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Informing the Public about the U.S. Supreme Court's Work

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Supreme Court of the United States

Address

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Ruth Bader Ginsburg[*]

My remarks this afternoon concern informing the public about the work the Supreme Court does. I will speak of efforts simply to describe the Court's actions (both in-house efforts and press reports), and also of feedback on the Court's dispositions—comment on, or criticism of, the Court's work from people who keep us alert to our fallibility, reviewers who stimulate us to try harder, especially to write more comprehensibly.

I.

The Court speaks primarily through its opinions. It holds no press conferences and its members appear on no talk shows. But we try, in several ways, to advance public understanding of the Court's role and judgments.

On mornings when decisions are announced, opinion authors read aloud in the Courtroom short bench statements, running three to ten minutes in length, summarizing what the Court held and the principal reasons for the decision. Just after I read a bench statement, I supply the pages to our Public Information Office for immediate distribution to the press. I try to write the statements in plain English, copyable by reporters racing against a clock.

Every Court opinion is prefaced by a syllabus, which states the essential facts and outlines the Court's disposition in more detail than the bench announcement. A legend printed on the first page of every decision warns that "[t]he syllabus constitutes no part of the opinion of the Court but has been prepared [simply] for the convenience of the reader," and may not be cited as authoritative.[1] The syllabus is drafted

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* Associate Justice, Supreme Court of the United States. This address, presented at Loyola University Chicago School of Law on August 22, 1997, is a revised and updated version of a lecture originally published in 83 GEO. L.J. 2119 (1995). The address is published substantially as delivered at Loyola. To aid the reader, footnotes have been added.

1. The legend refers to *United States v. Detroit Timber & Lumber Co.*, in which the

by the Reporter of Decisions, but the justice who wrote the opinion may edit it closely and sometimes rewrite passages, as I more than occasionally do, mindful that busy lawyers and judges may not read more.

Since 1973, the U.S. Supreme Court has had a full-time Public Information Officer, today aided by a staff of four. The prime mission of the Public Information Office is to furnish reporters with the various documents they need to write their stories. The current Public Information Officer, Toni House, was for many years a reporter, so she understands press pressures. She has differentiated the work of the Court's Public Information Office from that of other government public relations offices by emphasizing: "Here, we do not do spin."[2]

Perhaps the major way we tell others about our work is through the talks we give to school and other groups who visit the Court, lectures out-of-town at colleges and universities (like this one), participation in bar and civic association programs, and also exchanges with colleagues abroad. We all took part as actors in a film completed last fall, a 22–minute presentation designed to serve as an introduction to the Court. That film, with settings in our Courtroom and conference room, is now shown throughout the day in the Court's small ground-floor theatre.

The Judiciary Committee of the U.S. Senate, last year, displayed what may have been a misapprehension of judges' extracurricular endeavors. The Chairman of the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts sent a survey to federal court of appeals and trial court judges in January 1996 inquiring, among other things, about extracurricular activities. Questions included:

> (a) Are you involved in . . . teaching, lecturing, writing law review articles . . . ?
>
> (b) If so, how much time do you spend on these activities, including preparation and travel?
>
> (c) [W]hat is the compensation you receive for such activities?[3]

Many judges found the survey disquieting. Some found it a good

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Court observed that "the headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports." United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906).

2. RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 48 (1994) (quoting Toni House).

3. SENATE SUBCOMM. ON ADMIN. OVERSIGHT AND THE COURTS, SENATE COMM. ON THE JUDICIARY, 104TH CONG., REPORT ON THE JAN. 1996 JUDICIAL SURVEY, pt. 2, app. A, at 2 (1996) [hereinafter SENATE REPORT].

chance to educate. Ralph K. Winter, now Chief Judge of the U.S. Court of Appeals for the Second Circuit, and long-tenured Yale Law School teacher, viewed the survey as "an opportunity to dispel myths."[4]

