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Meghan K. Jacobson

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Assault on the Judiciary: Judicial Response to Criticism Post-*Schiavo*

MEGHAN K. JACOBSON*

The freedom to question and criticize the government has been a protected right¹ and long-standing tradition throughout American history. Since the drafting of the Constitution over 200 years ago, judges have anticipated and sometimes even encouraged public scrutiny of judicial decisions. Nevertheless, public criticism of the judiciary has reached unprecedented heights. In 1996, for example, there was a sharp increase in both the frequency and intensity of attacks on the judiciary. Although in the following years public criticism of the judiciary markedly declined, the past two years have seen judicial criticism escalate to an entirely new level.² Allegations of misconduct, intimidation, threats, and even physical violence against the judiciary have become the norm, and yet all the while, the victims have remained virtually silent. While the public outcry surrounding the tragic story of Terri Schiavo led to vicious attacks on individual judges and the independence of the judiciary as a whole, the judiciary did not rise to its own defense. Instead, academic scholars, individual lawyers, and the organized bar responded to the criticism. As such, it is only natural to wonder: why did the judges fail to respond?

The answer to that seemingly simple question is complicated by the multitude of factors related to the appropriateness of judicial response to criticism. With few exceptions, it is the general consensus that ethical guidelines, tradition, and maintaining the dignity of the judiciary

* J.D. Candidate 2007, University of Miami School of Law; B.A. 2001, Tulane University. I dedicate this Note to my grandma, Valeria Morrissey, who has been a constant source of strength and inspiration throughout my life. I am eternally grateful to my parents, Stephen and Diane Jacobson, whose love and support motivate me to strive for perfection in everything I do, and to my fiancé, Chris Bancroft, for his endless patience, understanding, and encouragement throughout the past three years. I also thank Lindsay Harrison for her guidance during the writing process.

1. See U.S. CONST. amend. I (prohibiting Congress from making any law “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).

2. See D. Michael Guerin, *Why an Independent Judiciary*, 78 WIS. LAW. 5, 49-50 (explaining how recent criticism directed toward the judiciary has turned from healthy debate to personal attacks on judges); see also Michael B. Hyman, *What to Do About Heightened Intensity of Attacks on an Independent Judiciary*, 19 CBA REC. 12 (“[O]f late, both sides of the political aisle have notably ratcheted up the rhetoric beyond expressing simple displeasure or disagreement with an individual opinion. Instead, Washington has taken to assailing the judiciary’s authority, discretion, and integrity.”).

encourage silence in the face of criticism, whether that criticism is directed toward individual judges or is a generalized attack on the judiciary as a whole. This Note will address the wisdom of that consensus and whether the judiciary is ethically permitted to respond to the escalating public criticism. If so, should the judiciary nevertheless remain silent in the face of criticism, or is it in the best interest of both judges and the American people for the judiciary to respond? Moreover, what are the risks of responding, or failing to respond, when the separation of powers and the independence of the judiciary – the very foundations of our democratic government – are threatened?

HISTORICAL BACKGROUND

The debate over the independence of the judiciary is not new. More than 200 years ago, our Founding Fathers engaged in heated arguments, both before and after the Constitutional Convention, focusing on the extent and nature of the judiciary's role in the newly formed government.³ Indeed, today's outspoken critics of the judiciary find themselves in good company with the likes of Alexander Hamilton, Thomas Jefferson, and the man commonly referred to as the "Father of our Constitution," James Madison.⁴

The signers of the Declaration of Independence were all too familiar with the oppressive results of unchecked political power. The King of England established an absolute tyranny over the American colonies, and the signers recognized the importance of creating a stable system of justice to protect the people.⁵ The result was a declaration of this country's freedom and independence that embodied a "profound feeling for due process that is part of the American soul."⁶

Because the Founders were wary of both kings and political majorities, they were cognizant of the need to create a system of checks and balances to ensure that a fundamental principle of this country – the rule of law – would be safeguarded for the future.⁷ Accordingly, our Constitution provides for a three-tiered system of government, structured so that no branch holds limitless power.⁸ The judicial branch, once

3. Kathleen Blatz, *The State of the Judiciary*, 62 *BENCH & B. MINN.* 26, 27 (2005).

4. *Id.*

5. THE DECLARATION OF INDEPENDENCE para. 10, 11 (U.S. 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

6. *Kansas and Missouri Chief Justices Address Judicial Conferences*, 74 *J. KAN. B. A.* 9, 11 (2005) (remarks by Chief Justice Michael A. Wolff of the Missouri Supreme Court).

7. *Id.* at 12.

8. *See generally* U.S. CONST. arts. I–III.

described as the “least dangerous” branch of the government,⁹ holds a special place in our tripartite system, as it is primarily responsible for protecting basic human liberties from government encroachment. It completes the nation’s system of checks and balances¹⁰ and serves as an “arbiter of disputes between factions and the instruments of government.”¹¹

An independent judiciary¹² is vital to the accomplishment of these tasks. To ensure this independence, Article III of the Constitution provides that federal judges shall have life tenure and not be subject to a decrease in pay.¹³ As such, the judiciary is not a mere pawn to the executive and legislative branches but is insulated from retribution when the majority disagrees with the law. The judges can be confident in their ability to follow the law, regardless of the will of the people. However, for the judicial branch to check the executive and legislative branches and fulfill its role as protector of the people, it must have a vehicle by which to do so. This is found in the judiciary’s power of judicial review.

The concept of judicial review stems from *Marbury v. Madison*, the controversial decision in which Chief Justice John Marshall first articulated the concept by explaining that “the constitution controls any legislative act repugnant to it . . . [and it is] the province and duty of the judicial department to say what the law is.”¹⁴ This novel idea – that the courts would be the final arbiter of disputes between the other branches of government – led to harsh criticism of Marshall by many, including then-President Thomas Jefferson.¹⁵ In response to his critics, Marshall,

9. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1962).

10. *Id.* (“For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’ . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”) (citation omitted).

11. *Kansas and Missouri Chief Justices Address Judicial Conferences*, *supra* note 6, at 12.

12. See Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 PA. B. ASS’N Q. 60, 61 (identifying three policy goals that support the ideal of an independent judiciary, including: (i) protecting the people from “executive oppression”; (ii) “protection against violations of basic human rights” from either uncurbed legislative power or from a “majority opinion hostile to minority viewpoints”; and (iii) “judges who are not influenced by bias or self-interest, and are not swayed by momentary political impulses or demands” (citing Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 566, 567 (1996))).

13. U.S. CONST. art. III, § 1 (providing that federal judges “shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”).

14. 5 U.S. 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide the operation of each. . . . This is the very essence of judicial duty.”)

15. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 53 (1993) (citing 10 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 140 (Paul Leicester Ford ed., 1899)). Jefferson writes of Marshall’s opinion in *Marbury*:

[T]he Constitution has given, according to this opinion, to one of them alone the

unlike the typical modern judge, chose to respond publicly, albeit anonymously. Marshall denounced his critics and supported his view of the proper role of the Supreme Court by writing to the editor of a local newspaper under the penname of "A Friend of the Constitution."¹⁶ Marshall's critics eventually gave way, and judicial review continues to be the foundation on which our legal system rests.

The present rule of law deriving from *Marbury*, though not infallible, allows American citizens to rely upon the justice system with a substantial amount of certainty and encourages the resolution of disputes in a courtroom rather than on the streets.¹⁷ When an action's legality is questionable, few of us look to violence; instead, we turn to the courts for a just and peaceful resolution.¹⁸ The judge's decision is binding, and a litigant's options are limited to judicial appeal or a plea to the legislature in an attempt to change the law. Although no judge is perfect, this method of solving disputes has been highly successful in providing justice to American citizens. Indeed, our judicial system is highly regarded and emulated by many other countries around the world.¹⁹

ASSAULT ON THE JUDICIARY

The judiciary has come under attack numerous times throughout this country's history. In the 1950s, Earl Warren, Chief Justice of the U.S. Supreme Court and author of *Brown v. Board of Education*,²⁰ was the subject of widespread public criticism. "Impeach Earl Warren" signs were displayed across the nation, especially in the South, compliments of a private right-wing organization known as the John Birch Society.²¹ Warren's critics accused him of expanding "his judicial authority unconscionably and exponentially" and demanded that he be impeached.²² More than one million Americans signed a petition for

right to prescribe rules for the government of the others; and to that one too which is unelected by, and, independent of, the nation The Constitution, on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.

Id. (internal quotations omitted).

16. Michael Daly Hawkins, *Dining with the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L.J. 1353, 1356-57 (1996).

17. See Scott H. Hansen, *Is There a Future in Judging?*, 48 ADVOCATE (IDAHO) 21 (2005).

18. *Id.* at 21-22.

19. Blatz, *supra* note 3, at 28 ("[O]ur system of checks and balances is emulated worldwide . . . [and] a strong, independent judiciary is considered a necessary ingredient in the recipe for emerging democracies.").

20. 349 U.S. 294 (1955).

21. Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1, 4 (2005).

