FREE EXPRESSION AND JUDICIAL SPEECH: A GENERAL FRAMEWORK FROM ONE AMERICAN PERSPECTIVE

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How much, and in what ways, is a judge different from the rest of us for the purpose of determining what restrictions on judicial speech are appropriate and permissible?

This article will examine judicial free speech from an American perspective. The American "law" on the matter is not a uniform, fully developed body but, rather, is comprised of the law of fifty different states and the federal judicial system. Likewise, there is no single approach that American lawyers, scholars or judges would agree on as "the" American viewpoint in this area of law and ethics, and while both state and federal formulations are limited by the free speech principles of the First Amendment, these constitutional issues have neither been presented to nor definitively resolved by the United States Supreme Court.

For these reasons, this article will not attempt to state "the American law" of judicial free speech. Instead it will attempt to examine how judicial free speech issues might be approached within the structure of American judicial standards and to set forth a general framework for approaching the *kinds* of free expression issues involved in judicial speech. That examination and its resulting general framework is based primarily on two sources: the representative American ethical standards of judicial conduct and the constitutional concerns of the American First Amendment that may both inform and limit the application of those standards.

I. American Standards Governing Judicial Expression

Although each of the fifty American states and the federal government has its own authoritative standards of judicial conduct, the American Bar Association's *Model Code of Judicial Conduct*[1] is the basis upon which almost all American states have formed their judicial conduct rules. It is therefore fair to view the *Model Code* as representative of the current American approach to defining the acceptable standards governing judicial conduct and speech and to begin with a survey of

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[1]American Bar Association, *The Code of Judicial Conduct* (1990) [hereinafter the *Model Code*].

those provisions. Some of these deal directly with issues of speech while others deal with conduct in general, whether speech or non-speech conduct, that may have implications for what a judge may or may not appropriately say in certain circumstances.

I (a) Speech Directly Involved in Judges' Specific Case Work

Perhaps not surprisingly, the most specific *Model Code* standards explicitly affecting judicial speech are those most directly related to the individual judges' conduct of their own judicial business and, for the most part, deal with speech that is necessarily and directly involved in the actual work of the individual judges. The restrictions they impose, and the reasons underlying them, are those that are inherent in the central role of a judge as an impartial arbiter of individual cases within a system of justice under law and are primarily concerned with protecting the appearance and reality of judicial impartiality.

A judge is forbidden expression that "manifest[s] bias or prejudice" against participants, especially with regard to bias "based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status."[2] A judge is also forbidden from engaging in *ex parte* discussions concerning proceedings that are before the judge.[3] Both of these provisions are clearly designed to maintain both actual and apparent impartiality by the one whose neutrality is mandated in the very cases over which she presides. Less exclusively, yet no less clearly related to protecting judicial impartiality, are requirements that a judge must be courteous,[4] and is forbidden, as are the litigants and attorneys, from disclosing confidential information in a case or from using it other than for proper judicial purposes.[5]

A judge is specifically forbidden from commending or criticizing jurors with regard to their verdict. The expressed purpose of this rule is to avoid "imply[ing] a judicial expectation [by the judge] in future cases" which might "impair a juror's ability to be fair and impartial in a subsequent case," if a present juror served on another jury before the same judge in the future. The judge may, however, more

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[2] *Ibid* at Canon 3B(5). Canon 3B(6) also requires the judge to hold lawyers in the proceeding to the same standard, but purports not to preclude "legitmate advocacy" when those specified subjects "are issues in the proceeding."

[3] *Ibid.* at Canon 3B(7).

[4] "A judge shall be patient, dignified and courteous to [everyone] with whom the judge deals in an official capacity ...". *Ibid.* at Canon 3B(4).

[5] "A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." *Ibid.* at Canon 3B(4).

neutrally express her appreciation for the jurors' service generally to the judicial system and community.[6]

The final provision in this category prohibits a judge from publicly commenting on any proceeding that is "pending or impending" in any court. An earlier, 1972 version of the *Model Code* prohibited all such comment except when it was in the course of a judge's official duties, was an explanation of court procedures, or involved proceedings in which the judge was a litigant in her own personal capacity.[7] The 1990 revision of the *Model Code* retained the basic 1972 rule but limited the prohibition to comments that "might reasonably be expected to affect [the proceeding's] outcome or impair its fairness." The 1990 revision also extended the prohibition to any *non*public comment "that might substantially interfere with a trial or hearing."[8] The revised national model thus sacrificed the clarity of the bright line rule for, at least theoretically, greater freedom of judicial expression with regard to unfinished cases presently pending or likely to be brought before *other* judges.

