IS IT THE SIREN'S CALL?: JUDGES AND FREE SPEECH WHILE CASES ARE PENDING

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"The sirens of mythology pale in comparison to the allure of seeing yourself on CNN. The results, however, can be about the same."[1]
Judge Lance Ito, prior to handling the O.J. Simpson case[2]

I. INTRODUCTION

In November 1994, Judge Lance Ito, the presiding judge in the murder trial of O.J. Simpson, granted an exclusive interview to a local Los Angeles television station.[3] The interview was with a local news anchor, Tritia Toyota, and was shown in five-minute installments on the 11:00 p.m. news over the course of a week. The interview was heavily advertised and attracted enormous public attention.

Although the interview focused primarily on Judge Ito and his background, it did occasionally touch on the Simpson case. In the initial segment of the interview, Judge Ito described his family background and spoke of how his parents, Japanese-Americans, were

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1. B.J. Palermo, *Profile: Lance A. Ito, He Helped Pick Simpson Judge*, L.A. DAILY J., July 19, 1994, at 1, 5 (quoting Judge Lance A. Ito). The full quote consisted of three cautions Judge Ito offered for judges handling high profile cases:

> "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."

Id. at 5 (quoting Judge Lance A. Ito).

2. People v. Simpson, No. BA097211 (Cal. Super. Ct. L.A. County June 17, 1994).

3. *Lance Ito: Face to Face* (CBS television broadcast, Nov. 13-18, 1994). The interviews were broadcast by station KCBS-TV. I should disclose that I have frequently served as a commentator for KCBS during the Simpson case. However, I had no involvement whatsoever in the interview of Judge Ito. Additionally, it should be noted that the public criticism of the interview focused on Judge Ito and not on the actions of anchor Tritia Toyota or KCBS.

interned during World War II. Pictures of the internment camp, his parents, and Judge Ito as a child were shown.

In the second part of the interview Judge Ito discussed important influences in his life. In particular, he mentioned how he had asked an old mentor, now a retired judge, to serve as special master and handle the "mystery envelope."[4] During the preliminary hearing, the defense produced an item in an envelope and objected to the disclosure of its contents to the prosecution or the public. Judge Ito did not, of course, reveal the contents of the envelope in the interview, but he did describe his choice of a special master to handle it.

In the third and fourth parts of the interview, Judge Ito discussed his views of what makes a good judge and ruminated on what it feels like to be an instant celebrity. Finally, the interview series concluded with Tritia Toyota speaking to Judge Ito's parents.

Commentators were generally highly critical of Judge Ito for having granted the interview. Some objected that Ito was a hypocrite because he had repeatedly objected to the media frenzy surrounding the Simpson case but then fueled it by participating in the much-hyped interview.[5] Some argued, more generally, that it is inappropriate for a judge in a pending case to grant interviews with the press.[6]

Judge Ito's conduct provides the opportunity for considering the broader question: When, if at all, may or should judges handling pending cases make statements to the press? Although Judge Ito's interview occurred in the context of a case that has received unprecedented media attention, the issue could arise in countless cases in the future. For many reasons, judicial proceedings are increasingly attracting public attention. During the past few years, in Los Angeles alone there have been several highly publicized cases: the allegations of child abuse at the McMartin Preschool, the two trials of the officers responsible for the beating of Rodney King, the trial of the individuals involved in beating Reginald Denny, the murder trial of the Menendez brothers, and the trial of alleged Hollywood madam Heidi Fleiss.[7]

This trend of public attention to trials and judicial proceedings is likely to continue in the future. In part it is based on the public's

4. Andrea Ford & Jim Newton, *Prosecutors Zero In on Time of Killings*, L.A. TIMES, July 2, 1994, at A1, A5.

5. Jim Newton & Andrea Ford, *Ito's Televised Interview Stirs Controversy*, L.A. TIMES, Nov. 15, 1994, at A1.

6. *Id.* at A26.

7. M.L. Stein, *Press Squeeze at High-Profile Trial*, EDITOR & PUBLISHER, Aug. 21, 1993, at 9.

rediscovery of the inherent drama surrounding court proceedings. In the era before television, people attended court sessions for entertainment. The enormous success of books by authors such as Scott Turow and John Grisham reveal, and fuel, the public's interest in the legal system. Televising court proceedings, now legal in virtually all state courts, promises to make celebrities of judges in closely watched cases. There was a time when Judge Wapner from the *People's Court* was more famous than any Supreme Court Justice. Now with Court-TV, judges handling high-profile cases quickly will become familiar to wide segments of the public. In many instances there will be great public interest in hearing from the judge handling a pending case.

