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CIVILITY IN THE AGE OF THE INTERNET: CRITICIZING THE COURTS

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INTRODUCTION

Let me start with a seemingly simple proposition—that public confidence in the judiciary is essential to the rule of law.

The citizen who comes to the court seeking justice must do so in full confidence that the judge is independent of all interests or pressures that might interfere with a true and just decision according to the law. Unless members of the public respect the courts that administer the law, they will not settle their disputes through the courts. They will not obey court orders. Judgments become mere edicts that are, to borrow Shakespeare's words, like clanging bells "full of sound and fury, signifying nothing."¹

In a recent book, *Making Our Democracy Work*, Justice Stephen Breyer of the United States Supreme Court poses a "puzzling question"—why does the public accept and follow decisions made by the judiciary, a body he describes as "inoffensive, technical, and comparatively powerless."² The simple answer to this question is that the courts enjoy the confidence of the people. The people respect the courts not only for what they do—people may disagree with court decisions—but because they understand that the courts constitute the third branch of governance, without which democracy is impossible. This respect for the judicial branch, so vital to democracy, is grounded in and sustained by the discourse of civility—the tradition of respectful discussion and debate; of disagreeing with particular decisions without castigating the courts that make these decisions. This discourse of civility is fundamental to public confidence in the judiciary and ultimately to the rule of law.

The tradition of respectful civil debate, many suggest, is eroding. Public confidence in the judiciary, they assert, is being challenged by a rising crescendo

* Beverley McLachlin, Chief Justice of Canada, Remarks on Civility in the Age of the Internet at the James P. White Lecture on Legal Education at the Indiana University Robert H. McKinney School of Law (Apr. 8, 2015).

1. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5.

2. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 11 (Random House 2010).

of criticism directed at judges. The deference formerly paid to judges is too often being replaced by the invective of personal attack. Thus, Michael B. Hyman states, “of late, both sides of the political aisle have notably ratcheted up the rhetoric beyond expressing simple displeasure or disagreement with an individual opinion. Instead, Washington has taken to assailing the judiciary’s authority, discretion and integrity.”³

What we are witnessing is an erosion of the discourse of civility. This is more than just a matter of bad manners. If it continues unchecked, it has the power to erode public confidence in our justice systems and, more broadly, democratic governance. The answer to Justice Breyer’s question, “Why does the public accept and follow the decisions of the judiciary?,”⁴ may one day become, “They don’t.”

Tonight I want to talk about the erosion in the discourse of civility we are witnessing in the law. I will begin with some examples of attacks on judges and the judiciary. I will then explore some of the complex causes of ratcheting up of the rhetoric against judges with particular focus on the roles of technology and an increase in incivility. Finally, I will offer some ideas on how courts and those who care about the rule of law should respond to these attacks.

I. RATCHETING UP OF ATTACKS AGAINST THE JUDICIARY AND THE EROSION OF THE DISCOURSE OF CIVILITY

I begin by offering a few examples.

In the mid-nineties, a New York judge, Justice Harold Baer Jr., issued a decision to suppress evidence in a federal drug case.⁵ The decision ignited a firestorm.⁶ Mayor Rudolph Giuliani attacked it and Governor George Pataki added his voice to the chorus.⁷ White House Press Secretary Michael McCurry reportedly demanded that Justice Baer reverse his decision or risk being forced to resign.⁸ These comments received virulent and widespread press coverage.⁹ In the end, Justice Baer reversed his decision.¹⁰ Although we may never know whether his eventual reversal was merely the result of additional evidence or the byproduct of the attacks, four judges of the U.S. Court of Appeals for the Second Circuit issued a joint statement condemning the criticism of the decision.¹¹ “[W]hen a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling,” they wrote, “the entire process of orderly

3. Michael B. Hyman, *Getting Hammered: What to Do About Heightened Intensity of Attacks on an Independent Judiciary*, 19 CBA REC. 12 (2005).

4. BREYER, *supra* note 2, at 11.

5. *See* United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996).

6. Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 300 (1996).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Bayless*, 921 F. Supp. at 217-18.

11. Pollak, *supra* note 6, at 301.

resolution of legal disputes is undermined.”¹²

A decade later, the legal battle over the life of Terri Schiavo, a Florida woman who had been living on artificial life support for a number of years, precipitated another volley of anti-judicial invective.¹³ Numerous court decisions held that Ms. Schiavo was in a persistent vegetative state and sided with her husband’s efforts to disconnect life support measures.¹⁴ After the higher courts declined to intervene, then U.S. House of Representatives Majority Leader Tom DeLay viciously attacked the federal courts, referring to them as an “arrogant, out-of-control, unaccountable judiciary” and vowed that “the time will come” for them to “answer for their behavior.”¹⁵ Congressman Steve King also publicly criticized the judiciary for its decisions and threatened to cut off court funding.¹⁶ Others recommended mass impeachment and stripping the courts of jurisdiction to hear certain matters.¹⁷

Such attacks are not confined to the United States. Judges in Australia,¹⁸ Britain,¹⁹ and Canada have been attacked in ways that have the potential to undermine public confidence in the judiciary.

At this point, let me offer two observations.

The first is that attacks on judges are not a new phenomenon. In the 1950s, Earl Warren, Chief Justice of the U.S. Supreme Court and author of *Brown v. Board of Education*,²⁰ found himself the target of widespread public criticism.²¹ Signs imploring “Impeach Earl Warren” were displayed across this country.²² His critics accused him of expanding “his judicial authority unconscionably and exponentially.”²³ And more than a million people signed a petition for him to be removed from office.²⁴ Happily, the impeachment efforts were unsuccessful and *Brown* became one of the most celebrated U.S. Supreme Court decisions.²⁵

12. Meghan K. Jacobson, *Assault on the Judiciary: Judicial Response to Criticism Post-Schiavo*, 61 U. MIAMI L. REV. 931, 936 (2007).

13. *Id.* at 940.

14. *See id.*

15. Mike Allen, *DeLay Apologizes for Comments: Leader Wouldn’t Say Whether He Wants Schiavo Judges Impeached*, WASH. POST, Apr. 14, 2005, at A5, available at <http://www.washingtonpost.com/wp-dyn/articles/A51284-2005Apr13.html> [<http://perma.cc/P5N5-5SK4>].

16. Frank J. Williams, *Killing Justice: The Judiciary Under Siege*, 54 R.I. B.J. 15, 16 (2005).

17. *See* Sandra Day O’Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 4 (2006).

18. *Wik Peoples v. Queensland* [1996] HCA 40 (Austl.).

19. John A. Dyson, Lord Dyson, Remarks on Criticising Judges: Fair Game or Off-limits at the 3rd Annual Bailii Lecture (Nov. 27, 2014).

20. 349 U.S. 294 (1955).

21. Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK LITTLE ROCK L. REV. 1, 2-4 (2005).

22. *Id.* at 2.

23. *Id.* at 4.

24. *Id.*

25. *Id.*

The second observation is that robust—but respectful—criticism of judicial decisions and judicial misconduct is appropriate and desirable. Criticism of judicial decisions and judicial misconduct is appropriate and indeed useful—provided it is done in the context of civil discourse. In 1898, Justice David Brewer stated: “it is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism.”²⁶ That statement is as true today as it was in 1898.

As former President Bill Clinton put it: “[While] I support the independence of the federal judiciary . . . I do not believe that means that those of us who disagree with particular decisions should refrain from saying we disagree with them.”²⁷

Criticism of judicial decisions is part of democratic discourse. It is a constructive mechanism to uncover and address problems that merits public attention. Informed discussion and debate from lawyers, academics, and public officials are the hallmarks of the legal profession, both in Canada and the United States, and have played a crucial role in shaping the law. As one British judge put it, “[j]udges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance.”²⁸

Yet, criticism has limits—it must take place within the bounds of respectful civility. Criticism that rises to gratuitous personal invective and intimidation crosses that line. Such criticism does not promote constructive dialogue, and may undermine the judicial process and, more broadly, public confidence in the rule of law. It may provoke judges, consciously or unconsciously, to avoid making unpopular decisions. “When judges . . . are publicly belittled, the once bright line between heated, respectful debate and mean-spirited, agenda-laden accusations is eroded.”²⁹

To be clear, my concern is not that judges and judicial decisions are being criticized - that is normal in a healthy democracy. My concern is rather that we maintain the long and venerated tradition, both in your country and mine, that such criticism be conducted civilly and in a way that maintains a bright line between personal attack and democratic dialogue.