I (b) Extra-Judicial Conduct That Affects the Judicial Role Generally

A second basic category of restrictions are those directed at conduct generally, rather than specifically at speech. Speech is, however, one of the forms of conduct that may raise the dangers against which these restrictions are intended to guard. They are restrictions that may implicate the propriety or impropriety of both speech directly involved in judges' judicial duties and speech that concerns issues of general public interest and occurs in a judge's extra-judicial activities.

Some of these code restrictions are quite directly related to insulating judicial proceedings from bias or the appearance of bias, yet in a more general sense that is not as explicitly tied to particular cases. A judge is required to conduct all of her extra-judicial activities "so that they do not ... cast reasonable doubt on the judge's capacity to act impartially as a judge ...".[9] In a provision that suggests an implicit obligation to exercise restraint in making extra-judicial comments related to issues that may come before her, a judge is also obligated to recuse herself

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[6]*Ibid.* at Canon 3B(10).

[7]American Bar Association, *Code of Judicial Conduct* (1972).

[8]*Supra* note 1 at Canon 3B(9). In its comprehensive revision of its judicial conduct code, the Maine Supreme Judicial Court chose to retain the broader rule of the 1972 version, thus leaving the prohibition in effect as to all public comment on any pending or impending case. *Maine Code of Judicial Conduct*, Canon 3B(9) (1993).

[9]*Ibid., Model Code* at Canon 4A(1). The same provision also requires that extra-judicial conduct not "demean the judicial office ... [or] interfere with the proper performance of judicial duties." at Canon 4A(2) and (3).

from matters in which the judge's impartiality "may reasonably be questioned."[10] This may especially be true when considered in connection with a judge's general obligations to avoid the need for recusal and to be available for the judicial work of deciding cases.[11]

Private associational activities, while not speech in a stricter sense of verbal expression, involve matters often closely related to expression and are ordinarily accorded substantial protection under the First Amendment. A judge is forbidden under the *Model Code* from membership in any organization that "practices invidious discrimination on the basis of race, sex, religion or national origin",[12] a provision obviously intended to protect against the appearance of unfairness or partiality in any cases that may involve members of groups that are too often the victims of the kinds of discrimination designated in the *Model Code*.

Other provisions, while not unrelated to preserving the crucial fact and appearance of judicial impartiality, largely involve the more general protection of public confidence in the propriety and integrity of, and public respect for, those who are charged with the responsibility and authority to impose decisions on other people's disputes. A judge must avoid "impropriety and the appearance of impropriety" in all of her activities,[13] and must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary".[14]

"[L]end[ing] the prestige of the judicial office to advance the private interests of the judge or others," is directly forbidden by the *Model Code* in those general terms[15] as well as specifically in connection with fund-raising even for governmental, civic or charitable organizations, or in publicly appearing before or consulting with such bodies except with regard to the law, the legal system or the

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[10]*Ibid.* at Canon 3E(1).

[11]*Ibid.* at Canon 3B(1) explicitly requires a judge to "hear and decide matters assigned to the judge except those in which disqualification is required." Other provisions require judges to avoid activities that may lead to a frequent need to recuse: serving as an officer or advisor to a civic, charitable or governmental organization that will likely be involved in proceedings that would ordinarily come before the judge's court's appellate jurisdiction, Canon 4C(3)(a); frequent financial transactions or continuing business relationships with persons likely to come before the court on which the judge serves, Canon 3D(1)(b); gifts or other favors from anyone whose interests have or are likely to come before the judge, Canon 4D(5)(h). A judge is required to manage her investments so as "to minimize the number of cases in which the judge is disqualified", Canon 4D(4).

[12]*Ibid.* at Canon 2C.

[13]*Ibid.* at Canon 2.

[14]*Ibid.* at Canon 2A.

[15]*Ibid.* at Canon 2B.

administration of justice.[16] Speech, of course, would be the primary vehicle for most of the conduct that might violate these provisions.

And underlying everything is the extraordinary proposition that "the judicial duties of a judge take precedence over all the judge's other activities."[17] In other words, judging, if not the whole of one's life, must control and preclude all other things that may interfere or be inconsistent with doing the job of a judge.