An overwhelming majority of the court of appeals judges who responded to the survey (and a large majority did respond) reported: Indeed yes, they are involved in extracurricular educational and professional activities—notably teaching, lecturing, and occasionally writing law review articles, even books.[5] (Our Chief Justice has written two books so far,[6] and is working on a third, about civil liberties in war time. In that, he is following tradition. Chief Justice John Marshall, for example, wrote—and several times revised—a five-volume biography of George Washington.[7]) Most of our extracurricular endeavors entail no monetary compensation. The Executive Committee of the U.S. Judicial Conference, in its own response to the Senate Subcommittee's survey, explained that "[f]ederal judges . . . have a long and distinguished history of service to the legal profession through their writing, speaking, and teaching."[8] The Committee endeavored to gain a clearer understanding by legislators and the public that interaction between law schools, bar and civic associations and judges should be strongly encouraged, not viewed with suspicion.

If the U.S. Supreme Court is more accommodating to the press than it was in days before syllabi at the start of the Court's opinions, and a Public Information Office, the Supreme Court press corps still lacks the inside information that is grist for reporters' mills on other beats. Because confidentiality is vital to the way the Judiciary works, that lack of information is likely to persist.

II.

Journalists who cover the U.S. Supreme Court must be selective. They must select nowadays from upwards of 7000 petitions for

4. Deborah Pines & Bill Alden, *District, Circuit Judges Use Senate Survey to Boast, Gripe*, N.Y.L.J., Mar. 25, 1996, at 1.

5. *See* SENATE REPORT, *supra* note 3, at 49.

6. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS (1992) [hereinafter GRAND INQUESTS]; WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987) [hereinafter THE SUPREME COURT].

7. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 328-32 (1996).

8. EXECUTIVE COMM. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RESPONSE OF THE EXECUTIVE COMM. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO THE JUDICIAL SURVEY CONDUCTED BY THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, Feb. 1996, at 19.

review, and 80 to 100 oral arguments and decisions, the cases that warrant public attention. They do well, but they have missed some big ones. One notable example, on April 25, 1938, Justice Brandeis announced the decision of the U.S. Supreme Court in *Erie Railroad Co.* v. *Tompkins.*[9] "The question," Brandeis stated, "is whether the oft-challenged doctrine of *Swift* v. *Tyson* shall now be disapproved."[10] *Erie*, as every U.S. federal procedure student learns, overruled a precedent that held sway for nearly a century. *Erie* decreed that federal courts were to elaborate only on federal law; general common law, *Erie* firmly recognized—under the Rules of Decision Act, read in light of the Tenth Amendment—fell within each State's domain.[11] Yet not even the *New York Times* found that news—the news of *Swift*'s demise—immediately fit to print.

Justice Stone, one week after *Erie*'s release, wrote privately to Arthur Krock of the *New York Times* calling *Erie* "the most important opinion since I have been on the court."[12] The message took hold, and the next day, Krock devoted his column to the "Momentous Decision," Krock's comment opened:

> If the Supreme Court, like so many other arms of the government, had a publicity agent, eight days would not have passed before the importance of its decision in the Tompkins case became known. Though Justice Brandeis delivered this transcendentally significant opinion a week ago yesterday, it has generally eluded public notice.[13]

We still have no publicity agent but, as I just noted, we do have a Public Information Office to aid the press and, despite lack of access to inside information, the press has grown in capacity to relate what the Court does. No justice need today send letters of the kind Justice Stone dispatched to the *New York Times* on *Erie*. And I doubt any of my colleagues would say, as Justice Miller did late in the nineteenth century: The members of the press "have combined to bring the Courts and the administration of justice under their control, by their appeals to popular prejudice, accompanied by the usual amount of

9. 304 U.S. 64 (1938).

10. *Id.* at 69 (footnote omitted).

11. *See id.* at 79-80.

12. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 476-77 (1956) (quoting letter from Harlan Fiske Stone, United States Supreme Court Justice, to Arthur Krock, Columnist, N.Y. TIMES (May 2, 1938)).