26. See Roger J. Miner, *Criticizing the Courts: A Lawyer's Duty*, 29 COLO. LAW. 31, 32 (2000).

27. Alison Mitchell, *Clinton Defends His Criticism of New York Judge's Ruling*, N.Y. TIMES (Apr. 3, 1996), <http://www.nytimes.com/1996/04/03/us/clinton-defends-his-criticism-of-a-new-york-judge-s-ruling.html> [<http://perma.cc/S2FE-9CXP>].

28. Dyson, *supra* note 19, at 19.

29. Williams, *supra* note 16, at 15.

II. WHAT ARE THE CAUSES OF THE DECLINE OF CIVILITY IN CRITICIZING JUDGES AND JUDICIAL DECISIONS?

Although personal invective against judges is not new, the literature on the subject demonstrates a wide concern that it is becoming more frequent and more harsh. Why? We may well ask.

Many scholars have attempted to answer this question. Some point to the elimination of the offence of “scandalizing the court,” which was used in 1976, for example, to convict a Canadian minister for stating that a judgment dismissing a prosecution brought by his ministry was a “silly decision . . . a complete shock and a complete disgrace.”³⁰ However, the use of this power has faded in most common law countries during the last century, in harmony with expanded notions of free speech.³¹ The result, it is suggested, is a lessening of the traditional restraints against judicial criticism.³²

Other scholars have suggested that the increasing shrillness of criticism of judges and the judiciary is attributable to a growing attitude that deference towards people who occupy positions of authority is “unfashionable.”³³

Yet another factor may be that courts increasingly are called upon to decide issues that move them directly into the political and social spotlight, thereby inviting criticism. It is undeniable that the Supreme Court of Canada, for example, has ruled on numerous socially divisive issues, including same-sex marriage,³⁴ prostitution,³⁵ and most recently, doctor-assisted suicide,³⁶ and that such decisions invariably ratchet up the level of anti-judicial rhetoric.

These developments—lessening the formal sanctions against criticism of the judiciary, erosion of public attitudes of respect, and the increasingly socio-political subject matter of judicial decisions—go a long way to explaining the decline in civility in public discourse on judges.

May I suggest a final factor in this decline—the digital era and the changes it is bringing about in how we talk to and about each other.

Revolutionary Canadian thinker, Marshall McLuhan, writing at the dawn of the electronic era, pithily pointed out a profound truth, “the medium is the message.”³⁷ McLuhan was talking about radio and television.³⁸ But his fundamental insight—the permeability of the distinction between what we say

30. *R. v. Ouellette* (1976), 32 C.C.C. 2d 149 (Can. Que. C.A.).

31. *R. v. Kopyto* (1987), 62 O.R. 2d 449 (Can. Ont. C.A.) (the Court of Appeal for Ontario held that the common law offence could no longer be justified as a reasonable limit on freedom of expression).

32. *Id.*

33. Dyson, *supra* note 19, at 16.

34. *Reference re Same-Sex Marriage*, [2004] S.C.C. 79, [2004] 3 S.C.R. 698 (Can.).

35. *Canada (Attorney Gen.) v. Bedford*, [2013] S.C.C. 72, [2013] 3 S.C.R. 1101 (Can.).

36. *Carter v. Canada (Attorney Gen.)*, [2015] S.C.C. 5 (Can.).

