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EX PARTE BLOGGING:

THE LEGAL ETHICS OF SUPREME COURT ADVOCACY IN THE INTERNET ERA

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NOTE

EX PARTE BLOGGING: THE LEGAL ETHICS OF SUPREME COURT ADVOCACY IN THE INTERNET ERA

Rachel C. Lee*

Lawyers have been arguing their cases before the Supreme Court for over two centuries, while the phenomenon of legal blogs is perhaps a decade old. Yet legal blogs cannot be dismissed as merely a sideshow novelty—they are already capable of having a substantial impact on Supreme Court litigation. Events surrounding the recent decision in Kennedy v. Louisiana *demonstrate that blogs can both highlight errors in Court decisions and generate new arguments relevant to ongoing litigation. In addition, legal blogs create the opportunity for Supreme Court advocates to engage in ex parte blogging—posting persuasive material about a pending case in the hopes of directly influencing the Court's decisions. Attorneys for parties and amici in cases before the Court already sometimes post arguments online about their cases shortly after oral argument—potentially a crucial time in the Court's decision-making process—and evidence suggests that the Justices and their clerks may well encounter some of these posts online. Yet no one has analyzed the ethical implications of this practice, or what its effects might be on different groups appearing before the Court. This Note examines the relationship between ex parte blogging and the traditional concepts of prejudicial publicity and ex parte communications. The Note concludes that ex parte blogging threatens the impartial administration of justice and will systematically disadvantage some litigants. Thus, the legal profession should consider regulating ex parte blogging, despite the contributions that counsel for parties and amici might make to public discourse about constitutional and legal issues.*

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INTRODUCTION

Several intertwined issues appeared prominently in the Supreme Court's recent decision in *Kennedy v. Louisiana*:[1] whether a nonhomicide crime can be punished by the death penalty, how to evaluate the existence of a national consensus on the question, and whether the Supreme Court's supervision of the "evolving standards of decency" imposes a one-way ratchet on the death penalty. But the story of the *Kennedy* case—in which the Supreme Court held that it is unconstitutional to execute someone for raping a child[2]—also touches on a subtler problem. *Kennedy* offers a glimpse at the increasing potential for speech outside the walls of the nation's highest court to affect the decisions issuing from that court. With postings on legal blogs[3] now offering prompt, detailed, and readily accessible analysis of Supreme Court cases, is it time to reevaluate the ethical standards that govern the interplay between lawyers, the Internet, and the Court? Scholarship on the problems of improper publicity and ex parte communication has not yet begun to grapple with the power of blogs to rapidly reach large audiences—possibly including Justices or their clerks—with persuasive arguments on pending cases. This Note offers a first analysis of the contours of an emerging issue facing attorneys litigating before the Supreme Court.

One of the high-profile cases of the 2007 Term, *Kennedy v. Louisiana* had its genesis in the horrific rape of an eight-year-old girl in 1998.[4] Five years later, a Louisiana jury convicted the child's stepfather, Patrick Kennedy, of

1. 128 S. Ct. 2641 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) (mem.).

2. *Id.* at 2650-51.

3. A blog is a website offering a reverse chronological series of short essays or "posts" by an author. A blog may present posts only from a single author, or it may include posts from a larger group of member-authors, or posts from guest authors. Some blogs also allow visitors to the site to write comments about posts.

4. *Kennedy*, 128 S. Ct. at 2646.

aggravated rape.[5] The jury sentenced him to death.[6] No one had been executed in the United States for the crime of rape—either the rape of an adult or a child—since 1964.[7] Indeed, the Supreme Court held in 1977 that imposing the death penalty for the rape of an adult woman was unconstitutional because capital punishment "is an excessive penalty for the rapist who, as such, does not take human life."[8] Nevertheless, the state of Louisiana, along with five other states, had subsequently authorized the death penalty for the rape of a child.[9] The Supreme Court agreed to hear Kennedy's case to resolve the question of whether the Eighth Amendment prohibits imposing the death penalty for child rape as it does for the rape of an adult.

Pointing to a growing number of state legislatures that had considered or enacted laws allowing child rapists to be punished by death,[10] the state of Louisiana argued that increasing public outrage over sexual crimes against young children had led contemporary society to see the death penalty as an appropriate punishment for these crimes.[11] The Supreme Court disagreed. On June 25, 2008, after surveying the "national consensus"[12] and consulting its own judgment about the suitability of the death penalty for child rape,[13] the Court announced in a five-to-four opinion that such a punishment violated the Eighth Amendment. This decision drew considerable attention,[14] and both presidential candidates took the opportunity to express their disapproval of it.[15]

With most Supreme Court cases, the release of a decision is the end of the road. Not so for *Kennedy*. Three days after the opinion was published, a military appellate attorney, Dwight Sullivan, noted on his blog that the decision

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5. *Id.* at 2648.

6. *Id*.

7. *Id.* at 2657; *see also* Petition for Writ of Certiorari at 10 n.2, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

8. Coker v. Georgia, 433 U.S. 584, 598 (1977).

9. *Kennedy*, 128 S. Ct. at 2651; *see also* GA. CODE ANN. § 16-6-1 (2008); LA. REV. STAT. ANN. § 14:42 (2008); MONT. CODE ANN. § 45-5-503 (2008); OKLA. STAT., tit. 10, § 7115(K) (2008); S.C. CODE ANN. § 16-3-655(C)(1) (2007); TEX. PENAL CODE ANN. § 22.42 (2008).

10. Brief for Respondent at 34-39, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

11. *Id.* at 49.

12. *Kennedy*, 128 S. Ct. at 2657-58.

13. *Id.* at 2664.

14. *See, e.g.*, Robert Barnes, *High Court Rejects Death for Child Rape*, WASH. POST, June 26, 2008, at A1; Joan Biskupic, *Justices Reject Death Penalty for Child Rapists*, USA TODAY, June 26, 2008, at 4A; Linda Greenhouse, *Justices Bar Death Penalty for the Rape of a Child*, N.Y. TIMES, June 26, 2008, at A1; Warren Richey, *Supreme Court Sharply Limits Use of Death Penalty*, CHRISTIAN SCI. MONITOR, June 26, 2008, at 1.

15. Sara Kugler, *Obama Disagrees with High Court on Child Rape Case*, Associated Press, June 25, 2008, *reprinted in* Supplemental Brief for Respondent in Support of the Petition for Rehearing at 2a, app. B, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) [hereinafter Supplemental Brief for Respondent]; Press Release, Sen. John McCain, McCain Disappointed with Supreme Court Ruling that Fails to Protect Our Children (June 25, 2008), *reprinted in* Supplemental Brief for Respondent, *supra*, at 1a, app. A.

contained a potentially significant error.[16] In evaluating the national consensus against the death penalty (or lack thereof), both the majority and the dissent believed that "Congress has not enacted a law permitting the death penalty for the rape of a child."[17] Yet Sullivan observed that in the National Defense Authorization Act for Fiscal Year 2006, Congress provided that the maximum permissible punishment under the Uniform Code of Military Justice (UCMJ) for the rape of a child would be "death or other such punishment as a court-martial may direct" until the President otherwise prescribed.[18] None of the briefs by the parties or amici had brought this statute to the Court's notice. Now, however, the formerly obscure provision became the center of attention.

Eugene Fidell, an attorney specializing in military law, spotted Sullivan's blog post and mentioned it to his wife, *New York Times* writer Linda Greenhouse.[19] She broke the story of the Supreme Court's mistake as a front-page article in the New York Times.[20] Legal blogs circulated the story and discussed its implications.[21] The Justice Department even telephoned the Clerk of the Court to accept responsibility for not notifying the Court of the statute,[22] although the United States had been neither a party nor an amicus in the case. Then, on July 21, the state of Louisiana formally petitioned the Court for a rehearing, followed a week later by a motion from the Solicitor General for leave to file an amicus brief supporting Louisiana's petition.[23]

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16. Posting of Dwight Sullivan to CAAFlog, The Supremes Dis the Military Justice System, http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html (June 28, 2008, 18:25 EDT).

17. *Kennedy*, 128 S. Ct. at 2672 (Alito, J., dissenting) (omitting words added on the denial of rehearing), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) (mem.); *see also id.* at 2652, 2653 (majority opinion).

18. Pub. L. No. 109-163, § 552(b), 119 Stat. 3136, 3263 (2006).

19. Posting of Mark Obbie to Lawbeat Comments, Greenhouse and Fidell's Last Laugh, http://newhouse-web.syr.edu/legal/blog_comments.cfm?blogpost=654 (July 2, 2008, 08:10 EDT).

20. Linda Greenhouse, *In Court Ruling on Executions, A Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1.

21. *See, e.g.*, Posting of Jonathan Adler to The Volokh Conspiracy, Blogger Finds Factual Error in Kennedy's *Kennedy* Opinion, http://volokh.com/posts/1215008451.shtml (July 2, 2008, 10:20 PDT); Sentencing Law & Policy, Ineffective Assistance (by Prosecutors) in *Kennedy* Child Rape Case?, http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/ineffecttive-as.html (July 2, 2008, 14:53 EDT).

22. Linda Greenhouse, *Justice Dept. Admits Error in Failure to Brief Court*, N.Y. TIMES, July 3, 2008, at A15; Posting of Lyle Denniston to SCOTUSblog, DOJ Sends "Regrets" on Omitted Cite, http://www.scotusblog.com/wp/doj-sends-regrets-on-omitted-cite/#more-7637 (July 3, 2008, 11:05 EDT).

