters of Penn. v. the Commonwealth of Pennsylvania*, 175 A.3d 282 (Pa. 2018)).

<sup>131</sup> Meghan Leonard, *Republicans are Calling for the Impeachment of Pennsylvania Judges. It's Nothing New*, WASH. POST (Mar. 5, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/05/are-recent-calls-to-impeach-pennsylvania-judges-unusual-not-so-much/?noredirect=on&utm\\_term=.138cff1492d4](https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/05/are-recent-calls-to-impeach-pennsylvania-judges-unusual-not-so-much/?noredirect=on&utm_term=.138cff1492d4).

<sup>132</sup> *Id.*

<sup>133</sup> See Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>; see also Holly Yan, *'Black Lives Matter' Cases: What Happened After Controversial Police Killings*, CNN (June 26, 2017), <https://www.cnn.com/2017/06/26/us/black-lives-matter-deaths-outcomes/index.html>.Public.

the bench than votes in opposition for a many good many reasons. For one, the case was highly publicized as the assault of an unconscious woman on the street of a campus shocks the senses, and so, it would follow that a light sentence for that act would disturb the onlooking public. One could also argue that the true tidal wave against the judge's leniency rose with internalization and identification of women and society at large with the #MeToo movement, which contemporaneously spread through social media and has also been covered by the news media. From its inception, the movement has removed men from Hollywood production, newsrooms, and other corporate sectors that internal policies and politics could never blow the lid on.

Despite a setting where people are "more connected" than ever before, judges should not feel they need to show their connectedness or activism via social media. Social media platforms operate with banter and expression without exacting care to words or accuracy. To that end, the Texas State Commission on Judicial Conduct recently admonished the Honorable Michelle Slaughter, Judge of the 405<sup>th</sup> Judicial District Court, Galveston County, Texas, for ongoing Facebook comments on the high profile "boy in the box" trial after having warned the jury not to communicate with anyone via phone or Facebook.<sup>134</sup> Judge Slaughter also added a link to a *Reuters* article, which contained extraneous information that had not been admitted into evidence.<sup>135</sup> After being recused from the trial and for her comments about other ongoing cases, the Commission found Judge Slaughter in violation of Canon 3B(10) and Canon 4A of the Texas Code of Judicial Conduct.<sup>136</sup>

In *Youkers v. State*, the Texas Court of Appeals determined that a trial judge did not violate the Code or require disqualification from a trial when the father of the victim in the case was a Facebook "friend" of the judge.<sup>137</sup> The court noted the two had no relationship outside of meeting one another when they both ran for office and that upon receiving a Facebook message requesting leniency towards the defendant, the judge advised the father that the message constituted an improper *ex parte* communication which he could not read or consider.<sup>138</sup>

<sup>134</sup> Admonition and Order of Additional Education, Honorable Michelle Slaughter, CJC No. 14-0820-DI & 14-0838-DI, (Apr. 20, 2015) at <https://www.documentcloud.org/documents/2066528-slaughter-admonition-2015.html>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Youkers v. State*, 400 S.W.3d 200 (Tex.App.—Dallas 2013, pet ref'd).

<sup>138</sup> Michael Crowell, *Judicial Ethics and Social Media*, ADMIN. OF JUST. BULL. UNC SCHOOL OF GOV'T., Dec. 2015, at

Ultimately, the risk of judges landing in the midst of the news frenzy should not play into how a judge handles his/her judicial activity, nor should judges feel less inclined to speak or have sincere beliefs for fear of removal or social criticism. However, the role of the impartial judiciary demands caution in the ways that judges "connect" and "communicate." In fact, judges and judicial candidates run a dangerous risk of compromising the canons of judicial ethics, which value independence, impartiality, and propriety, as well as the appearance of these honorable traits.

## VI. CONCLUSION

An examination of the role of judicial interaction with the media leads to interesting commentary and cases. The lesson of being a public figure is that there will be public scrutiny, but a "judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."<sup>139</sup> The Codes of Judicial Conduct impress the aim upon judges to relay neither fear nor favor, but rather propriety and impartiality, so as to promote confidence in the judicial system. With such a lofty goal and nebulous canons of instruction, it is no surprise that judges avoid the media or that those who embrace the media risk receiving disciplinary action if not invariably careful.

Judges accept a role that removes them from being able to interact or speak in the full breadth of First Amendment freedom. Their words carry a special weight, implicating the bench, their fellow judges, and the system they represent. Judicial interaction on social media, in the courtroom, in a letter, or during an interview should not suggest bias or discuss pending litigation in a way that could jeopardize the fairness of the proceedings. With that in mind, it does not take away from the knowledge of the individuals on the bench and the educational need of the public. In fact, judges may appreciate the press when expressing need for legal reform, explaining a misunderstanding, or when presented with an opportunity to enlighten the public on judicial or constitutional matters. Perhaps if the larger public understood the tenet of judicial independence and were more involved in state elections and the legislative process, the political pressure and removal proceedings discussed would not receive the current level of support. Ultimately, responsible judicial conduct is one that practices restraint, civility, and fairness. The art of public dialogue has a lot to learn from such conduct, and it would be the public's loss to not hear from judges who adhered wholly to such a code.

<https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Judges%20social%20media%20July15.pdf>.

<sup>139</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES, Commentary on Canon 2A (2009).