37. MARSHALL MCLUHAN, *THE MEDIUM IS THE MESSAGE* (Penguin Books 1967).

38. *See generally id.*

and how we say it—applies with even greater force today, in the era of the iPhone and the Internet. How we say what we say—through blogs, tweets, Facebook, and chatrooms—is more and more affecting what we say. And often what we say electronically too often is neither polite nor pretty. Indeed, too frequently it turns out to be downright cruel. The victims of stealth attacks in the electronic universe may find themselves wounded, alone, alienated, and powerless. They suffer; sometimes, seeing neither remedy nor escape, they see no alternative but to take their lives.

One does not need to go far to find personal examples of victims of the digital age.

In 2010, a freshman at Rutgers University was captured kissing another man on a webcam set-up by his roommate, who then streamed the footage on Twitter.³⁹ After discovering that he had become a topic of ridicule, he committed suicide by jumping off the George Washington Bridge.⁴⁰

Recently, in Canada, a forty-two-year-old man was convicted of numerous counts of criminal harassment, identity fraud, and defamatory libel after a decade-long cyberbullying and harassment spree involving thirty-eight victims.⁴¹

Last year, Brian Burke, the former general manager of a NHL hockey team launched a civil suit against a number of anonymous bloggers and online commentators who allegedly defamed him by suggesting he had an extramarital affair.⁴²

Canadians were shocked when they recently learned that a seventeen-year-old Nova Scotia teenager had committed suicide after having endured months of extreme online harassment after a photo of her engaging in a sexual activity was distributed in her community.⁴³

Judges and the judiciary are not immune from the phenomenon of the licensed invective that electronic communications seem to promote. Occasionally, after rendering a controversial decision, I have found myself accidentally logging onto a newspaper or blog site. The initial story may be fine, but the mindless and personal invective (and occasionally I must admit—equally mindless approbation) of what I read in the posts that follow always comes as a shock.

39. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1, available at http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=0 [<http://perma.cc/GWM2-YVH3>].

40. *Id.*

41. *Robert Campbell of Ottawa Faces 181 International Cyberbullying Charges*, CBC NEWS (Aug. 2, 2014, 9:16 AM), <http://www.cbc.ca/news/canada/ottawa/robert-campbell-of-ottawa-faces-181-international-cyberbullying-charges-1.2724802> [<http://perma.cc/PD8F-83Z3>].

42. Amy Dempsey, *Brian Burke Cyber-Libel Suit a Reminder Anonymous Internet Commentators Can Be Unmasked*, TORONTO STAR (Apr. 27, 2014), http://www.thestar.com/news/gta/2013/04/27/brian_burke_cyberlibel_suit_a_reminder_anonymous_internet_commentators_c_an_be_unmasked.html [<http://perma.cc/4H5F-K6DN>].

43. There is a publication ban on the name of the teenager, although the Attorney General of Nova Scotia has indicated that he will not prosecute anyone for identifying her unless her name is used in a derogatory way. Out of an abundance of caution, I have not named her in these remarks.

What explains the connection between uncivil discourse and the electronic universe? Let me offer three ideas for your consideration: (1) the immunity effect; (2) the dehumanizing effect; and (3) the reinforcing effect.

First, the **immunity effect**. On July 5, 1993, the *New Yorker* published a now-infamous cartoon by Peter Steiner: a dog sitting at a computer, along with the caption “On the Internet, nobody knows you’re a dog.”⁴⁴ It was meant as a joke, but it also reveals a reality of the Internet age. The electronic universe offers a sense of immunity. It creates a space where people feel free to say whatever they want about whomever they want. Names are not necessary; addresses of senders may be elusive. This creates an environment ripe for abuse. It is difficult to make an offensive comment to a person’s face and almost as hard to abuse a person to her friend or acquaintance. But it is easy to post an anonymous blog denigrating someone or to send an offensive message using a fake Facebook name or Twitter handle. Why not, who’s to know? Freed from the normative social constraints on their behavior, the perceived invisibility conferred by the net frees the sender from the usual constraints on bad behavior—people will see what I am doing and think less of me for it. What’s more, it may seem like fun and offer cathartic release and a sense of power. All of this, with no fear of criticism, reprisal, or a slander suit. As one Internet commentator noted, “more venom than ever before is flowing from behind the cloak of anonymity, where people remain entirely unaccountable for their words and deeds.”⁴⁵