22. *Id.* at 3.

him to be removed from office.²³ The efforts to retaliate against Warren for the Court's unpopular and "activist" decision, which much of society deemed abhorrent, was seen by many as nothing but a "frontal assault on judicial independence."²⁴ Of course, the impeachment efforts were unsuccessful and *Brown* has now become one of the most celebrated Supreme Court decisions in our nation's history.²⁵

A relatively recent and particularly egregious example of hostility toward the judiciary involved Harold Baer, Jr., a federal judge appointed to the Southern District of New York in 1996 by then-President Bill Clinton. Criticism of the judiciary hit an all-time high – or as some might say, an all-time low – when Judge Baer was perceived by the public to be "soft" on criminals. The judge's ruling to suppress evidence in a federal drug case²⁶ was initially criticized by local New York politicians, including then-Mayor Rudolph Giuliani and then-Governor George Pataki.²⁷ Public criticism of Judge Baer's ruling soon became widespread, eventually developing into a major bipartisan issue in Washington. Congress was in an uproar with more than 200 members in the House of Representatives calling for Judge Baer's impeachment.²⁸ Even the White House became involved when the *New York Times* reported that White House Press Secretary Michael McCurry demanded that Judge Baer reverse his decision or risk being forced to resign.²⁹ Matters escalated even further when then-Senate Majority Leader Bob Dole called for his impeachment.³⁰

Judge Baer responded to his critics in an unusual and, some would

23. *Id.* at 4.

24. *Id.* at 3-4 ("It was retaliation, but it was also calculated intimidation designed to take the edge off constitutional interpretation in the years to come and to stand judicial independence on its head.").

25. *See, e.g.,* Gina Holland, *Judges' Job Security Defended*, VENTURA COUNTY STAR, Jan. 1, 2005, at 3 ("[Former Chief Justice] Rehnquist said that views on activism are subjective. 'Federal Judges were severely criticized 50 years ago for their unpopular, some might say activist, decisions in the desegregation cases, but those actions are now an admired chapter in our national history,' he said.").

26. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated by* 921 F. Supp. 211 (S.D.N.Y. 1996).

27. Louis H. Pollack, *Criticizing Judges*, 79 JUDICATURE 299, 300 (1996).

28. *See Brown*, *supra* note 21, at 7.

29. Pollack, *supra* note 27, at 300 ("McCurry 'put a federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation.' A day later the White House waffled. Jack Quinn, counsel to the president, wrote a Republican congressman who was urging that Judge Baer be asked to resign that 'the President supports the independence of the Federal judiciary, which is established by the Constitution. Although comments in recent press reports may have led some to conclude otherwise, the President believes strongly that the issues now before Judge Baer should be resolved in the courts.'")

30. *Id.* ("Senator Dole [insisted], '[Judge Baer] ought to be impeached instead of reprimanded. If he doesn't resign, he ought to be impeached.'")

say, dangerous manner – he reversed himself.³¹ Less than three months after he rendered his original ruling to suppress the drug evidence, Judge Baer vacated that ruling in an opinion that another federal judge referred to as a “careful analysis of the additional testimony . . . [written with] clarity, scholarship, forthrightness, and dignity.”³² In his second opinion, Judge Baer explained that “[a]lthough I previously accepted the defendant’s version based on the videotaped confession, the additional evidence has necessarily changed my view.”³³ Interestingly, the judge seemed to apologize directly to the public for his initial opinion, stating,

unfortunately the . . . (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City.³⁴

We may never be certain whether Judge Baer’s reconsideration and eventual reversal of his original order was merely the result of additional evidence or instead the unfortunate byproduct of an unconstitutional attack on the separation of powers and independence of the judiciary. Although many commentators maintain that Judge Baer did *not* in fact succumb to political pressure, it has been suggested that “the appearance that he did defer to the will of the man who appointed him judge is palpable and if he did so, judicial impartiality was grievously impaired.”³⁵

Following the intense criticism aimed at Judge Baer, four judges in the U.S. Court of Appeals for the Second Circuit reacted in an unprecedented manner.³⁶ Specifically, the judges issued a joint statement condemning the criticism, which admonished, “[w]hen a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling, the entire process of orderly resolution of legal disputes is undermined.”³⁷ The political attacks, the judges insisted, “threaten to weaken the constitutional structure of this nation.”³⁸ Former Chief Justice William Rehnquist also had his say in the controversy, referring to

31. *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996).

32. Pollack, *supra* note 27, at 301.

33. *Bayless*, 921 F. Supp. at 216.

34. *Id.* at 217.

35. Brown, *supra* note 21, at 7.

36. Then Chief Judge Jon O. Newman, one of the judges who prepared the statement, insisted that the intensity of the criticism directed at Judge Baer merited such a drastic response. “‘We issued our statement because what happened went far beyond informed criticism.’” John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50, 54 (1996).

37. *Id.* (internal quotations omitted).

38. Don Van Natta Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1 (internal quotations omitted).

judicial independence as a “crown jewel of our system of government.”³⁹ Rehnquist indicated that while criticism of the court is anticipated, the federal judiciary must remain independent if it is to function properly.⁴⁰ It was not surprising that a Supreme Court Justice and the Second Circuit judges recognized the attack on Judge Baer for exactly what it was – a threat to the foundation of our country’s government and an unconstitutional encroachment on judicial powers. What is surprising is that the sources of the criticism – representatives of the remaining two branches of government – did not see it as such.

There are numerous factors which make both federal and state judiciaries easy targets for criticism and attack. Because the Framers of the Constitution were concerned with potential attacks on the judiciary resulting from unpopular decisions, they undertook great efforts to shield federal judges from the political wavering of the public.⁴¹ Though granting federal judges life-tenure was intended to reduce threats to the independence of the federal judiciary, their protected status may in fact have invited more criticism in two distinct ways. First, because federal judges need not fear the loss of their job as a result of an unpopular decision, some accuse these judges of being unaccountable and unresponsive to public opinion.⁴² Second, because federal judges are appointed, some suggest they lack a constituency to defend their actions, which may invite more frequent and more hostile criticism,⁴³ particularly from politicians who have much to gain.⁴⁴

This reasoning does not necessarily hold true for state judges, many of whom are elected to the bench. The election process adds a new and highly political element into the criticism of individual judges. Unsubstantiated allegations are often lodged against elected judges with the sole purpose of gaining publicity during a political campaign. Because elected judges are not protected by a lifetime appointment, they must be “acutely conscious of the political fall-out from their decisions.”⁴⁵

Moreover, both state and federal judges are often perceived as easy

39. Gibeaut, *supra* note 36, at 55 (internal quotations omitted).

40. *See id.* (“Rehnquist said, ‘[t]he independence of the federal judiciary is essential to its proper functioning and must be retained.’”).

41. *See* U.S. CONST. art. III, §1.

42. Cooper, *supra* note 12, at 61.

43. *See* Hawkins, *supra* note 16, at 1355 (explaining that while a politician may think twice before criticizing a local justice of the peace, he will not hesitate before taking on a Supreme Court Justice).

44. *See generally* Sandra Day O’Connor, Justice, U.S. Supreme Court, Remarks on Judicial Independence at the Dedication of the Lawton Chiles Legal Information Center at the University of Florida Levin College of Law (Sept. 9, 2005), in 58 FLA. L. REV. 1 (2006) (discussing specific instances in which politicians have verbally attacked the judiciary).

45. *See* Cooper, *supra* note 12, at 61-62 (recognizing that this realization can threaten an elected judge’s independence and impartiality).

targets of criticism⁴⁶ because of the unlikelihood that they will respond. Indeed, there is a general consensus throughout the legal community that it is unwise, some even say unethical, for a judge to respond to his or her critics.⁴⁷ While it is true that, with few exceptions, judges typically remain silent in the face of an attack, it is less likely that their silence is mandated by judicial ethical guidelines than it is a result of 200 years of tradition.⁴⁸

THE CURRENT STATE OF THE JUDICIARY

In the ten years that have passed since Judge Baer was attacked with threats and intimidation, public criticism of the judiciary has markedly declined. However, with a few controversial judicial decisions making headlines in 2005,⁴⁹ there has been a sudden resurgence of criticism directed toward both state and federal judges, along with corresponding threats to judicial independence. Indeed, 2005 alone saw an alarming increase in unjust allegations, threats,⁵⁰ intimidation,⁵¹ and even physical violence⁵² aimed at the judiciary.

One possible reason for the increasing amount of public criticism of the judiciary is the recent advances in technology.⁵³ Television and radio sound bites, e-mail, and Internet news enable messages to be transmitted instantaneously to millions of individuals at one time and “in this electronically charged reality, the phrase ‘activist judge’ is being used

46. *Id.* at 63.

47. *Id.* (explaining that the problem of judicial criticism is exacerbated by the inability of the judiciary to fight back).

48. See Stephan J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 682-83 (1999).

49. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that New London's exercise of eminent domain power in furtherance of economic development plan satisfied the “public use” requirement of the Fifth Amendment of the U.S. Constitution); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that execution of individuals under eighteen years of age at the time of their capital crimes is prohibited by Eighth and Fourteenth Amendments); *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1161-63 (M.D. Fla. 2005) (denying Counts 6-10 of the Schindlers' Motion for Temporary Restraining Order requiring “[Michael Schiavo] and hospice to transport [Terri Schiavo] to hospital for medical treatment” after federal district court had been granted jurisdiction over this specific case by federal law); *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1381-82 (denying Counts 1-5 of the Schindlers' Motion for Temporary Restraining Order) (M.D. Fla. 2005).

50. See Guerin, *supra* note 2, at 49.

51. See, e.g., *id.* at 50 (explaining how some of the judges involved in the *Schiavo* case endured death threats and were forced to retain security personnel to ensure their protection).

52. See Jeff Coen & David Heinzmann, *Federal Judge's Family Killed*, CHI. TRIB., Mar. 1, 2005, at C1.

53. See Cooper, *supra* note 12, at 62 (“In John Marshall's time, a letter would take weeks to travel from Virginia to Boston; today, an attack on a judge can reach every town in Pennsylvania simultaneously and instantaneously.”).

with ever increasing frequency.”⁵⁴ The use of today’s media to disseminate information is especially dangerous because it rarely provides a complete and accurate picture of what happens in state and federal courthouses. Instead, contemporary media provides the public with a mere glimpse of what actually occurred.⁵⁵ Consequently, the public is often unaware of the reasoning and policy behind a judicial decision.

