Constructive Criticism

Cynthia Gray

In addition to the usual declaration that judges may "write, lecture, speak, or teach on legal subjects," the new Virginia code of judicial conduct makes clear that a judge "may express and explain his or her disagreement with existing precedent so long as he or she does so in a respectful manner and acknowledges his or her duty to faithfully apply existing precedent notwithstanding the judge's disagreement with it."[1]

That explicit permission to disagree, unique to the Commonwealth, may have been prompted by a 2020 opinion from the Virginia Judicial Ethics Advisory Committee nixing a judge's proposed article about the state supreme court's interpretation of a criminal law.[2] Noting its assumption that the author would be "scholarly and respectful" and would not discuss pending or impending cases, the committee determined that the article would likely be "a permissible educational or scholarship exercise"—if the judge-author only analyzed the statute and the court's decisions.[3]

However, the judge also intended "to assert that the Court has interpreted the statute 'incorrectly' and to provide an alternative interpretation."[4] In the committee's opinion, readers would likely infer from that analysis that, in ruling as a judge, the author would substitute their preferred interpretation rather than follow the criticized precedent.[5] Acknowledging the "natural tension" between judges having opinions about legal issues and judges being open-minded, the committee concluded that the proposed article appeared to represent "pre-judging or predisposition that would create in reasonable minds a perception that the judge is partial." The committee also rejected the inquiring judge's suggestion that the article would be permissible if the author included a disclaimer stating that they were not expressing an opinion on any case that may come before them.[6] The committee noted that it does not have the authority to address First Amendment issues.[7]

One committee member dissented, evoking the Hans Christian Andersen folk tale to argue that judges have the responsibility to respectfully point out "if the emperor has no clothes," that is, if "an appellate court may have misapplied a rule of construction or applied faulty logic."[8] The dissent noted that the inquiring judge was not advocating for nullification of the law, casting "aspersions on the competence or integrity of members of the judiciary," or suggesting "rebellion and defiance against the appellate court's ruling."[9] It explained:

> Barring publication of constructive and scholarly comments by a judge on issues relating to legal analysis would . . . silence those who would be most competent to speak to the issue, . . . inappropriately suggest that decisions of appellate judges are beyond criticism, and . . . inappropriately curtail activities designed to improve administration of justice.

The dissent disagreed with the majority's conclusion that the article's constructive criticism implied that the author would "disregard his or her duty to adhere to decisions of higher courts."

Stating that "improving the law is best done in an environment of robust and honest dialogue," the dissent argued that "the motherly maxim, 'if you don't have something good to say, don't say it at all!'" should not be added to the code of judicial conduct.[10]

The importance of judicial participation in the "long tradition of vigorous public debate" about judicial decisions was also emphasized by the Judicial Council of the United States Court of Appeals for the Seventh Circuit when it concluded that a judge who wrote an article titled "The Roberts Court's Assault on Democracy" had not violated the code, at least in most of what he had written.[11] The article had been published in *Harvard Law and Policy Review* and was written by a United States District Court judge.[12] The thesis of the article was, according to the Council, that, in decisions over the last 15 years, the United States Supreme Court has "undermined the rights of poor people and minorities to vote" and "increased the economic and political power of corporations and wealthy individuals," resulting in "a form of government that is not as responsive as it should be to the will of the majority of the people."[13]

Following media reports about the article, three individuals filed complaints against the judge-author. For example, one stated: "I don't see how a party with a conservative background appearing before [the judge] could be confident that they would receive fair, even handed treatment."

The Seventh Circuit Judicial Council described the "competing policy considerations."[14] On the one hand, judges should be encouraged to "offer the public valuable perspectives on the controversial cases of the day after they have been decided," "bring[ing] to bear their professional skills, experience, and training to evaluate the debates among Justices over the meaning and scope of prece-

Footnotes

1. Virginia Code of Judicial Conduct Canon 1L (2022), https://www.vacourts.gov/courts/scv/canons_of_judicial_conduct.pdf.
2. Jud. Ethics Advisory Comm., Opinion 20-2 (2021), https://www.vacourts.gov/programs/jeac/opinions/2020/20_2.pdf. The Virginia Supreme Court had approved the opinion as a rule requires the committee to "submit any proposed advisory opinion to the Supreme Court of Virginia for approval prior to its release to the inquirer and the public." Order Establishing the JEAC 3 (2019), https://www.vacourts.gov/programs/jeac/resources/order.pdf.
3. Jud. Ethics Advisory Comm., *supra* note 2, at 5.
4. *Id.* at 1.
5. *Id.* at 6.
6. *Id.*
7. *Id.* at 7.
8. *Id.* at 11.
9. *Id.* at 12.
10. *Id.* at 11.
11. Jud. Council of the Seventh Jud. Cir., Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman (2020), https://www.ca7.uscourts.gov/judicial-conduct/judicial-conduct_2020/07-20-90046_90044.pdf.
12. Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 Harv. L. & Pol'y Rev. 131 (2019).
13. Resolution of Judicial Misconduct Complaints, *supra* note 14, at 1.