Anonymity is a good thing in most contexts. Sometimes it promotes open and full debate. The *Federalist Papers*, a series of eighty-five essays written and published between October 1787 and May 1788, were anonymously written under the name “Publius”⁴⁶ and the First Amendment to the United States Constitution protects a person’s right to speak anonymously.⁴⁷ Today, in an age when governments can monitor email records with little oversight and private companies track people’s online movements, anonymity is sometimes a necessary condition of dissent and gives vulnerable groups in society a voice. Yet, we cannot ignore the role that anonymity plays in encouraging uncivil behavior in the electronic universe.

44. Michael Cavanaugh, “*Nobody Knows You’re a Dog*”: *As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Idea is as Relevant as Ever*, WASH. POST (July 31, 2013), http://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html [http://perma.cc/9Y4D-DB6F].

45. Wil Wheaton, *Anonymous Trolls Are Destroying Online Games. Here’s How to Stop Them*, WASH. POST (Nov. 11, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/11/11/anonymous-trolls-are-destroying-online-games-heres-how-to-stop-them/> [http://perma.cc/HG34-RV43].

46. *Primary Documents in American History: The Federalist Papers*, LIBR. CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/federalist.html> [http://perma.cc/9Z2N-YPE9] (last updated June 2, 2015).

47. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999).

The second and related characteristic of the electronic universe linked to growing incivility is what I call the **dehumanizing effect**. The Internet offers the ability to send messages into the ether with a few strokes of a key. The sender does not need to look the recipient in the eye or write in the address of a particular person. Indeed, they don't have to know the person at all. In a profound sense, the message is not personal. The sender need not even envisage a human recipient. She has a thought, she presses the 'send' or 'submit' button, and the message proceeds into the ether or the cloud—just “out there.” The sender is not obliged to think about the fact that the message may be received by another human being, much less who those human beings may be or how the message may affect them. This impersonality relieves the sender of the moral compunction he or she would normally feel about harming someone. It's easy to make smart remarks to the airwaves, but much harder to make them to a person's face.

Indeed, although many think of online interaction—via Facebook or Twitter, for example—as equivalent to face-to-face interaction, research is showing that it is markedly different.⁴⁸ Our brains have evolved to understand each other through visual cues—tone of voice, facial expressions, or a slight aversion of the eyes, for example—but all of that gets lost through the technological devices we use to communicate.⁴⁹ As a result, some studies have shown the lack of social skills and arrested ability to establish social relationships in young men who spend a lot of time online.⁵⁰ In short, an overexposure to non-visual relationships prevents our brain from learning how to establish real relationships.⁵¹ Another study noted that Internet communication—marked by an increased distance from the recipient, the lack of visual cues and an inability to observe the consequences of their behavior—lowered levels of empathy, defined as the ability to share another person's emotional state.⁵² And a decrease in empathy was found to contribute to cyber-bullying.⁵³

So pervasive is this phenomenon that a noted psychologist, John Suler, has given it a name: “online disinhibition effect.”⁵⁴ It is characterized by a loosening or even complete abandonment of social restrictions and inhibitions that would otherwise be present in normal face-to-face interaction during interactions with

48. See, e.g., Liraz Margalit, *The Psychology Behind Social Media Interactions*, PSYCHOL. TODAY (Aug. 29, 2014), <https://www.psychologytoday.com/blog/behind-online-behavior/201408/the-psychology-behind-social-media-interactions> [<http://perma.cc/BJE2-AKNY>].

49. *Id.*

50. Robin Thornton, *Privacy and Respect: Is the Internet Having a Dehumanizing Effect?*, LEADERS WEST (Nov. 3, 2014), <http://leaderswest.com/2014/11/03/privacy-respect-internet-dehumanizing-effect/> [<http://perma.cc/8P3X-KSV6>].