The source of contemporary judicial criticism also differs somewhat from criticism of the past. Whereas in years past political fringe elements primarily were responsible for and led the attacks on the judiciary, contemporary criticism frequently originates from coordinate branches of government or from highly regarded and influential political figures as part of a deliberate political strategy.⁵⁶ Most often, the source of these attacks is the legislative branch. One such attack was launched in 2005 against the U.S. Supreme Court and Justice Kennedy for the Court’s decision in *Roper v. Simmons*.⁵⁷

As part of their reasoning in holding that the execution of juveniles violated the Eighth Amendment’s ban on cruel and unusual punishment, the Court in *Roper* considered the fact that the United States is the only country in the world that continues to sanction the execution of minors.⁵⁸ A few powerful members of Congress blasted the Court for citing international law in their opinion, boldly arguing that it was sufficient grounds for removing the Justices from the bench.⁵⁹

54. Blatz, *supra* note 3, at 27 (explaining how “[b]loggers, pundits, Web surfers, talk radio, and cable news shows can turn perception into reality in amazingly short periods of time”). Adding to the difficulty, extensive surveys reveal three things about the public’s perception of the American justice system. First, most people know very little or nothing at all about the American court system. Second, there is an “underlying feeling of hostility” toward the judicial system. Finally, what most people know or think they know about the justice system comes from soundbites, television dramas, or sensational and atypical high-profile cases. Stephen Kelson, *Judicial Independence and the Blame Game: The Easiest Target Is a Sitting One*, 15 UTAH B.J. 14, 15-16 (2002). Indeed, it seems as though “the public understands the legal profession and the role of the judicial system less than ever before, and the mass media and the Internet are available to anyone with an opinion, no matter how informed or uninformed that opinion may be.” *Kansas and Missouri Chief Justices Address Judicial Conferences*, *supra* note 6, at 13.

55. Kelson, *supra* note 54, at 16. As Judge Michael J. Wilkins noted, the press often finds it easier to act as a critic of the court than to actually report what the court did and why. According to Wilkins, “[a]nyone can criticize something they don’t fully understand. The more noble undertaking would be to only criticize after assuring that both the reporter, and the readers or listeners, fully understand what actually happened, and why. Then criticize away.” *Id.* (internal quotations omitted).

56. Cooper, *supra* note 12, at 62.

57. *Roper v. Simmons*, 543 U.S. 551 (2005); see also John J. Flynn, “Making Law” and “Finding Facts” – *Unavoidable Duties of an Independent Judiciary*, 18 UTAH B.J. 6 (2005).

58. Flynn, *supra* note 57, at 6.

59. *Id.* Professor Flynn recognized that while such “absurd claims can easily be dismissed as the bizarre ranting of the ignorant, or cynical attempts by political fanatics to gain control of the courts,” they nevertheless resonate with many citizens. *Id.*

Another example illustrative of a legislative attempt to usurp the power of the judiciary occurred on June 23, 2005, when the chairman of the House Judiciary Committee, Congressman James Sensenbrenner, wrote a five page letter to Chief Judge Flaum of the U.S. Court of Appeals for the Seventh Circuit.⁶⁰ In the letter, Sensenbrenner demanded that the court reverse its decision in a recent narcotics case based upon his belief that the prison term the criminal received was too short.⁶¹ Sensenbrenner insisted on Judge Flaum's "prompt response" to "rectify the panel's actions."⁶² The letter caused such outrage that the aid who drafted it was fired.⁶³

THE POST-SCHIAVO CRISIS

Perhaps the most notable legislative attack on the independence of the judiciary occurred during the remarkably public legal battle over the life of Terri Schiavo, a Florida woman who had been living on artificial life support since suffering a cardiac arrest in 1990.⁶⁴ While the bitter battle between Terri's husband and legal guardian, Michael Schiavo, and Terri's parents, Mary and Bob Schindler, made its way through both the Florida state and the U.S. federal court systems, the media provided twenty-four hour coverage, and the American public was hooked.⁶⁵ Toward the end of Terri's life, numerous court decisions sided with Michael Schiavo and blocked the Schindlers' efforts to sustain their daughter's life.⁶⁶ With the clock finally running out, both the Florida state legislature and U.S. Congress attempted to pass special laws

60. Barbara E. Bergman, President, Nat'l Ass'n of Crim. Def. Law., Inaugural Remarks (Aug. 6, 2005), in 29 CHAMPION 41, 43 (2005).

61. *Id.*

62. *Id.*

63. *Id.*

64. Martha Neil, *Some Cases Are All the Rage – Literally*, 91 A.B.A. J. 38, 41 (2005).

65. See generally Lily Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665 (2007).

66. *E.g.*, Schiavo *ex rel.* Schindler v. Schiavo, 358 F. Supp. 2d 1161, 1161-63 (M.D. Fla. 2005) (denying Counts 6-10 of the Schindlers' Motion for Temporary Restraining Order requiring "[Michael Schiavo] and hospice to transport [Terri Schiavo] to hospital for medical treatment"), *aff'd*, 403 F.3d 1289 (11th Cir. 2005), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir. 2005), *reh'g denied*, 404 F.3d 1282 (11th Cir. 2005), *cert. denied*, 544 U.S. 957 (2005); Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1381-82 (denying Counts 1-5 of the Schindlers' Motion for Temporary Restraining Order) (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005), *reh'g en banc denied*, 403 F.3d 1261 (11th Cir. 2005), *cert. denied*, 544 U.S. 945 (2005); *In re* Guardianship of Schiavo, No. 90-2908-GD-003, 2005 WL 459634, at *1-2 (Fla. 6th Cir. Ct. Feb. 25, 2005) (denying the Schindlers' emergency motion to stay the order to remove Terri Schiavo's feeding tube); see also *In re* Guardianship of Schiavo, No. 90-2908GD-003, 2000 WL 34546715, at *7 (Fla. 6th Cir. Ct. Feb. 11, 2000) (ordering removal of Terri Schiavo's feeding tube). Pinellas County Circuit Court Judge George W. Greer, as a result of his rulings throughout the Schiavo case, received numerous death threats, angry e-mails, and phone calls. Julia Duin, *Judge in Schiavo Case Faces Death Threats*, WASH. TIMES, Mar. 30, 2005, at A1.

intended to preserve Terri's life as appeals in the case were exhausted.⁶⁷ After the higher courts declined to intervene, then-U.S. House of Representatives Majority Leader Tom Delay viciously attacked the federal courts, referring to them as an "arrogant, out-of-control, unaccountable judiciary" and vowed that "the time will come" for the men and women responsible for this to "answer for their behavior."⁶⁸ Congressman Steve King also publicly criticized the judiciary for its decisions in the *Schiavo* case, making a rare threat to cut off court funding.⁶⁹ Others recommended equally drastic measures including mass impeachment and stripping the courts of jurisdiction to hear certain matters.⁷⁰

The congressmen's comments resulted in a firestorm of controversy and fueled a debate that was already raging out of control. But the controversy that ensued implicated issues that reached far beyond the fate of Terri Schiavo. Indeed, the national debate that both preceded and followed Terri Schiavo's death revived the 200-year-old struggle that remains at the heart of our nation's government. The congressmen's threats and allegations were viewed by many throughout the legal community as yet another attempt by the legislature to encroach on the power that the Founding Fathers had reserved for the judicial branch.⁷¹

Such attacks on the judiciary can result in two distinct – yet related – undesirable consequences. First, it is feared that the criticism will prevent judges from remaining insulated from "the personal and political consequences of making an unpopular decision," thereby placing judicial independence at risk.⁷² Second, unjust criticism of the judiciary will erode the public's trust and confidence in the judiciary as an institution, two vital components in maintaining a healthy democracy.

67. Neil, *supra* note 64, at 41.

68. Mike Allen, *DeLay Apologizes for Comments: Leader Wouldn't Say Whether He Wants Schiavo Judges Impeached*, WASH. POST, Apr. 14, 2005, at A5. A month after DeLay fired his angry words at the judiciary, he apologized, explaining that he said something in an "inartful way" and should not have done so. *Id.* Republicans in the U.S. House of Representatives insisted that they did not open, nor did they plan to open, any new investigations of federal judges, despite DeLay's initial promise to the contrary. See Theodore B. Olson, *Lay Off Our Judiciary*, 30 MONT. LAW. 26, 27 (2005).

69. Frank Williams, *Killing Justice: The Judiciary Under Siege*, 54 R.I. B.J. 15, 16 (2005) ("'We can do that,' King said. '[When their] budget starts to dry up – we'll get their attention. We must get them in line.'")

70. See O'Connor, *supra* note 44, at 6. Justice O'Connor described her reaction to a lawyer's suggestion that Congress cut the Supreme Court's budget until it agrees to allow cameras and audio equipment into all federal courtrooms: "Given the political climate, and the tenuous grip many people have on the concept of judicial independence, when I hear a threat to cut judicial budgets, even when it is only about cameras, I get really worried." *Id.*

71. Neil, *supra* note 64, at 41.

72. Kelson, *supra* note 54, at 18; see also Pollack, *supra* note 27, at 301 (attacks on a judge risk inhibition of the judiciary as they endeavor to serve the public by discharging their constitutional duties).