23. Docket for Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343), *available at* http://origin.www.supremecourtus.gov/docket/07-343.htm; Petition for Rehearing, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

The Supreme Court rarely grants a rehearing,[24] but in this case, the Court invited briefs on the question from Kennedy, the state of Louisiana, and the Solicitor General of the United States.[25] In their briefs, Louisiana and the Solicitor General contended that the passage of the 2006 statute, along with a subsequent Executive Order[26] authorizing the death penalty for child rape under the UCMJ, fatally undermined the majority's holding in *Kennedy*. "The Court's analysis rests on a critical error of federal law,"[27] they argued, as the recent explicit endorsement of the death penalty for child rape by both political branches of the national government should call into question the Court's conclusion that there existed a national consensus against such punishment.[28] On the other hand, Kennedy argued that military law was irrelevant to the analysis of a national consensus regarding the civilian criminal justice system,[29] that the congressional and presidential actions did not manifest any specific attention to the matter and did not validly authorize the death penalty,[30] and that in any case, merely "add[ing] one more jurisdiction to the tally" should not alter the Court's ultimate conclusion.[31] Meanwhile, Sullivan continued to follow the case, posting his criticisms of Kennedy's brief immediately after its filing[32]—several of which were picked up by Louisiana's supplemental brief[33]—and analyzing more favorably the state's and the Solicitor General's briefs.[34] On October 1, the Court declined to rehear the case and issued a modification of its earlier opinion, acknowledging the

24. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 814-15 (9th ed. 2007) (noting that none of the 710 petitions for rehearing filed in the 2005 Term were granted).

25. Docket for *Kennedy*, *supra* note 23.

26. Exec. Order No. 13,447, § 3(d), 3 C.F.R. 243, 278 (2008) (amending MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45 (2008)).

27. Brief for the United States as Amicus Curiae at 4, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

28. Supplemental Brief for Respondent, *supra* note 15, at 18; Brief for the United States, *supra* note 27, at 6.

29. Brief for Petitioner in Opposition to Rehearing at 5, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

30. *Id.* at 9-10. Kennedy's attorneys suggested that the net effect of the amendments to the UCMJ and the Executive Order may have been to withdraw authorization for the death penalty, due to another statutory provision. *Id.* at 9 n.5 (citing 10 U.S.C. § 818 (2006)).

31. *Id.* at 11.

32. Posting of Dwight Sullivan to CAAFlog, Supreme Court Filings Focus on Military Death Penalty System, http://caaflog.blogspot.com/2008/09/supreme-court-filings-focus-on-military.html (Sept. 17, 2008, 21:21 EDT).

33. *See* Supplemental Brief for Respondent, *supra* note 15, at 9, 11-15. Louisiana also cited to Sullivan's September 17th post, stating that it discussed "a number of other factual errors about the military-justice system." *Id.* at 15 n.4.

34. Posting of Dwight Sullivan to CAAFlog, "Military Law is American Law," http://caaflog.blogspot.com/2008/09/military-law-is-american-law.html (Sept. 24, 2008, 19:44 EDT); Sullivan, Supreme Court Filings, *supra* note 32.

omission but explaining that it did not alter the validity of the majority's previous analysis.[35]

The oversight in the *Kennedy* opinion was not the first factual error in a Supreme Court decision, nor even the first arguably relevant to the Court's reasoning in a case.[36] But in contrast to earlier eras, in which mistakes were unlikely to become notorious,[37] the rapid online dissemination of Supreme Court opinions and the ease of communicating any detected errors means that the occasional flaws will much more frequently become public knowledge now.[38] Indeed, just such a "micro-discovery"[39] or error-correction function[40] is cited as one of the advantages of legal blogs.[41]

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35. *Kennedy*, 129 S. Ct. at 1 (statement of Kennedy, J.), *modifying* 128 S. Ct. 2641. Ironically, Justice Kennedy's discussion of the order for modification itself apparently contained a minor and immaterial error. *See* Posting of Dwight Sullivan to CAAFLOG, Yet Another Factual Error in *Kennedy v. Louisiana*, http://caaflog.blogspot.com/2008/10/yet-another-factual-error-in-kennedy-v.html (Oct. 1, 2008, 18:02 EDT) (reporting that one of the six individuals cited by Justice Kennedy as being under a UCMJ death sentence had had his sentence vacated on appeal); *see also Kennedy*, 129 S. Ct. at 1-2 (statement of Kennedy, J.).

36. For example, in *Walker v. City of Birmingham*, the Court held that civil rights activists could not challenge the constitutionality of an ex parte injunction forbidding a protest march, having chosen to first disobey the injunction and march anyway. 388 U.S. 307, 320-21 (1967). To distinguish this holding from *In re Green*, an earlier case in which the Supreme Court had permitted just such a collateral attack on an injunction, the *Walker* court argued, *inter alia*, that "[t]he petitioner in *Green* had further offered to prove that the court issuing the injunction had agreed to its violation as an appropriate means of testing its validity." *Id.* at 315 n.6 (citing *In re* Green, 369 U.S. 689 (1962)). Yet the Ohio court had never agreed to the violation. Rather, at a conference in chambers after the injunction had already been violated, the opposing party had suggested that Green "submit to the court the four signators of the agreement to be dealt with on contempt," in order to induce Green to refrain from filing a motion challenging the injunction directly. Brief of Petitioner at 10-11, *In re Green*, 369 U.S. 689 (No. 61-312).

37. As far as I can determine, the inaccuracy in *Walker* has never been noted in any published scholarship or court decision.

38. See, for example, the recent criticism of *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 36 (2008), for having mistakenly described the relationship between radius length and surface area as an exponential one. Posting of Sonja West to PrawfsBlawg, Mathiness, http://prawfsblawg.blogs.com/prawfsblawg/2008/11/mathiness.html (Nov. 13, 2008, 13:19 EST); *see also Winter*, 129 S. Ct. at 379. Fortunately, this error is trivial—except perhaps to mathematicians.

39. Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089, 1097 (2006).

40. A. Michael Froomkin, *The Plural of Anecdote is "Blog*,*"* 84 WASH. U. L. REV. 1149, 1153 (2006).

41. Though the scholars who suggest this are presumably not thinking solely of proofreading Supreme Court opinions, some bloggers have suggested precisely that. *See* Posting of Joseph Mazzone to Concurring Opinions, SupremeCourtOfTheUnitedStates.blogspot.com?, http://www.concurringopinions.com/archives/2005/12/supremecourtoft.html (Dec. 17, 2005, 18:41 EST) (proposing that the online community be enlisted to scrutinize draft opinions before publication); Posting of Tom Smith to The Right Coast, Jurisprudence and Information, http://rightcoast.typepad.com/rightcoast/2008/07/jurisprudence-a.html (July 7, 2008, 18:38 PDT) (same).

Will bloggers change the world of Supreme Court litigation by inspecting published opinions? Perhaps not. Established channels still have power, for one thing. It is quite possible that Sullivan's discovery in *Kennedy* would not have amounted to anything if it had not been amplified by the *New York Times*, and his discovery was, after all, formally presented to the Court through Louisiana's petition. And at the end of *Kennedy*, the flurry of speculation and briefing resulted in a reaffirmation of the original outcome.[42] But the *Kennedy* case illustrates the potential for blogs to have real influence on the course of litigation, both by noting errors and by generating arguments that may be adopted by a party. Even the tradition-steeped world of the Supreme Court is not insulated from the online conversations of bloggers.

What does it mean for advocates and the Court to have an array of case-specific legal analyses a mouse-click away? *Kennedy* demonstrates some of the likely consequences, and to the extent that error-detection and argument-generation by a third party improve the quality of the Court's final product, blogging may be beneficial.[43] But the possibilities for the Court and the outside world to interact through the new technology extend beyond the indirect communication illustrated by Sullivan's posts. In particular, blog posts written by counsel for parties or amici in litigation pending before the Court may represent an old problem—attempts to influence the administration of justice—in a new guise. In this context, as the line between talking about the Court and talking to the Court softens, conventional understandings of the ethical constraints on publicity and ex parte communications may be inadequate.

This Note will explore the phenomenon of ex parte blogging and its ethical implications. Part I will examine the way in which blogging could be a tool of advocacy for lawyers and the evidence that the Court may be vulnerable to its use. Part II will analyze how ex parte blogging would be treated under the current framework of ethics rules for attorneys and Justices, and determines that ex parte blogging is not regulated effectively at present. Part III will then survey the options for responding to the problem, while considering the distinctions between blog posts, law review articles, and newspaper editorials. The Note will conclude with an evaluation of these options and an invitation for the legal community to begin to consider how it wishes to respond to ex parte blogging.

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42. Despite the unchanged black-letter outcome of the *Kennedy* affair, the controversy might have damaged the credibility of the majority opinion's analysis. However, on an issue as polarized and culturally sensitive as the death penalty, it seems unlikely that adherents of either side will be moved by this skirmish.

43. Greater public awareness of what will typically be very minor errors in Court opinions will probably not inflict significant damage on the institution's reputation. There might be concerns about finality if opinions were frequently modified in significant ways, but the Court will presumably manage its response to post-opinion issues in order to ameliorate this risk.

I. THE PHENOMENON OF EX PARTE BLOGGING

In *Kennedy*, the interaction between Dwight Sullivan's blog and the Supreme Court was mediated through traditional media and the formality of a petition and briefing by parties. But there is every possibility that the Court could in some cases be directly influenced by content in a blog. The Court may still place ceremonial quill pens at counsel tables before oral argument, but there are computers behind the doors of the Justices' chambers. Only the Justices themselves can say to what extent they or their law clerks browse the Internet,[44] or how they handle the information they might acquire along the way, but there are clear indications that the Court may be quite familiar with the online universe.