13. Arthur Krock, *A Momentous Decision of the Supreme Court*, N.Y. TIMES, May 3, 1938, at 22, *quoted in* Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011, 1029 (1978).

lying."[14]

There are occasional slips, of course. Still too often in my view, the press overstates the significance of something the Court or a justice does, or of an order denying review. An example from the current Term—when we declined to review a decision of the Ninth Circuit regarding California's Proposition 209,[15] one front page article opened: "[T]he United States Supreme Court upheld California's sweeping ban on affirmative action policies."[16] In truth, we did not uphold or affirm anything in the Proposition 209 case. We simply denied review.

My colleague Justice Stevens, in published statements, time and again reminds that a denial of a request for review (a petition for certiorari) leaves the lower court decision unreviewed, neither approved nor disapproved.[17] Reasons why a petition fails to attract the four votes needed to grant review vary from the technical to the prudential: review may be sought too late; the judgment of the lower court may not be final; a case may raise an important question but the record may be cloudy; the particular controversy—although not the large issue it raised—may have become moot; the matter may benefit from further opinions, further percolation in the lower courts, for, in Justice Frankfurter's words, "[w]ise adjudication has its own time for ripening."[18]

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14. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 279 (1939) (quoting letter from Samuel Freeman Miller, United States Supreme Court Justice (Jun. 23, 1875)).

15. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397 (1997), *denying cert. to* 122 F.3d 692 (9th Cir.).

16. Sam Howe Verhovek, *Referendum in Houston Shows Complexity of Preferences Issue*, N.Y. TIMES, Nov. 6, 1997, at A1.

17. *See* Barber v. Tennessee, 513 U.S. 1184, 1184 (1995) (Stevens, J., respecting the denial of certiorari) (commenting that "on occasion it is appropriate to restate the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits"); *see also* Brown v. Texas, 118 S. Ct. 355, 356 (1997) (Stevens, J., respecting the denial of certiorari) (stating "the Court's action in denying certiorari does not constitute either a decision on the merits of the questions presented or an appraisal of their importance.") (citations omitted); Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting the denial of certiorari) (stating "[a]s I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits."), *reh'g denied*, 117 S. Ct. 1465 (1997).

18. Singleton v. Comm'r, 439 U.S. 940, 943 (1978) (Stevens, J., respecting denial of certiorari) (quoting Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-19 (1950) (Frankfurter, J., respecting denial of certiorari)); *see id.* at 945 (providing possible reasons for the denial of certiorari as (1) "absence of any conflict among the Circuits [may be] a sufficient reason for denying certiorari;" (2) "in allocating the Court's scarce resources, [it may be] entirely appropriate to disfavor complicated cases which turn largely on unique facts;" and (3) "[a] series of discussions by the courts of appeals may

The press tells the public not only about what the Supreme Court decides and what we decline to decide. Reporters also write about oral arguments before the Court. The American Bar Association's Division for Public Education, in cooperation with the Association for American Law Schools and the Newspaper Association of America Foundation, is making a vital contribution in that regard. In advance of each of the Term's seven two-week sitting periods, the Division for Public Education publishes a newsletter called *Preview*, a journal containing a synopsis of each case calendared for argument. Law teachers write the previews — each running four or so double-columned pages in length—in commendably plain English. These synopses can aid the press to comprehend the threshold issues on which decisions sometimes turn—standing or mootness, for example. A grasp on these issues may yield reports more enlightening than the report of a case from last Term announcing that the Supreme Court ordered the eight–year-old Arizonans for English as an Official Language suit dismissed for "legal technicalities."[19]

Now and then, the press ventures a tentative forecast based on oral argument. My first Term on the Court, for example, in mid-April 1994, we heard argument in *Honda Motor Co.* v. *Oberg*,[20] a case concerning court control of punitive damages awarded by juries. Five days later, a lawyers' journal, the *Legal Times*, described the argument for Honda as disappointing—a performance both "faltering" and "unfocused."[21] The same report described as "dazzling" the performance of counsel for the punitive damage awardee—the personal injury plaintiff. That argument, in the reporter's view, "captivat[ed]" the Court.[22] In the fullness of time—in the June opinion flurry—the Court announced its judgment: 7–2 for Honda, the party whose lawyer, in the opinion of the *Legal Times* reporter, had faltered and "never . . . recovered."[23] I wrote a dissent in the *Honda* case,

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well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court").

