Address

Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law

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I

I am deeply honoured to participate in the Vice-Chancellor's lecture series, and I am delighted to join you in celebrating the sesquicentenary of this most distinguished, vibrant university. This evening I shall explore with you a topic that engages me passionately — strengthening the public's faith in our courts. I say passionately for a reason: I was born and educated in South Africa at a time when law — and the application of law — were perversions of justice. So I bring to this topic my experience of living in a society where, during the apartheid era, judges were distrusted, the prestige of the judiciary diminished.

How might our independent courts best preserve their integrity, and with it the people's confidence that justice will be administered fairly and impartially? Today I want to address one aspect of that timeless question: Should citizens be permitted to say practically anything they please about judges and the courts — even untrue and vicious things? Should certain speech be treated as unlawful because it might affect the judicial process? Should the Executive be free to criticise the decisions of judges? And what if the criticism is by a law officer of the government? In my remarks, I shall examine the extent to which freedom of speech does — or should — protect what is said about the courts, and I shall discuss why the issue has recently become so urgent in the United States.

First, an example from British legal history. In 1946 there was a series of ghastly murders in London. Several women were found dead with bite marks on their necks. Inevitably the tabloid newspapers labelled the unknown murderer 'the vampire killer'. One day the *Daily Mirror*, the largest-selling tabloid, had a banner story on page one headlined: 'Vampire: A Man Held'. The story said the vampire would 'never again lure victims to a hideous death. Of this the *Mirror* can assure you.' The story did not name the arrested man. But on a remote, inside page there was a brief piece saying that a man named Haig was 'helping the police with their inquiries' into crimes the story did not identify.

The editor of the *Daily Mirror* was immediately summoned to court and charged with contempt for publishing material that might prejudice a jury in a future trial of Haig for the 'vampire' crimes. The editor was Sylvester Bolam, known to his colleagues as 'Bishop Bolam', or 'the Bishop', because he always

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wore black suits. He was brought to court, tried by a judge — briefly — and summarily convicted. He was sentenced to six months in prison. Bolam served that time. He never worked for the *Daily Mirror* or any other newspaper again.

That is an example of the use of the contempt power by judges to punish statements made outside the courtroom that judges find may improperly influence the legal process. The particular use I am going to consider is to punish statements critical of judges: words that are said to scandalise the court.

II

American and Australian law share many features: a common reverence for constitutional democracy, a tripartite government of carefully calibrated checks and balances, and, until the middle of the 20th Century, a common understanding of how far the state may go in regulating people's criticism of the courts. The traditional English rule regarding the crime of contempt of court by scandalising the court was articulately summarised by your Justice Rich in the *Dunbabin* case, decided in 1935. Publications may scandalise the court, he wrote,

> which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.[1]

It is fair to say that, allowing for some variations and refinements, this pronouncement captures the broad common-law offence of scandalising the court as that offence exists in most Commonwealth countries today, including Australia.[2]

The American law of contempt of court, however, has veered sharply away from the Commonwealth norm. The seminal case is *Bridges v California*,[3] cited frequently by the Australian High Court and other Anglo-American tribunals.[4] It had an unusual history. The case was brought by Harry Bridges, an influential leader of the powerful longshoremen's union in California and, as it happens, a native Australian. Mr Bridges had been held in contempt of court and fined $125 for a telegram he sent to the Secretary of Labor criticising a California judge's decision in a lawsuit involving his union. At the time the offending telegram was published in local papers a motion for a new trial in the case was pending.

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1 *R v Dunbabin; Ex Parte Williams* (1935) 53 CLR 434 at 442.

2 Justice's Rich's definition of the offence of 'scandalising the court' was recently cited, for example, by Australian courts in *Re Colina; Ex P Torney* (1999) 200 CLR 386 at 390 and in *R v Hoser* [2002] WL 74420 at para 45, [2001] VSC 443. See also *State v Mamabolo*, CCT44/00 (11 April 2001), 2001 (3) SA 409 (CC) (discussing historic rationale for offence of scandalising the court in common-law countries and refusing to abolish the offence).

3 314 US 252 (1941).

4 See, for example, *Ng v Secretary for Justice* (1999) 2 HKLRD 293 at 311; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 32; *R v Kopyto* (1987) 47 DLR 4th 213 at paras 208–214 (Cory JA); *Re Mulgaokar* [1978] SCR (3) 162 at 185.

Bridges' appeal was heard in the United States Supreme Court on the same day as another free-speech case about criticism of judges involving *The Los Angeles Times*. That paper had also been held in contempt and fined varying amounts for publishing several editorials. I particularly like the editorial that drew the highest fine, $300. This was the headline: 'Probation for Gorillas?' The editorial said a judge would make 'a serious mistake' if he granted probation to two members of the Teamsters Union who had been convicted of assaulting non-union workers. Rather than probation, the editorial said, the community needed the example of the Teamsters' 'assignment to the jute mill'.[5]

In both cases the challenged contempt consisted of a critical public comment, made outside the courtroom, about a matter pending before a judge. Would the United States Supreme Court uphold the convictions? The answer would depend as much on the implacable operation of fate as on the legal skills of the Justices.