There are several legal blogs that attract a large number of readers,[45] but perhaps the most prominent website focusing on the Supreme Court is SCOTUSblog.[46] Many attorneys following the Court's business check SCOTUSblog regularly for news and commentary, and it appears that they have company from inside the Supreme Court building as well. On a recent workday, the site registered over a hundred hits from an IP address registered to the Court.[47] Of course, these visits could be from court personnel other than the Justices and their clerks, and some of the visits could be merely to peruse the court calendar or read coverage of a recently released decision. But a steady visitor to the site will be exposed to lists of cert petitions to watch, discussions of the filed briefs in various cases, and recaps of oral arguments, along with links to news stories or other blogs with similar material—all touching on the merits of pending litigation.

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44. In 2005, Justice Kennedy informed the House Appropriations Committee that he did legal research on the Internet. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42. However, it is impossible to determine from reports of his comment whether he was merely referring to research on commercial legal databases such as Westlaw or LexisNexis, and the transcripts of the hearing have not yet been published by the Government Printing Office.

45. *See* Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025, 1030-32 (2006) (listing popular legal blogs including The Volokh Conspiracy, How Appealing, TaxProf Blog, and Sentencing Law and Policy, each of which was attracting over 100,000 page views per month as of April 1, 2006).

46. SCOTUSblog, http://www.scotusblog.com/wp (last visited Nov. 30, 2008). The site features news and commentary on current litigation, as well as links to media stories and posts about the Court on other blogs.

47. On Tuesday, November 18, 2008, an arbitrarily selected day on which no opinions or orders were issued, visitor tracking software (to which I was granted access by Tom Goldstein) showed that SCOTUSblog received at least 105 hits from a Supreme Court IP address (report on file with author). This figure does not capture the total number of hits for the day, as I only checked the traffic log at approximately half-hour intervals. During busy periods, the log capacity was not large enough to record all the site visits occurring in the previous thirty minutes.

In addition to the browsing habits of Court staff, the citations in official opinions from the Supreme Court and lower courts reflect a trend towards citing more online sources, including blogs.[48] In 1996, Justice Souter apparently became the first federal judge to cite to an Internet source in a reported opinion,[49] and the Supreme Court cited a legal blog in 2005, referencing Professor Douglas Berman's Sentencing Law & Policy as the location of a particular document.[50] Furthermore, two compilations of court citations to blogs showed 32 citations in federal and state court decisions between January 2004 and August 6, 2006,[51] and 13 more by July 26, 2007.[52] Clearly, federal judges are encountering blogs and other Internet sources.[53] In fact, the published citations probably underestimate their exposure, as it would be extremely unlikely for judges to cite everything they or their clerks read.[54]

If the Justices or their clerks are potentially looking at blogs and other online commentary on litigation, then it becomes attractive for lawyers to attempt to influence their impression of an issue or a case via this means. Such an approach might be utilized either by litigants or by third parties such as law professors. Professor Eugene Volokh observes that as an alternative to traditional means of communicating with the courts, a blog post is:

> much easier and quicker to produce than an amicus brief; it's often all we can do, since in many cases we know that we won't take the time and trouble to

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48. Colleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 428-29, 448-49 tbl.1 (2002) (surveying published federal opinions from 1996 to 2001); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 115-18 (2007) (noting citations to blogs, Wikipedia, and other nonlegal sources); *see also* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 500-13 (2000) (examining increase in nonlegal citations in U.S. Supreme Court and lower court opinions for selected years from 1950 to 1998 and arguing that improved access to information accounted for the increase).

49. Barger, *supra* note 48, at 428 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727, 777 n.4 (1996) (Souter, J., concurring)).

50. *See* United States v. Booker, 543 U.S. 220, 278 n.4 (2005) (Stevens, J., dissenting in part). Eugene Volokh observed that three-quarters of the court citations to blogs as of August 6, 2006, were to Douglas Berman's Sentencing Law & Policy. Volokh, *supra* note 39, at 1096.

51. Posting of Ian Best to 3L Epiphany, Cases Citing Legal Blogs—Updated List, http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html (Aug. 6, 2006) (listing twenty-eight citations in federal cases, including one in a Supreme Court case, and four in state cases). According to Best's research, the first federal lower court opinion to cite a blog was *Suboh v. Borgioli*, 298 F. Supp. 2d 192, 194 (D. Mass. 2004). Best, *supra*.

52. Posting of Dave Hoffman to Concurring Opinions, Court Citations of Blogs: Updated 2007 Survey, http://www.concurringopinions.com/archives/2007/07/post_22.html (July 26, 2007, 18:52 EDT).

53. Judges and their clerks might sometimes be directed to these sources by briefs, of course. But this does not appear always to be the case. Schauer & Wise, *supra* note 48, at 503 ("Far more often than not, the nonlegal source cannot be found in any of the briefs . . . .").

54. Volokh, *supra* note 39, at 1096.

write a brief and it does double duty as a way of disseminating the blogger's views to the public as well as to the judges.[55]

Logically, such influence should be most effective at points before a decision (or tentative decision) on a case is reached. Thus, bloggers would most wish to convey information to the Court at certain times: before conference on a cert petition; after oral argument and before the voting conference on a case;[56] and during the period when the Court is considering any post-decision issues such as arose in *Kennedy*.[57] Some advocates are obviously thinking along these lines; approximately five to ten times every year, a party seeking certiorari urges SCOTUSblog to highlight its case in a blog post.[58]

Efforts to influence the Court's outlook on a case could take several forms. First, someone could manipulate publicity around a case to raise the Justices' awareness of it or to provide persuasive nonlegal information about it. Seeking mention of a cert petition on SCOTUSblog probably falls in this category, as might more traditional campaigns to generate coverage and friendly op-eds in the mainstream media.[59] On the other hand, attorneys could also use blogs to make legal points. Sullivan's posts about *Kennedy* are examples of how an unaffiliated lawyer might do so.[60] But lawyers associated with a case may also

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55. *Id.*

56. The voting conference takes place within a few days of the oral argument. GRESSMAN ET AL., *supra* note 24, at 13-14 (noting that oral arguments are normally scheduled for Monday through Wednesday, and conferences are on Friday except in May and June, when they are scheduled for Thursday); John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 70 (2005).

57. *See* Petition for Rehearing, *supra* note 23. The recent *Exxon Valdez* case also brought a post-decision dispute to the Court's attention. *See* Respondents' Submission with Respect to Rule 42.1, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219) (seeking clarification regarding interest on judgment).

58. E-mail from Tom Goldstein, Partner, Akin Gump Strauss Hauer & Feld, LLP, to author (Nov. 20, 2008, 09:56:21 EST) (on file with author). Editorial decisions about which petitions to thus feature, however, are made independently by SCOTUSblog's reporter, Lyle Denniston. *Id.* Tom Goldstein also regularly posts a "Petitions to Watch" column, which he controls, that lists—but does not discuss—petitions that he deems to have a reasonable chance of being granted. E-mail from Tom Goldstein, Partner, Akin Gump Strauss Hauer & Feld, LLP, to author (Nov. 24, 2008, 13:35:31 EST) (on file with author). Beginning with the conference of January 16, 2009, that list automatically includes any case in which Akin Gump or Howe & Russell (another firm involved with SCOTUSblog) represent a lead party, so as to "avoid any appearance of handicapping [their] own petitions." Posting of Ben Winograd to SCOTUSblog, Petitions to Watch: Conference of 1.16.09, http://www.scotusblog.com/wp/petitions-to-watch-conference-of-11609 (Jan. 5, 2009, 17:28 EST).

59. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1525 (2008) ("[Attorneys] push hard for amici support, generate stories in the national news print and broadcast media, and prompt the publication of op-eds in the nation's leading newspapers, all to coincide with the timing of the Court's consideration of the cert petition."); *see also id.* at 1525 n.155 (describing op-eds and news stories associated with four recent cases).

60. *See* Sullivan, "Military Law is American Law," *supra* note 34; Sullivan, Supreme Court Filings, *supra* note 32; Sullivan, The Supremes Dis the Military Justice System, *supra*

be exploiting this opportunity to get in an extra word with the Court, in what might be called "shadow-briefing."

It should be noted that the rules of the Court permit supplemental briefing after oral argument only "by leave of the Court," and never by an amicus.[61] Thus, an amicus posting after argument is potentially communicating with the Court at a time when the Court rules would ordinarily forbid such communication, and even a party doing so at this time would be circumventing the need to seek leave of the Court.[62] Yet counsel for parties and amici do post during this time.

For instance, in *Burton v. Stewart*,[63] Kent Scheidegger—attorney for the Criminal Justice Legal Foundation, an amicus supporting the respondent—posted a pair of blog entries within thirty-six hours of oral argument in the case.[64] His posts analyzed the legal issues discussed during the argument and rebutted the petitioner's reasoning with regard to a jurisdictional question.[65] In the end, the petitioner lost unanimously on jurisdictional grounds.[66] To be sure, Scheidegger's shadow-briefing may not have been responsible for that outcome. The Justices were interested in the problem at oral argument,[67] and

note 16. Sullivan himself, however, reports that he did not expect his original post to be read by anyone at the Court. E-mail from Dwight Sullivan to author (Mar. 6, 2009, 17:41:16 EST) (on file with author).

61. SUP. CT. R. 25.6 (2007); *see also id.* R. 25.5 (suggesting that a supplemental brief is to be restricted to "late authorities, newly enacted legislation, or other intervening matter"). Furthermore, "[th]e grant of such a motion for leave is not automatic; the Court regularly denies them." GRESSMAN ET AL., *supra* note 24, at 801.

