Florida Law Review

Volume 51 | Issue 5 Article 5

January 1999

Civility Among Judges: Charting the Bounds of Proper Criticism By Judges of Other Judges

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CIVILITY AMONG JUDGES: CHARTING THE BOUNDS OF PROPER CRITICISM BY JUDGES OF OTHER JUDGES

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I. INTRODUCTION

Although incivility among attorneys has attracted widespread public attention and has dominated recent discussions about the apparent erosion of civility within the legal profession,[1] many judges, lawyers, and commentators have detected a less sensational but still troubling rise in incivility by judges toward other judges.[2]

While most judges may be models of civility compared with lawyers or members of the executive and legislative branches of government, incivility among judges is in many ways more troubling than is incivility

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1. *See, e.g.*, Lydia P. Arnold, *Ad Hominem Attacks: Possible Solutions for a Growing Problem*, 8 GEO. J. LEGAL ETHICS 1075 (1995); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); Thomas G. Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177 (1996).

2. For example, 50% of the 82 judges in the Seventh Circuit who responded to a 1989 survey believed that there were "civility problems" between or among judges; 47% perceived no problem, and three percent provided no response. *See Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 431 (1992) [hereinafter *Interim Report*].

in other branches of the legal profession or the government because civility is one of the hallmarks of judicial temperament. As one commentator has pointed out, lack of "judicial civility—professional courtesy and respect among judges," tends to erode the institutional legitimacy of the courts.[3]

Issues involving the civility of judges toward one another usually arise out of critical comments that judges make about other judges. Such criticism takes many forms, including 1) comments in written opinions of judges who serve on multi-judge panels about the majority, concurring, or dissenting opinions; 2) comments in written opinions of higher courts about the decisions or opinions of lower courts; 3) public comments about other individual judges or their decisions; 4) public comments about the courts and the judiciary that are not directed against specific judges; and 5) private comments made about other judges or their decisions, collectively or individually.

II. BILIOUS WRITTEN OPINIONS

The apparent increase in acerbity in written opinions, starting with those of members of the U.S. Supreme Court, has been the focus of many recent discussions about judicial incivility. Some ninety-four percent of the judges who reported inter-judicial civility problems in a 1989 Seventh Circuit survey[4] perceived that this problem arose in written decisions.[5] Some eighty-three percent believed that this was a problem at the circuit level, while fifty-six percent perceived a problem at the district court level and only six percent found a problem among bankruptcy and magistrate judges.[6] Various respondents complained that "[s]ome appellate opinions contain unnecessarily harsh criticism of trial judges" and that "[c]ertain circuit judges seem compelled to display their intellect by stinging bashes of lower court decisions and those who make the decisions."[7]

One recent opinion of the United States Court of Appeals for the District of Columbia accused U.S. District Judge Stanley Sporkin, a highly respected jurist, of having "wreaked havoc in the administration of justice" by "knowingly" abusing his discretion in sentencing a defendant in a drug case to forty-one months in prison rather than the seventy to eighty-seven months recommended by the sentencing guidelines.[8]

The trial judge responded to this blistering criticism with an acerbic

3. Scott C. Idleman, *A Prudential Theory of Candor*, 73 TEX. L. REV. 1307, 1391 (1995).

4. *See Interim Report*, *supra* note 2, at 378. Only 50% of the responding judges in the Seventh Circuit perceived that there was a civility problem. *See id.*

5. *See id.* at 378.

6. *See id.* at 431.

7. *Id.* at 405.

8. United States v. Webb, 134 F.3d 403, 408-09 (D.C. 1998).

opinion of his own.[9] Decrying the appellate panel's "unwarranted and inappropriate personal attack on this Court," Judge Sporkin recused himself from further participation in the case and wrote a detailed defense of his original decision.[10] As Judge Sporkin observed,

> One Article III judge's right to engage in a negative attack on a second Article III judge arising out of a good faith official action is nowhere to be found in Article III of the Constitution. What is more, simple fairness and due process . . . require that a co-equal judge be given notice and an opportunity to respond to such a vicious attack. It goes without saying that reviewing courts are supposed to sit in judgment of cases, not fellow judges.[11]

Arguing that the appellate court was "simply dead wrong" in contending that the trial court failed to follow the law, the judge explained in considerable detail why the facts of the case justified a sentence that was shorter than that for which the guidelines called and why the law permitted such an exercise of discretion.[12]

Returning to his criticism of the Court of Appeals' opinion, Judge Sporkin aptly argued that:

> There is much talk about the need for heightened civility among the members of the bar. Civility starts at home. How can courts expect lawyers appearing before them to be more civil when Article III judges themselves are not civil to one another? The panel's strident language encourages disrespect for this Court . . . .
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> . . . We who try to discharge our judicial responsibilities in a conscientious and just manner should not be the victim of vicious personal attacks from other judges. Such attacks have no role to play in the administration of justice. Under the federal system, district courts and appellate courts receive powers from the same part of the Constitution. They are equals and must be treated as such.[13]

Sporkin contended that "common decency" required Judge Ginsburg

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9. *See* United States v. Webb, No. CRIM.A. 94-0245SS, 1998 WL 93052 (D.C. Cir. Feb. 20, 1998).

10. *Id.* at *1.

11. *Id.*

12. *Id.* at *2-7.

13. *Id.* at *7. Judge Sporkin reminded the panel that "its unfounded criticism was leveled at a judge who has spent nearly 40 years in government service, over 12 as a member of the United States District Court." *Id.*

to expunge his remarks from the record.[14]

Judge Sporkin's criticisms of the appellate court were fair. Even though the appellate court clearly disapproved of the trial judge's departure from the sentencing guidelines, the appellate court's remand of the case would have been enough of a rebuke to the judge. To the extent that the appellate court needed to explain its remand, it should have criticized Judge Sporkin's decision in a less histrionic fashion than to allege that it "wreaked havoc in the administration of justice."[15] For example, it could properly have characterized his decision as "inappropriate" or even as "extreme." But while the trial judge's criticisms of the appellate court were quite apt, the trial judge's lecture to the appellate court on the need for judicial civility may itself have been an exercise in the type of incivility that judges should avoid. Although the judge properly recused himself from further proceedings if he felt that he could not in good faith abide by the appellate court's decision, he ought to have suffered the insult in silence, leaving his defense to scholars or commentators, or addressing the issue of civility in a forum other than a judicial opinion.

Similarly, various commentators have deplored the increasingly astringent tone of many U.S. Supreme Court opinions.[16] During recent years, for example, Justices have derogated the opinions of their colleagues as both "foolish"[17] and "absurd."[18] As Judge Richard A. Posner pointed out a dozen years ago, an

> increasingly common manifestation of excessive judicial self-assertion is the abuse—often shrill, sometimes nasty—of one's colleagues. . . . Such criticisms figure ever more prominently not only in dissenting and concurring opinions but in majority opinions as well, now that it is the fashion for the author of the majority opinion, usually in footnotes, to attack the dissenting opinion (and sometimes even a concurring opinion).[19]

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14. *Id.*

15. United States v. Webb, 134 F.3d 403, 409 (D.C. 1998).

16. *See, e.g.*, Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583 (1994).

17. *Id.* at 639 (citing International Union v. Johnson Controls, Inc., 499 U.S. 187, 219 (1991) (Scalia, J., concurring); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 984 (1984) (Rehnquist, J., dissenting); Smith v. Goguen, 415 U.S. 566, 586 (1974) (White, J., concurring)).

18. *Id.* (citing Nordlinger v. Hahn, 112 S. Ct. 2326, 2345 (1992) (Stevens, J., dissenting); Grady v. Corbin, 495 U.S. 508, 543 (1990) (Scalia, J., dissenting); Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting)).

19. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 232-33 (1985).

Such writing may be ill-advised because "a dissent can be perceived as chipping away at the court's legitimacy."[20] There is little indication, however, that the use of hyperbolic or blistering language in judicial opinions has seriously eroded public respect for the Supreme Court or other appellate courts. Very few citizens actually read judicial opinions,[21] and those who do are generally sophisticated enough to recognize that the issues that reach the appellate courts often involve subtle, complex, and highly political questions about which honest, competent, and reasonable judges may sharply differ. Even when the news media reports bilious judicial language to a mass audience, the typical layperson seems to sense that a certain amount of contention is part of the normal give-and-take of the judicial decision-making process.

The most dangerous aspect of the apparent growth of sarcastic majority opinions, peevish concurrences, and stinging dissents is not so much that they erode the legitimacy of appellate courts, as that they confuse the law by interjecting a high level of contentiousness and verbosity into judicial opinions which should be designed to provide guidance variously to lower courts, law enforcement agencies, legislators, and citizens.[22] Rhetorical gamesmanship obfuscates rather than clarifies the law.[23] As Francis Bacon once observed, "[A]n overspeaking judge is no well tuned cymbal."[24] Moreover, incivility in written opinions might decrease a judge's influence among his or her colleagues.[25] Judges should remain mindful that they are writing judicial opinions rather than law review articles, and they therefore should write with simplicity and succinctness, limiting their cleverness to an occasional Holmesian epigram.