We now know, from internal confidential memoranda, that the nine Supreme Court Justices originally decided to uphold the contempt convictions in both cases, by a majority of six to three.[6] But after the initial vote, two of the Justices who had voted to affirm retired; another Justice who had voted to affirm changed his mind after reading the draft majority opinion.[7] One of the two new Justices on the Court voted to affirm, the other to reverse.[8] If you are keeping score, you know that there was now a bare majority of five to void the convictions.

That is what happened. Justice Hugo Black, writing for the now-majority, set aside the contempt convictions. Banning comment on pending cases, he wrote, would stifle speech at the very moment that interest in the matters would likely be at its height, and when the speaker would have the widest audience for his or her ideas. No considerations of disrespect for the judiciary or disruption of the judicial process, Justice Black said, could justify such censorship — that is, unless the comments presented a '"clear and present danger"'[9] of substantively distorting the administration of justice. In his words: 'The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.'[10] Because the comments of Harry Bridges and *The Los Angeles Times* editorials presented no

5 Above n3 at 271–272.

6 See Anthony Lewis, 'Justice Black and the First Amendment' (1987) 38 *Ala LR* 289 at 295–296. The Justices who originally voted to uphold the convictions were Charles Evans Hughes CJ & James C McReynolds, Owen J Roberts, Harlan F Stone, Felix Frankfurter & Frank Murphy JJ. The Justices originally voting to reverse were Hugo L Black, Stanley F Reed & William O Douglas JJ.

7 Murphy J changed his vote, and Hughes CJ & McReynolds J retired. Id at 296.

8 James F Byrnes J voted to affirm. Robert H Jackson J voted to reverse. Ibid.

9 See id at 261 and 273 (citation omitted). The phrase was first used by Justice Oliver Wendell Holmes in *Schenck v United States* 249 US 47 (1919), 52.

10 Above n3 at 270–271.

high danger of immediate threat to the administration of justice, he concluded, the contempt convictions must be reversed.[11]

In *Bridges v California*, American jurisprudence concerning scandalising the court departed sharply from the path of English common law. It has never looked back. With what consequences? On the most tangible level, *Bridges* and its progeny have allowed the live practice of justice to unfold before the American people in all of its raw immediacy and sometimes manipulative theatricality. Press conferences on the courthouse steps, in front of a mountain of microphones, are now common fare on American newscasts. Our airwaves crackle with programs that purport to bring gavel-to-gavel trial coverage to the public. Instant telephone polls and Internet chat rooms augment the telecasts, allowing viewers to vote on, among other things, whether the accused should be found guilty. The coverage is not only national but international. One shudders to think what Justice Rich would have to say about all this.[12]

But more important than feeding America's voyeuristic, 'prurient culture',[13] *Bridges* and the cases that have built on it have laid the American judiciary open to the unrelenting scrutiny of the public, which, more often than not, means the scrutiny of the media. Some of this criticism has been polite and restrained; some quite the opposite. The case of *Bush v Gore*,[14] for example, in which the United States Supreme Court in effect chose the nation's 43rd President by halting the recount of votes in Florida, unleashed a torrent of invective against the nine Justices both during and after the momentous decision. Consider a column by the popular, well-respected *New York Times* columnist Maureen Dowd, published the day after *Bush v Gore* was handed down.[15] Hers is not the harshest criticism levelled at the Court about that decision, but it may be one of the most memorable.

Dowd imagines what the Justices were thinking during the oral argument, with quotes attributed to each Justice by name. Justice Sandra Day O'Connor worries

11 See id at 273.

12 See generally, Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt With in Australia and America' (1997) 45 *Am J Comp L* 109. Professor Chesterman notes that 'the media in the US generally have access to significantly more aspects of the [criminal] trial proceedings than in Australia. They may normally inspect all court documents and documentary evidence, whereas in Australia their access to these is somewhat precarious. Often ... they are permitted to file and broadcast the proceedings ... They may also be allowed to publish the names of jurors (in Australia, jury anonymity is deemed essential, at least until the jury is discharged).' Id at 113. Professor Chesterman further observes that pre-trial publicity of criminal cases is generally more pervasive in the United States than in Australia: 'The [US] media can, and regularly do, highlight material which in Australia would risk prosecution under the sub judice doctrine — for example, the background (including any prior convictions) of the accused, the evidence which both 'sides' are likely to (or, in the media's view, should seek to) bring to the court, the media's view as to guilt or innocence, any broad political implications of the case and films or photographs of the accused.' Id at 144.

13 That phrase was coined by Yale Law Professor Paul Gewirtz. See Paul Gewirtz, 'Privacy and Speech in 2001' in Dennis J Hutchinson, David A Strauss & Geoffrey R Stone (eds), *The Supreme Court Review* (2002) at 139, 154.

14 531 US 98 (2000).