Most of those who viewed the public outcry surrounding the *Schiavo* case as an attack on judicial independence were not as worried about the threats of budget-cutting and jurisdiction-stripping as they were about the possibility that DeLay and other outspoken critics were undermining both individual judges and the judicial institution as a whole.⁷³ For the judiciary to fulfill its role in the tripartite system of government as set out by the Founding Fathers, it must be truly independent and composed of judges who are fair, impartial, and dedicated to applying the law.⁷⁴ There is no room for political considerations or majoritarian beliefs in the law. As former U.S. Supreme Court Chief Justice Warren Burger so eloquently stated years ago, “[j]udges . . . rule on the basis of law, not public opinion, and they should be totally indifferent to pressures of the times.”⁷⁵ But this basic tenet of law is unfamiliar to many Americans,⁷⁶ which makes the statements of influential political leaders all the more dangerous and misleading.⁷⁷ Aware that words such as “accountable” and “activist” were becoming part of some citizens’ everyday vernacular, lawyers, judges, and legal scholars became increasingly concerned with the damage done to the public’s faith and trust in the judiciary and the “impact that eroded trust has [had] on the nature of our democracy.”⁷⁸

Their fears were validated when a September 2005 American Bar Association (“ABA”) Survey⁷⁹ revealed that more than half of the American public was angry and disappointed with the nation’s judicial branch.⁸⁰ The survey, conducted six months after Terri Schiavo’s death, found that a majority of respondents agreed with statements that “judi-

73. Blatz, *supra* note 3, at 28.

74. See, e.g., James W. Riley Jr., *The Judiciary Must Be Independent*, 49 RES GESTAE 5 (2006).

75. Guerin, *supra* note 2, at 5.

76. A poll commissioned by the ABA in July 2005 indicated that forty percent of respondents could not even identify the three branches of government. Martha Neil, *ABA Activism Survey Alarms Scholars*, 31 MONT. LAW 20, 21 (2005).

77. Robert J. Grey Jr., *Stop the Verbal Assaults*, 27 NAT’L L.J. 22 (2005) (explaining that the public’s confusion and misunderstanding of the proper role of the courts has been exploited by some irresponsible political leaders with the goal of intimidating the judiciary into bending to political whims).

78. Blatz, *supra* note 3, at 27. “We need to be concerned because a judiciary subservient to other branches of government cannot uphold an individual’s rights against the stiff wind of popular will.” *Id.*; see also Michael B. Hyman, *Getting Hammered: What to Do About Heightened Intensity of Attacks on an Independent Judiciary*, 19 CHI. B. ASS’N REC. 12 (2005) (“Justice Stephen Breyer, in discussing threats to judicial independence at the ABA meeting in Chicago, told the gathering, ‘[i]f you say seven or eight or nine members of the Supreme Court feel there’s a problem . . . you’re right.’ . . .”).

79. The ABA survey was conducted by the Opinion Research Corporation, who contacted 1016 adults around the country. The margin of error was plus or minus three percentage points. Neil, *supra* note 76, at 20.

80. *Id.*

cial activism” has reached a crisis stage, and – perhaps most shockingly – judges who ignore the peoples’ values should be impeached.⁸¹

The severity of the situation was reflected in the responses of those who took a stand against the outspoken critics of the judiciary. Even before the ABA’s survey was conducted, deans from over 200 law schools across the country, reacting to what this Note refers to as the “post-*Schiavo* crisis,” released a public statement condemning the harmful and irresponsible attacks on the judiciary and demanding an end to the criticism.⁸² The ABA also reacted quickly to the attacks. Six days before Terri Schiavo’s death, for example, then ABA president Robert Grey issued a statement in defense of the judiciary. Recognizing that the circumstances surrounding Terri Schiavo had evoked strong feelings from all Americans, Grey argued that many people have “crossed the line” and are now using the tragedy as an excuse to viciously attack the men and women of the judiciary.⁸³ Grey called on members of the legal profession to respond to attacks on the independence of the judiciary and the Constitution and to work to reinstate public trust and confidence in the American justice system.⁸⁴

Not everyone in the legal community views the recent criticism of judges and the judiciary as an unjustified attack or a threat to judicial

81. *Id.* Moreover, nearly fifty percent of the respondents agreed with a congressman who called judges “arrogant, out-of-control and unaccountable.” *Id.* As one legal scholar explained, the thought that judges should “somehow follow the voters’ views really reflects a fundamental misunderstanding of what judges are supposed to do They should only be criticized when they ignore the law and start infusing their own values into the law regardless of the law.” *Id.* (internal quotations omitted).

82. Williams, *supra* note 69, at 15. The statement read in part: “These attacks upon judges from properly doing their duty are profoundly misguided; if the public comes to believe that judges will make their decisions with an eye towards being evaluated according to some political gauge, respect for our legal system will be seriously undermined. The expectation of fairness and the rule of law will be eroded, and the authority of the courts will diminish.” *Id.*

83. Press Release, Statement of Robert J. Grey, Jr., President, Am. Bar Ass’n, Re: Attacks on the Judiciary in the Terri Schiavo Case (Mar. 25, 2005), <http://www.abanet.org/media/statementsletters/sttjudiciary.html>. Recognizing that it is entirely appropriate for commentators, policymakers, and the public to actively engage in debates over the issues implicated by the *Schiavo* case, Grey demanded an end to the judicial attacks. “Instead of maligning them for applying existing law to the case at hand, even though it may not reflect the current will of Congress, we should praise them for dispensing even-handed justice and upholding the independence of the judiciary even under the most difficult circumstances. These judges deserve our respect, not our scorn.” *Id.*

84. Robert J. Grey, Jr., *Lawyers Must Defend Judges, Juries*, 91 A.B.A. J. 6 (2005). The new president of the ABA, Michael S. Greco, has also taken affirmative steps in defense of the judiciary. In response to what he characterized as an “alarming increase in rhetorical and physical attacks on the judiciary,” Greco established the Commission on Civic Education and the Separation of Powers. Greco hopes the Commission, established in August 2005, will be effective in educating the public about the vital role of an independent judiciary in U.S. government. Michael S. Greco, *Lawyers Have a Lot to Teach*, 91 A.B.A. J. 6 (2005).

independence, however.⁸⁵ To the contrary, some see criticism – even exceptionally harsh criticism – as a natural product of a thriving democracy in action.⁸⁶ They view public criticism as serving a vital function as a check on the judiciary’s power⁸⁷ and insist that what many people characterize as a vicious attack on the independence of the judiciary is simply a modern day resurgence of the 200-year-old struggle between the coequal branches of government.⁸⁸

To be sure, judicial criticism can be constructive, uncovering and addressing a problem that merits public attention.⁸⁹ Public awareness, debate, and criticism of judicial decisions ensure that people are informed of controversial court decisions that have broad implications for all citizens.⁹⁰ Indeed, informed discussion and debate from lawyers, academics, and public officials have been hallmarks of the American legal institution⁹¹ and have played a vital role in shaping the law. Some argue further that public criticism of the judiciary protects against “unwise decisions”⁹² and that, consequently, judges “should welcome all criticism . . . in order to help them improve the quality of their work.”⁹³ Moreover, a judge on the U.S. Court of Appeals for the Second Circuit argues that while all citizens have a right to criticize the judiciary, lawyers, as officers of the court, have an ethical and societal *obligation* to

85. The words of Justice David Brewer, for example, still resonate with many in the legal community. In 1898, he said, “[i]t is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as being beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism.” Roger J. Miner, *Criticizing the Courts: A Lawyer’s Duty*, 29 COLO. LAW. 31, 32 (2000) (internal quotations omitted).

86. John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2d 277, 277 (1998) (arguing that such criticism is the “natural response of the national political process to nominees with little paper record and to a federal judiciary that – rightly or wrongly – has extended its reach into controversial social and moral issues”).

87. Molly McDonough, *Hatch: 9th Circuit Is ‘Poster Child of Judicial Activism,’* 4 A.B.A. J. E-REPORT 4 (2005) (“‘Insisting on freedom from such criticism, or arguing that criticism undermines some notion of judicial independence, insulates the judiciary from a potential check on its power, and, therefore, invites it to be less careful in its decisions and less solicitous to do exact justice.’” (quoting Senator Orrin Hatch)).

88. Yoo, *supra* note 86, at 286.

89. Howard C. Coker, *Responding to Judicial Criticism*, 73 FLA. B.J. 10 (1999).

90. Riley, *supra* note 74, at 5.

91. Pollack, *supra* note 27, at 301.

92. Miner, *supra* note 85, at 32. As Chief Justice Harlan F. Stone once said, “I have no patience . . . with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with the great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.” Miner, *supra* note 85, at 32 (citation omitted).

93. Yoo, *supra* note 86, at 281. While judges certainly do not enjoy being criticized by the public, they are grown adults who do not need to be shielded from reality. Yoo emphasizes that federal judges do not need protection from criticism, as they are the only branch of our national government that is insulated from political pressure. *Id.*

do so.⁹⁴

There can be no doubt that every American enjoys the fundamental freedom to criticize the government,⁹⁵ which necessarily includes the right to criticize individual members of the judicial branch or the judiciary as a whole.⁹⁶ While most people agree that the right to criticize the judiciary is critical to maintaining a free and democratic society,⁹⁷ there is also a general consensus that healthy criticism only goes so far.⁹⁸ To be sure, the type of criticism leveled at the judiciary following the death of Terri Schiavo has crossed the line to become nothing but personal attacks and intimidation.⁹⁹ This criticism, it is feared, will soon prevent judges from remaining insulated from the personal and political consequences of making unpopular decisions.¹⁰⁰

Given the potentially devastating effects that such attacks and unjust criticism can have, i.e., threatening the independence of the judiciary and undermining the public's confidence in the judicial system, the question then becomes, what, if anything, should be done about it?