Thus, the issues raised by Judge Ito's interviews are sure to arise again and again in the future. In analyzing such judicial behavior, three questions must be answered. First, under what circumstances do statements by judges in pending cases violate the code of judicial ethics? Second, even if the statements violate the code of judicial ethics, are they protected by the First Amendment and, if so, under what circumstances? Finally, even if the statements are legal, are they desirable; is it a good thing for judges in pending cases to speak to the press and grant interviews?

This Essay addresses each of these three questions in turn. The scope of the Essay is limited to discussing the legality and propriety of statements made by judges in pending cases. My overall conclusion is that it is both legal and desirable for judges to speak to the press and that judicial speech about pending cases should be limited only where it poses a substantial risk of materially prejudicing an adjudicatory proceeding.

II. Do Judges' Statements About Pending Cases Violate the Code of Judicial Ethics?

In evaluating the conduct of judges, the threshold question is whether the behavior violates codes of judicial ethics.[8] Four provisions of the Model Code of Judicial Conduct are potentially relevant.

Canon 1 of the Model Code of Judicial Conduct states: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct . . . so that the integrity and inde-

8. Because my focus is not solely on the Simpson case or even cases in California, I will consider the relevant provisions of the American Bar Association's Model Code of Judicial Conduct rather than the provisions of California law regulating judicial behavior.

pendence of the judiciary will be preserved."[9] Although Canon 1 is not a basis for disciplining judges, it does express the general philosophy of the Code.[10]

Canon 2A states that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[11] Again, this is a general provision and while judges certainly may be disciplined for violating the law, it is more questionable whether judges can be disciplined under the general requirement for promoting confidence in the judiciary.[12] The standard is obviously vague; it provides little guidance as to which statements are allowed and which are prohibited.[13] The provision also is overbroad.[14] If a judge exposes serious corruption in the judicial system, that might undermine public confidence in the integrity of the judicial system,[15] but the speech surely would be constitutionally protected.

The provision most directly on point is Canon 3B(9). It provides:

> A judge shall not, while a proceeding is pending or impending in any court, make 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. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.[16]

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9. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

10. *See, e.g.*, *In re* Schenck, 870 P.2d 185, 214 (Or.) (Unis, J., specially concurring in part, dissenting in part) ("Canon 1 is *not* a rule of conduct under which a judge may be disciplined. Rather, Canon 1 is the basic philosophical provision of the Code, and its terms have an important bearing on all the other canons."), *cert. denied*, 115 S. Ct. 195 (1994).

11. MODEL CODE OF JUDICIAL CONDUCT Canon 2A.

12. One judge has stated that he has "reservations as to whether the standard expressed in Canon 2A could serve as the basis for discipline for conduct not otherwise proscribed by the Code." *Schenck*, 870 P.2d at 215 n.1 (Unis, J., specially concurring in part, dissenting in part).

13. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (articulating rule that vague laws regulating speech violate First Amendment).

14. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 519-20 (1972) (articulating principle that overbroad laws regulating speech violate First Amendment).

15. MODEL CODE OF JUDICIAL CONDUCT Canon 2A.

16. *Id.* Canon 3B(9).

Interestingly, the Commentary following the rule is broader in its restriction of speech than the rule. The Commentary declares: "The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition."[17]

Finally, Canon 4 provides that judges are allowed to speak and write about the legal system so long as the activities do not undermine the ability of the judge to appear neutral and impartial. Canon 4 states: "A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code."[18]

In light of these provisions, when is a judge prohibited from speaking to the press? These rules do not create a blanket prohibition on all judicial statements, but rather draw a distinction based on the content of the speech.[19] Four major types of judicial statements during pending cases can be identified: (1) statements about the judge's personal life; (2) statements about the facts or issues in pending cases; (3) statements about prior cases; and (4) statements about issues of law generally.

These categories are not completely distinct. For example, a judge may explain how his or her background has led to views on a particular issue and that issue might be the core of a pending case. Similarly, a judge might speak generally about the law, but the application of the speech to a pending case could be obvious to all observers. For example, if Judge Ito had stated to the press his general views about admitting prior acts of domestic violence in murder trials where a husband has killed a wife or ex-wife, all would see the connection to the Simpson case—even if Judge Ito had never mentioned it by name. Or a judge might discuss a prior case that is factually identical to a pending case. Still, for the sake of analysis, it is worth considering each category separately.