As one law dean has aptly argued, judicial independence does not "mean that the sharp differences that should flourish among the Justices are truly advanced by snitty language that might be appropriate in the House of Commons or other low places of parliamentary debate but that

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20. Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113, 115 (1990) (noting that a dissenting opinion may harm a court's legitimacy without mentioning the judge's tone).

21. *See* POSNER, *supra* note 19, at 233.

22. *See id.*

23. *See id.*

24. Francis Bacon, *Essays, Civil and Moral*, *in* 3 HARVARD CLASSICS 132 (Charles W. Eliot ed., 1960).

25. As one commentator has observed, Justice Brennan was more influential with both his colleagues and Congress because he adhered to principles of "civility" and "congeniality." Edward R. Leahy, *Justice William J. Brennan, Jr.: The Law of Free Expression and the Art of Civility*, 6 COMM. LAW CONSPECTUS 1, 4 (1998). Unlike some dissenting judges who have referred to the prevailing opinion as "the majority," Brennan "had a collegial habit of noting points of agreement with 'the Court' before discussing his criticisms." *Id.*

somehow seems out of place in the United States Reports."[26]

Likewise, judges should display respect for the lower court judges whose decisions they review. The reversal of a lower court decision is a conclusive rebuke to a lower court and any demeaning language is superfluous. If the appellate judge believes that the lower judge was incompetent, he or she can quietly work through established channels to remove, reform, or discipline the lower court judge. Written attacks concerning the lower court judge's error can only detract from the dignity of the judicial process.

III. PUBLIC COMMENTS ABOUT SPECIFIC JUDGES OR THEIR DECISIONS

Although judges generally tend to be respectful toward their colleagues in their public comments outside written opinions, some judges have been known to cast aspersions upon the competence, diligence, integrity, or temperament of other judges. Judges should categorically abstain from such comments because they detract from the dignity of the judicial system and tend to impugn its integrity.

Intemperate comments about one's judicial colleagues impugn the integrity of the judicial system for several reasons. Perhaps the most obvious reason is that such comments may shake public faith in the judge who is the target of criticism.[27] Litigants and lawyers naturally might question the quality of justice dispensed by a judge who has been denounced by one of his or her own colleagues as lazy, incompetent, careless, or corrupt. Although a judge's conduct may indeed warrant criticism from his or her colleagues, the appropriate means of such criticism is the well ordered structure of the judicial disciplinary process rather than public invective. Discreet and objective reports of possible misconduct to the appropriate authorities are consistent with the deliberative character of the judicial system. Similarly, emotional or subjective public criticism of a judge by another judge is antithetical to the spirit of due process. Public criticism of a judge is not likely to contribute toward a fair resolution of charges against a judge. Such criticism might, if only subconsciously, bias those who conduct the proceedings against the judge since public criticism might create an atmosphere of hostility. On the other hand, such criticism might bias the proceedings in his favor since those who sit in judgment on the judge might wish to compensate for any possible damage done to the judge's reputation as a result of such public criticism.

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26. Gaffney, *supra* note 16, at 644.

27. *See* POSNER, *supra* note 19, at 233 (arguing that abusive opinions serve to distract the reader and lower the judiciary's reputation to the public).

Perhaps a less obvious danger of public criticism of judges is that it may impugn the character of the judge who renders the criticism.[28] Just as children are warned that someone who points a finger at another person has three fingers pointing back at him, so a judge should be mindful that intemperate or unseemly criticism of another judge might harm his or her own reputation more than the judge he or she is criticizing. Since judges are supposed to be calm, discreet, deliberate, and objective, a judge's intemperate criticism of a colleague naturally calls into question that judge's own fitness for judicial office. If, for example, a judge ridicules a colleague as a "moron," this is more likely to unfavorably affect the public's view of the judge who makes the accusation than it is to alter perception of the judge who is the target of such an invective. Literally, no one will believe that the target of the criticism is truly a moron, but many observers might question the temperament of a judge who would speak so crudely about a colleague.