15 Maureen Dowd, 'Liberties; The Bloom is Off the Robe' *NY Times* (13 Dec 2000) at A35.

about the effect of her vote on her husband's country club membership. Justice Clarence Thomas muses to himself that if the arguments go on much longer, he'll miss his favourite pornographic cable shows. And, just in case the point remains elusive, Chief Justice William Rehnquist announces, '[W]e still need to anoint Bush president. It's best for us. We'll just have to work harder to hide the truth: that we are driven by all the same petty human emotions as everybody else in this town — ambition, partisanship, political debts and revenge.' One can hardly imagine a more compelling example of a comment 'calculated to impair confidence in the court's judgment'.[16] But no judge in the United States would hold Maureen Dowd's comments to fall outside the free speech/free press protections of the First Amendment.

Broad vulnerability to criticism has always been a challenge for American judges, who are prevented by rule — and convention — from speaking out about pending cases or answering even the most flagrantly wrong-headed criticisms. United States Supreme Court Justice Felix Frankfurter called it our 'judicial lockjaw'.[17] But most American judges, I think, have come to understand that their own judicial autonomy is integrally bound up with the public's virtually unfettered freedom to criticise them. They would probably agree with the observations of the late Chief Justice Warren Burger that, in the United States, the judiciary and the media supply a sort of 'lateral support' for each other, so that 'any force that can destroy the one can probably destroy the other'.[18]

I shall return to this point, but first let me consider a related issue. How has all of this speech — a great deal of it wonderfully productive, a great deal of it irreverent, rude, bombastic, puerile, or worse — how has all of this speech *actually* affected the American public's faith in the integrity of the courts? Even after six decades and more of very broad criticism of American judges and the administration of justice, the fact remains, as Justice Stephen Breyer observed, that we live in an 'orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable behavior which most people would not countenance'.[19] Even *Bush v Gore*, where the political stakes could not have been higher nor the margin of decision slimmer, provoked no widespread disobedience of the courts. Of course people obey court decisions for a variety of reasons. But surely one of them, a significant one, is that, whatever they might think about individual judges or courts, or individual decisions, the American people trust that judges as a whole, and the judiciary as an institution, will perform their core constitutional role independently, with fairness and integrity. And paradoxical as it may seem to you,

16 See above n1.

17 Quoted in Frances K Zemans, 'The Accountable Judge: Guardian of Judicial Independence' (1999) 72 *S Cal LR* 625 at 636.

18 Hon Warren E Burger, 'The Interdependence of Judicial and Journalistic Independence' in *Delivery of Justice: Proposals for Changes to Improve the Administration of Justice* (1990) at 348–349.

19 Hon Stephen G Breyer, 'Judicial Independence in the United States' (1996) 40 *St Louis U LJ* 989 at 996.

the American public's trust is the product of our citizens' nearly unbounded right to peer into every nook and cranny of the administration of justice, and to voice their opinions, in any timbre, about what they find.

In my home state, the Commonwealth of Massachusetts, forceful criticism of the judiciary has a long history. Massachusetts trials come under live, intense, often searing media scrutiny every day, in the Massachusetts media and frequently in the national media. Our courts don't just tolerate that scrutiny. We invite it. Since 1998, cameras have been permitted in our courtrooms by court rule.[20] We have a Judiciary Media Committee, jointly chaired by a Justice of the Supreme Judicial Court and a member of the media, that meets frequently to address mutual concerns and promote good working relationships between the courts and the media. Our courts have a well-regarded public information office that keeps news outlets informed of the latest court news and fields media inquiries on behalf of our trial and appellate judges.

How has all of this attention to the courts, some of it highly critical, affected the faith of Massachusetts citizens in their judiciary? It has made the judiciary stronger. Let me illustrate with an example concerning a recent decision by my court. At issue was the implementation of Massachusetts' so-called 'clean elections' statute, a campaign finance reform law that permits electoral candidates for certain offices to receive substantial public dollars in return for agreeing to abide by limits on campaign contributions and spending.[21] Many Massachusetts legislators opposed the law, and our Legislature had routinely failed to pass proposed campaign reform legislation. Instead, the people enacted the clean elections bill by popular vote, as the initiative provisions of our state Constitution permit.[22] But the Legislature refused to appropriate the money required to implement the clean elections statute. The unfunded statute languished on the books. Several candidates seeking clean elections public funding then sued the state. My court held that, under the Massachusetts Constitution, the legislators were required to provide the money, in the absence of repealing the law.[23] When our judgment was issued, prominent legislators denounced it and lambasted the justices in the majority, and a key legislator suggested greater accountability of judges by their popular election — all this while other aspects of the case were still pending.[24] The reaction was swift. Legal groups, the popular press, and ordinary citizens spoke out — passionately — in support of preserving judicial independence through the system of judicial appointments. The suggestion to elect Massachusetts judges was rejected.