The generality of some of these provisions, coupled with the fact that they also represent much that is at the heart of the special nature of what it is to be a judge, can put these ethical mandates in an especially problematic tension with the special importance that the First Amendment attaches to the free discussion of public issues and makes the issue of judges' "political" speech, dealt with in the following section, among the most difficult issues to resolve.

I (c) Speech About Politics and Public Issues[18]

The provisions of the *Model Code* that deal directly with political speech *expressly* forbid only certain designated political activities involving speech that place a judge right in the midst of partisan politics. The exact parameters of permissible speech concerning the law and the legal system, as well as non-legal matters, are less specifically addressed, being permitted generally (or at least not expressly forbidden), yet subject to the other requirements of the *Code* whose principles may impose restraints that are not *explicitly* set forth with regard to judicial speech in the political arena. The most problematic form of those "other requirements" are the general standards discussed in the preceding section of this article.

Expressly forbidden are (1) public endorsement of or opposition to candidates, (2) speeches on behalf of political organizations, (3) attendance at political rallies,[19] and (4) appearances at public hearings before, or engaging in other kinds of consultation with, executive or legislative bodies or officials "except on

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[16] *Ibid.* at Canon 4C(1) and 4C(3)(b)(i) and (iii).

[17] *Ibid.* at Canon 3A.

[18] In order to concentrate on the general questions involved in judicial free speech, this article does not address the more specialized question of political speech or activity involved when a judge is a candidate for judicial office.

[19] *Supra* note 1 at Canon 5A(1)(b),(c) and (d). A "political organization" is defined in the *Code* as "a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." *Ibid.* at "Terminology". Some states might apply the restrictive view to general political activity beyond those activities specifically enumerated in the *Model Code*. Maine, for example, added a provision prohibiting "any other political activity" except that which is "authorized" by other sections of the *Code* or is "on behalf of measures to improve the law, the legal system, or the administration of justice." *Maine Code of Judicial Conduct*, Canon 5A(1)(f).

matters concerning the law, the legal system or the administration of justice."[20] These are the kinds of political activity and speech that are inherently likely to undermine both the reality and the appearance that a judge is separate from the ordinary influences of ordinary politics, and thus independently able and inclined to decide cases fairly and according to law – the basic requisite of judicial independence that lies at the foundation of the separation of powers. Active participation in partisan politics, or activities that have the effect of putting a judge into the governing processes of the executive or legislative bodies, are inherently inconsistent with a judge's job description.

On the other hand, a *Model Code* provision purporting to deal with "avocational", rather than explicitly with "political" activities, expressly permits a judge's expression, teaching, and participation in activities concerning "the law, the legal system [and] the administration of justice." Yet, the same provision also permits the same kinds of speech activities concerning "non-legal subjects." In other words, expression about everything is permitted, except the specified political participation that is expressly prohibited, and all expression that is permitted, whether about the law or non-legal subjects, is expressly made subject to the general principles governing judicial conduct.[21]

Unfortunately, although for understandable reasons, those issues that are most difficult are always the ones that the "rules" do not resolve. The lines between issues concerning the law and issues that are political in nature, or between those that are partisan and those that are non-partisan, are difficult or impossible to draw. The differences in consequences between speech "concerning the law" and that concerning "non-legal subjects," or whether there even are any such differences, are unclear from the *Model Code*'s text. They must instead be resolved by the presumably *ad hoc* application of those other "requirements of this Code", to which speech concerning both law and non-legal subjects appears, from the text, to be equally subject.

The official "Commentary" to the "avocational activity" provision of Canon 4B may be instructive on the *Model Code*'s approach to these ambiguous inter-relationships and its view of the proper role of a judge and her speech within the social-legal-political system, although the commentary provides no clear resolution of the issues.

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a

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[20] *Ibid. Model Code* note 1 at Canon 4C(1).

[21] *Ibid.* at Canon 4B.

> judge is encouraged to do so, either independently or through a bar association, judicial conference or other association dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.[22]

The subjects seemingly "favored" for judicial expressiveness – the law, the legal system, and the administration of justice – are matters in which judges have both a special knowledge and a special, even official, interest and responsibility concerning the issues involved in political discussion. The exemption for consultation with other governmental branches on these subjects can be explained and justified on the basis of their official responsibilities and central role in the operation of the judicial system. It is inherently necessary for judges to deal with other governmental bodies and officials simply to maintain and manage the operation of the judicial system itself.

