



Sticks and Stones : Ethical Limits on Judicial Responses to Public Criticism

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Types of Attacks on Judges

- Corruption
- Conflict of interest
- Personal bias
- Disregard for the law
- Politically motivated
- Other examples?



Roadmap

1. First Amendment Doctrine

- a. False Speech
- b. Defamation
- c. Gag Orders

2. Ethical Restraints on Judges' Ability to Respond

3. Formation of judicial response committee





False Speech

“Fake News”

Combines inaccurate facts with interpretation or opinion

Opinion and commentary protected by First Amendment

False statements of fact are often protected as well



United States v. Alvarez, 132 S. Ct. 2537 (2012)

leading case on false speech



Facts:

- Stolen Valor Act made it a crime for anyone to falsely claim they had received congressional decoration or medal for service in the armed forces
- Challenged as a content-based restriction under the First Amendment

United States v. Alvarez, 132 S. Ct. 2537 (2012)

Court's Analysis

- “[T]he government has not demonstrated that false statements should constitute a new category” of unprotected speech.
- Examples of permissible false speech bans:
 - False statements to government officials
 - Impersonating government official
 - Lying under oath
 - Defamation



United States v. Alvarez, 132 S. Ct. 2537 (2012)

Court's Analysis Cont'd

- Agreed Stolen Valor Act was content based
 - Only prohibited false statements on one topic
- Therefore must survive “exacting scrutiny” (strict scrutiny)
 - compelling govt interest ✓
 - narrowly tailored ✗
 - least restrictive means ✗
- Overbroad: prohibits false statements in limitless times and settings
- Not the least restrictive means

False Speech Takeaways

- More often than not, it's protected by the First Amendment
- Unconstitutional to punish all false speech about a particular topic, such as a specific judge or court case

Defamation



Defamation

Elements

A **published false statement of fact** (not opinion or joke) made about an **identifiable person** (the plaintiff), where the speaker or publisher acted with the **requisite level of fault**, and the false statement caused the plaintiff to suffer **reputational damage**

Public Officials

Probate judges qualify as **“public officials”** and as such are subject to the “actual malice” standard created in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964):

Actual Malice: To constitute a claim of defamation, the statement must be false, publicly circulated, and the statement must have been made **with knowledge of its falsity** or **with reckless disregard of the truth** with **clear and convincing evidence**

Defamation

Defamation suits brought by judges:

- *Murphy v. Boston Herald* 449 Mass. 42 (2007)
- *Bentley v. Bunton* 153 S.W.3d 50 (Tex. 2004)
- *Keohane v. Stewart* 882 P.2d 1293 (Colo. 1994)

Defamation: *Bentley v. Bunton*, 94 S.W.3d 561 (Tx. 2002)

Facts

- Verbal criticism of a judge by a talk show host on the show
 - Accused judge of being corrupt
 - **“The most corrupt,” “number one corrupt,” “ultimate corrupt”** elected official in the county
 - Dared judge to come on to talk show to deny the allegations
 - **“The fact is, y’all are corrupt, y’all are the criminals, y’all are the ones that oughta be in jail.”**
- Co-host does not use the word “corrupt,” but expresses agreement with host on the air

Court’s Analysis

- Used actual malice standard
- “Accusing a public official of corruption is ordinarily defamatory *per se*”
- Testimony from host’s friend:
 - “He said that the one that he really couldn’t get anything on that bothered him was old Bascom Bentley.”
- Court held that statements by host were **defamatory**
- Statements by co-host were **defamatory**

Defamation: *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994)

Facts

- Accused a judge of accepting a bribe in a trial
- Written statements made by a community member in two letters to the editor
 - “Sick Pillars of the Community,” “HOW SICK!!!!”
 - Did not refer to Judge Keohane by name
 - But did refer to **collusion and payoffs** between judges and doctors
- Verbal statements made by a city councilmember
 - “That’s the best judge money can buy.”
 - “What do you think, was [Judge Keohane] paid off in drugs or money?”
 - “Do you think he was paid off in cash or cocaine?”