Critical comments by government officials on what judges do are a familiar phenomenon. Australia has just had a striking example. The Minister of

20 See Massachusetts Supreme Judicial Court Rule 1:19, as amended, 430 Mass 1329 (2000).

21 See Mass Gen L ch 55A, §§ 1 et seq.

22 See article 48, The Initiative, V, § 1, of the amendments to the Massachusetts Constitution.

23 *Bates v Director of the Office of Campaign & Political Finance* 436 Mass 144 (2002).

24 See, for example, Rick Klein, '[Massachusetts Speaker of the House Thomas] Finneran Suggests Election of Judges' *Boston Globe* (8 Feb 2002) at A1; Steve Marantz, 'Finneran Considers Reining in Judiciary Over Clean Elections' *Boston Herald* (8 Feb 2002) at 14.

Immigration attacked the courts for allegedly reading loopholes into recent legislation limiting judicial review of decisions on refugee applications. The Minister said laws should be decided by Parliament not by 'unelected and unresponsible' judges.[25] He said that on television, on the Channel 9 *Today* program, just before a special court panel was to consider the very issue. Chief Justice Michael Black told your Solicitor General that the court was aware of the television comments, but was 'not amenable to external pressures from Ministers or from anyone else'.[26]

Judges in the United States are intimately familiar with attacks from other government officials — the Executive, and, often with the greatest ferocity, our Legislators, as happened in Massachusetts as I have just described. That criticism may — and often does — reflect popular opinion of the moment. But as Justice McHugh of your High Court said last month, 'The Judiciary has to apply the law, not public opinion.'[27] And that is what we do, no matter the level of attacks.

Massachusetts judges make decisions that are sometimes unpopular and that are denounced by the public, usually through the press. But both as a lawyer and a jurist, I have never seen, or heard, anything to suggest even remotely that any Massachusetts judge, or any Massachusetts court, has been swayed in the slightest by the glare of the spotlight in rendering any order or decision. Judges simply pay no attention to the huffings and puffings voiced outside of the courtroom. Juries are equally indifferent to extrinsic comments, even in the most widely publicised, sensationalised trials.[28] Again and again, Massachusetts citizens have seen their judiciary's imperviousness to outside bullying, even as we open our work to the closest inspection. And that experience is the source of the people's faith in what we do.

The American experiment in criticising the courts — even subjecting pending cases to harsh, intense, and sometimes unfair scrutiny — is in one sense of course an outgrowth of the uniquely American context. The First Amendment occupies a pre-eminent position in our Bill of Rights, and distrust of government is one of the foundation principles of our democracy.[29] I well recognise that Australia does not have a Bill of Rights, and that, as Sir Owen Dixon said, '[t]he framers of the Australian Constitution were not prepared to place fetters upon legislative action.'[30] Still, it is an oversimplification to presume that the muscular criticism of judges that is a staple of American life is merely a reluctant concession to the 18th

25 Quoted by Frank Brennan, SJ AO, in *Developing Just Refugee Policies in Australia: Local, National and International Concerns*, University of Sydney, 7 August 2002, as published by Uniya Jesuit Social Justice Centre (2002) 1 at 7.

26 Quoted in ibid.

27 Quoted in id at 8.

28 Compare Chesterman, above n12 at 124–131 and 140 (noting that while empirical research about the effects of publicity on jurors is inconclusive and contradictory, American courts have developed a variety of 'sophisticated' techniques to minimise the effect of media publicity on jurors).

29 The First Amendment to the United States Constitution is made applicable to the states by the Fourteenth Amendment.

30 Quoted in *Nationwide News Pty Ltd v Wills*, above n4 at 44 (Brennan J).

Century libertarian ideals of the Founders of the United States. Such criticism of courts and judges exists because it is vital to the triumph of the rule of law in our pluralistic, multifaceted democracy.

Other courts, some in present and former Commonwealth countries, have, albeit slowly, begun to draw the same conclusions. They have begun to acknowledge, in the words of Justice Peter deCarteret Cory, then of the Ontario Court of Appeal, that '[t]he concept of free and uninhibited speech permeates all truly democratic societies ... [and] the courts are not fragile flowers that will wither in the hot heat of controversy ... The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism, nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions.'[31]

I know that some have defended the ancient crime of contempt by scandalising the court on the grounds that it is rarely enforced and does little to quell public criticism. I believe that it has been some decades since a successful prosecution for scandalising the court in this country. But listen to one distinguished journalist writing in *The Times* of London in July of this year. He was recounting a particular court proceeding, related to the trial of a police official for fabricating evidence against a convicted murderer who was later pardoned. On hearing the judge's charge to the jury, reports the journalist, 'I ... had a strong desire to say to [the judge], "This trial has been a farce, my lord, and you are the chief clown," but wisely or perhaps cravenly refrained, thus sparing myself perhaps a longish spell in ... jail for contempt of court.'[32] Few journalists in Commonwealth countries are likely to be as frank as Sir Ludovic Kennedy in confessing to timidity when faced with a possible contempt of court charge. But how many journalists have felt, and continue to feel, the same chill of censorship when they write, or think about writing, about the courts? And when an eminent journalist admits to being intimidated by the prospect of a contempt of court charge, can one really be sure that the public is getting the full measure of information it needs to make informed decisions about the judiciary, to understand why judges do what they do? Is an 'enforced silence'[33] really a sign of respect?