1. *Statements about the judge's personal life.* Statements about a judge's personal life generally would not violate any provision of the Model Code of Judicial Conduct. There is a possible argument that all

17. *Id.* Canon 3B(9) commentary.

18. *Id.* Canon 4B.

19. Content-based restrictions on speech raise serious First Amendment problems. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). These First Amendment issues are discussed *infra* part III.

public statements by judges undermine the integrity of the judiciary. This, however, is untenable; a judge's statements might enhance the public's image of the judge and the bench. There is no basis for a blanket assumption that all statements by judges, regardless of their content, are harmful to the public's image of the judiciary. Nor should judges be subject to discipline simply because statements are controversial or unpopular. As discussed in Part III, such discipline would raise obvious First Amendment issues.

Judge Ito, for example, spoke at some length about his family background and his personal life. Frankly, I found the most moving aspect of the interview to be his description of his parents' experience in an internment camp during World War II and Judge Ito's explanation of how that influenced his choice of career.

There might be instances in which the judge's statement about his or her personal life is so clearly related to the pending litigation as to run afoul of the provision prohibiting comments about pending litigation. This would require, however, a showing that the particular statement would be understood as being about the pending case and that it would meet the standard for discipline in a pending case, as discussed below.

2. *Statements about pending cases.* Canon 3B(9) prohibits judges from making statements about pending cases "that might reasonably be expected to affect its outcome or impair its fairness."[20] In fact, it prohibits judges from making such comments about proceedings "pending or impending in *any* court."[21] Therefore, under this rule it would be improper for judges to serve as commentators for the media on cases pending before other judges if the comments might be prejudicial.

The current rule is desirable in that it draws a distinction between comments that "might reasonably be expected to affect its outcome or impair its fairness" and those that are unlikely to affect a pending proceeding.[22] Judge Ito's statements about using a retired judge to handle the mystery envelope, and his remarks about how it feels to be the jurist in a high-profile case, were both about a pending case, but they did not make him seem biased in favor of either side.

The prior version of the Model Code of Judicial Conduct contained a flat prohibition on judges making comments on pending

20. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9).
21. *Id.* (emphasis added).
22. *Id.*

cases.[23] The earlier incarnation of the rule stated that "[a] judge should abstain from public comment about a pending or impending proceeding in any court."[24] The argument for the earlier rule is that a blanket prohibition of all comments about pending cases is essential because line-drawing is too risky; once judges are allowed to speak about pending cases there is an inherent risk that their statements might be prejudicial. Yet, there is no reason why lines cannot be drawn here. Although as with any line-drawing there are grey areas, some statements are likely to be highly prejudicial and others quite innocuous. The better approach, as embodied in the current rule, is to limit expression only in instances where restrictions on speech are necessary.

Several types of statements by judges about pending cases are likely to be harmful. For example, judges obviously should not disclose confidential information that they learn by virtue of their position.[25] Likewise, the rule should be applied to prohibit judges from making statements to the press that will impair the possibility of having a fair trial. The possibility of an impartial jury is certainly reduced if a judge publicly proclaims a belief in a defendant's guilt.[26] Also, to preserve the appearance of justice, the judge should not make any statements that indicate that the judge has made up his or her mind about unresolved disputed issues.

3. *Statements about past cases.* The rules do not prohibit judges from speaking publicly about prior cases. Nor should there be any prohibition. Once the case is over, there is no need to restrict speech to protect either a fair trial or the appearance of justice. When judges explain their prior rulings they help to explain the law and the decisions to the public. The only limitation is that judges cannot disclose confidential information that is not a part of the public record of the case.

It is possible that a past case is factually so closely related to a pending case that a statement about it will violate the Model Code of

23. The earlier version, adopted in 1972, was superseded by the 1990 version.

24. MODEL CODE OF JUDICIAL CONDUCT Canon 3A(6) (1972).

25. *See* United States v. Aguilar, 21 F.3d 1475 (9th Cir.) (overturning conviction of judge for disclosing existence of wiretap to suspect in criminal investigation), *cert. granted*, 115 S. Ct. 571 (1994).

26. *See* McCullough v. Commission on Judicial Performance, 49 Cal. 3d 186, 199, 776 P.2d 259, 267, 260 Cal. Rptr. 2d 557, 565 (1989) (ordering removal of judge from office for directing jurors to find defendant guilty).

