

SHOULD JUDGES BE PERMITTED TO SPEAK OUT ON THEIR DECISIONS?

BY JESSICA RIZZO¹

Judges opine for a living. Proffering the rationale for a decision she has made is among the judge's most significant duties. Judicial opinions "declare the uncodified law and interpret the codified law."² At the trial court level, judicial opinions provide a basis for appeal while, at the appellate level, opinions constitute binding precedent for lower courts. In our common-law system, judges have the awesome power of making law and they exercise this power by "speaking out" about their decisions in written opinions. In one sense then, judges are not merely permitted to speak out about their decisions, doing so is a requirement of their office.

Even this form of judicial outspokenness, at least as it has often been practiced, has attracted its dissenters. As Judge Joseph Ulman memorably put it in 1935, "If all the judicial opinions written and printed in a single year in the United States were laid end to end they would reach from confusion to futility."³ Ulman believed that the proliferation of "logorrheic" opinions did little to clarify the law and everything to muddle it for lawyers and laymen alike.⁴ "The American people," he insisted, "really do believe in the mental and moral integrity of its judges and would accept decisions of its high courts even if they were not backed up by confused and confusing opinions."⁵ Bemoaning the length⁶ and stylistic deficiencies⁷ of judicial opinions has been a popular pastime for members of the legal profession for at least a century, but today the practice of writing judicial opinions is itself largely uncontroversial.

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² *Judicial Opinions*, 7 Alb. L.J. 354, 354 (1873).

³ *The Plague of Judicial Opinions*, 11 B. Br. 136, 136 (1935).

⁴ *Id.*

⁵ *Id.*

⁶ See Francis A. Leach, *Length of Judicial Opinions*, 21 Yale L.J. 141, 141 (1911-1912).

⁷ See Henry C. Merwin, *Style in Judicial Opinions*, 9 Green Bag 521, 521 (1897).

There is a difference, however, between explaining how existing law applies to the facts of a given case and offering one's perspective on whether that application leads to a just result. Some believe the latter practice to be inappropriate. "[T]o reflect the independence they bring to the bench," it has been argued, judges must "refrain in their judicial pronouncements from commenting gratuitously and unnecessarily on the strict facts and legal issues before them."⁸ According to this view, which we might call the school of judicial quietism, the ideal judge takes all possible precautions to conceal her peevishness and predilections from the public. For the judicial quietist, the judge's opinion *of* the law has no place in her legal opinions—the judge's opinion *of* the law can only undermine the appearance of her independence, which will in turn compromise her authority as an ostensibly neutral arbiter, opening her up to accusations of bias. Within this strict conception of the judge's role there is no place for judicial editorializing. Outwardly, at least, she must calmly accept the law as it is, without attempting to resist or change it.

Of course, not all judges are judicial quietists. Consider the following caveat one district court judge included in an opinion occasioned by a copyright dispute between theater artists:

Although the strict application of statutory requirements, [sic] may have produced what might be considered an unfair result, given the defendants [sic] valuable collaboration in the creation of the play, this Court is bound to follow and apply the law.⁹

The case, *Cabrera v. Teatro Del Sesenta*, dealt with a play created using a relatively novel method of collective authorship. Several different collaborators contributed ideas, research, and dialogue, but one collaborator in particular, plaintiff Cabrera, put the proverbial pen to paper and took responsibility for transcribing the script. Under United States copyright law, even though the play was the product of many artists' creative contributions, the one collaborator who

⁸ L. Yves Fortier, *Should Judges Speak Out - No*, 24 Judges J. 42, 45 (1985).