In my view, drawn from my own experience, freedom to criticise judges and their decisions, save for those rare cases of real and imminent danger, is a necessary condition of judicial independence. This is particularly true, I think, for those pluralistic democracies in which judges hold office for life, or for a very long time, during good behaviour, with virtually no check on their power save an

31 *R v Kopyto*, above n4 at paras 95 and 197 (Cory JA).

32 Ludovic Kennedy, 'Why Are We So Wedded to a System that Fails Us at Every Turn?' *The Times* (London) (2 July 2002) at Law 3.

33 See above n10.

unwieldy impeachment process.[34] In the context of the United States, one scholar has termed this the most 'extreme' form of judicial independence.[35] The power vested in judges in such circumstances can hardly be underestimated. It is near absolute. The only viable defence available to the people against abuses of such formidable judicial power is the public accountability of judges. The ultimate cost of secreting the courts' work from public view may in fact be distrust and cynicism. In the interests of ordered liberty, that cost is too high.

Justice Albert Louis Sachs of the Constitutional Court of South Africa, writing recently in support of allowing a greater freedom to criticise the judiciary, observed, '[t]here are no intrinsically closed areas in an open and democratic society.'[36] He recalled how the general paucity of criticism of the judiciary under South Africa's apartheid regime had allowed injustices such as race-based capital punishment to go unexplored. '[T]he more the critics were suppressed,' he said, 'the greater the loss of prestige of the judiciary.'[37] And United States Supreme Court Justice Hugo Black said: 'I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticising their government, its actions, or its officials.'[38] As Chief Justice Burger noted, this extends to the judicial branch: 'The operations of the courts and the judicial conduct of judges are matters of utmost public concern.'[39] By placing the onus of upholding the judiciary's integrity on a muzzled populace, the crime of scandalising the court gets it exactly backward: that burden of accountability falls most properly on a transparent judiciary.

III

I doubt that relaxing the traditional common law rule against commenting on pending trials or 'scandalising' the judiciary will lead to an abandonment of faith in independent judges or to the biased administration of justice. With full deference to the different social, historical, and political climates of our different nations, it is my view that Commonwealth courts can, and should, tolerate a great deal more criticism of judges and of the judiciary, even when a case is pending, than is presently permitted.

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34 I agree with the words of former Supreme Court Chief Justice William Howard Taft: 'Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism ... In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.' Quoted in Bruce Fein & Burt Neuborne, 'The Case for Independence: Why Should We Care about Independent and Accountable Judges?' (2001) 61(April) *Or St B Bull* 8 at 13.

35 Gerhard Casper, *Separating Power: Essays on the Founding Period* (1997) at 137.

36 *R v Mamabolo*, above n2 at para 77 (Sachs J).

37 Id at para 76 (Sachs J).

38 *New York Times v Sullivan* 376 US 254 (1964), 297 (Black J concurring).

39 *Landmark Communications, Inc v Commonwealth of Virginia* 435 US 829 (1978), 839 (Burger CJ).

But I also wonder, with increasing concern, whether, in the United States, we are taking the idea of free speech against the courts into reckless and dangerous territory. The problem is most acute in those states that hold judicial elections, and it promises to become more acute still. I realise that the notion of a constitutional democracy electing its judges may sound quite foreign to you. When I arrived in the United States at the age of 24, I found the idea of elected judges to be one of the most puzzling features of American democracy. But judicial elections have been a staple of the American landscape since the middle of the 19th Century.[40] The United States remains, insofar as I have been able to determine, the only democracy that elects many (or any) of its judges.[41] Today my home, the Commonwealth of Massachusetts, is one of only a handful of states in which all judges are still appointed for life or until a mandatory retirement age.[42] In 39 states, some or all judges are elected, either initially or in retention elections.[43] Fully 87% of all state appellate and trial judges face election at some point in their tenure.[44] These facts gain resonance when we realise that '[o]ver 90% of all court business in the United States occurs in state trial courts ...'[45] and not in the federal courts where judges have life tenure. Thus the potential of the judicial election process to affect how people think about and experience the American justice system, and ultimately how we feel about the rule of law, is enormous.

Does the system of electing state judges work? The answer may surprise or even shock you: it *has* worked; it has worked well.[46] Historically, elected judges have performed their duties as conscientiously, as fairly, as appointed judges. Some of America's most influential jurists have stood on the judicial hustings. The late Supreme Court Justice William Brennan, widely acknowledged to be a titan of American constitutional law, was a product of the judicial election process in New Jersey. Justice Sandra Day O'Connor was an elected judge in her native Arizona.