19. Joan Beck, *Congress Should Pass "English-only" Legislation*, CHI. TRIB., Mar. 6, 1997, § 1, at 25.

20. 512 U.S. 415 (1994).

21. *Tribe Drives Home Points in Honda Case*, LEGAL TIMES, Apr. 25, 1994, at 10. A later issue of the *Legal Times* published an experienced appellate advocate's letter to the editor disagreeing with the reporter's appraisal of the argument for Honda. The letter stated: "In my view, [Honda's attorney] made a clear, well-reasoned, and effective argument on behalf of Honda in challenging circumstances." Robert A. Long, Jr., *Frey Excelled at the Supreme Court*, LEGAL TIMES, May 9, 1994, at 42.

22. *Tribe Drives Home Points in Honda Case*, *supra* note 21, at 10.

23. *Id.*

joined only by the Chief Justice.[24] As I recall, upon release of the decision, there was scant comment on the captivating counsel's lack of success.[25] But I am sympathetic, for the press operates with necessary haste. I appreciate, too, what *New York Times* Supreme Court reporter Linda Greenhouse wrote on this topic: The press corps "is often groping along in the dark, trying to make sense out of the shadows on the cave wall."[26]

What should be the objective of press accounts of oral arguments? Not to predict winners, I think. One television reporter, Rita Braver, offered this description of what she tried to convey to her audience: "I hope with an argument story you and your spouse will get into a discussion of which side is right."[27] A worthy aim, don't you agree.

The U.S. Supreme Court operates on a Term system—every case heard from the first Monday in October through the last sitting day in April or May must be decided before we leave town in July. It is not uncommon, on days in June, for the Court to release in one fell swoop six or even more opinions, consuming over 100 pages in the small print of U.S. Law Week. June opinions, understandably, are reporters' pet peeves. They have asked that we stagger June opinions daily across the month or, at least, the final weeks. We have accommodated them only in part by adding three or four extra sitting mornings in June's last two weeks.

I have it on reliable authority that reporters would like us to add to our opinions a "practical effects" section in which we spell out the real world impact of the opinion.[28] But they know that is wishful thinking, for case law generally does not work that way. In our common law system of adjudication, matters seldom can be fully settled "on the basis of one or two cases;" they generally "require a closer working out,"[29] often involving responses by, or a continuing dialogue with, other branches of the federal government, the States, or the private sector.

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24. *See* 512 U.S. at 436 (Ginsburg, J., dissenting).

25. *But see* Tony Mauro, *Justice Ginsburg Presses Her Case*, LEGAL TIMES, Feb. 27, 1995, at 10 (recognizing, "in retrospect," that argument of counsel for Honda "may have been . . . strategically wise").

26. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1559 (1996).

27. DAVIS, *supra* note 2, at 76 (quoting CBS news correspondent Rita Braver).

28. *See* Letter from Paul M. Barrett of the *Wall Street Journal* to author (Oct. 25, 1994) (on file with author).

29. Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 339 (1940) (Conference on the Status of the Role of Judicial Precedent).

III.

I turn now from reporting Court decisions to feedback on Court dispositions. As James Oakes, a former Chief Judge of the United States Court of Appeals for the Second Circuit, accurately observed, life tenure—which all federal judges in the United States enjoy—does not mean insulation from inspection. "[H]ardly an institution," Judge Oakes said, "operates with so many built-in checks and balances capable of instant criticism."[30] Judge Oakes mentioned among the critics: one's own colleagues and other judges, law professors, law reviews, and, "to an ever greater and more professional extent, the press."[31] To that list, I would add the U.S. Congress, for the legislature is a prime audience for and responder to judicial opinions.