Court’s Analysis

- Written statements
 - Not actionable; opinion protected by fair comment privilege
- Verbal statements
 - Actionable
- Court awarded compensatory and punitive damages against city councilmember

Dissent

- “[A] reasonable listener could not understand the comments as assertions of actual fact about Keohane, but would recognize them as **figurative expression of Stewart’s dissatisfaction** with the verdict.”

Defamation: Opinion versus Fact

Does the “fair comment” privilege apply? *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

- (1) Whether statement is “sufficiently factual to be susceptible of being proved true”
- (2) Whether “reasonable people would conclude that the assertion is one of fact.”

Statements which “represent[] the ~~actual~~ **actual opinion** of the speaker” are protected under the First Amendment and are therefore **not actionable**. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

However, “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980).

Defamation: Actionable versus Non-Actionable

Actionable	Non-Actionable
<p>“What do you think, was [Judge Keohane] paid off in drugs or money? Do you think he was paid off in cash or cocaine?” <i>(Keohane v. Stewart)</i></p>	<p>“A community ... would have to be even sicker” to retain an officer of the court who is guilty of participating in the activities described in the letter <i>(Keohane v. Stewart)</i></p>
<p>Co-host names judge as one of the most corrupt officials in the county. Host corrects that judge is “the most corrupt.” Co-host states, “Yeah.” <i>(Bentley v. Buntorf)</i></p>	<p>“sickie,” “terrorists,” “scum” <i>(Keohane v. Stewart)</i></p>



Gag Orders

Gag Orders: What is a Gag Order?

Definition

- “Gag order” refers to a judicial ruling that bars public disclosure or discussion of information related to a case.
- A gag order prohibits participants in judicial proceedings from speaking to the public or the press about those proceedings.

How do courts treat gag orders?

- Courts find that gag orders are a form of **prior restraint** and are **presumptively unconstitutional** under the First Amendment *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (finding that courts “[carry] a heavy burden of showing justification for the imposition of such a restraint.”).
- Courts issuing gag orders must demonstrate **imminent danger to a compelling interest** that would justify such a prior restraint (strict scrutiny).

Gag Orders: *Nebraska Press* (1976)

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)

- “[P]rior restraints on speech and publication are **the most serious and the least tolerable** infringement on First Amendment rights.”*Id.* at 559.
- “[T]he guarantees of freedom of expression are not an absolute prohibition under all circumstances, but **the barriers to prior restraint remain high** and the presumption against its use continues intact.”*Id.* at 570.

Gag Orders: *S.B. v. S.S.* 243 A.3d 90 (Pa. 2020)

Facts:

- Child custody case
- Trial court cleared a father of sexual abuse allegations
- Child's mother posted her disagreement online via Youtube and social media
- Mother's lawyer posted link to child's in-court testimony about alleged abuse
- Trial court issued a gag order instructing the mother to **remove those public comments** and **prevented** the mother and counsel **from discussing the case further** in any public forum

Court's Analysis:

- Court found that the protective order restricted only the manner of the speech and not the content of the speech
- The court applied a lower level of scrutiny *intermediate scrutiny*
 - **Narrowly tailored** to the **important** governmental interest
- Found that lower court's actions satisfied intermediate scrutiny
- Gag order upheld

Dissent:

- Content-based restriction
- No time limit

Gag Orders: *Baskin v. Hale*, 337 Ga. App. 420 (2016)

Facts:

- Child custody case
- Mother posted derogatory remarks on social media that the trial court found to be detrimental to the parties' minor children
- Trial court entered an order that prohibited both parties from placing any information relevant to the case either online or on any public medium until the child turned 18
- Order also prohibited parties from publicly alleging that the court reporter's transcript of a hearing in the case was flawed or had been altered

Court's Analysis:

- Order vacated
 - “[W]e cannot condone the superior court’s attempt in this case to restrict the parties’ and lawyers’ right to publicly criticize the court and litigation for the next ten years.”
- The court recognized that the parties and lawyers had a First Amendment right to publicly criticize the court and refused to condone the superior court’s restriction on these rights.