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40 Well before the American Civil War began in 1860, the nation experienced a groundswell of support for the method of selecting judges by popular vote. By mid-19th-Century, Georgia, Vermont, Indiana, Mississippi and New York, among others, all had a system for the popular election of at least some judges. See Lawrence M Friedman, *The History of American Law* (2nd ed, 1985) at 126–127. 'Every state that entered the union after 1846 provided that the voters would elect some or all of their judges.' Id at 371.

41 See Roy A Schotland, 'Financing Judicial Elections, 2000: Change and Challenge' (2001) *L Rev Mich St U Det CL* 849 at 890 ('no democracy except the United States elects judges').

42 See, for example, Mass Const, Pt II, ch 3, art 1, as amended; NH Const, Pt I, art 35; RI Const, art 10 at § 4. Federal judges have life tenure during good behaviour. See US Const, art III, § 3.

43 See *Republican Party of Minnesota v White*, 536 US 122 SCt 2528 (27 June 27 2002), 2543 (O'Connor J concurring).

44 Above n41 at 853.

45 Scott D Wiener, 'Popular Justice: State Judicial Elections and Procedural Due Process' (1996) 31 *Harv CR - CL LR* 187 at 221 n5. '[A]bout 98% of court business [in the United States] takes place in state courts of all levels.' Ibid.

46 For a spirited defence of the judicial elections process, see Hon Shirley S Abrahamson, 'The Ballot and the Bench' (2001) 76 *NYULR* 973. The author is Chief Justice of the Wisconsin Supreme Court and a veteran of several judicial elections.

But since the late 1980s, judicial elections — once sleepy, mostly nonpartisan affairs that generated little public interest or controversy — have become political dog fights of a high order. That is because political, business, and other interests have 'woken up' to the fact that judges matter.[47] They matter not only to individual litigants but, because of our system of constitutional review of statutes, to the fate of every 'hot button' controversy in the nation: government regulation, abortion, tort reform, civil rights, public safety — there is hardly any pressing public controversy that is not, in the end, resolved by judges.

As interest groups have come to recognise the importance of the judiciary, state judicial elections have become more competitive. Opposing groups, trial lawyers and pro-business groups, for example, or abortion-rights and pro-life organisations, all hoping to advance their own agendas, support opposing candidates for judicial office. This has meant more campaigning, more advertising, and more campaign money. A lot more campaign money. In the five states with the most hotly contested Supreme Court elections in 2000, almost $35 million was raised by the candidates.[48] Where does the money come from? Interests that have cases in court, or expect to have cases in court, and their lawyers. A relentless barrage of pugnacious advertisements — paid for by groups for whom winning is the chief aim — now threatens to cheapen the judicial office.[49] The judicial election system that has worked so well for a century and more is in danger of talking itself out of all credibility.

And the danger may be growing. In June of this year, supporters of unbounded campaign speech scored a major victory in the United States Supreme Court. The case, *Republican Party of Minnesota v White*,[50] raises the issue of judicial campaign speech with urgency and in my judgment has the most serious implications for the principles of judicial independence in the United States. At issue was the constitutionality of a Minnesota judicial conduct canon, the so-

47 Here are the words of one business lobbyist: 'The business community woke up in the late 1980s and realised that there are three legs to the government stool — the executive branch, the judicial branch, and the legislative branch. We were playing quite well for over a decade in two of those three and decided that the judicial branch are the arbitrators of the final interpretation of all rules and regulations that are passed by the legislature. Consequently, in '89 to the present, [my organisation] ... periodically got involved in state-wide appellate court races, most of those being supreme court races ...' Quoted in David Barnhizer, '"On the Make": Campaign Funding and the Corrupting of the American Judiciary' (2001) 50 *Cath U LR* 361 at 377. See generally, Anthony Champagne, 'Interest Groups and Judicial Elections' (2001) 34 *Loyola LA LR* 1391.

48 Above n41 at 862.

49 Consider a television advertisement aired during the 2000 election season in an effort to unseat three justices of the Michigan Supreme Court. A prosperous-looking man identified by the name-plate on his desk as 'Insurance Co. CEO' angrily rifles through papers on his desk. He barks into his speaker phone, 'Lucille, where are my judges?' A female voice responds: 'Just where they've always been, sir. Right in your pocket.' The camera cuts to three actors, dressed in judicial robes, dancing in puppet-like fashion. In another infamous television advertisement targeted to unseat Ohio Supreme Court Justice Alice Resnick, a figure of 'Lady Justice' is seen peeking out from her blindfold as hands pile money onto her scales of justice. Video clips of these and other judicial election advertisements are available from the Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185; web site: <www.ncsconline.org>.

50 Above n43.

called 'announce clause', which prohibited any candidate for judicial office from 'announc[ing] his or her views on disputed legal or political issues'.[51] Did such a canon violate the First Amendment? The United States Supreme Court held that it did. Justice Antonin Scalia, writing for the bare majority of five, concluded that judicial election speech, like any political speech, is at the 'core' of First Amendment protections. By committing itself to a process of judicial elections, he said, Minnesota had necessarily also committed itself to a full airing of candidates' views that would enable voters to make thoroughly informed decisions.