Judicial Conduct.[27] For instance, the judge might make a statement about a past case that arises from the same facts as a pending case and perhaps even involves a co-conspirator. The question would then be whether the statement could be regarded as being about the pending case and whether it could "reasonably be expected to affect its outcome or impair its fairness."[28]

4. *Statements about legal issues generally*. Judges are allowed to write and speak about the law. In fact, Canon 4 provides that "[a] judge may speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code."[29] This is certainly desirable. Judges have a unique vantage point and their voices are likely to carry great weight in debates about the legal system. Therefore, judges are to be encouraged to teach, speak, and write about the law.

It is possible, of course, that in some instances statements about the law will be understood as being about a pending case before the judge, and it is possible that the statements can be so strong as to undermine the ability of the judge to appear impartial. However, for reasons discussed below, I believe that there should be a strong presumption in favor of encouraging judges to speak about the law. A statement should be seen as violating the rules only if it is clearly related to a pending case and would undermine the ability of the judge to seem impartial in the matter.

As an example, Judge Ito's comments about the criminal justice system and the qualities of a good judge should be allowed under the Model Code of Judicial Conduct. These aspects of Judge Ito's remarks were not about the Simpson case and would not cause the public to doubt Ito's impartiality.

It is especially problematic to view judges as biased based on their statements about legal issues. Judges express views about legal issues in their opinions, and the fact that a judge has an opinion on a point of law obviously does not preclude the judge from hearing other cases that present the same legal question. For example, Justice Scalia repeatedly has expressed his view that *Roe v. Wade* should be over-

27. I intentionally limit this to factual similarity. As to similarity of legal issues, as argued below, the fact that a judge has expressed a view as to a legal issue is not a basis for disqualifying the judge. For example, the fact that the judge has written an opinion on a topic does not preclude the judge from sitting in a future case even though the judge has expressed a view on a disputed legal question.

28. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

29. *Id.* Canon 4B.

ruled.[30] Yet, no one suggests that this disqualifies him from sitting on future abortion cases even though his views are well known and his vote is a virtual certainty. Generally, statements about legal issues by a judge should not be a basis for discipline or disqualification of the judge.

In sum, when analyzing the Model Code of Judicial Conduct it is important to distinguish among types of judicial speech. The rules limit expression only if the speech concerns a pending case and only if the speech poses a threat to the fair administration of justice.[31]

Relatively few cases deal with disciplining judges for statements to the press. By far the vast majority of cases concerning judicial discipline for speech have discussed the types of speech allowed during election campaigns.[32] In two recent cases, however, judges were disciplined for speech about pending cases. *In re Schenck* concerned a judge who wrote a letter to the editor and a guest editorial in a newspaper defending his handling of a case and criticizing the district attorney's ability to handle criminal cases.[33] The judge defended his decisions as "tough and reasonable" and said that "[p]erhaps the county court . . . needs to investigate what alternatives might be available to ensure the county has a vigorous, competent prosecutor."[34] Oregon follows the earlier version of the Model Code of Judicial Conduct that prohibits all speech by judges concerning pending cases, and the Oregon Supreme Court upheld the judge's suspension without pay for a period of forty-five days for violating this rule.[35]

30. *See, e.g.*, Casey v. Planned Parenthood, 112 S. Ct. 2791, 2873-85 (1992) (Scalia, J., concurring in part, dissenting in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 532-37 (1989) (Scalia, J., concurring in part and concurring in the judgment).

31. *See* Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986) (judges not prohibited from making out-of-court statements as long as statements do not involve pending or impending proceedings).

32. *See, e.g.*, Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993) (holding that restriction on campaign speech by judges violates First Amendment); Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991) (narrowly construing restriction on judicial candidate's speech so as not to violate Constitution); ACLU v. Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990) (granting preliminary injunction against law restricting speech of judicial candidates); Berger v. Supreme Court, 598 F. Supp. 69 (S.D. Ohio 1984) (upholding restrictions on speech of judicial candidates), *cert. denied*, 490 U.S. 1108 (1989); *see also* Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (arguing proscription of campaign speech by judicial candidates violates First Amendment and reduces participation of voting public).

33. 870 P.2d 185 (Or.), *cert. denied*, 115 S. Ct. 195 (1994).

34. *Id.* at 200.

35. *Id.* at 210.