94. Miner, *supra* note 85, at 31 (arguing that the Preamble to the ABA's Model Rules of Professional Conduct's statement that "it is a lawyer's duty . . . to challenge the rectitude of official action" imposes an affirmative duty on every member of the bar to criticize the courts (internal quotations omitted)); see MODEL RULES OF PROF'L CONDUCT pmb. ¶ 4 (1997).

95. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 145-46 (1959) (Black, J., dissenting) (stating that "the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed"); see also Joseph J. Roszkowski, *ABA House Votes on Criticism of Judges, Medicaid & More at Mid-Year Meeting*, 46 R.I. B.J. 21, 21 (1998) (arguing that the right to criticize public officials and the institutions in which they serve is a vital component of the American concept of self-government and the resulting debate can lead to a better government).

96. Even former President Clinton has asserted his right to criticize the rulings of the federal bench: "[While] I support the independence of the Federal judiciary[,] . . . I do not believe that means that those of us who disagree with particular decisions should refrain from saying we disagree with them." Alison Mitchell, *Clinton Defends His Criticism of New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996 (internal quotations omitted).

97. Indeed, even the ABA recognizes the need to monitor courts and express dissatisfaction with their actions in appropriate forums. These forums include voting booths, higher courts, the media, and the legislature. See, e.g., Am. Bar Ass'n, *Sample Open Letter on Judicial Independence*, May 2005, <http://www.abanews.org/docs/judindepopenletter.pdf>.

98. See, e.g., Coker, *supra* note 89, at 10 ("If [criticism] is misguided, unsubstantiated, exaggerated and unanswered, then [it] unfairly demeans and destroys a person or institution by eroding respect, confidence and trust."); Grey, *supra* note 84, at 6 ("While criticizing judicial decisions is a time-honored practice, efforts to intimidate and threaten judges are not part of that tradition."); Guerin, *supra* note 2, at 50 (arguing that increasing hostility toward the courts will threaten to undermine the independence of the judiciary).

99. Guerin, *supra* note 2, at 49-50; Williams, *supra*, note 69, at 15 (noting that when "judges . . . are publicly belittled, the once bright line between heated, respectful debate and mean-spirited, agenda-laden accusations is eroded").

100. See Kelson, *supra* note 54, at 18.

JUDICIAL OPTIONS IN RESPONDING TO CRITICISM

A thorough analysis of both case law and scholarly writing reveals three general methods that state and federal judges utilize in responding to public criticism. First, a judge may formulate a response within court opinions and other legal documents that he writes as part of his judicial activities. Second, a judge may respond extrajudicially, by personally advocating on his own behalf or by releasing a statement to the media. Finally, a judge may remain silent in the face of an attack, leaving his defense to others such as the organized bar.

RESPONDING WITHIN A JUDICIAL OPINION

It is rare to see a judge respond to criticism within a judicial opinion or order. Perhaps this is because it is often the judge's opinion itself that is the direct target of the criticism. Consequently, the judge is left without a judicial vehicle in which to respond. Of course, as was the case with Judge Baer, it is entirely possible for a judge to reconsider his initial resolution of a specific legal issue and vacate his previous order. Judge Baer did just that, and his second order, specifically addressed to "those who may take the time to read this decision,"¹⁰¹ resembled an apologetic response to his critics in which he eventually succumbed to their demands.

The *Schiavo* case presents another example of how a judge may respond to criticism within a judicial opinion. Because the media coverage and public criticism surrounding Terri Schiavo was not only continuous, but escalated as the case progressed through both the Florida state and the U.S. federal court systems, the judges at every level were acutely aware of the intense emotions of many Americans, as well as the increasingly hostile attitude toward the judiciary. Consequently, many of the judges were in the unique position to be able to respond to the concerns of the general public as well as to the allegations and threats of the individual congressmen. One such judge, Judge Birch¹⁰² from the U.S. Court of Appeals for the Eleventh Circuit, took advantage of this opportunity to defend the judiciary against the onslaught of unjust allegations and heavy criticism.

On the eve of Terri Schiavo's death, Judge Birch filed a concurring opinion aimed at silencing the critics and correcting the public's general misunderstanding of the courts' role in the *Schiavo* case.¹⁰³ In an opin-

101. *United States v. Bayless*, 921 F. Supp. 211, 214. (S.D.N.Y. 1996).

102. Judge Birch is a conservative judge, appointed by former President George H. W. Bush. He was appointed in 1990 and is now a seventeen-year veteran of the U.S. Court of Appeals. See Lincoln Caplan, *This Fight's About More than Just Judgeships*, WASH. POST, May 8, 2005, at B3.

103. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1270 (11th Cir. 2005).

ion that read more like a high-school civics lesson than a sophisticated legal analysis, Judge Birch specially concurred in the Eleventh Circuit's denial of a rehearing en banc¹⁰⁴ of a previous decision rendered by the District Court.¹⁰⁵ Recognizing that "the time ha[d] come for dispassionate discharge of duty,"¹⁰⁶ Judge Birch articulated what many in the legal community attempted to convey for the weeks and months leading up to Terri Schiavo's death. In the concurring opinion, which was clearly directed more toward the uninformed public¹⁰⁷ than the multitude of lawyers and legal scholars involved with the case, Judge Birch endeavored to educate the public with a brief and elementary lesson on American history, explaining:

[T]he Framers established a constitutional design based on the principles of separation of powers. . . . [They] established three coequal but separate branches of government, each with the ability to exercise checks and balances on the two others. And to preserve this dynamic, the "Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others.'"¹⁰⁸

After enlightening the public on two core principles of our nation's system of government – separation of powers and the independence of the judiciary – Judge Birch then confronted his critics' allegations head on. Acknowledging that some members of society, including certain members of Congress, had accused the judiciary of acting as "activist judges," Judge Birch returned fire, pointing out that when "the legislative and executive branches of our government have acted in a manner demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people – our Constitution[,] . . . it is the duty of the judiciary to intervene."¹⁰⁹ Ultimately concluding that it was proper for the appellate court to deny rehearing en banc,¹¹⁰ Judge Birch summed up

104. *Id.* at 1271.

105. *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1161-63 (M.D. Fla. 2005) (denying Counts 6-10 of the Schindlers' Motion for Temporary Restraining Order requiring "[Michael Schiavo] and hospice to transport [Terri Schiavo] to hospital for medical treatment" after federal district court had been granted jurisdiction over this specific case by federal law).

106. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d at 1270, 1271.

107. A judicial opinion is often addressed to multiple parties. While an opinion certainly speaks to those who have a direct stake in the case at bar, including the parties, their lawyers, and lower court judges, an opinion may also be directed to a broader audience such as students, expounders, or critics of the law. John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 490 (2001). Ordinarily, judicial opinions do not explicitly reference these groups; however, a judge occasionally addresses one or more groups directly. *Id.*

108. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d at 1272-73 (citations omitted).

109. *Id.* at 1271, 1276.

110. *Id.* at 1271. Judge Birch explained that because various provisions of An Act for the

his concurrence with an ominous yet fitting warning: “*If sacrifices to the independence of the judiciary are permitted today, precedent is established for the constitutional transgressions of tomorrow.*”¹¹¹

If given the opportunity, responding to criticism within a judicial opinion can be an ideal and effective means for a judge to communicate with his critics; it certainly was for Judge Birch. However, because judges are often criticized based on their legal opinions themselves, it is a rare case when a judge will either have the opportunity to respond to criticism made prior to an opinion’s publication or to be able to anticipate and respond to criticism before the criticism is actually made. Consequently, a judge is often left with two choices when confronted with criticism: speak out extrajudicially or remain silent.

SILENCE

With few exceptions, there is an implicit – if not explicit – assumption throughout the legal community that the most appropriate way for a judge to deal with his critics is to do nothing at all.¹¹² Many believe that a judge enters the public sector with the expectation of being exposed to public scrutiny and criticism, and it is improper, even unethical, for a judge to speak extrajudicially in his own defense or in defense of the judiciary as a whole.¹¹³ The authority cited most for this proposition is the ABA’s Model Code of Judicial Conduct (“Model Code”).¹¹⁴

Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005), also known as Terri’s Act, were unconstitutional infringements on the principle of the separation of powers, the exercise of federal jurisdiction in this case was improper. *Id.* at 1275.

111. *Id.* at 1276 (emphasis in original) (recognizing that even when faced with a tragedy such as that suffered by Terri Schiavo and her family, the court “must conscientiously guard the independence of our judiciary and safeguard the Constitution”).

112. See Fortunato, *supra* note 48, at 682-83 (“This strategy . . . of non-response is widely practiced by judges and supported by individual scholars and committees of concerned members of the legal community who have examined the problems of attacks on the judiciary.”).

113. See, e.g., Cooper *supra* note 12, at 63 (the problem of judicial criticism is “aggravated by the inability of the judiciary to fight back”); Fortunato, *supra* note 48, at 708 (“[T]he conventional wisdom to date has counseled – and in some cases, mandated – silence.”); Miner, *supra* note 85, at 32 (“Even in the case of unfair and unjust criticism, the bench should remain silent”).