51. See generally Margalit, *supra* note 48.

52. See Jacek Pyzalski & Vassilis Barkoukis, *Empathy and Moral Disengagement in Adolescent Cyberbullying: Implications for Educational Intervention and Pedagogical Practice*, ADAM MICKIEWICZ U. REPOSITORY 61 (2012).

53. *Id.*

54. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321-26 (2004).

others on the Internet.⁵⁵ Although he notes that this may help some people reveal suppressed emotions, such as fears and wishes, or show unusual acts of kindness, it also allows people to be rude, critical, angry, hateful, and threatening.⁵⁶

A third characteristic of the electronic age linked to the current epidemic of incivility is the narrowing of discourse or what I call the **silo effect**. A half-century ago, the marketplace of ideas consisted of the press, books, lectures, and conversations between concerned citizens. The formerly limited scope of the marketplace imposed a discipline on what was discussed and how it was discussed. Interested participants were bound to encounter ideas opposed to their own, whether they sought them out or not. To open the newspaper to the op-ed page was—and still is—to risk an encounter with views other than one's own. The result was that a person's initial views on a matter were challenged, enriched, refined, and sometimes abandoned.

The electronic marketplace, by contrast is limitless and diverse. IBM estimates that 90% of the world's online data has been created just in the past two years.⁵⁷ Given that it is impossible to take in even a fraction of the information that is available on the web, most individuals prioritize information that is congruent with their current values, simply ignoring any discrepant information. By its very breadth, the Internet, paradoxically, promotes the tendency in participants to go to sites that reinforce their opinions, biases and prejudices and—what is worse—to stay there.

Perversely, the Internet has become less an open marketplace than a closed cultural attic through which we construct our peculiar cultural reality, tailored to our biases, needs, and fantasies. Whatever the topic, the Internet provides a perfect medium to validate our thoughts and opinions. At the same time, we shun sites with opposing views. Instead of a marketplace, where ideas are set out in their stalls for all to see and select, silos develop—hermetically sealed universes of people with the same views, prejudices, and biases. Voices rise ever shriller, ever harsher, in the crescendo of like views. Nuances are drowned out; harmonies crushed into one-note choruses. Grace notes are few and far between.

In some ways, this is nothing new. Psychologists have referred to this phenomenon as “confirmation bias”: “the human tendency to seek out only facts that fit what we already know to be true while downplaying or ignoring contradictory evidence.”⁵⁸ As Mark Twain is said to have quipped, “to a man with a hammer, everything looks like a nail.”⁵⁹ Indeed, people have always been prone

55. *Id.*

56. *Id.*

57. Tomas Chamorro-Premuzic, *How the Web Distorts Reality and Impairs Our Judgment Skills*, MEDIA NETWORK (May 13, 2014), <http://www.theguardian.com/media-network/media-network-blog/2014/may/13/internet-confirmation-bias> [<http://perma.cc/H3QK-79UP>].

58. Eric Weiner, *The Year of Living Gloomily*, WASH. POST (Dec. 28, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601128.html> [<http://perma.cc/T4AA-3VW7>].

59. *Quoted in* Peter Margulies & Laura Corbin, *Reliability and the Interests of Justice: Interpreting the Military Commission Act of 2006 to Deter Coercive Investigations*, 12 ROGER

to confirmation bias. But access to the Internet amplifies the phenomenon since we need not look far to confirm our particular bias.⁶⁰ It's only a click away.

Technology reinforces the already human tendency to stay within our own bubble of ideas. In a TED Talk, political activist Eli Pariser discusses how websites such as Facebook and Google use algorithms to create filter bubbles that govern what material one gets, and, more importantly, you do not decide what gets edited out.⁶¹ The danger, he states, is that “this moves us very quickly toward a world in which the Internet is showing us what it thinks we want to see, but not necessarily what we need to see.”⁶²

