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The Appearance of Impartiality

INTRODUCTION

Richard Drew/Associated Press
Judge Shira Scheindlin of Federal District Court in Manhattan was removed from New York City's stop-and-frisk case last week.

When an appeals court removed the judge from the stop-and-frisk case in New York, the panel accused her of several indiscretions: commenting out of court on a pending case, inappropriately steering cases to her court and encouraging a potential plaintiff to sue.

The accusations raise questions about what it means to be impartial, and to appear impartial. What restrictions should be placed on judges?

What Do You Mean by 'Impartial'?

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Judges should be impartial. Everyone agrees on that. But behind the single word “impartiality” lurk several distinct issues that need to be disentangled.

First consider the facts of a specific case: who did what to whom. Judges must be open-minded about such facts. They must make factual findings based only on the evidence presented by the parties, and they should not opine about the facts before deciding the case. Abandoning this sort of neutrality — for instance, declaring that the defendant is guilty before a trial starts — is obviously improper.

It's problematic to have a bias about the facts of the case. But a neutral view of the law is not impartiality; it's just incompetence.

Judicial impartiality with respect to the parties to a case is also generally desirable. A judge who favors one party, or gives greater weight to that party’s claims, is not behaving neutrally. This kind of neutrality may be harder to maintain where repeat players, such as the government, are concerned, but it may not be necessary. At the Supreme Court, for instance, the statements of the solicitor general are typically considered more than usually trustworthy. Abuses of that trust can also leave marks. Deception by the solicitor general’s office regarding the internment of Japanese Americans during World War II almost certainly made the justices more skeptical of the government’s claims of military necessity in post-9/11 detention cases. This sort of institutional memory is generally accepted and not harmful.

What about the law? Here the model of impartiality used for case-specific facts is inappropriate. Judges learn about the law from sources other than the parties, and they do so both before litigation begins and outside the courtroom. A judge who had no opinions about the law before a case began would not be impartial; she would be incompetent. Judges should have views about the law, even about unsettled legal questions. Expressing those views

should not be seen as compromising neutrality. In particular, Supreme Court nominees should not be able to hide behind impartiality in declining to answer questions in confirmation hearings.

Last, how active may a judge be in case management, for instance by suggesting motions or arguments to parties? There is an instinctive aversion to such behavior. It would surely be wrong for an umpire to help out one team. And purely tactical advice from a judge ("Have the defendant wear glasses to look less threatening") is equally improper. But litigation is not merely a contest of skill, and judges are not merely umpires. Sporting contests do not have right answers, but most lawsuits do, and judges frequently take active steps to reach those answers. They may, for example, decide a case based on a theory or argument that neither party raised. If this behavior is not taken to exhibit bias — and it generally is not — it is hard to see why suggesting the theory is improper, and indeed Supreme Court justices frequently do just that during oral argument. Advice that facilitates a better legal decision (suggesting, perhaps, how a party could present particular evidence if they had it) is not improper.

Breaking the Rules for Ethical Reasons

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Much has been said about Federal District Court Judge Scheindlin and her ruling on the stop-and frisk case in New York. Little has been said about her decision to try to make the legal system fair when it comes to racial profiling.

The data from New York alone makes the case for further scrutiny of practices and tactics that have targeted young black and Hispanic men not when they are legitimately pursued, nor when there is probable cause that they committed an offense or are carrying illegal weapons associated with a potential crime.

What Judge Scheindlin did, which does raise ethical questions, was recommend a series of steps to prevent and monitor police profiling in cases where there is no evidence of wrong doing. A similar approach was adopted by the late Judge Bruce Wright in New York, when he used the practice of leveling the playing field for black and brown youth in New York, because they were, in his mind, too often profiled. The lesson here is that sometimes the ethical path for judges is to break the rules so that important issues can be discussed and debated to enhance our understanding of racial justice in America.

Which Judges Breached the Rules?

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As a former U.S. District Court judge, I believe that the rules about judicial speech are too restrictive. But last week's decision from the Second Circuit panel highlighted the importance of other rules of conduct – and it was the members of the Second Circuit, not Judge Schira Scheindlin, who violated those rules.

The three members of the panel, Judges Jose Cabranes, Barrington Parker and John Walker, expressed concern about the assignment of the stop-and-frisk case to Judge Scheindlin (the "related-case rule") and about her public comments, which they said were about a pending case and were therefore improper. In fact, it was their acts that violated procedural fairness, and their

acts that forced the judge to make a public statement about a pending case – in order to rebut their accusations.

It was the members of the Second Circuit, not Judge Schira Scheindlin, who violated the rules of judicial conduct. Their flawed decision shows why those rules should be followed.