⁹ *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 768-69 (D.P.R. 1995).

physically wrote the final version of the text was the sole author of the play and the sole owner of the intellectual property at stake. The other collaborators had no rights as “joint authors” because the play could not be said to be a “joint work.” In issuing her opinion, the judge faithfully applied the law, declaring Cabrera to be to the sole author and denying his collaborators any legal claim to the work, but she went a step further, pointing out that this faithful application had produced “what might be considered an unfair result.”¹⁰

What effect does the inclusion of such a qualification have? Does it undermine the appearance of the judge’s independence? Call into question her ability to function as a neutral arbiter? Open her up to charges of being unduly influenced by the powerful experimental theater lobby? No, here the judge’s expression of discomfort with the verdict she was bound to hand down clearly bolsters the appearance of her independence. Here we have a judge explaining that, while she disagrees with the law, she will apply it anyway because it is her duty to do so. Such a statement reflects the judge’s ability to set aside her personal feelings and even her intellectual objections—it is a testament to her understanding of her role and her sense of integrity.

Still, the judicial quietist would object to such a statement, perhaps by arguing that such incidental remarks may gradually erode our reverence for the law. If even judges do not have confidence in our precedent, after all, how can we expect the general public to respect it?

Because I believe that critical awareness of the law is more important than unthinking respect for it, it is my position that judges should be permitted and even encouraged to speak out on their decisions the way the *Cabrera* judge did within the context of her opinion. Crucially, the judge did not disregard precedent or otherwise warp the law to attain a result that satisfied her personal sense of “fairness.” She did, however, use her platform to call attention to a place where

¹⁰ *Id.*

the law seemed to have fallen out of step with the reality of accepted professional practice, and where it might consequently need to be reevaluated by the legislature. Judges always run the risk of revealing themselves to be biased or otherwise compromised when they speak, but society will benefit from learning about disqualifying biases sooner rather than later—the appearance of independence, after all, is dangerous when it masks a real conflict of interest or prejudice.

While judges’ intuitions about what the law *ought* to be should not be what motivates their rulings, judges’ thoughts on such matters are not without interest and value. It is beneficial to have remarks such as the *Cabrera* judge’s preserved for posterity because, collectively, such judicial observations can indicate points of tension in need of resolution by the legislature or higher courts. Taken together, an accumulation of such remarks may inspire lawmakers to draft a legislative amendment or Supreme Court justices to vote to grant certiorari in a critical case. Judges are the ones who observe firsthand, day after day, how the law’s abstract principles collide with the messy reality of experience. Judges are the ones who see the faces and hear the stories of those whose lives have been touched—and sometimes mutilated—by the law. It is often argued that the will of appointed judges should not supersede the will of the people’s elected representatives, as those elected representatives are somehow “closer” to the people, more attuned to the peoples’ authentic desires.¹¹ At least at the trial court level, however, it is the judge who has the clearest view of the results of policies drafted by elected representatives. It is the judge who must hear testimony from witnesses and look into the eyes of defendants. Given this privileged position, it would be a great waste for judges not to speak out about the human costs they find themselves staring down when charged with administering an ill-considered policy.

¹¹ See e.g. DANIEL HOROWITZ, *STOLEN SOVEREIGNTY: HOW TO STOP UNELECTED JUDGES FROM TRANSFORMING AMERICA* (2016).

The Anti-Drug Abuse Act (ADAA) of 1986 was a particularly high-stakes example of such a policy, and its legacy has shown how judges speaking out can have a major consequences for people's lives. The ADAA established a hundred-to-one sentencing disparity between crack and powder cocaine, requiring, for example, a minimum sentence of five years without parole for possession of five grams of crack cocaine, and the same sentence for possession of five hundred grams of powder cocaine. In 1988, Congress doubled down and made first-time simple possession of crack cocaine an offense punishable by a mandatory minimum penalty, the only drug so punished. Because of its relatively low cost, crack cocaine has been more accessible to poor people than powder cocaine. Since a disproportionate number of African Americans live in poverty in the United States, a disproportionate number of African-American drug users have historically used crack cocaine, while more affluent white Americans have tended to use powder cocaine. As a result, critics of the ADAA have long pointed to the Act's outsize impact on African-American communities.