Most of the work currently done by U.S. federal courts, including the Supreme Court, involves not grand constitutional principle, but the interpretation and application of statutes passed by Congress, laws that are sometimes ambiguous or obscure. When Congress has been Delphic or dense, or simply imprecise, courts often invite, and are glad to receive, legislative correction or clarification.[32]

Regarding the Judiciary itself, I will tell you of the responses I get to an opinion in circulation. My colleagues closely guard the label, "Opinion of the Court." They do so in "Dear Ruth" letters responsive to a circulating opinion. Such letters not uncommonly read: "Please consider adding, deleting, dropping, revising to say . . . ;" or, more hopefully, "I will have no problem joining if you will take out, put in,

30. James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 948-49 (1979).

31. *Id.* at 949.

32. Both in his book and in several articles, Robert Katzmann describes current efforts to aid Congress to address court interpretations of unclear legislation, and to train the legislative mind on court of appeals decisions, as well as Supreme Court opinions, construing ambiguous statutes. *See generally* ROBERT A. KATZMANN, COURTS & CONGRESS (1997) (examining the relationship between the courts and Congress and offering suggestions for improving communication between the two); Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189, 2190-91 (1997) (reporting on the progress of a project concerned with improving communication between the courts and Congress); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 654-55 (1992) (discussing an inquiry into the types of mechanisms that might improve interaction concerning statutory revision between the courts and Congress). For commentary on the Katzmann & Herseth article, see M. Douglass Bellis, *A View from the House of Representatives*, 85 GEO. L.J. 2209 (1997); Frank Burk, *Statutory Housekeeping: A Senate Perspective*, 85 GEO. L.J. 2217 (1997); Mark J. Langer, *Implementing the Project: A Court Administrator's Role*, 85 GEO. L.J. 2219 (1997); James L. Buckley, *The Perspective of a Judge and Former Legislator*, 85 GEO. L.J. 2223 (1997).

alter or adjust as follows."[33] I am comforted, at such times, by a remark our Chief has traced to Chief Justice Hughes: Hughes said that during the many years he served on the Court "he tried to write his opinions clearly and logically, but if [another justice whose vote was necessary to make a majority] insisted on putting in [particular language], . . . in it went, and let the law reviews figure out what it meant."[34]

There was a long time in the U.S. Supreme Court's history, indeed until Chief Justice Melville Fuller's 1888–1910 tenure, during which justices did not routinely circulate their draft opinions among their colleagues prior to delivery. The consultation process was less formal; the opinion author in those days had a freer hand to compose and publish an opinion untouched by all his colleagues' minds.[35] I would not vote for a return to that old way. Most of the time, my colleagues' comments help me to improve an opinion. And there is nothing better than a good dissent to force one to sharpen her presentation for the Court.[36]

Opinions in controversial U.S. Supreme Court cases often go through multiple drafts, first to gain at least five votes, then to account for dissenting or separately concurring opinions. No opinion I have ever written for the Court has survived totally untouched by other minds. On a collegial court, in short, one's own colleagues are both dress rehearsal and opening night critics. Supreme Court justices benefit, too, when other judges in the system, both federal and state judges, endeavor to parse our precedents, revealing gaps we can fill, or infirmities we can remedy the next time around.

For enlightenment on decisions past, present, and future, do judges read legal commentaries and law reviews? Yes, most of us do.

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33. *See* Ruth Bader Ginsburg, *Remarks for American Law Institute Annual Dinner, May 19, 1994*, 38 ST. LOUIS U. L.J. 881, 886-87 (1994).

34. REHNQUIST, THE SUPREME COURT, *supra* note 6, at 302.

35. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815, at 183-95 (1988) (III-IV OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (describing Marshall Court practice of delivering an "Opinion of the Court" produced by a single justice — usually Marshall himself —without prior review by other Court members); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-1868, PART ONE 69-70 (1971) (VI OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (continuing this practice, with minor modifications by the Chase Court); CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 320-31 (1939) (initiating the practice of circulating opinions during Fuller Court).

36. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986); Antonin Scalia, *Nineteenth Annual Lecture: The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 41.

Benjamin Cardozo said on this matter: "Any morning's mail may bring a law review . . . to disturb our self conceit and show with pitiless and relentless certainty how we have wandered from the path. The reviewer seems to say [as does a character in Shakespeare's *Othello*]: 'It is a judgment maim'd and most imperfect.'"[37] New York's current Chief Judge, Judith Kaye, more recently and cheerfully said: "Parties do not necessarily have in mind the sensible, incremental development of [the law] . . . . Academic writers therefore become genuine partners in the courts' search for wisdom."[38] They aid us best, I might add, if they are honest and careful, and do not, as Learned Hand said of the lazy judge, attempt to "win the[ir] game by sweeping [opposing chess pieces] off the table."[39]

If law journal citations in Supreme Court opinions are less numerous in the 1980s and 1990s than they were in the 1970s,[40] they are hardly out of favor. My law clerks this year reported that in the 1995–1996 Term, law journal commentary was cited in at least twenty-five of the Supreme Court's opinions, in contrast to October Term 1937, the term the great case of *Erie* v. *Tompkins* was decided, when citations to law review articles showed up in only six opinions.

We are, it is true, not of one mind on the value of academic writings. Justice Souter noted in a 1996 opinion that "[t]he great weight of scholarly commentary agree[d]" with his position.[41] He wrote in dissent.[42] The Chief Justice, author of the majority opinion, replied: The dissent "disregards our case law in favor of a theory cobbled together from law review articles."[43] And in another case, Justice Scalia charged Justice Stevens with advancing a "head-snapping proposition," derived from "no less weighty authority than a law-review article."[44]

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37. Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 915-16 (1953) (quoting WILLIAM SHAKESPEARE, OTHELLO act 1, sc. 3 (E.A.L. Honigmann ed., Thomas Nelson & Sons, 3d ed., 1977)) (repeating the words of the character Brabantio).

38. Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989).

39. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362 (1939).

40. *See* Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134-35 (1986) (reporting decline in number of citations to legal periodicals, from 963 in 1971-1973 Terms to 767 in 1981-1983 Terms).

41. Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1150 n.8 (1996) (Souter, J., dissenting).

42. *See id.* (Souter, J., dissenting).

43. *Id.* at 1129-30.

44. Janklow v. Planned Parenthood, Sioux Falls Clinic, 116 S. Ct. 1582, 1586 (1996) (Scalia, J., dissenting from a denial of certiorari).

Learned Hand said 70 years ago what I believe remains true of law teacher and judge: "[E]ach is necessary to the other, each must understand, respect and regard the other, or both will fail."[45]

Before concluding with some words on the now traditional media, I should at least note the vast potential of cyberspace for communicating what the Court does, and for multiplying comment on the Court's work. Electronic copies of our opinions are instantaneously available to readers worldwide. By sending an E-mail message to Cornell University's Legal Information Institute, for example, one gains access to the syllabi of all Supreme Court opinions on the day of release, along with instructions on accessing the full text of the day's opinions. An online service for attorneys, Counsel Connect, produces, as quickly as the opinions can be read, a discussion forum, called "Supreme Court Watch," moderated by a practicing attorney, a law professor, and a journalist; participants in this venture share views on what we may or may not have wrought. The cognoscenti in the academy subscribe to automatic mailing list services that enable them to chat about our work product in various fields—administrative law, criminal law, legal history, for example. Court opinions are also discussed on dozens of the thousands of news groups on the Usenet portion of the Internet.

The quantity of commentary in cyberspace is highly variable in quality and cogency, a cacophonous debate some have called it. Like most of my colleagues, I cannot even begin to tune in on the computer media without a staff member's aid. But last year, the Court issued an opinion with a citation—our first—to a site on the World Wide Web, and this year, in a case involving indecency on the Internet, one friend of the Court brief was presented on a CD-ROM. In time, we will find our way into and around this new form of commentary, and comprehend better how it can cast light on our work.