No party had moved to disqualify the judge – not during the years at the trial court level, not on appeal. No one challenged the case's assignment to Judge Scheindlin. No party complained about her interviews with the news media. Without a party raising these issues, for the panel to do so was a "cheap shot." The Appeals Court doesn't have the right to just review anything it wants. Even more significant, had the parties moved for disqualification, the judge would have written a decision, explaining what happened. None of the accusations against her was sound, and a fair process would have shown that.

The judge's most vehement opponent here was not a party, but rather Mayor Michael Bloomberg, who used the media to attack her participation in the case. But judges are not supposed to cave into political pressure, not listen to the press drumbeat; that is what judicial independence means.

The scandal of this case is not about judicial speech or the assignment process. It is about disrespecting the parties and the process, not to mention a fine judge. I'm glad the case has led to a conversation about judicial impartiality. I just hope we see who the transgressors are, and see that Judge Scheindlin is not one of them.

Err on the Side of Allowing Speech

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Public understanding of the U.S. judicial system leaves something to be desired. Approximately two-thirds of Americans can't name one Supreme Court justice or all three branches of government. Not surprisingly, Judge Judith Sheindlin, the television jurist better known as Judge Judy, is far more famous than Judge Shira Scheindlin, the federal judge whom the Second Circuit appeals court recently removed from presiding over challenges to New York City's stop-and-frisk policy.

A number of judges are making efforts to combat the citizenry's ignorance about the courts. Some judges, including U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, write articles and books about the judicial process. Other judges, such as Judge Scheindlin, deliver speeches, teach or give interviews to journalists. And a few judges, like Richard Posner and Richard Kopf, speak directly to the public through blogging.

One of judges' duties is civic education. When courts try to muzzle judges, the silence is generally worse than the speech.

These efforts are valuable and should be encouraged. As New York State Chief Judge Jonathan Lippman has written, "When judges take the time to speak, write, lecture, and teach, particularly on law-related issues, it improves public understanding of the courts and strengthens positive perceptions and institutional support for the judiciary and the legal system."

The Second Circuit's decision removing Judge Scheindlin from the stop-and-frisk cases – which may have had less to do with her media interviews and

more to do with the panel's allegations about her use of an internal court rule concerning how cases get assigned – might have been justified (although the move has received significant criticism). But as a general matter, when policing supposed violations of impartiality, courts should err on the side of permitting judicial speech. Doing otherwise risks creating a "chilling effect," causing already cloistered judges to shirk their duties of civic education, further disengage with the world around them, and hide underneath their robes. Impartiality, both actual impartiality and the appearance of it, is an important judicial value. But so is transparency, which strengthens judicial accountability and contributes to public understanding of the courts. And when it comes to comprehending the complex, often opaque operations of the justice system, we need all the help we can get.

Judges Have a First Amendment Right, Too

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From an ethical standpoint, it is never a good sign when someone starts a sentence with the comment, "I'm sure I am going to get in trouble for [this].... " That is particularly true when the someone is a federal judge, obligated by a code of judicial conduct to avoid the "appearance of impropriety." So when Judge Shira Scheindlin made the comment before inviting plaintiffs to challenge New York's stop-and-frisk practices, her statement attracted criticism from an appellate court. The court was equally disturbed by comments she had made in press interviews. However, what is most troubling about the case is not what Judge Sheindlin said, but how the appellate court responded . It accused her of ethical misconduct and removed her from the proceeding without any hearing or evidentiary record on which to evaluate its decision.

Judicial credibility is enhanced, not diminished, by opportunities for public education.

Judge Scheindlin made her comment in the course of an earlier case that produced a settlement concerning alleged racial profiling. In suggesting that the plaintiffs bring a new case that she would accept as related, the court did nothing wrong on the merits. The two cases were clearly related; they involved the same practices. The judge's offhand comment about "getting in trouble" was ill-considered but her conduct was not unethical.

Nor, if Judge Scheindlin's ' statements are to be credited , did she violate the code of conduct in giving press interviews. According to her account, she did not comment on the merits of the case, which is contrary to the code; the statements attributed to her came from the opinion. No party suggested otherwise or requested her disqualification.

From a First Amendment perspective, the appellate court's opinion is disturbing on both substantive and procedural grounds. As a substantive matter, where free speech interests are at stake, courts should be wary about allowing an elastic standard like "appearance of impropriety " to muzzle appropriate comment to the press. Judicial credibility is enhanced, not diminished, by opportunities for public education. As a procedural matter, before impugning the reputation of the trial judge, the appellate should have provided an opportunity to be heard. If the goal of judicial ethics rules is to encourage public confidence in the fairness of proceedings, the appellate court 's decision was ill- calculated to do so.

http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality