

HOME PAGE

TODAY'S PAPER

VIDEO

MOST POPULAR

TIMES TOPICS

Log InRegister Now

TheNewYorkTimes

Search All NYTimes.com

Go

Room for Debate

WORLD

U.S.

N.Y. / REGION

BUSINESS

TECHNOLOGY

SCIENCE

HEALTH

SPORTS

OPINION

ARTS

STYLE

TRAVEL

JOB

REAL ESTATE

AUTOS

« Room for Debate Home

Facebook

Twitter

Judges Have a First Amendment Right, Too



Deborah Rhode is a law professor at Stanford Law School.

Updated November 3, 2013, 11:44 PM

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.

Join Room for Debate on Facebook and follow updates on [twitter.com/roomfordebate](#).

Topics: Law, judiciary

Previous

Err on the Side of Allowing Speech David Lat Next

What Do You Mean by 'Impartial'? Kermit Roosevelt

3 Comments

Share your thoughts.

ALL

READER PICKS

Newest

Write a Comment

The Appearance of Impartiality

A New York judge is accused of improperly steering cases and commenting out of court. What restrictions should be placed on judges? [Read More »](#)

Debaters

What Do You Mean by 'Impartial'?



Kermit Roosevelt, author, "The Myth of Judicial Activism"

Which Judges Breached the Rules?



Nancy Gertner, former judge

Err on the Side of Allowing Speech



David Lat, founder, Above the Law

Judges Have a First Amendment Right, Too



Deborah Rhode, law professor

Related Discussions

If Police Encounters Were Filmed

Should police officers be required to wear cameras that record their interactions with the public?

Reconsidering Young Lifers' Sentences

Should prisoners serving mandatory life sentences without parole who committed their crimes as juveniles be eligible for a new sentencing hearing?

Is the Civil Rights Era Over?

With rulings on affirmative action, voting rights and same-sex marriage, are we seeing the end of the civil rights movement? Did it win?

Out of Officials' Hands and Onto the Ballot

Should voters enact more local laws through ballot initiatives? Or would that become too chaotic?

ROOM


for

DEBATE

Room for Debate

Like

60,046 people like Room for Debate.



Facebook social plugin

Recent Discussions



Giving Stilettoes the Business



Too Many Bodies, Too Little Space



Should High School Last Six Years?



Should You Bribe Your Kids?



If Jews Skip Synagogue and Christians Skip Church

[Home](#) | [World](#) | [U.S.](#) | [N.Y./Region](#) | [Business](#) | [Technology](#) | [Science](#) | [Health](#) | [Sports](#) | [Opinion](#) | [Arts](#) | [Style](#) | [Travel](#) | [Jobs](#) | [Real Estate](#) | [Autos](#) | [Back to Top](#)
© 2012 The New York Times Co. | [Privacy](#) | [Your Ad Choices](#) | [Terms of Service](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Advertise](#) | [Site Map](#)