The dissenting opinions were scathing, and excoriated the court for placing judicial elections on a par with the elections of popular representatives. By blurring the distinctions between these types of elections, Justice John Paul Stevens wrote, 'the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.'[52] Justice Ruth Bader Ginsburg was more blunt. She accused the majority of disingenuously permitting judicial candidates to promise to rule a certain way on important issues.[53] Surely the most striking opinion in *White* is from Justice O'Connor. In a short, acerbic concurrence, she wrote to state her views that 'the very practice of electing judges undermines' the state's '"compelling governmental interes[t] in an actual and perceived ... impartial judiciary."'[54] States that choose to elect judges, she suggested, have no one but themselves to blame for the resulting morass of actual or perceived judicial bias. For the record, Justice O'Connor is presently the only member of the Supreme Court who has held elective judicial office.

The practice of electing state judges is firmly entrenched in the United States, as Justice O'Connor and her colleagues surely realise, and there is little evidence of any public sentiment to do away with it.[55] So the solution Justice O'Connor proposes for the judicial campaign excesses she deplores — returning to the appointive system — is no solution at all.

With the *White* decision, the Supreme Court struck the balance between freedom of speech and the preservation of judicial integrity clearly in favour of speech. As a result of *White,* similar judicial speech restrictions in place in most of the states are now of dubious validity.[56] No one can predict the *White* decision's ultimate effect on American judicial elections, but I have no doubt that *White* makes regulation of judicial campaign speech much more difficult, if not, as some already have argued, impossible. Judges will have a much harder time evading the demands of their interest-group funders to take sides on hot-button legal issues. And if attack-dog politics consolidates its sway over judicial elections, if campaign

51 Minn Code of Judicial Conduct, Canon 5(A)(3)(d)(i)(2000).

52 Above n43 at 2546 (Stevens J dissenting).

53 See id at 2550 (Ginsburg J dissenting).

54 Id at 2542 (O'Connor J concurring) (ellipses and bracketed text in original; citation omitted).

55 See William Glaberson, 'States Taking Steps to Rein in Excesses of Judicial Politicking' *NY Times* (15 June 2001) at A1, A18: 'Although polls typically find many voters saying that campaign contributions influence judges' decisions, ballot initiatives for appointment of judges often fail.'

56 See generally Marcia Coyle, 'New Suits Foreseen on Judicial Elections' *National LJ* (8 July 2002) at A1.

finance needs continue to drive judicial candidates into the arms of targeted interest groups, then due process of law and the American public's faith in our judiciary — both elected and appointed — are likely to be the decision's most serious, if unintended, victims.[57]

The danger is real. Scorched-earth judicial electioneering has already begun to erode the American public's confidence in the judiciary. While most Americans express positive views about the judiciary as the whole, they are increasingly worried that justice is for sale in some states.[58] Judges are equally concerned.[59] In California, where judges are elected, former Supreme Court Justice Otto Kaus famously noted that for an elected judge to ignore the political ramifications of a decision near election time would be 'like ignoring a crocodile in your bathtub'.[60] The *White* decision sharpens the crocodile's teeth. And that is because, in my view, the logic of *White* is insupportable. The difficulty with the opinion is not that it equates judicial *elections* with elections for popular representatives. Rather, it confuses judicial *accountability* with a politician's accountability. We expect, we rely on, our elected representatives to promise specific action to accomplish specific results. Governors, senators, and representatives are partisans; that is why we vote for them. If they renege on their promises, woe be to them at the next election! But judges we expect to adjudicate, not to advocate. Implicit in our constitutional compact is the guarantee that judges will give us a fair hearing, that they will treat each litigant non-preferentially, that they will weigh all the evidence presented in court, and only the evidence presented in court, as if no other universe of facts existed or mattered. The *White* decision ignores an important distinction:

57 See generally, Stephen B Bright, 'Political Attacks on the Judiciary' (1997) 80 (Jan–Feb) *Judicature* at 165. Judges who handle criminal matters, for example, seem to be particularly vulnerable during election time. As legal scholar Anthony Champagne stated: 'All it takes in this era of mass media politics is for a judge to do something — almost anything — such as [to set] an apparent low bail for a murderer or reversal of a death sentence on appeal. A ten second media message can turn that decision into a charge of coddling criminals that could ruin the judge's career.' Anthony Champagne, 'Politics and Judicial Elections' (2001) 34 *Loyola LA LR* 1411 at 1422–1423. Some 13 years before Professor Champagne's remarks, Oregon Supreme Court Justice Hans Linde observed the same disturbing tendency for bald appeals to 'law and order' to distort both judicial elections and the public's perception of due process. See Hon Hans A Linde, 'Elective Judges: Some Comparative Comments' (1988) 61 *S Cal LR* 1995 at 2000–2001.