Returning, finally, to the more familiar mass media (newspapers and magazines, radio and TV), Justice Frankfurter, it is said, urged the press to cover the Supreme Court at least as well as it covered the World Series baseball games.[46] In 1994, for once, his counsel was heeded. (As you may recall, there was no World Series that year.[47]) Even if that never happens again, the press can be relied upon to assure that the Court will not, as it should not, exist—to quote

45. Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466, 480 (1926).

46. *See* LIVA BAKER, FELIX FRANKFURTER 218 (1969).

47. *See It's Official, It's Over*, N.Y. TIMES, Sept. 15, 1994, at B14 (announcing the cancellation of the 1994 World Series).

Frankfurter again—as "a mystical entity . . . set apart from the community and spared the criticism to which in a democracy other public servants are exposed."[48] There is, each Term, some "murky decision-reporting," a veteran Supreme Court reporter acknowledged.[49] But, he explained, murky decision-reporting may accurately capture a murky decision.[50] And so it may.

Critics of Court products sometimes exaggerate, to augment their point. Legislators may condemn a judicial opinion as sacrilegious (an opinion of mine, written while I served on the Court of Appeals for the District of Columbia Circuit, was so condemned),[51] a dissenter may call a Court opinion "ludicrous,"[52] "inexplicable,"[53] or "folly,"[54] even "terminal silliness."[55] A law review writer may overlook what does not fit into the writer's analysis.[56] An opinion I wrote in the 1995 Term was put down by one commentator as "slopp[y]" and "smug,"[57]

48. Bridges v. California, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting). Ironically, Justice Frankfurter penned these words in an opinion dissenting from the reversal of contempt convictions decreed by trial courts against publishers of items alleged to interfere with the ongoing "orderly administration of justice." *Id.* at 272.

49. John P. MacKenzie, *The Supreme Court and the Press, in* MASS MEDIA AND THE SUPREME COURT: THE LEGACY OF THE WARREN YEARS 29, 30 (Kenneth S. Devol ed., 4th ed. 1990) (reprinted from 67 MICH. L. REV. 303, 305 (1968)).

50. *See id.*

51. See 128 CONG. REC. 5890-95 (1982), reporting the House floor discussion of H.R. Res. 413, 97th Cong., 2d Sess. (1982) (enacted), a resolution expressing "deep concern" over the panel decision in *Murray v. Buchanan*, No. 81-1301 (D.C. Cir. 1981) (Ginsburg, J.). That decision relied on *Flast v. Cohen*, 392 U.S. 83 (1968), to hold that a taxpayer had standing to challenge Congress's payments to its chaplains. The panel decision was later vacated and the appeal dismissed after rehearing *en banc*. 720 F.2d 689 (D.C. Cir. 1983) (upholding congressional payments, based on Marsh v. Chambers, 463 U.S. 783 (1983)).

52. Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

53. Coleman v. Thompson, 501 U.S. 722, 767 (1991) (Blackmun, J., dissenting).

54. R.A.V. v. St. Paul, 505 U.S. 377, 415 (1992) (White, J., concurring in judgment). *See generally* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194-96 (1992) (listing among invectives used in Supreme Court and court of appeals opinions: "outrageous," "the quintessence of inequity," "a blow against the People," "naked analytical bootstrapping," "reminiscent of Sherman's march through Georgia," "Orwellian"); Philip A. Lacovara, *Un-Courtly Manners*, A.B.A. J., Dec. 1994, at 50, 52-53 (catalog of intemperate expressions appearing in opinions issued during the October 1993 Term includes: "myopic," "baffl[ing]," "misleading," "facile," "steamrolling," "as blind to history as to precedent").