62. However, a concerned nonamicus blogger such as Professor Volokh, see *supra* text accompanying note 55, having chosen not to take advantage of the option to file an amicus brief, would be no more inhibited by the Court rules from blogging at this time than at any other.

63. 549 U.S. 147 (2007).

64. Posting of Kent Scheidegger to Crime & Consequences, *Burton* Argument: Jurisdiction, http://www.crimeandconsequences.com/crimblog/2006/11/burton-argument-jurisdiction.html (Nov. 7, 2006, 15:31 PST); Posting of Kent Scheidegger to Crime & Consequences, *Burton*, *Teague*, and AEDPA, http://www.crimeandconsequences.com/crimblog/2006/11/burton-teague-and-aedpa.html (Nov. 8, 2006, 12:51 PST).

65. Scheidegger wrote:

> On rebuttal, Fisher claims again that the state should have objected to the first petition and is now barred from objecting to the second (p. 50). Nope. Nonexhaustion of other claims not mentioned in the petition is no ground for objecting to a habeas petition. You can't default an issue by not making a meritless objection, and you have no obligation to warn your opponent he is defaulting claims he may want to make in the future. Further, the successive petition rule in AEDPA goes to subject matter jurisdiction. Such issues cannot be defaulted.

Scheidegger, *Burton* Argument: Jurisdiction, *supra* note 64. Scheidegger also posted a comment on SCOTUSblog with a link to his analysis of the argument. *See* Comment of Kent Scheidegger to Posting of Lyle Denniston on SCOTUSblog, Commentary: *Burton* and the Looming AEDPA Issue, http://www.scotusblog.com/wp/commentary-burton-and-the-looming-aedpa-issue (Nov. 8, 2006, 18:05 EST).

66. *Burton*, 549 U.S. at 157.

67. Transcript of Oral Argument at 12-17, 26-35, 50, *Burton*, 549 U.S. 147 (No. 05-9222).

after the argument, at least one other observer publicly identified the point as possibly critical to the case.[68] Nonetheless, the power to potentially reach the Justices with one more presentation of the best arguments for a side—particularly a version crafted after the insight that oral argument offers into the Justices' concerns[69]—could be invaluable to litigants.

And Scheidegger is hardly alone in posting case-related material in the interlude between oral argument and conference. Orin Kerr, co-counsel for the petitioner, put up two posts in the days before conference in *Scott v. Harris*,[70] analyzing issues raised during oral argument.[71] The day before conference in *District of Columbia v. Heller*,[72] Professor Carl Bogus, who filed an amicus brief on behalf of professional historians, posted an extended discussion of the proper interpretation of historical evidence about gun rights.[73] The afternoon after oral argument in *United States v. Gall*,[74] Professor Douglas Berman, who assisted with an amicus brief on behalf of the New York Council of Defense Lawyers, posted his view on a point that he felt counsel for Gall had neglected to emphasize at argument.[75] And the list could go on.[76] In any given case of such blogging, the lawyer may not have realized that the Court might see the post, nor thought of it as a way around the Court rules on supplemental briefing. But the potential for the Court to be influenced is independent of the blogger's intent—and the intent to reach the Court will likely be present more

68. Posting of Lyle Denniston to SCOTUSblog, Commentary: *Burton* and the Looming AEDPA Issue, http://www.scotusblog.com/wp/commentary-burton-and-the-looming-aedpa-issue (Nov. 7, 2006, 12:19 EST).

69. Oral argument provides a look into a Justice's thinking not only to the parties but also to other Justices. *See* Roberts, *supra* note 56, at 70 ("[O]ral argument is the first time you begin to get a sense of what your colleagues think of the case through their questions.").

70. 550 U.S. 372 (2007).

71. Posting of Orin Kerr to Volokh Conspiracy, Reflections on the Oral Argument in *Scott v. Harris*, http://volokh.com/posts/chain_1172720514.shtml (Feb. 26, 2007, 20:10 PST); Posting of Orin Kerr to Volokh Conspiracy, What Are the Facts in *Scott v. Harris*?, http://volokh.com/posts/chain_1172720514.shtml (Feb. 28, 2007, 22:23 PST).

72. 128 S. Ct. 2783 (2008).

73. Posting of Carl Bogus to ACSBlog, Praying for a Second Shot on the Second Amendment, http://www.acsblog.org/guest-bloggers-praying-for-a-second-shot-on-the-second-amendment.html (Mar. 20, 2008, 12:05 EDT).

74. 128 S. Ct. 586 (2007).

75. Sentencing Law and Policy, First-Cut Reactions to the *Gall* Transcript, http://sentencing.typepad.com/sentencing_law_and_policy/2007/10/first-cut-react.html (Oct. 2, 2007, 17:29 EDT).

76. I myself posted an argument preview and an analysis of the oral argument in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008), on SCOTUSWiki at http://www.scotuswiki.com/index.php?title=Morgan_Stanley_Capital_Group%2C_et_al._v._Public_Utility_1&oldid=2048. At the time of the postings, I had accepted an offer of summer employment from Stoel Rives LLP. The firm represented PPM Energy Inc., which was an amicus for the petitioners in *Morgan Stanley*, and a petitioner in a related petition, No. 06-1454, that was granted, vacated, and remanded after the *Morgan Stanley* decision.

and more often as lawyers become increasingly familiar with the power of blogging.

II. EX PARTE BLOGGING UNDER THE CURRENT ETHICAL FRAMEWORK

If blogging gives lawyers another soapbox to stand on, is that a problem? Attorneys should act zealously on behalf of their clients,[77] and perhaps the use of this new tool fits comfortably into our model of professional responsibility. After all, many clients and lawyers have come to see managing public relations as part of an attorney's service to high-profile clients.[78] Blogging could perhaps be considered a legitimate and beneficial extension of that task. Not only could it deftly present a party's arguments to the Justices—a traditionally esteemed skill—but it would also spur the error-correction phenomenon seen in *Kennedy* and foster valuable public discussion on constitutional issues.[79] Professor Berman, for instance, believes that blogging by lawyers encourages "effective and balanced discussion of [public] issues," and he is reluctant to hinder attorneys from speaking out on behalf of their clients as they deem appropriate.[80]

However, our legal system will enjoy the educational benefits of blogging without the participation of counsel for litigants and amici, so long as there is widespread interest among unaffiliated attorneys in writing about Supreme Court cases. It is true that there would be certain drawbacks to excluding lawyers associated with a case from the blogosphere. As Professor Berman fears, litigants themselves might sometimes suffer if attorneys were unable to defend their clients' reputations online, and the public dialogue might also be weakened.[81] Unrelated third parties writing about a case might suffer from lack of familiarity with the litigation,[82] and they might not present exactly the same

77. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf.").

78. Lonnie T. Brown, Jr., *"May It Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 123 (2004).

79. For more discussion of the speech benefits associated with blogging by lawyers, see *infra* Part III.D.

80. E-mail from Douglas Berman, Professor, Ohio State University, to author (Mar. 2, 2009, 16:54:36 EST) (on file with author). Professor Berman is particularly concerned that lawyers be able to challenge "significant public misinformation" about their clients. *Id.*

81. *Id.*

82. Scholars have noted that the commentators employed by the media to discuss a high-profile trial such as O.J. Simpson's murder trial may be neither fully conversant with the facts of the case nor expert in the relevant areas of law. Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303, 1319-23 (1996) (proposing duty of competence for commentators); *accord* Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 LOY. L.A. L. REV. 649, 659-61 (1994). Of course, there may be less of a problem with legal bloggers overreaching their competence, simply because they are aware that they are writing for a legally sophisticated audience.

arguments that the parties and amici would. Indeed, if unaffiliated bloggers misunderstand an aspect of the case, a lawyer for a party or an amicus would be in the best position to correct them.[83] But on the whole, Supreme Court cases attract a good deal of thoughtful attention, and vibrant public debate about them does not rely on the contributions of attorneys officially connected with the proceedings. And there is reason to believe that contributions from those attorneys might, in fact, be problematic.

A century ago, Justice Holmes explained that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[84] The traditional threats to this principle were publicity in newspapers and ex parte communications. Blogging by attorneys representing parties or amici has aspects resembling both. It is similar to newspaper publicity in that it is publicly available and widely disseminated—potentially reaching the legal decision maker, but not certain to do so. Yet it also contains the essence of ex parte contact; it is a means of timely communicating selected information to the Court, without notification to the opposing party or a built-in mechanism for that side to offer a counterargument.

Blogging that is directed at the Court thus shares many of the same underlying dangers as improper publicity or ex parte communications. Like them, it would tend to destroy the impartiality of the decision maker.[85] It has the potential for unfairness—one side could say something that the other has little effective opportunity to rebut. Indeed, the other party may not even know that a rebuttal is necessary.[86] On occasion, this imbalance might lead the Court to accept a proposition whose weakness would have been exposed if it had been tested through an adversarial process.[87] Furthermore, ex parte blogging

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83. In *Kennedy*, for example, the online discussion proceeded on the assumption that the death penalty could now be validly imposed under military law for child rape. Yet Kennedy's eventual brief in opposition to rehearing argued that the authorization in the 2006 Act was ineffective under the terms of another statute. *See* Brief for Petitioner in Opposition to Rehearing, *supra* note 29, at 9 n.5. If Kennedy's point was correct, then the earlier discussion had unknowingly suffered from the absence of Kennedy's contribution—an illustration of the value of adversarial argument.

84. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

85. *See* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1355-56 (2000); Steven Lubet, Ex Parte *Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96, 96 (1990).