But apart from this recognition of the need for intergovernmental consultation in the operation of the courts and the textual provisions explicitly prohibiting designated forms of "partisan" political speech, the commentary suggests that the unique expertise of judges in the legal system and profession is a reason to *encourage* judges to express themselves on issues concerning the law and the legal system, at least by way of working to "improve" it. While there is no comparable affirmative justification encouraging comment about the "non-legal" subjects also referred to in the text, neither the commentary nor the text suggests that such judicial expression is forbidden as long as it does not violate the unspecified "other provisions" of the *Code*. Likewise, while the thrust of the commentary seems to suggest some preference for directing judicial law reform efforts into mainstream channels, neither the commentary nor the text precludes a judge from being the lone advocate of unorthodox measures for reform. Further, neither the commentary nor the text addresses the problem of distinguishing between law "reform" and something other than reform, like retrogression or defense of the *status quo*.

Special problems of free speech and censorship would arise if these provisions of the *Code* contemplate a distinction between "good" law reform and "undesirable" change. While any notion of "improving" something implicitly suggests *changing* it, common sense interpretation, as well as First Amendment mandates, could sensibly interpret the requirements only in a way that would provide equal freedom to oppose suggested reforms and advocate the *status quo*. Similar objections to unacceptable viewpoint discrimination would also prevail

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[22] *Ibid.* at Canon 4B, "Commentary". The "Commentary" also notes that the reference to the other requirements of the *Code* "is included to remind judges that the use of permissive language ... does not relieve a judge from the other requirements of the *Code* that apply to the specific conduct."

against the commentary's explicit approval of expressed opposition to the persecution of lawyers and judges "in other countries". To the extent the commentary implies that a judge may *not* do the same with regard to events in the United States, surely a judge's speech would be equally protected if a judge believed, for example, that contempt sanctions imposed on an attorney in a completed case constituted "political persecution."[23]

The resolution of issues arising in the area of extra-judicial political and public issue speech lie in the interpretation and application of a very indefinite text. The proper and sensitive interpretation of what "rules" may be lurking in that text can be informed by the ethical considerations underlying the "other requirements" of the *Model Code* and the concerns, values and nature of free expression. They are, of course, also limited by the constitutional restraints of the First Amendment. The desirable interpretation, however, may best be achieved simply by interpreting the rules in a way that respects those constitutional limits and the reasons that underlie them.

II. The Speech-Protective Nature of the American First Amendment

The United States Supreme Court, through a process of decisions and opinions over the past three-quarters of this century, has developed a First Amendment tradition of relatively stringent, constitutionally mandated, protection for individual speech that appears to be unique within the world community. Since part of the task of this article is to assess the nature of American restrictions on judicial speech against the background of the general American approach to constitutionally-based speech protections, my treatment of First Amendment principles will be more general than would be necessary to defend the approach suggested here against challenges by other competing views of what particular doctrines comprise American First Amendment law.

Although it is true that "the First Amendment is not an absolute" in the sense of forbidding all regulation or prohibition of whatever is verbal or expressive, the use of such an obvious proposition as a starting point for First Amendment analysis seems to me unhelpful at best and, at worst, destructive of what the First Amendment in fact is. It is doubtful that anyone who has given significant thought to the meaning of the First Amendment has ever believed it to be "absolute" in the sense described. Starting with a denial that it is absolute has often been used

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[23]The content-neutral prohibition in Canon 3B(9) *ibid.* of either favorable or unfavorable comment that might affect the outcome or impair the fairness of any case pending in any court would not run afoul of this problem since that provision is both directly related to the central necessity of protecting the impartiality of judicial decision-making in the specific case and is not drawn into operation only by the *criticism* of the system.

as a strawperson in an effort to avoid or soften the need for the more stringent and particularized analysis that traditional First Amendment principles require.