114. The ABA’s Model Code of Judicial Conduct originates from the 1924 ABA Canons of Judicial Ethics, which consisted of thirty-six provisions that were intended to be a “guide and reminder to the judiciary.” MODEL CODE OF JUDICIAL CONDUCT preface 2 (2003) (citations and internal quotations omitted). Because the canons were meant to guide the behavior of judges’ behavior as opposed to provide for disciplinary action, their usefulness was limited. See Nancy L. Sholes, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 381-82 (1992). The canons were superseded by the 1972 Code of Judicial Conduct. *Id.* at 383-384. Although the 1972 Code was drafted to be more enforceable, it was eventually deemed insufficient to deal with pressing societal issues. *Id.* Thus, in 1990, the ABA adopted a new Model Code of Judicial Conduct (“Model Code”). *Id.* at 384. It has since been amended three times. Model Code of Judicial Conduct – Center for Ethics and Professional Responsibility, <http://www.abanet.org/cpr/mcjc/home.html> (last visited Mar. 16, 2007) (“The ABA Model Code of Judicial Conduct was

The Model Code has been adopted at least in part by most, if not all, of the fifty states.¹¹⁵ Along with its federal analogue – the Code of Conduct for United States Judges¹¹⁶ – the Model Code is intended to provide basic standards to govern the conduct of judges and to provide guidance for judges in their efforts to maintain high standards of both judicial and personal conduct.¹¹⁷

Those who believe that the proper judicial response to criticism is no response at all find support for their contention throughout the Model Code. In fact, two out of the five canons that comprise the Model Code explicitly address the propriety of extrajudicial speech.

Canon 3 requires that a judge perform the duties of judicial office impartially and diligently.¹¹⁸ To that end, Canon 3B(2) mandates that a judge remain faithful to the rule of law and not be swayed by outside influences, including “partisan interests, public clamor, or fear of criticism.”¹¹⁹ In order to maintain the judiciary’s impartiality and independence, Canon 3B(9) prohibits a judge from making any public comment that might reasonably be expected to affect the outcome or impair the fairness of a *pending* or *impending* proceeding.¹²⁰ In the commentary

adopted by the House of Delegates of the American Bar Association on August 7, 1990, and amended in 1997, 1999, and 2003.”). On February 12, 2007, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct completed a three-and-a-half-year revision process, which culminated in the adoption of the Revised Model Code of Judicial Conduct (“Revised Model Code”). Mark Harrison, Chairman, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Chair Message, <http://www.abanet.org/judicialethics> (last visited Mar. 26, 2007). Among other changes, the Revised Model Code clarifies any ambiguities contained in the Model Code regarding the propriety of judicial response to criticism. Although the Revised Model Code has not yet been adopted by any of the fifty states, the Commission hopes “that the [R]evised [Model] Code will promote national uniformity and be adopted by the highest Court in each state.” *Id.* Because the Model Code was the version under which the courts were operating during the post-*Schiavo* crisis, however, the Model Code will be the primary subject of analysis in this Note. A thorough analysis of the new language in the Revised Model Code and its implications for the future, should the states choose to adopt it, will follow.

115. Brown, *supra* note 21, at 9.

116. See CODE OF CONDUCT FOR U.S. JUDGES (U.S. Courts Judicial Conference 2000), available at <http://www.uscourts.gov/guide/vol2/ch1.html>. The Code of Conduct for United States Judges (“Code of Conduct”) is very similar to and generally follows the provisions of the Model Code. ABA Revises Code of Judicial Ethics, JOYCE FOUND., Feb. 16, 2007, <http://www.joycefdn.org/News/NewsDetails.aspx?NewsId=162>. In fact, Canons 1, 2, and 3 of the Code of Conduct and the sections therein are substantively identical to those of the Model Code. These three canons are entitled: (1) A Judge Should Uphold the Integrity and Independence of the Judiciary; (2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities; and (3) A Judge Should Perform the Duties of the [Judicial] Office Impartially and Diligently. Compare CODE OF CONDUCT FOR U.S. JUDGES Canons 1-3 (U.S. Courts Judicial Conference 2000), with Model Code of Judicial Conduct Canons 1-3 (2003).

117. MODEL CODE OF JUDICIAL CONDUCT pmb1. (2003).

118. *Id.* Canon 3.

119. *Id.* Canon 3B(2).

120. *Id.* Canon 3B(9) (“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

following Canon 3B(9), the Committee explains, using language identical to that found throughout the Model Code, that these restrictions on judicial speech are “essential to the maintenance of the integrity, impartiality, and independence of the judiciary.”¹²¹

Given the importance of the public’s confidence in the fairness and independence of the judicial system, the Model Code’s prohibition on extrajudicial speech regarding a pending or impending case is unsurprising. A judge who comments on the merits of a case over which he is or will be presiding conveys to the public a bias and partiality that conflict with his role as a fair and neutral arbiter of disputes. Such comments by a judge suggest that he may decide the case based on his own preconceived notions or views expressed by the public, rather than making his decision based on the law and facts of each individual case.¹²² Moreover, one judge commenting on a case pending before another judge leads to the possibility that those comments will affect the outcome or fairness of that case, or at the very least create the appearance that this may happen.¹²³

The expansive prohibition in Canon 3B(9) casts a wide net and could be broadly construed as forbidding a judge from commenting on virtually any aspect of a pending or impending case. However, Canon 3B(9) also specifically identifies two categories of speech as falling outside the canon’s proscription: (i) public statements made within the course of a judge’s official duties and (ii) public statements in explanation of court procedures.¹²⁴ Again, these exceptions are somewhat vague and open to interpretation. At least one state has interpreted the exceptions to allow a judge to discuss a case in general and abstract legal terms as well as provide background information regarding the general operation of the courts.¹²⁵ Even with its two exceptions, Canon

its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . . 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.” (emphasis supplied)). The commentary to 3(B)(9) and (10) defines a pending proceeding as “one that has begun but not yet reached final disposition,” whereas “an impending proceeding is one that is anticipated but not yet begun.” *Id.* Canon 3B(9)-(10) cmt.

121. *Id.*

122. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. n.1 (2007) (explaining the distinction between a judge and a legislator or executive branch official).

123. Cynthia Gray, *When Judges Speak Up: The Code of Judicial Conduct and Public Education*, 38 JUDGES’ J. 6, 8 (1999). A rule such as Canon 3B(9) “guards against the dangers that a judge might feel pressured or appear to feel pressured by the comments of a peer and colleague; that a jury would accord deference to or would appear to accord deference to an opinion expressed by a judge; or that a public impression might be created that citizens are not being treated fairly because different judges do not agree.” *Id.*

124. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2003).

125. *In re Sheffield*, 465 So. 2d 350, 355 (Ala. 1984).

3B(9) provides a clear prohibition on judicial speech – even when that speech is in response to an unfair attack on a judge’s conduct in a pending matter – so long as the response might reasonably be expected to affect the matter’s outcome or impair its fairness.

Canon 4 also explicitly references the propriety of judicial speech, yet does so in permissive, as opposed to prohibitive, terms. Canon 4 requires a judge to conduct any extrajudicial activities so as to minimize the risk of conflict with any judicial obligation.¹²⁶ Because it is widely recognized that judges can serve an important societal function by sharing their valuable knowledge and experience with others to benefit the judicial system as a whole, Canon 4B specifically permits a judge to “speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, [and] the administration of justice.”¹²⁷ While Canon 4 encourages judges to use various methods of communication to contribute to the improvement of the law and the legal system in general, the rule is silent as to how a judge may or may not respond to criticism of his individual conduct or that of the judiciary in relation to a specific matter.

Whereas Canons 3 and 4 specifically address the propriety of extrajudicial speech, the first two canons of the Model Code speak generally to the obligations of every judge to uphold the integrity and independence of the judiciary¹²⁸ and to avoid impropriety and the appearance thereof.¹²⁹ Although these canons do not explicitly dictate whether and to what extent a judge may respond to criticism, Canons 1 and 2 nevertheless serve as much of the basis for the belief that any response from a judge is unethical.

Recognizing that an independent judiciary is vital to a just society, Canon 1 requires that judges uphold the integrity and independence of the judiciary.¹³⁰ Commentary to Canon 1 explains that deference to both the rule of law and specific rulings of the courts depends upon public confidence in the integrity and independence of the judiciary, which in turn depends upon the judiciary acting without fear or favor; “[a]n independent judiciary is one free of inappropriate outside influences.”¹³¹

Some argue that this broad and expansive canon carries the implicit assumption that a judge should refrain from responding to any criticism, particularly that which is directed toward a judge in his individual

126. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2003).

127. *Id.* Canon 4B.

128. *Id.* Canon 1.

129. *Id.* Canon 2.

130. *Id.* Canon 1.

131. *Id.* Canon 1 cmt.

capacity.¹³² First, remaining silent when faced with criticism may indicate to the public that the judge is unaffected by the criticism and will not allow it to influence the judge's future decisions. His silence demonstrates an unwillingness to be swayed by public sentiment and emphasizes the importance of adhering to the rule of law at any cost, two vital components in maintaining public confidence in judicial independence.

Response to criticism of individual judges – for example, defending a particular legal decision – is also discouraged on the basis that any response would undermine the dignity of the court.¹³³ This position is summed up by the words of one legal scholar:

[J]udges ordinarily should refrain from explaining or defending their decisions even if their critics have ignited a firestorm of hostility. . . . While some judges might suppose that such comments will help to restore or maintain public confidence in the judicial system, comments about individual decisions are far more likely to subtly erode public respect.¹³⁴

Similarly, many believe that it is inappropriate for judges to respond to criticism directed toward a specific decision because the reasoning of that decision has already been made available to the public.¹³⁵ Simply put, the opinion should speak for itself and any additional comment by the judge is unnecessary.