86. *See* Abramson, *supra* note 85, at 1355; Lubet, *supra* note 85, at 96. Although anyone can create an online blog and post his or her argument, a relatively few blogs attract most of the visitors. *See* Caron, *supra* note 45, at 1031 tbl.3, 1032 tbl.5 (reporting data showing that the top-ranked law blog, The Volokh Conspiracy, received approximately ten times as many visits as the sixth-ranked blog, Sentencing Law and Policy); Bradley M. Bakker, Note, *Blogs as Constitutional Dialogue: Rekindling the Dialogic Promise?*, 63 N.Y.U. ANN. SURV. AM. L. 215, 250 (2007) (citing studies demonstrating that blog readership follows a lognormal distribution). A brand-new or obscure legal blog will probably be less visible to the Court than one of the more well-established sites.

87. *See* Abramson, *supra* note 85, at 1356 (quoting Rose v. State, 601 So. 2d 1181,

may appear to the public to be a form of back-channel communications with the Court—particularly when so little is known about how the Justices treat such material—giving rise to "the appearance of impropriety."[88]

In addition to the threat that blogging poses to the proper functioning of our legal system, the nature of practice before the Supreme Court means that blogging could produce asymmetries with serious consequences for some parties appearing at the Court. In recent years, litigation before the Court has become increasingly concentrated in a specialized Supreme Court bar.[89] Professor Richard Lazarus argues that these attorneys are more familiar with the strategies that are effective with the Court,[90] and that they correspondingly enjoy more success in their endeavors than nonexpert practitioners.[91] However, their expertise is not uniformly distributed among potential parties. Aside from attorneys from the Solicitor General's office—traditionally regarded as preeminent Supreme Court advocates[92]—members of the Supreme Court bar largely represent business interests.[93] If blogging directed at the Court offers a legitimate advantage to litigants, it is these parties whose counsel will be familiar with the strategy and possibly better-connected to the blogs that are most likely to catch the Court's eye. Despite the pro bono assistance that the Supreme Court bar provides to some litigants, other groups—such as employment discrimination plaintiffs[94] and criminal defendants[95]—are systematically less likely to be represented by expert counsel. The creation of law school clinics specializing in pro bono Supreme Court litigation may

1183 (Fla. 1992), *aff'd in part, rev'd in part*, 675 So. 2d 567 (Fla. 1996)); Lubet, *supra* note 85, at 97. A glimpse of the potential for this problem can be seen in *Kennedy* on the question of whether the 2006 Act did in fact result in the valid authorization of the death penalty for child rape under military law, which bloggers assumed to be the case. *See supra* note 83 and accompanying text.

88. Abramson, *supra* note 85, at 1356.

89. Lazarus, *supra* note 59, at 1498-1501, 1515-21; Roberts, *supra* note 56, at 75-76. The "Supreme Court Bar" that Professor Lazarus describes is a group made up of practitioners who are repeatedly involved in Supreme Court litigation. There is also the formal Supreme Court Bar, a much larger group of attorneys authorized to practice before the Court. Lazarus, *supra* note 59, at 1491.

90. Lazarus, *supra* note 59, at 1510-11, 1525, 1540.

91. *Id.* at 1515-17, 1526-27, 1540-44.

92. *Id.* at 1493-97.

93. *Id.* at 1498-1500.

94. Lazarus reports that Supreme Court attorneys in private practice are reluctant to work pro bono on behalf of parties whose interests are broadly opposed to those of their primary clients. *Id.* at 1560.

95. Lazarus argues that an "embedded culture" within the criminal defense bar resists losing control over their cases once they advance to the Supreme Court. *Id.* at 1560-61. Federal defendants may thus be facing the Solicitor General of the United States with the assistance only of trial counsel, while the disparity in expertise may be slightly less in the case of state defendants. Nevertheless, state Attorneys General and Solicitors General may also possess significant Supreme Court expertise. *Id.* at 1501; *see also* Roberts, *supra* note 56, at 77.

ameliorate the disparity, but does not erase it.[96] Nonbusiness parties will therefore be at a further disadvantage if specialists have yet another tool at their disposal that they themselves do not or cannot use effectively. Moreover, if targeted blogging is effective at the certiorari stage, before many petitioners acquire expert pro bono assistance, whether through a clinic or otherwise,[97] the dominance of the Supreme Court bar and their business clients will be further magnified.

Thus, blogging directed at the Court by advocates endangers the impartiality of the Justices and the institutional legitimacy of the Court, and threatens to tilt the playing field in favor of certain interests. These risks appear substantial enough to potentially justify regulation. But are these problems already adequately controlled by the current framework of ethics rules?

A. *Publicity*

Blogging by lawyers is a form of publicity—attorneys present information about a case in a medium widely accessible to the public and thus to the decision makers. Because such publicity "tend[s] to prevent a fair trial in the courts, and otherwise prejudice[s] the due administration of justice,"[98] it has long been a matter of concern to the profession. The bar has historically discouraged lawyer-generated publicity,[99] with the 1908 Code of Ethics of the American Bar Association asserting that "[n]ewspaper publications by a lawyer as to pending or anticipated litigation" are "[g]enerally . . . to be condemned."[100] There is a potential conflict between official condemnation of such speech and the First Amendment, of course, but the permissible contours of regulation have lately been illuminated by the Supreme Court.

In *Gentile v. State Bar of Nevada*, the Supreme Court considered whether the First Amendment shielded a Nevada attorney from discipline for statements he made at a press conference immediately after his client's indictment.[101]

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96. Many clinics are led by attorneys from firms with Supreme Court practices, and thus the clinics' cases are also limited by those lawyers' conflicts. *See* Lazarus, *supra* note 59, at 1560.

97. *Id.* at 1561.

98. ALA. STATE BAR ASS'N, CODE OF ETHICS R.17 (1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS, app. F, at 356 (1953).

99. For the historical development of the pre-*Gentile* rules on publicity, see generally Brown, *supra* note 78, at 95-103; Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497, 498-510 (2007); Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816-25 (1995).

100. ABA CANONS OF PROF'L ETHICS Canon 20 (1908), *reprinted in* THOMAS HUGHES, ETHICS OF THE PRACTICE OF THE LAW 86 (1909).

101. 501 U.S. 1030, 1033 (1991).

Money and cocaine had been stolen from a safe-deposit vault rented by police for undercover drug investigations, and the police blamed Gentile's client, the vault company owner.[102] At the press conference, Gentile informed reporters that the evidence indicated his client was not involved in the crime, and moreover, that prosecutors were attempting to pin the crime on him rather than pursuing the likely thief, a corrupt police detective.[103] In a fractured decision, the Court reversed Gentile's reprimand because the Nevada rule banning publicity contained a vague safe harbor for statements of "the general nature of the . . . defense."[104] However, the Court also held that the First Amendment is compatible with a rule prohibiting lawyers from making extrajudicial statements with a "substantial likelihood of materially prejudic[ing]" an adjudicative proceeding.[105] Such a standard would not be constitutional if applied to the press,[106] but "[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[107] Thus, the "substantial likelihood of material prejudice" standard provides sufficient protection for their limited First Amendment rights.[108]

Undergirded by *Gentile*, the current ABA Model Rule 3.6 governing publicity provides that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[109]

The rule also contains a list of statements specifically permitted, including "information contained in a public record,"[110] and an exemption for any statement "required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[111] The net effect of these loopholes and the "substantial likelihood of material prejudice" standard is that a good deal of publicity—particularly the sort likely

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102. *Id.* at 1039-40 (Kennedy, J., concurring).

103. *Id.* at 1034.

104. *Id.* at 1048 (Kennedy, J., opinion of the Court) (alteration in original) (quoting NEV. SUP. CT. R. 177(3)(a) (repealed 2006)).

105. *Id.* at 1075 (Rehnquist, C.J., opinion of the Court).

106. *Id.* at 1070-71 (acknowledging "clear and present danger" standard for regulation of media speech about pending litigation).

107. *Id.* at 1074. Justice Kennedy disagreed with this analysis, arguing forcefully that lawyers representing clients in pending litigation should be entitled to full protection for their extrajudicial speech. *Id.* at 1053-54 (Kennedy, J., dissenting).

108. *Id.* at 1075 (Rehnquist, C.J., opinion of the Court).

109. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2002).

110. *Id.* R. 3.6(b)(2).

111. *Id.* R. 3.6(c).

to be contained in blog posts directed at the Supreme Court—is perfectly permissible.[112]

First, to the extent that blogging directed at the Court consists of repackaging arguments and information already contained in filed briefs or offered at oral argument, it will fall within the safe harbor for "information contained in a public record."[113] Second, where there has already been unfavorable public discussion initiated by third parties—as could quite plausibly occur in an active Supreme Court case—counsel for a litigant is authorized to state "such information as is necessary to mitigate the recent adverse publicity."[114] These two provisions alone curtail the usefulness of Rule 3.6 in addressing the blogging problem.

Finally, the "material prejudice" standard will be difficult to satisfy in appellate litigation. As a threshold matter, the scope of the rule's operative language appears broad enough to potentially encompass appellate proceedings, even though the rule is clearly aimed primarily at publicity associated with trials. But comment 6 cautions that the "nature of the proceeding" affects what constitutes material prejudice, and nonjury proceedings are deemed least sensitive to extrajudicial speech.[115] This presumption is consistent with the general design of our legal system, in which judges are supposed to be able to filter information dispassionately and use only that which is appropriate in reaching their decisions.[116] Moreover, Rule 3.6 is designed to prevent inflammatory or misleading statements, while the statements most likely to move the Court will probably be rational legal arguments.[117] And even beyond the theoretical resistance of judges to prejudice and the inaptness of the rule to appellate-style arguments, there is a further practical obstacle. Would the Justices publicly declare that the United States Supreme Court is *substantially likely to be materially prejudiced* by an argument in a blog post, as *Gentile* suggests they must in order to constitutionally uphold the application of the rule to a lawyer-blogger?[118]

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112. Even in its core domain of trial publicity, Rule 3.6 allows considerable latitude to attorneys. *See* Brown, *supra* note 78, at 106-12.

113. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(2).

114. *Id.* R. 3.6(c); *see also* Brown, *supra* note 78, at 109-11.

115. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 6.

116. *See* Moses, *supra* note 99, at 1835-36.

117. For the same reason, Rule 3.8(f), which prohibits prosecutors from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," probably does not have any application to Supreme Court blogging. Public condemnation of Mr. Burton (convicted of rape, robbery, and burglary) would undoubtedly have been unaffected if the state had declared that his habeas petition was jurisdictionally barred because he had made an earlier petition before exhausting his state-law appeals on all claims. *See supra* notes 65-66 and accompanying text. But regardless of the official rule, the culture of the Solicitor Generals' and Attorney Generals' offices might constrain their use of the blogging approach.

118. *See* Moses, *supra* note 99, at 1837 ("[I]t would seem nonsensical for a Court to conclude that public comments by a lawyer are substantially likely to influence it.").

Would a state Supreme Court dare make the indirect accusation by disciplining a member of its own bar on those grounds?

As a result of these limitations, Rule 3.6 appears unlikely to prohibit either a conventional op-ed campaign[119] or shadow-briefing by blog post. The former conclusion is in line with the sense that one gathers from legal scholars, most of whom seem to regard editorials as ethically acceptable.[120] Whether or not op-eds are tolerable, however, there is reason for greater concern about blogging. Although the audience for a legal blog is probably smaller than for a major newspaper,[121] it may still contain relevant Justices and clerks, and the self-selected nature of its audience means that a blogger can present arguments in more sophisticated terms. A blogger can refer to "subject-matter jurisdiction" or provide the citation to a case that supports her point; the copy editor of the *Washington Post* would get out his red pencil. A blogger also has complete control over the timing of a blog post, whereas a newspaper will have its own priorities as to when it wishes to run an editorial. Consequently, unless the Justices are impervious to speech directed at them from outside the Court, no matter what the medium, blogs may be more persuasive and have greater impact on the Court than newspapers. To protect the impartial administration of justice, greater control of blogs would befit their greater danger.[122]

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119. The editorials that Professor Lazarus identified as related to petitions for certiorari do not appear to be written by lawyers associated with the cases, and thus they are distinct from the central focus of this Note. *See* Lazarus, *supra* note 59, at 1525 n.155 (citing Paul Atkins, Op-Ed, *A Serious Threat to Our Capital Markets*, WALL ST. J., June 10, 2006, at A12; Theodore J. Boutrous, Jr., Op-Ed, *Due Process for Exxon*, WALL ST. J., Oct. 23, 2007, at A18; Editorial, *Calling All Plaintiffs*, WALL ST. J., May 2, 2006, at A16). However, it would be possible for similar op-eds to be orchestrated by the counsel of record in a case, and an attorney can violate ethics rules by using another person to perform an activity that the attorney would be prohibited from doing herself. MODEL RULES OF PROF'L CONDUCT R. 8.4(a).

120. *See* Lazarus, *supra* note 59, at 1525 (mentioning without disapproval efforts of the Supreme Court bar to generate editorials). In dismissing the possibility that an attorney writing a blog post instead of an amicus brief could be committing an ethics violation, Professor Volokh asserts that "[a] blog post is no more an ex parte communication than a published law review article or an op-ed in the *New York Times*." Volokh, *supra* note 39, at 1096 & n.10. Volokh has located the potential ethics issue in the ex parte rule, discussed *infra* at Part II.B, but he clearly believes that newspaper editorials are proper. *But see* Moses, *supra* note 99, at 1837 ("Under the current rules, attempts to use the press to influence judges might be considered unethical as they involve extrajudicial publicity designed to influence . . . an adjudicative proceeding.").

121. SCOTUSblog might get ten to fifteen thousand hits on an ordinary weekday; the Washington Post reaches about seven hundred thousand subscribers. *See* Frank Ahrens, *Washington Post Staffers Take Early Retirement*, WASH. POST, June 1, 2006, at D1 (reporting circulation figures for the *Washington Post*).

122. It could be argued, however, that given the demographics of the Court, the Justices are more likely to be exposed to newspapers and other traditional print media than to blogs. On the other hand, to the extent that the clerks have any influence on the Court's actions—a controversial question in its own right—it might similarly be argued that the clerks are more likely to read blogs than the *Wall Street Journal*.

Similarly, law review articles could also theoretically be a form of publicity, but they typically pose little risk of unduly influencing a proceeding. Like a blog post, they can advance complex arguments in legal terminology, and they are likely to reach a judicial audience. However, unlike a blog post—or even a newspaper editorial—traditional law review articles are rather unlikely to be made to order for the particular case at hand. Because of the long lead time necessary to research and write a substantial piece, plus the further delay before publication, it will be uncommon for a law review article to have been drafted with the aim of influencing a pending case.[123] Rarely, then, will a traditional law review raise concerns akin to those caused by blogs.

On the other hand, as the news media and law reviews themselves adapt to the Internet, the attributes of blogging will begin to surface in those contexts as well. In addition to publishing a thick volume of scholarship each year, law reviews now increasingly maintain online sites presenting brief pieces with a potentially shorter publication lag.[124] These pieces might well be tailor-made for a particular case and would create the same risks as a blog post. To the extent that law reviews or newspapers come to share the relevant characteristics of blogs, they should logically merit the same ethics treatment as well.

B. *Ex Parte Communications by Attorneys to Judges*

Another ethics principle that might speak to blogging is the long-standing ban on ex parte communications to judges. Driven by the same desire to preserve the decision maker's impartiality that animates the prohibition on publicity, the profession has long cautioned lawyers not to communicate with judges ex parte. The 1887 Alabama Code of Ethics declared that "[i]t is bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause,"[125] and the ABA's 1908 Code[126] and early twentieth century manuals of ethics[127] echoed the admonishment. The details of the

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123. There may be exceptions to this, especially where a high-profile case in the lower courts is deemed likely to eventually reach the Supreme Court, or an industry repeatedly faces litigation involving a particular issue. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 n.17 (2008); Shireen A. Barday, Note, *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711 (2008) (examining publication by law reviews of industry-funded research on punitive damages).

124. For example, the *Yale Law Journal* offers the Pocket Part, at http://yalelawjournal.org (last visited Mar. 5, 2009). Similarly, a consortium of law journals at seven schools, including Stanford, supports The Legal Workshop, at http://legalworkshop.org (last visited Apr. 22, 2009).

125. ALA. STATE BAR ASS'N, CODE OF ETHICS R.15 (1887), *reprinted in* DRINKER, *supra* note 98, app. F, at 356.

126. ABA CANONS OF PROF'L ETHICS Canon 3 (1908), *reprinted in* HUGHES, *supra* note 100, at 81 ("A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause . . . .").

127. GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 205 (1910) ("It is improper, therefore, for the lawyer to attempt to discuss a case with the presiding judge

prohibition have evolved over time,[128] but the modern ABA rule entitled "Impartiality and Decorum of the Tribunal" states that "[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; [or] (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order."[129]

Many states retain an older version of the rule,[130] containing exceptions authorizing communication under certain circumstances, including if the communication is "[i]n writing if the lawyer promptly delivers a copy of the writing to opposing counsel."[131]

Because the interests justifying the ex parte rule are closely analogous to those supporting the publicity rule, and because it too restricts the speech of only those lawyers involved in a proceeding[132] and only for the duration of the proceeding, it is almost certainly constitutional under *Gentile*.[133] Indeed, the classic forms that ex parte speech takes—private conversation or correspondence with a judge—have even less value to society than Gentile's public dissemination of information about the integrity of the legal system.[134] As applied to blogging, of course, the contributing-to-the-public-debate aspect of *Gentile* would resurface, but regulation might still be possible.[135] "Even outside the courtroom," the Court has established that "lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be."[136] Moreover, "a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional."[137] The traditional ex parte restriction is manifestly necessary to

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except in open court."); GEO. W. WARVELLE, ESSAYS IN LEGAL ETHICS 191 (2d ed. 1920) ("It is gross impropriety for counsel to discuss his pending cases with the judge or to privately argue their merits, or to address to him private communications respecting his causes in court.").

128. *See* Abramson, *supra* note 85, at 1385-90 (discussing changes since 1969 version).

129. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2002).

130. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(b) (1983).

131. N.Y. COMP. CODES R. & REGS., tit. 22, § 1200.41(b)(2) (2007) (effective through Mar. 31, 2009); *accord* CAL. R. OF PROF'L CONDUCT R. 5-300(B)(4) (2008).

132. While Rule 3.5 is not explicitly limited to the lawyers involved in a particular proceeding, such an interpretation is implied by the phrase "during the proceeding." In light of this and the traditional understanding of ex parte communications, *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113(1) (2000), it is reasonable to interpret the rule as applying to only those lawyers representing parties or amici in a case.

133. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., opinion of the Court) ("[The publicity rule] is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech.").

134. *See id.* at 1069.

135. *See infra* Part III.C.

136. *Gentile*, 501 U.S. at 1071 (citing *In re* Sawyer, 360 U.S. 622 (1959)).

137. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) (internal quotations omitted) (analyzing restriction on speech by judicial candidates).

serve the state's substantial interest in the fair operation of the legal system, and narrowly tailored to do so, as it restricts only speech by lawyers to court officials during pending litigation. It is thus presumably constitutional.