The immediate result? A wide but shallow interchange—more voices, but fewer views, and a narrow and constricted exchange of ideas. The longer-term result? Too often a coarsening of social dialogue, an upward ratcheting of the rhetoric of outrage, anger and violence—in a word, incivility. This, in turn may perversely curtail free speech. The *Economist* recently worried that “although the [I]nternet was supposed to usher in an era of unprecedentedly free speech, what instead seems to be emerging is a ‘dystopia, where exuberance and eccentricity are shut down by the fastidious whims of a bullying, puritanical critical mass.’”⁶³

The same dynamic may in part explain the increase in attacks against the judiciary. Complex judicial discussions are reduced to ten-second sound bites or 140-character tweets. The decision—and by extension the judge—is completely right or completely wrong. Thus, “the Internet has . . . created a new medium for incendiary criticism of judicial decisions.”⁶⁴

In summary, the phenomena I’ve discussed—diminished respect for authority, the socio-political nature of modern judicial decisions and the electronic universe we live in—are loosening the traditional constraints on criticism of judges and changing the forms it takes. The line between criticizing judicial decisions—which is valuable—and criticizing the court that makes them is becoming ever more difficult to discern.

This brings me to my third and final query. How, in the face of these changes, can we maintain the civility in discourse on judicial affairs and actions that is essential to public confidence in the judiciary and to the rule of law?

WILLIAMS U. L. REV. 750, 756 (2007).

60. Weiner, *supra* note 58.

61. *Id.*

62. Eli Pariser, *Beware Online “Filter Bubbles,”* TED TALKS (Mar. 2011), http://www.ted.com/talks/eli_pariser_beware_online_filter_bubbles/transcript?language=en [<http://perma.cc/Y32B-NE82>].

63. William Watson, *We Need ‘Inappropriate’ Politicians*, OTTAWA CITIZEN (Mar. 23, 2015), <http://ottawacitizen.com/opinion/columnists/watson-we-need-inappropriate-politicians> [<http://perma.cc/GZ79-K2B3>] (quoting *Infamy, Infamy*, ECONOMIST, Mar. 14, 2015, available at <http://www.economist.com/news/books-and-arts/21646185-uses-and-abuses-public-opprobrium-infamy-infamy> [<http://perma.cc/3JVD-JD5H>]).

64. Charles Gardner Geyh, *The Criticism and Speech of Judges in the US*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 262 (H.P. Lee ed., Cambridge Univ. Press 2011).

III. HOW COURTS CAN RESPOND TO CRITICISM?

I would like to offer four answers to this question: (1) direct response by judges; (2) emphasis on the ‘open court principle’; (3) educating the public about the importance of civility; and (4) a commitment to civility in professional life.

The first thing judges can do when forced with intemperate and ill-concerned criticism is to speak out and set the record straight. However, this course is fraught with danger. In 1625, Sir Francis Bacon wrote words that are still true, “an overspeaking judge is no well-tuned cymbal.”⁶⁵ Responding to criticism may give the appearance that the judge is stepping into the political arena. This, in turn, may raise doubts about the judge’s ability to make objective judgments about the legal issues. The truth is, judges must accept personal restrictions on their freedom of expression. As the noted South African judge Albie Sachs once observed, “as the ultimate guardian of free speech, the judiciary [should] show the greatest tolerance to criticism of its own functioning.”⁶⁶ A cautious approach is advocated by the American Bar Association’s Model Code of Judicial Conduct, which, at Model Rule 2.10, proposes:

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any non-public statement that might substantially interfere with a fair trial.⁶⁷

Although stated more broadly, the Canadian *Ethical Principles for Judges* also suggest restraint, stating:

Judges should refrain from . . . taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.⁶⁸

On the other hand, we no longer believe that the judges must decide only what is necessary, say only what is necessary, and on no account ever talk to the press. Lord Hope of the Supreme Court of the United Kingdom sums it up this way: “There will, no doubt, be times when it is best to keep silent. But reticence, not absolute silence, is what the judicial office requires.”⁶⁹ When facts are

65. 6 FRANCES BACON, THE WORKS OF FRANCIS BACON 3 (Ulan Press 2012).