An initial illustration of what seems to me to be a more accurate and helpful view of the uniquely speech-protective strains of American First Amendment doctrine lies in the relationship, and the basis for its distinction between "protected" and "unprotected" speech. An integral and fundamental First Amendment principle, that largely underlies the Supreme Court's determination that certain categories of speech are "unprotected", is that speech within those categories has little or no expressive role in productive discussion or in the free marketplace of ideas. This articulated basis is fundamental, whether or not one agrees with the court's application of the principle to any one or all of the "unprotected" categories. The First Amendment does set aside certain categories of speech as "unprotected" by the First Amendment – deliberately or recklessly false expression such as perjury or defamatory statements about public officials or public figures, negligent defamation of private persons, personal threats of physical violence, "fighting words", "obscenity", and advocacy that amounts to a direct incitement of illegal conduct and that also has a likelihood of producing that objective.[24]

Yet, speech on the other side of those deliberately drawn lines is comprehensively protected: false defamation that does not have the requisite fault; advocacy of violently overthrowing the government that does not constitute direct incitement or produce a clear and present danger; deliberately provocative speech that does not fall within the narrow definition of fighting words; and sexually descriptive passages that most communities would find patently offensive and highly "prurient", but that have an arguable literary or artistic role within the work as a whole. The fact that these categories are narrowly drawn by the Court underlines an additional important factor in understanding the nature of the balance struck by the First Amendment. It gives a high value to free speech and recognizes the dangers of presuming that a majority can lay a legitimate claim to either the ability or the authority to determine what is true or to discount the value or truth of minority expression.

A second illustration of the First Amendment's speech-protective approach lies in its treatment of social interests that compete with the value of "protected" speech. While the interests in constitutionally protected speech are not wholly free from competition with other societal concerns, the justification for restrictions is

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[24]"Fighting words" are words directed personally at an individual or individuals that are designed or inherently likely to provoke violence *with little or no furtherance of the exchange of information or ideas.* "Obscenity" refers to expression that depicts or describes bodily functions in a manner that is patently offensive under contemporary standards, and that appeals to a prurient interest in sex or bodily functions, *and that is determined to have no substantial educational, literary, artistic or scientific value* when considered in the context of the whole expressive work of which it is a part.

assessed under the heavily speech-favouring, albeit subjective, formula of whether the competing interest is "compelling" or "of the highest order" and whether the particular restriction is "necessary" in order to achieve the competing interest by means that are the "least restrictive" of the opportunities for expression. This is especially true of speech having to do with public or political issues. Likewise, while "reasonable regulations" of the "time, place and manner" of speech have long been allowable under First Amendment rubrics, they are allowable only if they are not unduly restrictive of the opportunities to convey the message and are not based on a desire to suppress it.

That which gives American First Amendment jurisprudence whatever unique value or disability it may have is thus reflected even in the non-"absolutist" doctrines, which themselves represent and contain stringently protective strains to try to safeguard free expression in a world that by its nature is often hostile to the unpopular idea or to factual assertions that are considered to have been generally or completely discredited. In requiring this approach, the First Amendment does sometimes get in the way of what an overwhelming majority, or an influential profession, may deem to be important social policy, but it does so on the judgment that the protection of speech from just such determinations is an even more fundamental policy for the long-term public good. That's what it's there for.

III. A General Framework for Assessing Judicial Speech Restrictions

III (a) Speech Directly Involved in Judges' Specific Case Work

As noted earlier, the most explicit *Model Code* restrictions concern speech by a judge in her own judicial work or speech that may have a direct impact on the judicial work of other judges or on the legal system's operation in actual cases. Even the speech-protective principles of the First Amendment pose little or no problem for speech-related rules that are a crucial part of a job description on matters that directly involve the actual work of the judiciary or the operation of the system of justice in which the judiciary exists.

There should be no more problem in restricting a judge's public comments on actual cases that are pending or impending in the court system, before that judge or another, than there is in preventing the American ambassador to Karachi from contradicting directions from Washington about the American position with regard to Pakistan, from conveying either truthful information or the ambassador's own candid opinion concerning the direction of "tilt" between Pakistan and India in American foreign policy, or for that matter, from giving her honest and thoughtful opinion about the proper United States policy on some point of difference between her government and that of Canada, even though, as the ambassador to

a different country, that is not "her case." Such restrictions are simply inherently attached to the nature of both positions in a most direct way.

The same is true of restrictions on speech that undercuts the appearance of impartiality, both speech that occurs in the cases that are before that judge and general statements and associational memberships that are inherently likely to cause reasonable question about the ability of the judge to be impartial in cases that are highly likely to come before the judge at some future time, such as cases involving groups who are common victims of discrimination and stereotypes. Just as an attorney is forbidden by duties of loyalty from speaking against her client's interest in a matter in which the attorney represents the client, so may a judge be forbidden from speaking in a way that compromises that impartiality to which the judge owes the highest duty. Likewise, if a police officer can be barred from revealing information from a confidential investigation, a judge can be barred from disclosing what all the other participants in a case are barred from revealing. Requiring that a judge's speech be courteous to those who appear before her is at least as easily justified as requiring the same from a grocery clerk at the checkout counter. This is especially so given the added and crucial nuances that undue impatience, discourtesy or undignified expression engaged in by a judge in the course of a trial or other judicial duties can hold for the perception of impartiality.

In First Amendment terms, the justification follows from the centrality of the judicial function and the direct relationship of the explicit speech restrictions to the nature of the judicial position. The restrictions are inherent elements in the description of a socially crucial job, clearly necessary and sharply related to a social interest of the highest order – the maintenance of, and public confidence in, the impartial operation of the system for dispensing equal justice under law.

The same is true for the more general restrictions of conduct that may involve speech occurring within a judge's official duties. An example that has stirred recent debate within Canada is the *Marshall Prosecution*, in which, according to the Inquiry Commission's report, an appellate court included in its opinion some conclusions concerning the fault of a wrongfully convicted defendant that were unsupported by the record, not relevant to the decision, and unfair to the defendant in ways that were gratuitously harmful.[25]

Since the speech in such a case is so inextricably linked to the execution of the judicial task, no greater problem of free speech is involved in subjecting such conduct to accountability review than if a judge had deliberately misinstructed the

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[25]See generally *Report to the Canadian Judicial Council of Inquiry Committee Established Pursuant to subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (1991) 40 U.N.B.L.J. 210.

jury. The question in both cases would be whether a judge had failed in the proper performance of the judicial task. For the same reasons that rules *explicitly* regulating speech directly involved in a judge's work can be justified, rules regulating *conduct* that may include speech can constitutionally preclude a judge from revealing to the jury the judge's own strong and well-based belief of a criminal defendant's guilt, or admitting inadmissible evidence simply because the judge feels certain that it is true, or using the judicial office to lay blame that is unsupported by the record and irrelevant to resolving the issues before the judge. All these things would violate what it is to be a judge in a most direct way.

Such situations may, however, be complicated by the fact that the "findings" appear, at least on the surface, to involve the kind of judgment necessary to judicial decision-making. While a judge may be right or wrong in finding the facts or applying the law, such errors, as a matter of practicality or fairness, cannot *ordinarily* be matters for discipline.[26] Although the codes of judicial conduct do require a judge to adhere to the law in decision-making, substantial deference is required if every decision on the facts or law is not to be turned into a question of accountability or discipline. As the correctness of judicial rulings and the relevance of the remarks in a judge's opinion become more debatable, disciplinary review may become less appropriate. That is not because speech is involved, however, but rather because the disciplinary review of judicial decision-making would then start to impinge more heavily on the judicial function itself and more dangerously on the judicial independence necessary to make correct, but unpopular, decisions, or to explain them accurately and candidly.[27]

III (b) Extra-Judicial Speech: Public Issues and Politics[28]

The issues involved in the proper or permissible regulation of judicial speech that occurs outside the context of a judge's judicial work are more difficult precisely because they do not ordinarily have the same direct connection to a judge's work that most clearly justifies restrictions in other situations. To the extent that extra-judicial speech does directly affect judicial duties, as in extra-judicial

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[26]See *Matter of Benoit* (1985), 487 A. (2d) 1158 at 1162-1164 (Me.) where it was held that a legal error constitutes misconduct, rather than a reversible error, only if a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong under all of the circumstances in which the error was committed.

[27]To say that deference is appropriate to disciplinary review of judicial decision-making, including explanations in a judicial opinion, is to urge caution, not abdication. Little, if any, deference is due with regard to rulings that are unacceptably wrong and have serious consequences. Errors that are established to be deliberate call for no deference at all.

[28]As indicated earlier, in order to concentrate on the general questions involved in judicial free speech, this article does not address the more specialized question of political speech or activity involved when a judge is a candidate for judicial office.

comment on cases pending before other judges, restrictions would of course be constitutionally justified on the same basis.

By prohibiting political partisanship in its most naked forms, the *Model Code* suggests that explicit political activity is inconsistent with the nature of the judicial office. On the other hand, by not expressly prohibiting all public issue speech by judges, and even encouraging speech with regard to the law and judicial administration, the *Code* clearly suggests that not all broadly political speech is inappropriate for members of the judiciary. Yet, the permissible area is left largely undefined – governed only by a general reference to the other provisions of the *Code*, some of the most important of which are themselves general and undefined.