In 2010, President Obama signed the Fair Sentencing Act into law, reducing the disparity between the amounts of crack and powder cocaine needed to trigger federal penalties and eliminating the statutory mandatory minimum sentence for simple possession of crack. The Fair Sentencing Act was not retroactive, which meant that the thousands of people, mainly African Americans, already serving disproportionately harsh prison sentences remained incarcerated. The First Step Act, signed into law by President Trump in 2018, aimed to rectify this. The First Step Act retroactively applies the Fair Sentencing Act, reducing or eliminating the mandatory minimum penalties and reducing the statutory maximum penalties for certain crack offenses. The

Act authorizes defendants to move for a sentence reduction, but courts retain full discretion over whether to grant or deny a defendant a new sentence.¹²

This is where the practice of judges speaking out on their decisions comes in. In the years after the ADAA was passed, predictions of a “bloodbath of violence” begotten by “a generation of crack babies” who would grow up to become “superpredators” proved unfounded.¹³ The panic subsided, and by 1995, even the United States Sentencing Commission had taken the position that the relative harmfulness of crack cocaine compared to powder cocaine had been overstated, and that the heavier crack penalties hit minority offenders the hardest.¹⁴ Judges, however, remained constrained by guidelines calling for extreme sentences for crack offenders. Even when a judge found a prescribed sentence length to be overly punitive, she was duty-bound to administer it. Fortunately, not all judges passed over the dispensation of such sentences without comment. In *United States v. Boulding*, the presiding judge was compelled to sentence the defendant to life in prison for a crack conspiracy offense, but said on the record at the sentencing hearing:

[I]t’s a very difficult sentencing hearing for me, because life in prison is not the sentence I would impose on Mr. Boulding if I had the full discretion that I normally have in sentencing...

[u]p until, you know, 10 minutes before coming out here today, I still have been looking for ways to say, Is that mandatory minimum of life in prison really a mandatory minimum of life in prison?

I won’t go through all of the avenues that I looked into, but I say it simply to indicate I’m not doing this lightly, and I’m not doing it willingly. In my view, in the Court’s view, if I were to apply the [relevant] factors—deterrence, incapacitation, need for rehabilitation, a sentence that reflects the seriousness of the offense—I would certainly impose a significant custodial sentence...but I would not impose life in prison on a 29-year-old man. I think that’s too much. I think it is too much punishment.¹⁵

¹² See *First Step Act*, INSIDER EXPRESS (U.S.S.C./Off. Of Educ. And Sent’g Prac., Washington, D.C.), Feb. 2019, at 8.

¹³ See 2 A. Javier Treviño, *The Cambridge Handbook of Social Problems* 346 (2018).

¹⁴ U.S.S.C. REPORT TO CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (2015).

¹⁵ *United States v. Boulding*, 379 F. Supp. 3d 646, 649-650 (W.D. Mich. 2019).

More than a decade later, following the passage of the First Step Act, Boulding moved for a reduced sentence and the judge tasked with considering the motion consulted the transcript of the sentencing hearing. He read what had been said and radically reduced Boulding's sentence. Boulding will now see the outside of a prison one day because a judge spoke out, sending a message to the future that this young man was doing time more time than he deserved and that his case deserved reconsideration.

Judges who speak out about their decisions do not always have such welcome and direct effects on people's lives, but the potential benefits of speaking out far outweigh the possible harms. When judges speak out, they bring a wealth of experiential knowledge to policy discussions and pave the way for reconsideration of precedent that has outlived its usefulness. Judges are already encouraged to participate in community outreach activities to promote public understanding of the justice system, and it is good for everyone that judges are in and of the world rather than sequestered away from the people who may appear before them as litigants. Judges already teach, lecture, and publish widely, all forms of speaking out that have great value for the legal community as a whole. Most importantly, judges are not verdict machines—their views of the law as applied are often nuanced and critical, especially when they find themselves forced to hand down a ruling that strikes them as unjust. In my view, we should pay careful attention to what judges have to say about their opinions, not seek to silence them. More judicial speech, not less, will make our society more just.