Moreover, litigants and attorneys who appear before such a judge might wonder whether a judge who is so lacking in proper judicial temperament could fairly adjudicate their cases. Indeed, many might expect the judge to be even harsher or more unbalanced in his or her treatment of litigants and lawyers who are more at the mercy of the judge and less able to defend themselves than are the judge's colleagues. Of course, the opposite might be true—a judge might be rougher with his or her own colleagues precisely because he or she is not judging their cases or because he or she holds them to a higher standard, just as judges usually expect more of lawyers than litigants. For example, I once saw a New York trial judge flay a tardy attorney in open court, and then moments later treat an incoherent *pro se* litigant with the utmost patience and respect. In most instances, however, litigants and attorneys probably would expect that the judges would be no more temperate in their treatment of them than they have been in the treatment of their colleagues. Of course, a judge can overcome this presumption by the way in which he or she acts in court. But his or her conduct in court will not erase the impression of judicial imbalance that has been projected to countless citizens if his or her intemperate criticism of a colleague is reported in the news media.

Moreover, intemperate remarks by judges about their colleagues potentially violate several provisions of the *Model Code of Judicial Conduct*.[29] In particular, intemperate speech might violate Canon 1, which provides in relevant part that "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the

28. *See id.* Judge Posner believes if readers think that a judge's criticism "is hyperbolic he will think less well of the abusing judge. . . ." *Id.*

29. MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2, 3 (1998) [hereinafter MODEL CODE].

judiciary will be preserved."[30] For the reasons explained above, gratuitous criticism of judicial colleagues constitutes a low form of conduct and tends to diminish the integrity and independence of the judiciary.[31]

Similarly, intemperate speech potentially violates Canon 2A, which provides in relevant part that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[32] As explained above, a judge's criticisms of his or her colleagues can call into question the judge's own temperament and undermine faith in his or her ability to decide cases in a calm and deliberate manner.[33]

Moreover, criticisms of judicial colleagues also seem to conflict with Canon 3B(4), which declares that "[a] judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . . ."[34] The reference to "others" can certainly be interpreted to include other judges.

Furthermore, if a judge's remarks tend to impugn the integrity of a judge on a particular matter that is pending in the court of the judge who is the target of criticism, the judge who renders the criticism may be in violation of Canon 3B(9), which prohibits a judge from making "any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."[35]

Similarly, a judge's criticisms of other judges may create the impression that he or she is biased in a pending case. Accordingly, the Supreme Judicial Court of Maine publicly censured a judge who wrote letters to the editors of four newspapers criticizing the decision of a higher court in vacating and remanding to him sentences that he had imposed in nine criminal cases.[36] The court explained that

> [b]y publishing his letters, the content of which made readily apparent his lack of impartiality, [the judge], at the very least, created the appearance that the judicial system was unfair. More specifically, citizens, whose legal rights and freedoms were at risk, were subjected to a public prejudgment of their cases by the very judge who was assigned to reimpose sentence.[37]

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30. MODEL CODE, *supra* note 29, Canon 1.
31. *See supra* text accompanying note 27.
32. MODEL CODE, *supra* note 29, Canon 2A.
33. *See supra* text accompanying note 27.
34. MODEL CODE, *supra* note 29, Canon 3B(4).
35. MODEL CODE, *supra* note 29, Canon 3B(9).
36. *See In re* Benoit, 523 A.2d 1381, 1382 (Me. 1987).
37. *Id.* at 1383.

Although some judges defend their criticism of other judges on First Amendment grounds, the First Amendment should not shield judges who make intemperate remarks about colleagues. As the leading treatise on judicial conduct aptly argues,

> [t]he fact that epithets, falling short of "fighting words," may be afforded the status of protected speech provides little amelioration for judges. Judges have extraordinarily little interest in the use of insulting language, while the public interest in judicial dignity and impartiality is correspondingly high. Thus . . . the right to insult necessarily gives way to the public interest.[38]

In one of the few reported decisions concerning a judge's constitutional right to criticize another judge, however, the Fifth Circuit reversed a ruling that upheld the Texas Commission on Judicial Conduct's public reprimand of a justice of the peace for criticizing the county court system for dismissing or sharply reducing the fines of the overwhelming majority of traffic offenders who appealed their convictions by justice or municipal courts.[39] The judge made the comments in an open letter to county officials and in remarks to a news reporter.[40] In his open letter, the judge concluded that the court "would be really busy" if all convicted traffic offenders became aware of the court's leniency in hearing appeals.[41] The judge told a reporter that the county court system was "not interested in justice" in hearing traffic appeals.[42] The Commission chided the judge for being "insensitive" and warned that his remarks could only "cast public discredit upon the judiciary."[43]