In the event that the criticism is not directed toward a particular judge but is instead directed toward the judiciary as a whole, some proponents of the "silence method" suggest a balancing test instructing a judge to refrain from defending the court unless the defense has a higher likelihood of preserving judicial integrity than diminishing it.¹³⁶ Under this subjective test, responding to criticism would rarely be appropriate. In the case of widespread dissatisfaction with the judicial system or diminished public confidence in the court, however, it may be appropriate for a judge to defend the judiciary or the judicial process in general.¹³⁷ Following this reasoning, the "post-*Schiavo* crisis" may be a rare circumstance in which the court can and should respond to unjust

132. See, e.g., Gray, *supra* note 123, at 6.

133. See *Response to Criticism of Judges: Model Program Outline for State, Local, and Territorial Bar Association: Suggested Program for the Appropriate Response to Criticism of Judges and Courts*, A.B.A., July 1997, available at http://www.abanet.org/jd/lawyersconf/pdf/response_to_criticism.pdf.

134. William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 606 (1989).

135. *Id.* (explaining that if an opinion is rational and reasonable, then the judge will be unable to contribute anything of value to the debate beyond what has previously been stated in the opinion).

136. *Id.* at 609–10.

137. *Id.*

criticism and allegations of impropriety while still remaining within the ethical bounds of the Model Code.

Canon 2 of the Model Code instructs that at all times, a judge must avoid impropriety and the appearance thereof.¹³⁸ Like Canon 1, Canon 2 is also followed by commentary emphasizing the importance of public confidence in the judiciary.¹³⁹ The commentary goes on to explain that “a judge must expect to be the subject of constant public scrutiny . . . and must therefore accept restrictions on the judge’s conduct,” such as restrictions on judicial speech imposed by Canon 3B(9).¹⁴⁰ Although the Committee never says so explicitly, the implication that it is improper for a judge to respond to “public scrutiny” could hardly be clearer, particularly when that scrutiny relates to a pending or impending matter.

Taken as a whole, the five canons comprising the Model Code¹⁴¹ do in fact place restrictions on a judge’s ability to respond to criticism. The Model Code is not nearly as restrictive as some believe, however. Together, Canons 1 through 5 instruct a judge to refrain from commenting on pending or impending cases if the outcome may be affected or its fairness compromised, but they permit comment on non-pending or resolved matters so long as those comments do not lead to the appearance of impropriety or detract from the integrity of the court in any way. Although the Model Code *implies* that responding to criticism of a resolved matter – such as the criticism the judiciary received after Terri Schiavo’s death – may in fact detract from the court’s integrity and lead to the appearance of impropriety, nothing in the Model Code explicitly addresses the propriety of such a response. Interpreted broadly, therefore, the Model Code permits individual judges to respond to generalized attacks on the judiciary by informing the public of the role of an independent judiciary in the legal system. The propriety of responding to criticism of individual judges and their decisions, however, is arguable and depends on one’s individualized interpretation of the Model Code. The issue becomes even more complicated when the criticism is couched as a general attack on the judiciary but is in fact a direct assault on one particular judge. In this situation, the Model Code provides little guidance, and it can be very difficult for a judge to determine what response is permitted by the Model Code, if any at all.

138. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2003).

139. *Id.* Canon 2 cmt. (“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”).

140. *Id.*

141. Each state varies in the extent to which they adopt the Model Code. Some state codes may be more restrictive than the Model Code, such as Pennsylvania, which specifically limits the ability of judges to respond to unfair criticism of their record. Cooper, *supra* note 12, at 63.

Perhaps in response to the uncertainty many judges face when deciding whether and how to respond to criticism, in 2003 the ABA announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct.¹⁴² The Commission was instructed to review the Model Code and recommend revisions for possible approval.¹⁴³ Recognizing the need for comprehensive revision “in light of societal changes, as well as changes in the role of judges,” the Commission went to work to create a revised Model Code that would improve and clarify the standards of conduct for judges serving throughout the nation.¹⁴⁴ The House of Delegates’ approval of the revised Model Code (“Revised Model Code”) on February 12, 2007, marked the completion of three and a half years of work.¹⁴⁵

About halfway through the Commission’s work, the legal battle over the life of Terri Schiavo seemed like it was slowly coming to an end when the Schindlers’ Motion for Emergency Stay was denied, clearing the way for Terri’s feeding tube to be removed pursuant to a 2000 court order.¹⁴⁶ After numerous legal attempts to block the feeding tube’s removal failed,¹⁴⁷ Terri Schiavo died,¹⁴⁸ yet the onslaught of criticism against the judiciary did not subside.¹⁴⁹ The timing of these events surely made it difficult, if not impossible, for the Commission to ignore the increasingly hostile attacks on the judiciary and the judges’ perceived inability to respond when drafting the Revised Model Code. To be sure, the Commission’s concern for this issue is evident in the Revised Model Code itself. Despite efforts to preserve the existing Model Code “to the maximum extent possible,”¹⁵⁰ one glaring addition

142. MODEL CODE OF JUDICIAL CONDUCT preface (2003).

143. *Id.*

144. Harrison, *supra* note 114.

145. *Id.*

146. *In re* Guardianship of Schiavo, No. 90-2908-GD-003, 2005 WL 459634, at *1-2 (Fla. 6th Cir. Ct. Feb. 25, 2005); *see also In re* Guardianship of Schiavo, No. 90-2908GD-003, 2000 WL 34546715, at *7 (Fla. 6th Cir. Ct. Feb. 11, 2000) (ordering removal of Terri Schiavo’s feeding tube).

147. *See* Kathy Cerminara & Kenneth Goodman, *Schiavo Case Resources, Key Events in the Case of Theresa Marie Schiavo*, (2006), <http://www6.miami.edu/ethics/schiavo/timeline.htm> (describing the Schindlers and their advocates’ myriad legal attempts to block the removal of Terri Schiavo’s feeding tube).

148. *Terri Schiavo Has Died*, CNN.COM, Mar. 31, 2005, <http://www.cnn.com/2005/LAW/03/31/schiavo/index.html>.

149. *See, e.g.*, Larry Lipman & Dara Kam, *Republicans Renew Criticism of Judiciary’s Actions*, PALM BEACH POST, Apr. 1, 2005, available at http://www.palmbeachpost.com/state/content/news/epaper/2005/04/01/a9a_POLITICAL_0401.html.

150. *Id.* Indeed, though the Revised Model Code is different in form, it remains substantially the same in substance. Whereas the Model Code consists of five canons followed by individual sections and commentary, the Revised Model Code has only four canons followed by numbered rules and comments. Compare MODEL CODE OF JUDICIAL CONDUCT (2003), with MODEL CODE OF JUDICIAL CONDUCT (2007).

in the Revised Model Code is difficult to miss. Under Canon 2 of the Revised Model Code (what was previously Canon 3 under the Model Code), Rule 2.10 addresses Judicial Statements on Pending and Impending Cases. With language almost identical to that of Canon 3B(9) in the Model Code, Rule 2.10(A) of the Revised Model Code instructs a judge to refrain from making any public comment that might reasonably be expected to affect the outcome or impair the fairness of any pending or impending matter.¹⁵¹ In an effort to clear up any confusion remaining from Model Code, however, the Commission added a phrase that leaves very little to interpretation. Unlike any statement in the Model Code, Rule 2.10(E) of the Revised Model Code unequivocally states that “subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.”¹⁵² The Reporter’s Explanation of Changes to Rule 2.10 explains the Commissioner’s reasoning: “Judges are justifiably reluctant to speak about pending cases. However, the Commission wanted to make clear that when a judge’s conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding.”¹⁵³

Accordingly, under the Model Code a judge is not explicitly prohibited from responding to public criticism so long as the response does not violate any other provision of the Model Code. Whether a response violates another provision in the Model Code is difficult to determine, however, because Canons 1 and 2 imply that a judge’s public response to criticism may detract from the integrity of the court and create the appearance of impropriety. In an effort to clarify the standards and remove any confusion surrounding the propriety of a judge’s response to criticism, the Commission revised the Model Code to *affirmatively grant a judge permission* to respond to criticism attacking his conduct, even in a pending matter, so long as his comments are not reasonably expected to affect the outcome or impair the fairness of the matter pending.¹⁵⁴

151. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A) (2007).

152. *Id.* R. 2.10(E) (emphasis supplied).

153. *Id.* R. 2.10 reporter’s explanation of black letter n.3. The Reporter’s Explanation of Changes are printed after each rule in the Revised Model Code. See MODEL CODE OF JUDICIAL CONDUCT (2007). These changes have been drafted by the Commission’s reporters, based on the record of the Commission, with the sole purpose of informing the ABA House of Delegates about each proposed amendment to the Model Code, prior to the amendments’ consideration. *Id.* They have not been approved by the ABA Joint Commission and are not to be adopted as part of the Model Code. *Id.*

154. Nevertheless, the new language found in the Revised Model Code will not govern judges’ conduct until it is adopted by the states. See Sholes, *supra* note 114, at 384-85 (explaining that each updated version of the Model Code is “merely a set of suggestive guidelines and has no legal significance unless jurisdictions statutorily enact or adopt it in the form of court rules”).