All that can be offered within the scope of this article is an effort to suggest a general framework as a starting point for assessing the various situations and kinds of judicial commentary that can arise. The formulation is based on the *Model Code*'s exclusion of speech directly undermining judicial impartiality in actual or likely cases, its exclusion of partisan political activity, its general recognition of the permissibility of extra-judicial public issue speech by judges, the protection of the nature of the judicial office that is reflected in the "other provisions" of the *Model Code* to which all extra-judicial speech is subject, and the speech-protective principles underlying the First Amendment. The framework, in short, attempts to set forth the factors that seem most relevant to determining the balance between the presumption of free speech on public issues and those social interests that, in terms of First Amendment doctrine, are of the highest order and are directly related to the essential and necessary nature of being a judge.

The two factors I would propose as a starting point for determining what speech can be deemed impermissible for judges are based on two of the matters that are most clearly among the central concerns of the *Model Code* and whose prohibition is among the most clearly permissible under the First Amendment: (1) the extent to which a judge's extra-judicial statements deal with issues or persons likely to be involved in cases over which the judge must, or ought to, preside; and (2) the extent to which a judge's comments are partisan in nature or context, rather than addressed more generally to issues of public policy. In order to assess the appropriateness of particular remarks or the practice of a particular judge with regard to the second factor – the extent to which the speech or practice is unacceptably partisan – two other factors may come into play: (a) the extent and frequency with which a particular judge engages in public political discussion, so that the greater the frequency, the greater the danger that the line between the judicial and the general political functions is crossed by the judge and thereby for the judiciary in general; and (b) the extent to which the issues addressed are within or outside the realm of issues arguably related to the proper operation and structure of the legal system.

The easiest of these considerations to identify and deal with is the public issue speech that is challenged because it involves issues that are likely to come before the judge. Such speech would seem to be at least implicitly governed by the explicit prohibition on public comment on pending or impending cases. The *Code* prohibition would explicitly apply to any speech, whether in or out of court, that literally came within its proscription. It would be justified constitutionally because of its direct relationship to the central need of the judicial system to maintain impartiality and avoid the actuality and appearance of prejudgment by the presiding judge or the judicial system in the actual pending or impending cases that were the subject of the remarks and would apply to all of a judge's public speech, whether political or otherwise. Even where there is a question as to whether the remarks are explicitly directed at a particular case, the principle could apply to all of a judge's public speech that clearly implicates issues in pending or impending cases, whether political or otherwise.

In the area of public issue or political speech, this principle might well come into play in the case of remarks directed to general political issues that involve the power of the legislature to enact or of the executive to administer or enforce laws – questions concerning the constitutionality of particular proposed actions. Such comments might well involve judicially cognizable issues that could come before that judge or other judges. Such pronouncements on litigable issues concerning the power of the political branches of government would be as inappropriate, when made outside of the deliberative judicial process for considering and resolving them, as if a judge had publicly announced her belief that a newly indicted defendant was guilty (or innocent) before a trial had occurred. Whether or not this was improper would depend on the likelihood that the issues would be raised in future litigation.

The question of partisanship in public issue speech beyond the nakedly-partisan political activities specifically designated in the *Model Code* is far more difficult. Those difficulties raise a question as to whether it is even possible to draw any effective or predictable intermediate line between speech that is closely and narrowly associated with the administration of the judicial system and speech that is essentially analogous to the *Code*'s explicitly barred political activities.

The *Model Code* is surely correct in its position that nakedly partisan political activity inherently undermines both judicial impartiality and judicial independence from the regular democratic political process, both of which are essential to judges' ability to decide individual cases fairly and according to the law. Its explicit prohibition of those designated activities specifically supplements other provisions of the *Code* requiring insulation of judicial decision-making from private interests, and providing that "[a] judge shall not be swayed by partisan interests, public

clamor or fear of criticism."[29] Influences that are wholly proper for a legislator or executive in a representative democracy are unacceptable in the judiciary. There is a direct connection between the likelihood of actual or apparent political influences and the judicial work of a judge who is also a party leader or campaigner; the directness of that connection establishes the same constitutional justification as that which supports restrictions on the speech of judges in their actual judicial work.