On appeal, the Fifth Circuit held that the Commission had failed to carry the heavy burden of demonstrating that its legitimate interest in protecting the administration of justice outweighed the judge's First Amendment rights.[44] The court explained that the Commission failed to explain precisely how the judge's "public criticisms would impede the goals of promoting an efficient and impartial judiciary," and that the court was "unpersuaded that they [the citizens] would have such a detrimental effect."[45] Indeed, the court averred that "those interests are ill served by

38. JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS 342-43 (2d ed. 1995).

39. *See* Scott v. Flowers, 910 F.2d 201, 213 (5th Cir. 1990).

40. *See id.* at 204.

41. *Id.* at 205.

42. *Id.*

43. *Id.* at 204.

44. *See id.* at 212-13.

45. *Id.* at 213.

casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, [the justice of the peace] in fact furthered the very goals that the Commission wishes to promote."[46]

In some of the other reported decisions concerning criticism by judges of other judges, courts have tended to exhibit a similarly remarkable reluctance to impose sanctions for harsh comments that judges have made about fellow judges.[47] For example, the Supreme Court of Tennessee reversed a finding of the Court of the Judiciary that derogatory remarks made by a county criminal court judge about the county juvenile court and its non-lawyer judge constituted a violation of provisions of the Tennessee Code of Judicial Conduct requiring a judge to be impartial and courteous.[48]

The judge made the remarks at two separate habeas corpus proceedings brought by men who were incarcerated for failure to pay child support. The habeas corpus proceedings were among eight hearings at which the judge expressed frustration about what the state supreme court described as the "state of the Juvenile Court's records, its use of rubber stamp to sign orders, including those mandating incarceration, [its] ineffectiveness in informing defendants of their constitutional rights, and what he perceived to be the Juvenile Court's practice of imposing indefinite incarceration on those who did not pay child support."[49] The judge's remarks included statements that "we have a non-attorney in here that is fouling up the works by some garbage that has no business coming out of a court of law," and he needed to provide guidance to "this person who is masquerading as a judge down there."[50]

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46. *Id.*

47. *See, e.g.*, McCartney v. Commission on Judicial Qualification, 526 P.2d 268 (Cal. 1974); *In re* Brown, 879 S.W.2d 801 (Tenn. 1994).

48. *See In re Brown*, 879 S.W.2d at 807. The Court of the Judiciary found that the judge had violated Canon 2A, which provides that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and Canon 3A(3), which provides that "[a] judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction." *Id.* at 802.

49. *Id.* at 806.

50. *Id.* at 804. The following are remarks that the Court of the Judiciary found to be violative of the Code: (1) "Twenty-seven years [the approximate length of the juvenile judge's tenure] is long enough for somebody to get their act together down there." *Id.* at 802. (2) "Maybe we wouldn't have this mess here if juvenile court would act like a juvenile court and deal with some juvenile matters." *Id.* at 803. (3) "Now I'm going to put a foot deep up somebody's behind if we don't get this thing turned around and corrected the way it is supposed to be done because that process down there is disgusting to a trained lawyer who practices criminal law." *Id.* at 804. (4) "They are pretty scrupulous about dealing with people's rights around here, except one place." *Id.* (5) "[The judge believed he needed to do what he could to] protect the citizens from the mess they got into by

The court reasoned that "[w]hile much of the appellant's language was harsh and some remarks were crude, his statements were not directed at Judge Turner personally, except to the extent that the structure and procedures under review were made necessary by the fact that Judge Turner is not a lawyer."[51] Accordingly, the court concluded that "the comments found offensive were directed at the perceived inadequacies and improprieties in the structure and operation of the Juvenile Court system, which are appropriate subjects for criticism."[52]

In another case, the Supreme Court of California held that a judge could not be disciplined for challenging

> the transfer of a preliminary hearing on a murder case that was about to commence in his courtroom by calling a recess, taking court personnel and counsel to the presiding judge's chambers and there, in the presence of court personnel and counsel, angrily demanding an explanation from the presiding judge.[53]

Although the court deplored this conduct as "repugnant to the venerable tradition that judges share the bench as brethren in a spirit of mutual respect and courtesy" and believed that "[t]he disrespectful confrontation with the presiding judge was surely an uncalled-for embarrassment to the latter, and most certainly appeared injudicious to the observing court personnel and lawyers," the court found "no showing that *public* esteem for the judicial office was substantially impaired by that apparently isolated incident."[54]

In other cases, however, courts have taken a harsher view of the propriety of criticism of judges of fellow judges. For example, the Supreme Court of Wisconsin in 1989 suspended a state trial judge from office for two years on account of his incivility toward litigants, witnesses, and other courts.[55] In hearing a motion for a new trial on the ground that the rule requiring suppression of illegally or improperly seized evidence had been violated, the judge declared that:

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grandfathering somebody down there to play honorary judge." *Id.* (6) "[The people] don't have a real live judge [in juvenile court.]" *Id.* (7) "[Lawyers should provide] guidance of this person with the infirmity down there, so we can stumble along, paying another half million a year because he is an honorary judge, and we don't get what we're supposed to get but we'll get what we can out of this." *Id.* at 805.

51. *Id.* at 806.

52. *Id.*

53. McCartney v. Commission on Judicial Qualifications, 526 P.2d 268, 280 (Cal. 1974).

54. *Id.* at 284 (emphasis in original).

55. *See* Disciplinary Proceedings Against Gorenstein, 434 N.W.2d 603, 609 (Wis. 1989).

> The suppression rule must be changed; and I am talking to the hypocrites in the Appellate Court and the Supreme Court, because I have seen the decisions that have come down. They bend the rules until they almost break them, then they bend the law. . . . And to argue all this stuff frankly—if the boys upstairs [referring to the Court of Appeals] don't like it and if the boys and girls in Madison [referring to the Supreme Court] don't like it, if they have got the guts to reverse this case on a lot of technical things, let them do it, and I will run against the first judge that reverses this case.[56]

The court did not specifically discuss the weight that it accorded to this remark in suspending the judge, but the court's opinion suggests that the judge's suspension was based primarily upon his rudeness to parties who were before him and his failure to modify his behavior after an earlier private admonition.[57] It is unlikely that the judge's discourtesy toward the higher courts of Wisconsin alone would have resulted in a disciplinary proceeding, much less a suspension.

In another case, the Supreme Court of Georgia suspended a trial judge for thirty days partly because he had used derogatory language toward the judge from the bench in revoking an order of the presiding judge. The suspended judge went to the judge's office "and berated and abused him with vulgar and obscene language which was heard by several other persons."[58]

Harsh comments by judges about their colleagues are probably more common than the dearth of reported opinions might suggest. Disciplinary authorities are naturally loath to commence proceedings against every judge who makes an improper comment about a fellow judge, even if such comments technically could justify sanctions. Disciplinary authorities probably lack time to adjudicate all such matters, especially if to do so would mire them in a morass of relative trivialities. Furthermore, a judge with an otherwise good record should not suffer public humiliation for every minor lapse of civility. Moreover, judges no doubt make many comments about other judges that may not actually justify any sanction, but which clearly are ill-advised. Incivility itself is not necessarily a breach of the Code of Judicial Conduct. The paucity of cases in which judges are disciplined for making improper comments about fellow judges, however,

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56. *Id.* at 606.

57. *See id.* at 609.

58. *In re* Broome, 264 S.E.2d 656, 656 (Ga. 1980). The decision does not provide more details about the circumstances surrounding the incidents or the precise language that the judge used. The judge also was suspended because he had presided in several cases in which his son-in-law had served as counsel. *See id.*

does not mean that judges should feel free to derogate their colleagues with impunity. As in every other matter of judicial conduct, judicial civility should be guided by common sense and self-control.

IV. CRITICISMS OF COURTS THAT ARE NOT DIRECTED AT PARTICULAR JUDGES

Judges sometimes make comments that are critical of their own courts or other courts without directing comments at individual judges. There are a number of notable historical examples of judges who have criticized the judicial process. During the early twentieth century, for example, Chief Justice Walter Clark of North Carolina tirelessly castigated the federal courts for their hostility toward social and economic reform legislation.[59] In countless articles and speeches, Clark condemned activist judges and called for limitations on the power of the federal judiciary.[60] Although Clark was robust in his criticisms, he generally avoided ad hominem attacks on individual judges. Despite the widespread criticism of the courts during the Progressive Era, Clark was the only prominent judge who regularly made public criticisms about judicial activism.[61]

Judges were not nearly so reticent when federal court decisions re-emerged as a source of public controversy on a different point on the political spectrum when the Warren Court expanded the scope of personal liberties during the 1950s and 1960s. Several prominent jurists were vocal in their public derogation of the Supreme Court. Judicial criticism reached a high water mark in 1958, when the Conference of Chief Justices issued a long report deploring various Supreme Court decisions and the general activism of the Warren Court.[62] The report, which was adopted by a vote of thirty-six to eight, with two chief justices abstaining and four not present, urged "the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it."[63] The report inspired much criticism from commentators who believed that judges should not criticize other judges. The *New Jersey Law Journal*, for example, warned that the resolution set a "dangerous precedent" because it broke the ancient tradition that barred judges from criticizing the decisions of higher courts.[64]

Criticism of the courts by judges has continued in our own day. For

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59. *See* William G. Ross, *Walter Clark of North Carolina: Antagonist of the Federal Judiciary*, 3 J. of S. LEGAL HIST. 1 (1994).

60. *See id.*

61. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS 1890-1937 (1994).

62. *See The Constitutional Principle of Judicial Self-Control*, 43 MASS. L.Q. 77 (1958).

63. *Id.* at 84.

64. *An Unprecedented Report and Resolution*, N.J. L.J., Sept. 11, 1958, at 4.

example, a New York criminal court judge has boasted that he warns his students at Columbia Law School that "[t]he court of appeals is in session; we are all in danger," and has stated in a book that the New York Court of Appeals is "a lottery."[65]

More recently, in 1998, Phil Hardberger, the Chief Justice of the Texas Court of Appeals for the Fourth District, published a 142-page law review article alleging that the Texas Supreme Court had unduly interfered with the proper roles of juries by circumventing juries in a decade-long line of decisions that favored large businesses and the government at the expense of individuals.[66]

At the start of his article, Chief Justice Hardberger stated that various members of the present court were elected with the support of business interests which had sought to place "conservative, activist judges" on the state supreme court.[67] Chief Justice Hardberger concluded that while "no one would contend that all of these [pro-defendant] cases were decided 'wrongly,' the appearance of bias leads one to the conclusion that the current Court favors its judgment over that of [the] jury."[68] Similarly, he contended "the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts"[69] and that the court's decisions have therefore interfered with the need for the predictability in the law that is promoted when judges refrain from interfering with jury verdicts with which they disagree.[70] Although Chief Justice Hardberger acknowledged that some recent decisions have demonstrated more deference to jury verdicts for plaintiffs, he intimated that these decisions may have been motivated by efforts to generate support in upcoming judicial elections.[71]

In contrast to critical comments about fellow judges, which are virtually never proper, critical remarks about the judicial system or particular courts may be appropriate if they are temperate and are intended to be made in a constructive manner. While judges can make constructive contributions toward the discipline or reform only through private channels, judges can sometimes have a positive impact on reform of the judicial process by publicly criticizing that process. Judges may lend credibility and legitimacy to arguments for judicial reform that might seem ill-informed or naive coming only from other sources. It is this very potency of judicial speech,

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65. Monroe H. Freedman, *The Threat to Judicial Independence By Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 732 (1997) (citing HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 31 (1996)).

66. *See* Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L. J. 1 (1998).

67. *Id.* at 3.

68. *Id.* at 7-8.

69. *Id.* at 141.

70. *See id.* at 142.

71. *See id.*

however, that should make judges hesitant to speak at all about such issues and inspire the greatest of circumspection when they finally decide to comment. If a judge cannot make any contribution to public discourse that lawyers, journalists, law professors and other citizens cannot make, it is better for the judge to remain silent. Moreover, a judge, like any critic, should not speak unless he or she is fully informed about the issues. A judge therefore should be particularly hesitant to criticize particular decisions of other courts unless he or she has studied the written opinions carefully and is fully conversant with the underlying facts and circumstances of the case.

These criteria suggest that Chief Justice Hardberger's extensive criticisms of the Texas Supreme Court in his recent law review article were not clearly inappropriate. As the chief judge of an intermediate court in Texas, Chief Justice Hardberger was obviously well qualified to comment upon the decisions of the Texas Supreme Court, and his lengthy law review article—which contained 933 footnotes—provided a scholarly and painstaking analysis of the decisions which he criticized. Moreover, no legal scholar had undertaken the same task of exhaustively reviewing the Texas Supreme Court's decisions from Hardberger's perspective, and there is no particular reason to suppose that anyone else would have undertaken this arduous task. Furthermore, Chief Justice Hardberger generally refrained from histrionic rhetoric and personal aspersions against individual judges. Although his disapproval of the court's decisions permeates the article, Chief Justice Hardberger generally allowed the court's decisions to speak for themselves. Finally, since the article concerned public issues about which Chief Justice Hardberger apparently felt a compelling need to speak out, one could argue that he had a duty to the people of Texas to sound an alarm about what he seems to have regarded as the misguided direction of their state supreme court.