The other case, *Scott v. Flowers*, involved an elected justice of the peace who wrote an "open letter" to county officials about a problem in the appellate courts of his county.[36] Specifically, the judge complained that the majority of defendants who appealed traffic offense convictions had the charges dismissed or the fines substantially reduced.[37] The Texas Commission on Judicial Conduct publicly reprimanded the judge, but the United States Court of Appeals reversed the conviction on First Amendment grounds.[38]

Putting aside the First Amendment issues that are discussed in Part III of this Essay, it is questionable whether the judges' speech in either case should have been the subject of discipline. Technically, the speech in both cases concerned pending cases. In *Schenck*, the judge criticized the prosecutor who was involved in pending cases before the judge;[39] in *Scott*, the judge's comments applied to cases then on appeal.[40] But in neither case was there any indication that the judge's speech undermined the appearance of fairness or impartiality. There is no reason to believe that the statements in either case "might reasonably [have been] expected to affect its outcome or impair its fairness."[41] In both instances the speech concerned important issues of public concern: the competence of the district attorney's office and the conduct of the appellate courts. Thus, punishing such speech raises major First Amendment questions.

III. Are a Judge's Statements About a Pending Case Protected by the First Amendment?

Assuming that the Model Code of Judicial Conduct is violated by a judge's speech, under what circumstances is such expression protected by the First Amendment? For example, if hypothetically Judge Ito was disciplined for his discussion of the Simpson case during the interview with KCBS, would the Constitution provide a successful basis for challenging the punishment?

In analyzing the First Amendment protection for judicial speech, the initial question must concern the constitutional standard to be applied. Three possible constitutional standards might be identified. One possibility would be to argue that the restrictions of judicial

36. 910 F.2d 201 (5th Cir. 1990).
37. *Id.* at 203-04.
38. *Id.* at 204, 212-13.
39. *See Schenck*, 870 P.2d at 200.
40. *See Scott*, 910 F.2d at 203-04.
41. Model Code of Judicial Conduct Canon 3B(9) (1990).

speech must meet strict scrutiny. The Supreme Court repeatedly has held that government restrictions of speech based on the content of its message will be allowed only if strict scrutiny is met. For example, in *Turner Broadcasting System v. FCC*, the Supreme Court declared that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[42] Justice Kennedy, writing for the Court, noted: "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[43]

The restriction on judges' speech about pending cases is clearly a content-based restriction. Judges are free to speak about almost anything so long as the content of the speech is not about the pending case. An analogy can be drawn to the Supreme Court's decision in *Simon & Schuster, Inc. v. New York State Crime Victims Board*.[44] In that case New York adopted a law prohibiting crime perpetrators from profiting by selling their stories to the media. The Supreme Court held this unconstitutional as an impermissible content-based restriction of speech, because the criminals could sell any story except those describing their crimes.[45] Likewise, under current rules, judges may speak about anything except pending cases. Under this approach, the restriction of judicial speech about pending cases would be allowed only if strict scrutiny is met.

A second possible standard would be to apply the First Amendment rules concerning the speech of government employees.[46] After all, judges are government employees and there is a well-established body of law concerning when the government may discipline its employees for their speech activities. The Supreme Court has held that the First Amendment protects speech by government employees if the speech addresses a matter of public concern and if the employee's interest in speech is not outweighed by the government's interest in efficiency.[47]

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42. 114 S. Ct. 2445, 2458 (1994).

43. *Id.* (citations omitted).

44. 112 S. Ct. 501 (1991).

45. *Id.* at 508-09.

46. The Fifth Circuit followed this approach in Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990).

47. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

Under this approach, the initial issue would be whether a judge's speech addresses a matter of public concern. Almost certainly this requirement would be met if the speech pertained to a pending case. Then the question would be whether the government's interest in efficiency outweighed the benefits of the speech. The objection, however, to a judge's speech about pending cases is not that it interferes with the efficient operation of the courts, but that the speech undermines the judge's appearance of fairness and impartiality. Thus, in applying the standard concerning government employees' speech to judges, the question would be whether the harms to the integrity of the courts are outweighed by the public benefits of the speech.