On the other hand, as currently defined, the ex parte rule probably does not apply to blogging. This is unfortunate. Blogging directed at the Court by an attorney in a case fits closely with the reasons underlying the ex parte rule: it supplies the judge with one-sided and thus potentially flawed information, it impairs the impartiality of the judge, it may create the appearance of unfairness, and it interferes with the opposing party's right to notice and a response.[138] In the case of a blog post, the other party may become aware of the communication because by its nature it is publicly accessible. But notice is not assured, and there is no guaranteed opportunity to reply. All in all, blogging hardly respects those "touchstones" of the ex parte rules, "even-handedness and due process."[139] Yet despite generating risks corresponding to the justifications for the ex parte rule, blogging would probably not fall within the scope of the rule because blog posts would not be considered "communications."

Although blogging could be an attempt to communicate with a judge, it differs from the conventional forms of ex parte communication. A conversation or a letter is both more certain to actually reach a judge, and more private. A blog post, by contrast, is instantaneously available to a very large potential audience, including opposing counsel—and yet the judge and clerks may never read it. In these respects, a blog post is more like statements published in a newspaper or law review, neither of which have traditionally been understood to violate the rule against ex parte communication.[140] But blogging allows the speaker to tailor his message to precisely appeal to the judge's sensibilities, at very low cost, and to begin making the message available at a time of the speaker's choosing. The novel nature of blogging, which is a form of public speech that incorporates the persuasive advantages of private communication,

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138. Abramson, *supra* note 85, at 1355-56 (describing dangers of ex parte communications); Lubet, *supra* note 85, at 96-97 (same).

139. Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 228 (2000).

140. *See* Volokh, *supra* note 39, at 1096 n.10 ("A blog post is no more an ex parte communication than a published law review article or an op-ed in the *New York Times*."). In the context of an alleged ex parte communication with an administrative agency by means of a newspaper advertisement, a Connecticut court noted that appellants were unable to cite any caselaw indicating that "contents of newspapers of general circulation constitute ex parte communications." Middlefield Citizens Action, Inc. v. Town of Middlefield Inland Wetland, No. 83209, 1999 WL 195882, at *10 (Conn. Super. Ct. Mar. 25, 1999). On the other hand, Professor Edward Cheng suggests that the difference between published material and private ex parte communication "is only one of degree," but he believes that published works are generally less problematic because they are more reliable, accountable, and publicly available. Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1295-96 (2007); *cf.* Moses, *supra* note 99, at 1841 ("[L]awyers—either working alone or with public relations firms—attempt to spin the media in order . . . to get an ex parte message to a judge, prosecutor, or other legal decisionmaker.").

thus suggests the need to broaden the application of the term "communications." Until that happens, however, blogging will be unrestrained by the rule against ex parte communications by attorneys.

C. *Receipt of Ex Parte Communications by Judges*

It takes two to communicate, of course, and the problem of ex parte blogging might be attacked from the judge's side of the bench as well. Certainly the profession has long prohibited judges from engaging in or receiving ex parte communications,[141] under exactly the same rationales as the rule governing attorneys.[142] The First Amendment permits such regulation because it concerns speech by government employees pursuant to their official duties.[143] Currently, the ABA Model Code of Judicial Conduct states that, with certain exceptions, "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . . ."[144] Indeed, the prohibition against judges considering ex parte communications is more expansive than its counterpart rule for attorneys—it is intended to cover even communications "with lawyers, law teachers, and other persons who are not participants in the proceeding . . . ."[145]

However, the same difficulty discussed above with respect to the attorney rule might apply to the judicial ex parte canon as well: widely disseminated statements might not be considered ex parte communications.[146] Unlike the classic examples of ex parte communications, such as a private conversation or a letter, they are publicly available and the judge may never learn of them. When a judge or her clerks view a targeted blog post regarding a pending case, though, the circle has been closed. An attorney has posted information directed

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141. ABA CANONS OF JUDICIAL ETHICS Canon 17 (1924), *reprinted in* DRINKER, *supra* note 98, app. D, at 331 ("A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.").

142. Abramson, *supra* note 85, at 1355-56; Lubet, *supra* note 85, at 96-97; Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 136-38 (2008).

143. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that memorandum written by deputy district attorney pursuant to job duties was not protected speech).

144. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2007).

145. *Id.* cmt. 3. Thus, although there may be no direct ethical problem from a law professor's end when sending a copy of a law review article to a judge, the judge would not properly be able to read the article if it were considered a "communication," discussed below. *See* Volokh, *supra* note 39, at 1095 ("Most law professors want their law review articles to influence courts. . . . We sometimes even send reprints of our articles to the chambers of judges who are deciding cases to which the articles are relevant.").

146. *See* Thornburg, *supra* note 142, at 140 ("[M]any do not think of reading written materials as an 'ex parte communication.'").

at them, and it has been received. All of the dangers of ex parte communication materialize: damage to the judge's impartiality (or at least, the appearance thereof), lack of notice and reply, and potentially flawed arguments. It would thus be crucial to achieving the purposes of the ex parte rules to deter judges from seeking out such information, widely disseminated or not.

Indeed, the judicial rule and its comments broadly instruct judges and their clerks[147] not to gather a variety of types of information, some of which might well be published. The model rule states that a judge "shall not investigate facts in a matter independently,"[148] and comment 6 clarifies that this prohibition includes information available in electronic media.[149] There has been some pressure on this point as judges grapple with their duty to assess the admissibility of expert testimony under the *Daubert* standard,[150] but a significant fraction of judges feel that it is unethical even in the *Daubert* context to look into the published scientific literature on a topic.[151] If reading peer-reviewed journals about a general topic is impermissible under the ex parte canon, how much more so reading a legal blog post about the very case?

Judges are naturally allowed to conduct independent research into the law, as opposed to the facts of the case.[152] They can read to their hearts' content the statutes, cases, and law review articles they find—these are the basic elements of the legal landscape. But if a judge wishes to avail himself or herself of the advice of a disinterested legal expert regarding "the law applicable to a proceeding," the Judicial Code declares that the parties in the case must receive notice and an opportunity to respond.[153] Judges are clearly not supposed to

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147. Rule 2.9(D) clarifies that law clerks should follow the ex parte precepts as well, and courts have applied the canon to the activities of clerks. *See, e.g.*, Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593 (5th Cir. 1977); Randolph v. State, 853 So. 2d 1051, 1057 n.6 (Fla. 2003); *see also* State v. Marcopolos, 572 S.E.2d 820, 824 (N.C. Ct. App. 2002) (prosecutor who gave document to judge's clerk violated rule against ex parte communication by lawyers).

148. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C).

149. *Id.* cmt. 6.

150. *See* Cheng, *supra* note 140, at 1265-68; George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 292-98 (1998); Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 53 (1994). Indeed, Professor Thornburg describes the current situation as a "perfect storm of confusion" created by "the forces of curiosity, availability, and legal muddle." Thornburg, *supra* note 142, at 156.

151. Cheng, *supra* note 140, at 1275-78 (reporting a survey of eighty-one state appellate judges, of whom approximately a third felt that consulting a medical treatise or medical journal to inform a scientific admissibility ruling was "undesirable" or "very undesirable").

152. *See* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (stating that despite the background norm of adversarial presentation of issues, "we are not precluded from supplementing the contentions of counsel through our own deliberation and research").

153. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(2).

seek legal analysis tailored to the case from outside chambers without providing procedural protections to the parties. Reading a blog post authored by counsel for one of the parties or amici—lawyers who don't even qualify as disinterested experts in the first place—would trample this principle.

Therefore, although the ethics rules for judges and those for attorneys both use the term "communication" in describing prohibited ex parte conduct, it is more likely that judges or clerks deliberately reading a blog post about a case pending before them would be deemed to have violated the Code of Judicial Conduct than that the blogger would be found to have violated the parallel rule for attorneys. Permitting a judge or clerk to read such material would frustrate the fundamental purposes of the judicial ex parte rule and would run counter to the spirit of the provisions established to insulate judges from outside input on their cases. Moreover, avoiding the appearance of impropriety assumes overriding importance when it comes to judicial behavior.[154] A generous interpretation of the ex parte rule is thus called for to avoid the appearance of unfairness that will result from judges perusing relevant blogs while presiding over a case.

One small hitch then presents itself. The Code of Judicial Conduct may forbid judicial exposure to ex parte blogging, but the Justices of the Supreme Court do not officially subscribe to the Code. All state courts and the lower federal courts have adopted some version of the Code[155]—not so the nation's highest court.[156] This is not to say that the Justices are heedless of the widely accepted norms of behavior befitting the judicial office,[157] but only that

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154. *Id.* R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . . ."); *see also* Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 854 (1989) ("[T]he basic rule of the Code of Conduct, the one to which all other rules are mere commentary, reflects this concern: judges should avoid not only impropriety but the appearance of impropriety in all things relating to their office.").

155. Sarah Schultz, Note, *Misconduct or Judicial Discretion: A Question of Judicial Ethics in the Connecticut Supreme Court*, 40 CONN. L. REV. 549, 562 (2007).

156. Andrew L. Kaufman, *Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct*, 32 HOFSTRA L. REV. 1293, 1324 (2004); Schultz, *supra* note 155, at 563. An argument can be made that the text of the federal code's compliance section encompasses the Justices, but the introduction does not list the Supreme Court as being among the courts covered by the code. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), *available at* http://www.uscourts.gov/library/codeOfConduct/Revised_Code_Effective_July-01-09.pdf; Comments of the American Bar Association Regarding Proposed Revisions to the Code of Conduct for United States Judges, cmt. 1 (Apr. 18, 2008), *available at* http://www.abanet.org/poladv/letters/judiciary/2008apr18_conduct_l.pdf.