66. *The State v. Mamabolo* 2001 (3) SA 409 (CC) at 409 para.78 (S. Afr.).

67. MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2011).

68. CANADIAN JUDICIAL COUNCIL, ETHICAL PRINCIPLES FOR JUDGES 29, available at https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf [<http://perma.cc/5L4D-KUHJ>].

69. James Arthur David Hope, Lord Hope of Craighead, Deputy President of the Supreme Court of the U.K., What Happens When the Judge Speaks Out?, Presidential Address at the Holdsworth Club, University of Birmingham 11 (Feb. 19, 2010), available at <http://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth09-10-hope.pdf> [<http://perma.cc/LV7R-F62Z>].

distorted or misinterpreted, a well-crafted and measured response setting the record straight may be called for. On the other hand, argumentative opinion is seldom appropriate.

A second response to unwarranted attacks that courts are more and more adopting lies in better relations with the public and the media.

Public confidence in the courts rests on the open-court principle—the right of the public to access the courts and see what they do. The more people see of what the courts actually do, the more they will have confidence in them. But it is no longer enough that the courthouse doors be open. Hearings, in appellate courts (and sometimes in trial courts) are now routinely broadcasted on television.⁷⁰ In addition, since 2009, the Supreme Court of Canada webcasts our hearings live on the Court’s website.⁷¹ Our experience with television and webcasting has been positive.

Judges are also revising their views on the media. The media remains the most important interface between the courts and the public. As Joe Mathewson states:

When the Court speaks, who listens? Who transmits each new rule of law to the citizenry? Even in the Internet era, when the Court posts its opinions promptly on its own Web site, both justices and citizens still depend on journalists to get the word out to the broad public. It is still reporters who immediately read the often challenging legal language and reasoning and make sense of it for lay understanding⁷²

At the Supreme Court of Canada, we assist journalists by providing press briefings on every judgment released by the Court. These briefings are aimed to guide the press through the reasons for judgment so as to ensure that the journalists have a proper grasp of the case and the decision, without placing any “spin” on the judgments. The goal is to ensure accuracy by guiding the media through the Court’s judgment in as objective a fashion as possible. Whatever courts can do to assist journalists in reporting accurately, without crossing the line into manipulation or spin, can only increase the public’s understanding of and confidence in the administration of justice.

A third response to uncivil discourse on judicial matters is civic education about the role of the judiciary and the importance of judicial independence. I applaud my friend and former U.S. Supreme Court Justice, Sandra Day O’Connor, for her work in this regard. It is vital work if we are to preserve public confidence in our institutions of governance, including the courts.

70. See *Federal Appeals Court Will Stream Hearings Live on Internet*, CNN (Dec. 2, 2013, 2:59 PM), <http://www.nbcbayarea.com/news/local/Federal-Appeals-Court-Will-Stream-Hearings-Live-on-Internet-234122781.html> [<http://perma.cc/N2D9-U2YP>].

71. See *Webcasts by Session*, SUP. CT. CANADA, <http://www.scc-csc.gc.ca/case-dossier/info/webcasts-webdiffusions-eng.aspx> [<http://perma.cc/Y96W-4P4X>] (last visited July 30, 2015, 9:30 PM).

72. JOE MATHEWSON, *THE SUPREME COURT AND THE PRESS: THE INDISPENSABLE CONFLICT* xv-xvi (David Abrahamson ed., Nw. Univ. Press 2011).

A fourth and final response is to teach civility and respectful discourse by example. As we go through our day-to-day work, we can aid the cause of cruel discourse on legal matter by practicing civility in our lives and our work.

Lawyers, academics and judges do well to constantly remind themselves of the three “R’s” of professional respect:

- Respect your clients;
- Respect your colleagues;
- Respect the courts you appear before and the judges to whom you make your submissions.

I am proud to be part of a profession that still prizes and practices civility, on both senses of the word—as a civil profession that seeks to help ordinary citizens and their concerns and as a civil way of being that strives always to be respectful, polite, and calm, ever seeking civil weather and civil seas. May ours remain a truly civil calling. Thank you.