This is a significant addition to the ethical code governing judges and undoubtedly reflects the Commission's grave concern for the welfare of the judiciary after the events surrounding Terri Schiavo's death.¹⁵⁵

Even if a judge's extrajudicial response to criticism is not per se unethical, those who insist that a judge should remain silent in the face of an attack maintain that an extrajudicial response is inappropriate at the very least. Thus, tradition, if not ethics, mandates that a judge not indulge his critics with a response.¹⁵⁶ Proponents of this argument are primarily concerned with maintaining public respect for the judiciary as a whole.¹⁵⁷ Specifically, any response to criticism – no matter how unjust or unsubstantiated – both detracts from the dignity of the courts¹⁵⁸ and communicates to the public an “unwillingness to maintain the openness of mind so essential for the proper performance of the judicial role.”¹⁵⁹ Therefore, by responding to criticism, judges could give the appearance of being too concerned with public opinion or too defensive, both of which will provoke more criticism.¹⁶⁰ This reasoning resembles the argument, made prior to the adoption of the Revised Model Code, that judicial response to criticism violates Canons 1 and 2 of the Model Code, which obligate a judge to uphold the integrity and independence of the judiciary and avoid the appearance of impropriety in all activities.¹⁶¹

A particularly well-known proponent of the “silence method” is Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, who gives one simple bit of advice to federal judges who find themselves the target of a firestorm of criticism: “[Do] absolutely noth-

155. Still, despite the Commission's clear statement of dissatisfaction with the recent attacks on the judiciary, they nevertheless remain hesitant to grant the judiciary the unrestrained freedom to respond to the media whenever they so choose. Instead, the Commission instructs in Comment 1 to Rule 2.10 that depending on the circumstances, a judge should consider whether it is preferable for a third party to respond to the criticism, as opposed to the judge himself. *Id.* R. 2.10 cmt. 1. The Reporter's Explanations of Changes explains that this suggestion reflects the Commission's “preference for keeping to a minimum the extent to which judges discuss cases directly with the media.” *Id.* R. 2.10 reporter's explanation of comments.

156. *See, e.g.*, Blatz, *supra* note 3, at 26-27 (“[T]he judiciary has a long tradition of refraining from political discourse because of our adjudicative role in the resolution of individual cases. And, this tradition of restraint has not equipped us to wade into the powerful currents of the information age.”).

157. *See, e.g., id.*

158. *See* Miner, *supra* note 85, at 80. This sentiment is reflected in the words of one legal scholar: “If the criticism is scurrilous, the criticism does not deserve the dignity of a judicial reply.” Ross, *supra* note 134, at 606; *see also* Cooper, *supra* note 12, at 64 (“When judges come to their own defense, they are accused of self-interest, and are demeaned by the necessity of entering a public forum to defend a position.”).

159. *See* Miner, *supra* note 85, at 32.

160. Cynthia Jacob, *Judges Are Lawyers Too*, 183 N.J. LAW. 4, 4 (1997).

161. MODEL CODE OF JUDICIAL CONDUCT Canons 1-2 (2003).

ing; silence is the price of life tenure.”¹⁶² Doing nothing in the face of an attack can take its toll on a judge, however, and occasionally a member of the judiciary decides that it just is not worth it. When Judge Sarokin, a federal Court of Appeals judge, found himself on the receiving end of a barrage of unjust criticism and accusations, he wrote a letter to then-President Clinton, advising him of his resignation.¹⁶³ Recognizing that the criticism was beginning to take a deleterious effect on his ability to remain impartial and unaffected by public opinion, Judge Sarokin explained to President Clinton:

It is apparent that there are those who have decided to “Willie Hortonize” the federal judiciary, and that I am to be one of their prime targets. . . . So long as I was the focus of criticism for my own opinions, I was designed to take the abuse no matter how unfair or untrue, but the first moment I considered whether or how an opinion I was preparing would be used was the moment I decided that I could no longer serve as a federal judge.¹⁶⁴

THE OPPOSITE STRATEGY: SELF-DEFENSE

While silence has been the most traditional response to criticism directed toward the judiciary, many argue that silence is just that: a tradition.¹⁶⁵ Specifically, even before the adoption of the Revised Model Code in early 2007, the argument was made that a judge is ethically permitted, perhaps even obligated, to respond to criticism directed toward him individually or the judiciary as a whole.¹⁶⁶

Advocates of the “self-defense strategy” typically begin by pointing out that, despite assertions to the contrary, the Model Code was never intended to limit a judge’s ability to respond to critics and defend oneself when verbally attacked.¹⁶⁷ In fact, as previously discussed, with the exception of Canon 3B(9), which prohibits a judge from commenting on pending cases under certain circumstances, nothing in the Model Code explicitly prohibits a judge from responding to criticism.¹⁶⁸ Thus, the

162. Hawkins, *supra* note 16, at 1354 (citation omitted).

163. Letter from H. Lee Sarokin, Judge, U.S. Court of Appeals for the Third Circuit, to President William Jefferson Clinton (June 4, 1996), available at <http://www.courtstv.com/archive/legaldocs/misc/sarokin.html>.

164. *Id.*

165. Fortunato, *supra* note 48, at 679 (explaining that conventional wisdom and prevalent practice dictate that “the men and women who make up the nation’s federal and state courts are obligated to remain silent and on the sidelines of any struggle to preserve their individual integrity or that of the judicial branch of government”).

166. *Id.*

167. *Id.* The Commission’s subsequent actions when drafting the Revised Model Code, i.e., granting the judiciary express permission to respond to criticism, certainly bolsters this argument.

168. See generally MODEL CODE OF JUDICIAL CONDUCT (2003).

conventional method of responding to criticism – doing nothing at all – may merely be a self-imposed restriction, “a tired custom and usage that at this point in our history does nothing to protect and preserve the independence of the judiciary.”¹⁶⁹

If responding to criticism is not proscribed by ethical rules, the question then becomes: is it in the best interest of the judiciary to do so? While some argue that responding to criticism compromises the dignity of the court, others counter that providing a judge with an opportunity to respond to criticism would, in fact, result in just the opposite.¹⁷⁰ When the court renders controversial decisions that may be contrary to the sentiments of the majority, the judiciary needs public confidence in its integrity and impartiality more than ever.¹⁷¹ To merit that confidence, judges must take an active role in defending themselves and rebut the often baseless claims and accusations of their critics.¹⁷² By remaining silent in the face of an attack on a judge’s integrity or the judiciary as a whole, the judge is conveying a sense of defeat to the often uninformed public.¹⁷³ By speaking out, however, a judge’s response can serve as a valuable tool to inform and elevate the public discourse regarding current issues and the judiciary as an institution.¹⁷⁴

Furthermore, by responding to their critics, judges can help dispel the popular notion that the judiciary, occupying what some view as “the most secretive of the three branches of the federal government,”¹⁷⁵ is “an aristocracy, above the fray and unaccountable.”¹⁷⁶ Indeed, indulging the common sentiment that judges occupy a superhuman status would be contrary to the Model Code’s commentary explaining that “[c]omplete separation of a judge from extra-judicial activities is neither possible or wise; a judge should not become isolated from the community in which the judge lives.”¹⁷⁷

169. Fortunato, *supra* note 48, at 684.

170. *Id.* at 687.

171. See Kelson, *supra* note 54, at 15 (“In order to do its job properly, the judiciary must have the public’s moral authority. Without it, the courts will not have the support of the legislature or executive which enforces its judgments and grants it resources to operate.”).

172. Fortunato, *supra* note 48, at 687-88. It becomes even more important to counter criticism that is part of a political ploy to advance the critics’ “misguided objective of having judicial decisions conform to majoritarian preferences.” *Id.* at 688.

173. *Id.* at 687.

174. *Id.*

175. Thomas Penfield Jackson, *Don’t Gag the Judges*, LEGAL TIMES, Sept. 30, 2002, at 58, available at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1032128635760> (explaining that although courts’ decisionmaking reasoning is typically available to the public, the most important decisions are made behind closed doors).

176. Fortunato, *supra* note 48, at 701.

177. Brown, *supra* note 21, at 13 (citation omitted).

CONCLUSION

The past two years have seen a dangerous resurgence of attacks on the judiciary that threaten the very foundation of our democratic government. Without a doubt, the tragedy that befell Terri Schiavo and her family touched the hearts of many and forced us to question our values and beliefs. While Terri Schiavo's story may have raised a seemingly novel and controversial issue to the public consciousness for the first time, it also dealt with an issue as old as the Constitution itself, placing our judiciary in the midst of a war that has been raging since the founding of this country. This war is far from over, and our judiciary will surely continue to face unjust criticism, threats, and intimidation long into the future. Then, as now, the good men and women of our courts will be forced to choose how they will respond to the type of criticism that threatens the independence of the judiciary and erodes public confidence in our courts.

In an ideal situation, a judge would have the opportunity to respond to critics by crafting a well-reasoned and illuminative argument in the opinion itself, as Judge Birch did in his concurring opinion in the *Schiavo* case. In the more likely situation that a judge will not have the opportunity to respond to his critics within a legal opinion, he can either remain silent or defend himself by responding extrajudicially. While both options have advantages and disadvantages, it has been the long-standing tradition of the bench to remain silent and leave its defense to others, such as the organized bar. This may change however, as the Revised Model Code now provides judges with explicit permission to respond to critics even if the conduct at issue relates to a matter currently pending before a court, so long as the response will not affect the fairness of the proceeding. On the other hand, even if many or all of the states adopt the permissive language of the Revised Model Code, the judiciary may nevertheless adhere to tradition and maintain the conventional practice of remaining silent, even when criticism is unwarranted and unjust. Although it is too early to tell whether the judiciary will embrace its newly articulated freedom, its very existence is a clear indication that the hostile and antagonistic criticism that has become so common in recent years will no longer be tolerated. Now, more than ever, those who have become accustomed to freely criticizing the judiciary without fear of being held accountable by a judge's response should think twice. The time has come when the judiciary just might fight back.