dents and other legal arguments made in those opinions."[15] On the other hand, judges "have special responsibilities in their public extrajudicial writings and speaking" not to "interfere with their work as judges" or "with public perceptions that the judges will approach the cases before them fairly and impartially."[16]

Explaining that the judge had based much of his article on opinions dissenting from the decisions he criticized, the Council concluded that "the vast majority" of his "substantive criticism of Supreme Court decisions" was "well within the boundaries of appropriate discourse," although it noted it was not "endorsing or disagreeing" with his views.[17]

However, the Council did admonish the judge for parts of the article. The article began:

> By now it is a truism that Chief Justice John Roberts' statement to the Senate Judiciary Committee that a Supreme Court justice's role is the passive one of a neutral baseball "umpire who [merely] calls the balls and strikes," was a masterpiece of disingenuousness. Roberts' misleading testimony inevitably comes to mind when one considers the course of decision-making by the Court over which he presides.[18]

According to the Council, the article also criticized "the Republican Party's support for measures to restrict voting rights and to enhance the political and economic power of corporations and the wealthy" and described "the party as having become more partisan, more ideological and more uncompromising."[19]

The Council concluded:

> The opening two sentences could reasonably be understood by the public as an attack on the integrity of the Chief Justice rather than disagreement with his votes and opinions in controversial cases. The attacks on Republican party positions could be interpreted, as the complainants have, as calling into question Judge Adelman's impartiality in matters implicating partisan or ideological concerns.[20]

The Council noted that its public admonition would remind all judges of their obligations to ensure that their "public speaking and writing do not undermine public confidence in the fair administration of justice."[21]

How judges can acknowledge disagreement among judges and call for improvements in the administration of justice without undermining public confidence in the judiciary and the courts is not a new debate.

In 1983 a Texas justice of the peace noticed that charges were dismissed or fines were reduced for the great majority of defendants who appealed their traffic offense convictions from justice or municipal courts to the county court-at-law.[22] He believed this practice "unfairly allowed those 'in the know' to violate the traffic laws repeatedly and with impunity while penalizing less sophisticated individuals who committed the same offenses." In an "open letter" to county officials, he attacked the prosecutor's office and the county court-at-law. If the county refused to change this practice, the judge stated, "the public at least should be made aware of it, and the court-at-law 'would be really busy then.'" The judge also told a reporter, "It seems the county court system is not interested in justice," or words to that effect. The truth of his claims was not contested.

The Texas State Commission on Judicial Conduct publicly reprimanded the judge for public statements that "were inconsistent with the proper performance of your duties as a justice of the peace and cast public discredit upon the judiciary."[23] The judge challenged the reprimand in a federal lawsuit contending that his statements were constitutionally protected speech.

The United States Court of Appeals for the Fifth Circuit agreed with the judge and held that, under the First Amendment, the judge could not be reprimanded for his "truthful public statements critical of the administration of the county judicial system of which he is a part."[24] The federal court emphasized that the judge should be expected, not only to exercise independent judgement in deciding cases, but also to "be willing to speak out against what he perceived to be serious defects in the administration of justice."[25] It concluded:

> The goals of promoting an efficient and impartial judiciary . . . are ill served by casting a cloak of secrecy around the operations of the courts" and that the judge had in fact furthered those goal "by bringing to light an alleged unfairness in the judicial system.[26]

A "silence is golden" approach by judges may not promote confidence in the judiciary for a public very aware of the criticism and challenges courts face and sometimes invite. Judges may join the debate without tarnishing the judiciary's reputation if they are thoughtful and constructive, requiring the balance judges are accustomed to bringing to all aspects of their role.

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14. *Id.* at 3.
15. *Id.* at 6.
16. *Id.* at 2.
17. *Id.* at 8-9.
18. Adelman, *supra* note 15.
19. Resolution of Judicial Misconduct Complaints, *supra* note 14, at 2.
20. *Id.* at 9.
21. *Id.* at 10.
22. The judge's letter and subsequent events are described in Scott v. Flowers, 910 F.2d 201, 203-04 (5th Cir. 1990).
23. *Id.* at 204-05.
24. *Id.* at 203. The Commission has also reprimanded the judge for insensitive statements to litigants, but the Court did not order that portion of the reprimand expunged.
25. *Id.* at 212.
26. *Id.* at 213.