58 See Justice at Stake, National Surveys of Voters and State Judges, 14 Feb 2002, available from Justice at Stake Campaign, 717 D Street, NW, Suite 203, Washington, DC 20004; web site: <www.faircourts.org>. In this survey of 1000 registered voters nationwide conducted in late 2001, 76% of voter respondents agreed with the statement that campaign contributions had 'a great deal of influence' or 'some influence' on judges' decisions. Fifty-four per cent of voter respondents stated that they were concerned 'a lot' that 'there are 2 systems of justice in the US — one for the rich and powerful and one for everyone else.' For further discussion and analysis of the survey, see Stan Greenburg & Linda A DiVall, '"Courts Under Pressure" — A Wake-Up Call from State Judges' (2002) *Judge's Journal* Summer at 11.

59 See Justice at Stake, National Surveys of Voters and State Judges, ibid. The organisation mailed survey questionnaires to 2428 state judges nationwide in late 2001–early 2002, and obtained an unusually high 61% response rate. Twenty-six per cent of the judicial respondents agreed with the statement that campaign contributions had 'a great deal of influence' or 'some influence' on judges' decisions. Eighty-four per cent of judicial respondents expressed concern about special interest groups buying advertising to influence judicial elections. See also Greenburg & DiVall, ibid.

60 Quoted in *Republican Party of Minnesota v White*, above n43 at 2542 (O'Connor J concurring).

Politicians break faith with the people when they abandon their advocacy. Judges break faith with the people when they abandon their neutrality.

IV

There is much we can do, as judges, to keep the public's trust. Alexander Hamilton called the judiciary the 'least dangerous branch' of government because judges have neither the power of the sword nor the power of the purse.[61] But we do have the power of our voices, which is a formidable power, and for the use of which we are solemnly accountable.

One measure of accountability, one building block of public respect, is how well judges educate the public about our role, and about the importance of judicial independence. Justice Breyer got it exactly right when he said that 'judicial independence is ... ultimately a question of helping the public to understand'.[62] In our system, the United States' system, with its constitutional guarantees that assure controversy, helping people to understand means that judges must write opinions and judgments that can be understood not only by themselves and the bar but by the public, and journalists. Judges must explain the importance of independent courts. For me, personally, it means agreeing to media interviews, speaking on television, and using other opportunities to communicate to ordinary people that law and the courts are not, fundamentally, about the random sensational trial but about soberly thinking through, and thinking through again, the delicate balance between freedom and order. People gain a new respect for the judiciary, a new concern to protect it, when they are helped to make the connection between an independent judiciary and the freedoms we so often take for granted. Democracy is an unruly business. Even as we enjoy its liberties, we need something more solid, more permanent. Indeed, we yearn for it. And that something is the rule of law.

The need for public understanding of the role of our courts puts an obligation on the two institutions that must seem unlikely allies: the courts and the press. Judges must be more communicative about their role. Journalists must probe beyond the big trials to understand, and help others to understand, the central role of judicial independence in our constitutional democracies. '"Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,"' wrote United States Supreme Court Justice Potter Stewart. 'Our society depends heavily on the press for that enlightenment.'[63] Judicial independence uniquely relies on many allies. Not least of these is a media knowledgeable about the judge's role in our democracy, willing to spend time

61 Alexander Hamilton, *The Federalist* No 78 (Clinton Rossiter ed, 1961) at 465.

62 Honorable Stephen G Breyer, 'Comment: Liberty, Prosperity, and a Strong Judicial Institution' (1998) 61 *Law and Contemp Problems* 3 at 5.

63 *Houchins v KQED, Inc* 438 US 1 (1978), 17 (Stewart J concurring). The first sentence is a quotation from Stewart J's dissent in *Branzburg v Hayes* 408 US 665 (1972), 726 (Stewart J dissenting).

examining and explaining that role, and willing to expose unfair attacks against judges and judicial independence to the clear light of reason.

I began by asking whether citizens, the public, the media should be permitted to say practically anything they please about judges and the courts. My answer to that question is, 'Yes.' Justice Felix Frankfurter, who initially did not warm to the idea, and who dissented in the *Bridges* case,[64] may have the last word on that subject. Writing five years after *Bridges* to concur in reversing a contempt of court judgment against an editor and his newspaper, he reminded us:

> A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.[65]

But should that same freedom be extended to judges to express their views on subjects that may come before them, even if they are elected to their office? I doubt that even Justice Hugo Black, whose decision in *Bridges* pointed the United States down a new path, would go that far.

64 See, for example, *Bridges v California*, above n3 at 280, in which Frankfurter J accused the majority of 'render[ing] states powerless to insist upon trial by courts rather than trial by newspapers'. Ironically, a weighty factor in Frankfurter J's dissent was that a California judge criticised by a *Los Angeles Times* piece at issue would soon stand for re-election and thus would be particularly vulnerable to threats from 'a powerful newspaper'. See id at 299 (Frankfurter J dissenting).

65 *Pennekamp v State of Florida* 328 US 331 (1946), 355 (Frankfurter J concurring).