The difficult question is how far the non-partisanship principle can be carried into the realm of less-nakedly-political expression. A position that most highly values the protection of the separate and special nature of the judicial position is to have no judicial speech on public issues other than what is most closely associated to the administration of the judicial system – a position that the overwhelming majority of judges probably follow as a matter of their own sense of what is either appropriate or required by the judicial position. On the other hand, a position that more highly values the role of free speech and the need for protecting it would permit judicial speech on public issues that is not essentially analogous to the *Code*'s explicitly barred political activities.

Drawing an intermediate line raises a number of difficulties. The *Model Code*'s attempt to draw such a line without in fact drawing it illustrates some of them. Its primary attempt is to suggest a distinction between speech related to law and the administration of justice and speech on non-legal subjects. Yet, it permits both and subjects both of them, at least on the face of its text, to the same potentially restrictive qualifications.

Discussion of law-related issues to which judges might make important contributions consistent with their judicial tasks and experience, and speech that is relevant or necessary to the maintenance and improvement of the legal and judicial system, are difficult to distinguish, except in gross extremes, from the discussion of other public issues that are broadly political in nature. The impact of mandatory minimum sentencing on a judge's ability to deal effectively with the individual defendants who come before her, or the nature of a corrections system to which legislation, either enacted or proposed, may require the judge to sentence to life imprisonment all thrice-convicted felons are but two examples.

The work of the courts and opportunities for constructive broadening of the public's knowledge and perception of the legal system are also involved. Chief justices report to legislatures and the public on issues concerning the operation of the courts and the funds that are needed for it. Some justices of the United States Supreme Court appear on highly informative and educational televised panels, contributing their unique perspectives to the public understanding of vital social

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[29] *Supra* note 1 at Canon 3B(2).

issues. The category of judiciary-related issues that a judge is presumably encouraged to discuss is not easily caged; truly meaningful discussion of such issues touches on public and political concerns that are broader than merely matters directly or narrowly affecting isolated work-a-day aspects of our judicial institutions. How confined in their range of relevant issues, or how constrained against their own candor, do we want judges to be?

Speech-protective First Amendment considerations come into play with regard to such comments – the judge's own interest as a citizen and conscientious member of the judiciary, the interests of the judicial institutions for which the judges are the primary sources of information, and the general public's interest in having the public discussion fully reflect the experience of those who are especially familiar with the situations and issues involved. The special problems of censorship and viewpoint discrimination that lurk in any attempt to distinguish appropriate and inappropriate speech on the basis of "establishment" approval that might assure greater "propriety" has been discussed above in connection with the ambivalent official "Commentary" to *Model Code* Canon 4B.[30]

On the other hand, it would not be credible to maintain that participation in public issue discussion can never draw judges into the political fracas in a way that may endanger the appearance of impartiality or judicial independence from the ordinary political processes. The more exclusively a public issue is associated with particular partisan or particular private interest groups, the greater the danger. The more an issue is associated with the business of the courts themselves, the less the danger (in general, although certainly not in all cases) and the more specifically related the justification is to judicial speech. Yet, this subject-matter based interrelationship between partisanship and the ambiguously indeterminate distinction between matters related to law and those related to non-legal subjects almost impossibly compounds the First Amendment problem. The scale of assessment becomes a slippery one indeed. The line seems too difficult to draw without threatening to preclude judicial comment on matters closely related to the judicial system itself or skewing the debate by imposing subject matter distinctions on what judges can talk about and what they cannot.

One of the difficulties inherent in the problem of drawing an intermediate line, however, is the unsatisfactory nature of *not* doing so. Taking either of the two more extreme positions requires an unsatisfactory alternative, the sacrifice either of the contributions that judges can make to constructive public discussion or of the protection of the judicial role.

Perhaps, in the end, the best solution does lie within the *Model Code*'s ambivalence – itself a symbol of the problem's irresolvable nature. Let the ethic

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[30] Section 1 (c) of this article.

that is already established within judges' own perception of their non-political roles be essentially self-enforcing, saving formal enforcement, as through disciplinary review, for the more egregious departures into the areas more closely analogous to the nakedly political activities explicitly designated by the *Model Code*. There is, after all, nothing wrong with having your cake and eating it too – if you can do it.

I realize that such a resolution may sound less like an American insistence on strict definition and enforcement of legal principle and more like an exercise in Canadian reasonableness or international law's recognition that law can include norms of conduct that may be inadequately enforceable. There is, however, no rule against an American perspective that includes a little Canadian accommodation.