The final possible approach would be to analogize to the standards used in regulating attorneys' speech. In *Gentile v. State Bar of Nevada*, the Supreme Court concluded that a state constitutionally may punish a lawyer's speech if the expression creates a "substantial likelihood of materially prejudicing [an adjudicatory] proceeding."[48] The Court explained that attorneys do not give up their First Amendment rights when they receive a license to practice law. Indeed, Justice Kennedy explained that "[t]o the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar."[49] The Court noted, however, that as officers of the court, lawyers' speech is constitutionally subject to greater restrictions than would be allowed in other circumstances.[50] The Court found that the First Amendment allows attorneys to be disciplined for speech that creates a substantial likelihood of materially prejudicing an adjudicatory proceeding.[51]

An argument can be made for any of these approaches. Although they differ in phrasing and emphasis, I question how much they actually differ in application. The government has a compelling interest in preventing judicial speech that poses a substantial likelihood of materially prejudicing an adjudicatory proceeding. Likewise, if there is a substantial likelihood of materially prejudicing an adjudicatory proceeding, then a court is likely to conclude that the government's interest outweighs the value of the speech. Thus, there is a strong argument that the best approach would be to apply the *Gentile* standard when evaluating the constitutional protection for judicial

48. 501 U.S. 1030, 1076 (1991).
49. *Id.* at 1056-57 (Kennedy, J., concurring).
50. *Id.* at 1075-76.
51. *Id.*

speech. Besides, there is a logic to holding attorneys and judges to the same standard.

Some might object that the *Gentile* standard is not sufficiently protective of speech, that strict scrutiny should be used. Yet, again, a court is likely to find that strict scrutiny is met and a judge may be punished for speech that risks substantial prejudice to an adjudicatory proceeding. Furthermore, courts are unlikely to find that judges are entitled to more constitutional protection for their speech than are all other government employees or than attorneys.

In fact, the current provision in the Model Code of Judicial Conduct states a standard that is quite similar to *Gentile* and specific to judges' speech. As discussed in Part II, it provides that judges are prohibited from speaking about a pending case only if the "public comment . . . might reasonably be expected to affect its outcome or impair its fairness."[52] Under any of the First Amendment standards described above, this rule probably is constitutional. The rule meets strict scrutiny because there is a compelling interest in preventing judicial speech that might reasonably be expected to affect the outcome or fairness of pending proceedings. The rule meets the standard for restricting government employees' speech because the government's interest in restricting such expression outweighs the judge's interest in making such comments.

Finally, the standard is very similar to the *Gentile* rule except in one respect. *Gentile* requires that there be a "substantial likelihood" that an attorney's speech would cause harm;[53] the Model Code of Judicial Conduct requires only that it "might reasonably be expected" that harm would occur.[54] I believe that the *Gentile* rule is preferable because it requires more likelihood of harm before speech is prohibited and subject to discipline. Yet, as a constitutional matter, the state almost surely would be regarded as having a compelling interest in prohibiting statements by judges that might reasonably be expected to affect the outcome or the fairness of a pending proceeding.

Under either the *Gentile* standard or the phrasing of the current Model Code of Judicial Conduct, all of Judge Ito's comments in the interview with KCBS were protected by the First Amendment. His comments about the Simpson case were general and did not express any views about disputed issues or evidence. Nothing he said caused a substantial likelihood of prejudicing the adjudicatory proceeding or

52. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).
53. *Gentile*, 501 U.S. at 1076.
54. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

could reasonably be expected to affect the outcome or the fairness of the case.

Similarly, the speech in both of the cases discussed earlier—*In re Schenck*[55] and *Scott v. Flowers*[56]—should have been regarded as constitutionally protected. Both involved issues of public importance and in neither instance was there any indication that the speech would jeopardize a fair trial.[57]

This is not to say that judges can never be punished for speech about pending cases. For instance, a judge could be disciplined for making comments that might prejudice the jury in a pending case. If a judge publicly declared his or her belief in a defendant's guilt prior to the jury's verdict, there almost certainly could be a finding of materially prejudicing the adjudicatory proceeding.

In sum, judicial speech, even about pending cases, should be regarded as constitutionally protected unless the government can prove that the speech posed a substantial likelihood of materially prejudicing an adjudicatory proceeding, or at the very least, prove that the statement might reasonably be expected to affect its outcome or impair its fairness. Under this standard the prior version of the Model Code of Judicial Conduct was overbroad because it prohibited judicial speech about pending cases even in situations where the restriction was unnecessary to protect a fair trial. The current version, which is more limited in scope, is constitutional.

IV. Is it Desirable for Judges to Speak About Pending Cases?

Even if a judge's speech does not violate the code of judicial ethics and even if it is protected by the First Amendment, that does not mean that the speech is desirable. For example, though most would agree that Judge Ito's interview did not violate the Model Code of Judicial Conduct and that, in any event, the speech is constitutionally protected, there is still the question of whether it was desirable for him to do the interview.

There are three main benefits when judges speak publicly while cases are pending. One is educating the public. When a judge explains aspects of a case or the legal system there is an enormous bene-

55. 870 P.2d 185 (Or.), *cert. denied*, 115 S. Ct. 195 (1994).

56. 910 F.2d 201 (5th Cir. 1990).

57. In *Scott*, the Fifth Circuit found that the judge's speech was protected by the First Amendment, *id.* at 203, but in *Schenck*, the Oregon Supreme Court rejected the claim of constitutional protection for the speech, 870 P.2d at 205.

fit in informing the public. For example, I believe that more people will learn about the law and the legal system from the Simpson case than any other single event in American history.

A contrary response might be that anything said by the judge could be communicated by others making judicial speech unnecessary. However, judges by virtue of their position and experience may offer perspectives that others cannot. Besides, a judge's comments—especially in a high-profile pending case—might receive greater public attention and a larger audience than another commentator. Additionally, under the First Amendment, it is never a justification to restrict one person's speech because someone else could express the same message.

A second benefit to having judges speak about pending cases is more subtle and therefore more often overlooked: It helps people to see judges as human beings. With rare exceptions, people know little about occupants of state and federal benches. This ignorance is especially ironic and sad when it comes to state court judges because in almost all states voters elect or review these judges at the polls.

The courtroom setting, with a black-robed judge sitting on a raised bench, makes judges seem more godlike than human. The interview with Judge Ito allowed people to see him as a person with a family, a cultural background, and human interests. The pictures of his childhood made it easier for people to view him not as an oracle of the law, but as a person.

The response to this might be that it is undesirable to humanize judges; that judicial rulings will carry more credibility if judges remain anonymous oracles of the law. Although I doubt that this is true, even if it were, I think that it is undesirable. If people see judges as human beings, they will have a better understanding of the legal system. People will better appreciate that the identity of the judge matters and will take more seriously the selection of judges at both the federal and state levels. They will be more likely to realize that when they hear of a court ruling it need not be accepted as an inevitable decision from on high, but a conclusion of a human being that can be discussed and criticized as such.

A third benefit of judges speaking to the media is that it might enhance the image of the bench, the courts, and maybe even government generally. A positive performance by a judge can improve the credibility of the judiciary. For example, the interview with Judge Ito showed him to be articulate and thoughtful. His moving description of his parents' experience in an internment camp helped explain his

decision to become a judge and his commitment to fairness. This can only enhance the credibility of his rulings and, more generally, enhance the image of the judiciary.

The response to this is to argue that interviews with judges might degrade the image of the bench and hurt the credibility of the judiciary. Judges might appear negatively in the media. Perhaps a particular judge will come off as incompetent, as autocratic, or as vain. Many reacted to the interview with Judge Ito in a different manner than I did. Many saw his television interview as egotistical and inappropriate.[58]

Ultimately, there is no inherent reason why interviews with judges will do more to enhance the image of the judiciary than they will do to harm the judiciary. Some statements by judges in pending cases might have a positive effect, some might have a negative effect.

Several arguments might be made against judges making statements about pending cases. One argument is that judges should discourage publicity about pending matters so as to enhance the likelihood of a fair trial and that judges only fuel publicity when they grant interviews. For example, Judge Ito was criticized as being a hypocrite for the interview with KCBS after months of attacking the press coverage of the case.

I disagree with both the premise of this argument and its application to Judge Ito. I do not believe that publicity about pending cases is to be avoided or that media coverage is inherently a threat to a defendant's right to a fair trial. In general, media scrutiny of a case promotes a fair trial because participants will take greater care since injustices can be exposed. A star-chamber proceeding[59] is the antithesis of a fair trial.

Moreover, there is little support for the proposition that even extensive media coverage prevents a fair trial. As the Supreme Court explained: "Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."[60] Additionally, much of the argument for re-

58. *See, e.g.*, Robert C. Fellmeth, *Just Another Nice Guy? Phooey!*, L.A. TIMES, Nov. 16, 1994, at B7.

59. The star chamber was an ancient English criminal court which proceeded inquisitorially. *See* G.R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 106-07 (G.J. Hand & D.J. Bentley eds., 6th ed. 1977).

60. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054-55 (1991) (citing Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977)); Robert E. Dreschel,

stricting pretrial publicity is based on the false assumption that jurors are tainted if they have heard anything about a case before the trial. A fair trial does not require ignorant jurors, but rather jurors who can be trusted to decide based on the evidence presented in the courtroom. As the Supreme Court has recognized, intensive voir dire—questioning of prospective jurors about what they have heard and what they think—is a key element of assuring a fair trial.[61]

Some of the criticism directed at Judge Ito for being a hypocrite was unfair. Much of Judge Ito's criticism of the media was for irresponsible reporting. For instance, his greatest outrage was directed at a local television reporter for falsely reporting that DNA testing linked blood on socks found at O.J. Simpson's home to Nicole Brown Simpson.[62]

Yet, it also is true that Judge Ito more generally objected to the media circus surrounding the Simpson case and in this way his interview with KCBS seemed curious, if not hypocritical. At times, Judge Ito did seem to be engaged in a battle with the press, disparaging the media, sending letters to media executives trying to control their stories,[63] and even at one point barring the media from the courtroom during jury selection. I believe that Judge Ito's error was in these attacks on the media and not in granting the interview with KCBS. Judge Ito, at times, seemed almost obsessed with trying to control press coverage of the case; something that judges cannot and should not try to do.

A second objection to judges speaking about pending cases is that it diverts attention from the case and focuses it on the judge. Robert Fellmeth wrote of Judge Ito:

> The problem is that the neutrality of a judge, in reality or public perception, may be influenced by more than financial reward; for many, the notoriety outweighs all other inducements.
>
> All along, the judge has confined his public appearances to the courtroom. Now he enters the spotlight to talk about

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An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue, 18 HOFSTRA L. REV. 1 (1989).

61. *Gentile*, 501 U.S. at 1055 ("*Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case based upon the evidence presented at trial.").

62. Andrea Ford & Greg Braxton, *Ito to Rule on TV Use in Courtroom*, L.A. TIMES, Oct. 4, 1994, at B1, B8.

63. Judge Ito sent letters to three media executives asking them not to air interviews with Faye Resnick until after the jury was sequestered.

> his past, his values, his dreams. Hey, I don't want to hear that stuff. I want a neutral and detached arbiter who refuses to buy into the media extravaganza. I want someone who does not allow even the perception that media attention may be an influence.[64]

This is a powerful argument, but I do not believe that it outweighs the benefits of judges in pending cases speaking to the press and granting interviews. If the interview educates people about the law and if it helps people to see judges as human beings, then it is desirable even if some might see the judge's behavior as an egotistical act. The fact that a judge gives an interview should not keep the jurist from being perceived as neutral and impartial. Nor should the fact that the judge agrees to an interview justify a conclusion that the judge's decisions will be influenced by media attention.

V. CONCLUSION

The intense public controversy over Judge Ito's interview with KCBS made it seem that it was unique and unheard of for a judge to speak with the press. Such is not at all the case. The *Los Angeles Daily Journal*, a newspaper covering the legal system, regularly profiles judges and frequently quotes them. During the bicentennial celebration of the Constitution, Justice Harry Blackmun was interviewed by the television show *Superior Court*.[65] The interviews, which were shown over a week, revealed a self-effacing, highly intelligent man. Last year, while he was still on the Court, Justice Blackmun was interviewed by *Nightline* where he spoke of issues such as the death penalty and abortion.[66] In fact, Judge Ito was interviewed earlier in the Simpson case by several newspaper reporters[67] and no one objected.

There are many reasons why a judge decides to talk to the press. Perhaps the judge wishes to criticize an aspect of the legal system and call for reform. Perhaps the judge wants to clarify a matter about which there is confusion. Perhaps the judge sees a unique opportunity

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64. Fellmeth, *supra* note 58, at B7.

65. Marjorie Williams, *On "Superior Court": A Brief Word from Justice Blackmun*, WASH. POST, Feb. 9, 1987, at A9; *Morning Report: TV & Video*, L.A. TIMES, Feb. 10, 1987, pt. VI (Calendar), at 2.

66. *Nightline* (ABC television broadcast, Apr. 5, 1994).

67. *See* Palermo, *supra* note 1; Henry Weinstein, *Ito Readies Himself for Glare of Media Spotlight*, L.A. TIMES, July 23, 1994, at A1.

to educate the public. Perhaps, at times, it is simply a matter of ego and the judge enjoying the media attention.

Whatever the reason why a judge speaks during a pending case, the speech is allowed so long as it does not seriously risk undermining the fairness of the proceedings. Under both the Model Code of Judicial Conduct and the First Amendment, judges can speak unless there is a real threat that the comments will materially prejudice the case. Hopefully speech by judges will enlighten and educate the public or, at the very least, allow the public to see judges in a more human light.