Gag Orders: Takeaways

- High presumption *against* their validity
 - *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)
- Courts more likely to uphold gag orders in cases involving minors to protect child privacy
 - But courts must still consider less restrictive alternatives



Judicial Ethics

Substantially Similar Rules Across States



- High standards of judicial conduct
- Promote public trust in the judiciary
- Reduce political or social influence
- Maintain integrity and independence

Common Themes



Surveyed Texas, California, New York, Georgia & Illinois

- Judges not to be “swayed by partisan interests, public clamor or intimidation, or fear of criticism”
- Judges may not publicly comment about matters pending before them or that may soon be pending before them, in a manner that would suggest their probable decision on the matter*
- Judges may not disclose or use for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity**

*NY & IL prohibit comment on pending matters in *any* court

** IL does not include this prohibition

Bottom Line

- Ethics rules significantly limit how judges can publicly respond to personal attacks on them or misinformation relating to a case pending before them.
 - Public remarks, even if carefully worded, may telegraph how judge is likely to rule or suggest judicial bias in favor or against one of the parties
 - Public remarks may also suggest that the judge is being swayed by public clamor or fear of criticism
- Even after the case is over, judges are limited in what they can say if it would disclose nonpublic information from the case.



What to do???



- False speech is protected
- Can't issue gag order
- Can't make public statement
- Defamation action has many downsides

Judicial Response Committee

ABA's Standing Committee on the American Judicial System recommends

- **Who:**
 - State or local bar association committee
- **Purpose:**
 - Defend judges when unjustly criticized for exercising official duties
 - Defend judiciary when unjust criticism erodes public trust

Step 1- Deputize and Equip a Response Team

- **Form a “rapid response team”**
 - Bar leaders and media savvy members
- **Charge committee to:**
 - **Monitor** public discussion of judges and the judiciary
 - **Accept** requests for assistance
 - **Determine** if a response to a particular criticism is necessary
 - **Prepare and disseminate** response



Step 2- Determine whether to respond

Factors weighing in favor of response . . .



- **materially inaccurate-** i.e., really got it wrong
- **displays a lack of understanding** of the legal system or role of the judge in the judicial process
- likely to have **alasting negative effect**n the community

Don't forget to ask: *Does the impacted judge want a public response?*

Timing & method of response



(1) Time is of the essence respond within same or next news cycle

=> Have “tool kit” prepared in advance

(1) Respond in same form and method as the initial attack or misinformation

=> respond to Facebook on Facebook, Twitter on Twitter, etc.

(3) Other methods of response:

=> email or call party disseminating unjust criticism

=> email or call reporter or editor of publication where criticism published

=> distribute op-ed to print and online media outlets

=> post response on bar association’s or other organizations’ websites

=> hold press conference (strongest response)

Step 3- Identify when response not appropriate

Such as when ...

- Criticism is justified
- Criticism is fair comment or opinion
- Criticism arises from personal feud or dispute with judge unrelated to court case

- Response would require taking a position on a political issue
- Response would require lengthy investigation of true facts
- Response would seem defensive or self-serving
- Response would conflict with other interests of the responding bar association



Do any states have a judicial response committee?

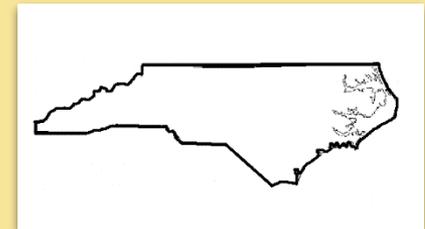


- **Texas State Commission on Judicial Conduct**

- Authorized by Texas Constitution
- To issue public statement when there is notoriety concerning a judge
- If in best interests of judge or public

- **North Carolina Judicial Response Committee**

- Organized by NC Chief Justice's Commission on Professionalism
- Responds to unwarranted attacks on judges by media and public in print, broadcast, or social media
- Judges contact Committee for assistance



Questions?