Chief Justice Hardberger's article nevertheless raises troubling issues because it suggests that the political predilections of a majority of judges of the Texas Supreme Court have inspired decisions which have usurped traditional jury functions. Judges who are tempted to criticizes courts should think very carefully before attempting to emulate Chief Justice Hardberger, especially if they lack his temperance and scholarship.

V. PRIVATE COMMENTS BY JUDGES ABOUT FELLOW JUDGES

Although a judge should feel somewhat more free to make critical comments about other judges in private, a judge should attempt to be temperate even in private, particularly if he or she is addressing persons whose opinion of the integrity of a particular judge or the integrity of the judicial system would be adversely affected by the judge's criticisms. The

same concerns expressed in the previous two sections are relevant to private remarks, except that the potential for harm may be less because the audience is smaller, and such comments are less likely to be reported in the news media.

VI. CIVILITY CODES

In response to growing concern about the lack of courtesy among members of the legal profession, approximately half of the states have adopted civility codes, some of which include sections that apply to judges' relations with other judges. In the preamble to its newly promulgated standards for the professional conduct of lawyers and judges, the West Virginia State Bar explains that

> [s]ociety at this time seems to be accepting a fundamental loss of common courtesy as a trend that accompanies the fast-paced existence most Americans now live. Perhaps instant communication, in which more information needs to be assimilated more rapidly, has rendered thoughtfulness nearly impossible. Perhaps it is simply the cynicism inherent in a society that values winning at all costs. It is appropriate for judges and lawyers to revive valuable traditions that may be lost.[72]

The Seventh Circuit has adopted the following civility code under the heading of "Judges' Duties to Each Other:"

> 1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
> 2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
> 3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.[73]

State civility codes for judges tend to be very similar to the Seventh Circuit's Code.[74] Some of the codes contain additional provisions. For

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72. *Standards of Professional Conduct*, W. VA. LAWYER, Jan. 1997, at 12 [hereinafter *Standards*].

73. *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441, 452 (7th Cir. 1992).

74. *See, e.g., Iowa Standards for Professional Conduct, available in* 1996 WL 260622;

example, West Virginia's *Code of Professional Conduct* states that "[a] judge should endeavor to work with other judges to resolve scheduling disputes utilizing the Rules of Court Scheduling Conflicts."[75]

The civility codes have inspired widespread commentary that is beyond the scope of this Essay. Many commentators have questioned their effectiveness,[76] and such codes clearly are no panacea, for they carry no specific sanctions and they are vague about what actually constitutes proper behavior. Moreover, a judge should not need to be told that he should treat other judges with respect. But such codes are better than nothing, and they at least provide a reminder that lack of civility is unworthy of a judge.

VII. CONCLUSION

Judges should generally refrain from public or private criticisms of other judges or their decisions. Such restraint is consistent with the general need for circumspection and restraint that judges should exercise in extra-judicial speech.[77] Judges should try to minimize acerbic comments about their fellow judges in their written opinions since such comments are generally superfluous, adding little or nothing to the usefulness of the opinion. Judges should confine their criticism of the abilities or character of fellow judges to private judicial disciplinary channels, for public aspersions bring both the target of the criticism and the critic into disrepute and help to undermine faith in the judicial system. Public criticisms of the judicial system generally have value only when the judge is in a position to make a unique contribution to public discourse. Any private or public remarks by a judge about a fellow judge or about the judicial system should be made with the objectivity, balance, and civility that is worthy of the temperament that is expected of a judge.

Standards for Professional Conduct within the Rhode Island Judicial System, published at *President's Message*, R.I. BAR J., May 1996, at 10; *Standards*, *supra* note 72, at 12.

75. *Standards*, *supra* note 72, at 12.

76. *See, e.g.*, Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 113-55 (1995); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 657-708 (1994); Brenda Smith, Note, *Civility Codes: The Newest Weapons in the "Civil" War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151, 151-85 (1998); *cf.* Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 253-66 (1998).

77. *See* William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. OF LEGAL ETHICS 589, 589-642 (1989).