55. Romer v. Evans, 116 S. Ct. 1620, 1630 (1996) (Scalia, J., dissenting).

56. Judges, too, are subject to this failing. *But see* Hand, *supra* note 39, at 362 ("[Cardozo] never disguised the difficulties, . . . [H]e would often begin by stating the other side better than its advocate had stated it himself.").

57. Stuart Taylor, Jr., *Outrages and Curmudgeonly Complaints*, LEGAL TIMES, Dec. 23 & 30, 1996, at 31.

but praised by another for its "powerful eloquence."[58] It is indeed hard, under the pressure of publication deadlines, to describe judicial opinions with entire accuracy. And, to describe court actions accurately, one of my colleagues has observed, is, in many cases, to describe them boringly.[59]

Jean Edward Smith's fine biography of John Marshall sets out a memorandum Marshall wrote in 1798, when he was in Paris, as an envoy of our government. The French foreign minister Talleyrand had accused the U.S. government of manipulating the press.[60] John Marshall explained that the U.S. press could not be so controlled. His words show the length and depth of our tradition:

> Among those principles deemed sacred in America, . . . there is not one . . . more deeply impressed on the public mind, than liberty of the press. That this liberty . . . has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good to which it is allied, perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures may be, which might correct without enslaving the press, they have never yet been devised in America.[61]

And that, I believe, remains true to this very day.

To sum up what I have tried to convey, participants in the U.S. system of justice prize fair comment on the work judges do. To assure ample room for such comment, members of the judiciary must expect and abide even comment of the unfair or uncomprehending kind. Please indulge this last personal example.

An Associated Press ("AP") release misreported a talk I gave at Louisiana State University last fall. The report said I called the U.S. Constitution outdated.[62] In fact, I praised the Constitution as it has evolved over the course of U.S. history. The AP circulated a correction,[63] but bad news, however incorrectly spun or distorted, is not easily erased. One correspondent wrote: "Your extreme views are outrageous. I am calling for your resignation." Another deplored my

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58. *The High Court Rejects Sex Bias*, N.Y. TIMES, June 28, 1996, at A32.

59. *See* Antonin Scalia, The Courts and the Press, American Enterprise Institute Boyer Lecture 18 (Dec. 6, 1989) (on file with author).

60. *See*, SMITH, *supra* note 7, at 229.

61. *Id.* at 229-30.

62. *See, e.g.*, Peter Shinkle, *Justice Ginsburg: Constitution "Skimpy,"* THE BATON ROUGE ADVOCATE, Oct. 25, 1996, at 1B-2B.

63. The AP correction circulated on November 4, 1996.

"alien, Anti-American ideology." Yet another wrote: "I am ashamed that you were ever appointed to your position and especially ashamed that you are a woman."

In April, the *American Legion Magazine*, a journal for armed services veterans, reported in its Washington Watch column: "ACLU views dominated [Ginsburg's] speech at Louisiana State University .... 'She's showing her true colors,' [a spokesman for] the Judicial Selection Monitoring Project [commented]."[64] Ominously, the *Legion Magazine* added: "Congressional insiders predict the fallout [from Ginsburg's talk] will be intense Senate scrutiny . . . of President Clinton's future nominees to the federal bench."[65] After all the advance billing, the issue perhaps will sell more than the usual number of copies, but the piece itself will disappoint the sensationalists, for it is entirely unprovocative fare.

While judges should have no immunity from critical commentary, they should have fair-minded defenders as well—true friends of the Court, people at the bar alert to the jealousy, mean spirit, oversight, or lack of understanding that sometimes triggers unfair comment from the political branches, the press, even the academy. True friends know that the good judge, to borrow great constitutional law scholar Paul Freund's words, is affected by the climate of the age, but will withstand the weather of the day.[66]

64. Cliff Kincaid, *Judge Not, Lest Ye . . .*, AM. LEGION MAG., Apr. 1997, at 16.

65. *Id.*

66. *See* William H. Rehnquist & Paul A. Freund, *A Colloquy*, 124 F.R.D. 336, 338 (1988).