157. One certainly hopes that they are no longer as cavalier about ex parte contact as was Justice Frankfurter, who engaged in unmistakable violations of the principle both as an attorney and, later, as a Justice during *Brown v. Board of Education*. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 98-101 (1960) (describing how Frankfurter, of counsel in *Stettler v. O'Hara*, 243 U.S. 629 (1917), met privately with Chief Justice White to persuade him not to permit the attorneys of record to submit the case on the briefs); Norman Silber,

formally, they are not bound by any external articulation of those norms. Still, the problem of case-related blogging directed at the Supreme Court once again escapes direct regulation.

III. OPTIONS FOR REFORM

The practice of law has changed dramatically since the first ABA Code of Ethics was published a century ago. The profession's ethics rules have changed apace.[158] Adhering to the same fundamental principles, the details of what constitutes ethical behavior have adapted to changing circumstances and our evolving understanding of what behavior best serves those principles. With the recent rise of legal blogging, the rules may need to adapt again. There is a real potential that the Court will be exposed to advocacy by lawyers associated with pending cases, with all the ill effects that ex parte communication entails, and the current rules do not effectively address the issue. It is time to consider what could be done instead.

A. *Do Nothing*

The first option, as when confronted with any problem, is to do nothing. Leave the current rules as they are, issue no guidance, and let the situation work itself out. Right now, the profession has not even begun to consider the matter widely, and those who do ponder the question may well find themselves in the same state of confusion as Professor Volokh: "I'm pretty sure that a blog post that obviously aims to reach the judges or clerks working on a case will be looked down on, though I'm not exactly sure why."[159] It is unclear whether the profession's informal norms would eventually develop into complete tolerance of Court-targeted blogging, or whether such advocacy would come to be universally regarded as unseemly (and thus likely ineffective with the Court

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The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History, 100 HARV. L. REV. 817, 832, 843-45 (1987) (interview with Phillip Elman, former law clerk to Justice Frankfurter) (describing conversations regarding civil rights cases between Justice Frankfurter and Elman, then an attorney in the Solicitor General's office); *see also id.* at 848-49 (describing Elman engaging in ex parte lobbying of Justice Frankfurter to secure grant of certiorari in a First Amendment case).

158. For instance, the bar has developed rules to handle conflicts of interest when attorneys move from one firm to another, MODEL RULES OF PROF'L CONDUCT R. 1.9 (b)-(c), 1.10(b) (2002), whereas the 1908 Code stated merely that "[i]t is unprofessional to represent conflicting interests in the same suit or transaction." ABA CANONS OF PROF'L ETHICS Canon 6 (1908), *reprinted in* HUGHES, *supra* note 100, at 82. For other examples of development in the rules governing attorney conduct, see MODEL RULES OF PROF'L CONDUCT R. 1.13 (describing duties to an organization as client); *id.* R. 5.5 (governing multijurisdictional practice of law).

159. Volokh, *supra* note 39, at 1096. It should be noted that Professor Volokh is writing about blog posts by lawyers not formally affiliated with a case, as a less costly alternative to filing an amicus brief.

audience) even if not prohibited. But what is almost certain is that the transition in either direction would be prolonged and muddy.

Attorneys who are Supreme Court specialists will be more attuned to how the Justices view ex parte blogging.[160] If members of the Court frown on it, specialists will not employ it, while attorneys less familiar with the Court's attitudes may still post, thereby potentially incurring the Justices' displeasure. If members of the Court move toward accepting ex parte blogging, the same repeat players will be more likely to use it, more practiced in doing so, and potentially better connected to favorable blogging opportunities than the novices. Since assistance by expert Supreme Court counsel is not randomly distributed among potential litigants but rather concentrated primarily among business clients and the federal government, either of these situations will weaken the position of groups typically represented by less experienced attorneys. These dynamics between Supreme Court novices and specialists are perhaps less likely to arise with criminal defendants.[161] The Solicitor General does not blog, and the culture of the office may discourage adoption of such an approach even if it is not disfavored by the Court. In addition, the amici who repeatedly support criminal defendants, such as the National Association of Criminal Defense Lawyers or the American Civil Liberties Union, will have Supreme Court expertise themselves. But overall, a lack of transparency about whether ex parte blogging is appropriate will tend to hinder disadvantaged parties.

B. *Do Too Much*

Instead of doing nothing, a code of ethics could theoretically attempt to do a great deal. Regulation could be draconian: no online discussion of pending Supreme Court cases by any licensed attorney. Such a rule would obviously go too far. It would impoverish public debate regarding the Supreme Court's work, and it would be wildly unconstitutional. Even if the courts are comfortable imposing some restrictions on speech by attorneys,[162] "[t]here are

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160. As with many matters, the members of the Court may not be of one mind regarding ex parte blogging. In the face of conflicting preferences by different Justices, attorneys would need to make strategic choices.

161. According to Professor Lazarus, criminal defendants are particularly likely to be represented by lawyers who are first-timers at the Court. Lazarus, *supra* note 60, at 1561. Federal criminal cases, by contrast, will be handled by the Solicitor General, who often also participates as an amicus in state criminal cases. *See, e.g.*, Clark v. Arizona, 548 U.S. 735 (2006); Samson v. California, 547 U.S. 843 (2006); Hudson v. Michigan, 547 U.S. 586 (2006).

162. *E.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding rule controlling advertising by lawyers); Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (affirming constitutionality of prohibiting speech by lawyer substantially likely to materially prejudice a proceeding); *see also* W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 312-13 (2001) (listing contexts in which regulation of attorney speech has been held permissible, despite unconstitutionality of restricting similar speech by

circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."[163] As speech that is crucial to the public's comprehension of our constitutional system, blogging by the legal profession as a whole on pending Supreme Court litigation would deserve the strongest protection if anything does. A prohibition on such speech would be a content-based restriction subject to strict scrutiny,[164] and it would fail. Regardless of whether the government's interest in the impartial administration of justice were to be declared a compelling state interest, the rule would not be narrowly tailored to serve that interest. Less restrictive alternatives, discussed below,[165] are available.

C. *Regulate Parties and Amici*

Another approach would be to prohibit attorneys for the parties and amici from writing blog posts directed at the Court concerning the merits of their pending cases. Such regulation would not be perfect; it involves several line-drawing problems and could sometimes be circumvented. However, it would at a minimum signal a professional consensus on the issue that could guide attorneys' conduct—if it could be upheld as constitutional.

If this regulation were to take the form of a rule of professional conduct, it might read:

> A lawyer representing a party or an amicus curiae in a matter shall not make an online statement concerning the merits of a pending or impending proceeding before the Supreme Court of the United States in the matter, if such statement can be reasonably interpreted as intended to influence the Justices, law clerks, research attorneys, or other court personnel who participate in decision-making for the proceeding. Intent to influence such decision-makers is not precluded by the existence of other purposes for the statement.

Such a rule might be adopted formally by the various state bars. Alternatively, they could issue opinions interpreting their existing ex parte rules to achieve a similar end.[166] Action by the state bars would be sufficient to control the conduct of attorneys practicing before the Supreme Court, since all members of the Supreme Court Bar must be members of their respective state bars.[167] However, it might well be a low priority for the states to amend their

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nonlawyers).

163. *Fla. Bar*, 515 U.S. at 634.

164. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002) (explaining that restriction on core free speech rights of judicial candidates must be "narrowly tailored to serve . . . a compelling state interest").

165. *See infra* Parts III.C, III.E.

166. For an example of an interpretation of pre-existing rules to fit a new context, see L.A. County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 514 (2005) (analyzing inadvertent ex parte contacts between attorneys and judges on e-mail listservs).

167. *See* SUP. CT. R. 5.1 (2007) (admission to the bar); *id.* R. 8.1 (disbarment and

rules when only a tiny fraction of their attorneys will ever practice before the United States Supreme Court.[168] In addition, it would be faster and more uniform to directly regulate the Supreme Court Bar. Currently, the Supreme Court's rules do not include specific ethics proscriptions, but Rule 8.1 could be amended to clarify that "conduct unbecoming a member of the Bar of this Court" includes ex parte blogging.

The proposed rule aims to regulate attorneys for parties and amici, but it does raise several practical issues. First, attorneys might evade it. Most obviously, they might ghost-write statements to be posted by other people. However, such a subterfuge would violate the existing prohibition on using other individuals to accomplish forbidden acts.[169] The chances of detection might be low, but the costs of being caught (or even suspected) would be high, especially for the repeat players of the Supreme Court bar whose reputation before the Court is essential to their practice.

A nonparty group or individual wishing to influence the decision-making process in a case could also avoid the rule by simply not becoming an amicus. This is unavoidable; the rule could not be administered if it were necessary to define the class of potential amici and attempt to identify those who refrained from filing a brief in order to have their lawyers make arguments online instead. Nor would it be fair to penalize those who chose to trade the certainty that their briefs would land on the clerks' desks for the freedom to speak online. In any case, potential amici are only likely to consider staying out of a proceeding when there is already another amicus who would adequately present their viewpoint to the Court in an official brief. Thus, the number of attorneys escaping through this loophole seems unlikely to be high.

Second, the proposed rule suffers from two line-drawing problems. To begin with, it will be difficult to determine what degree of involvement with outside parties suffices to violate the rule. The rule would be severely underinclusive if attorneys were allowed to draft arguments for formally unaffiliated bloggers and coordinate their online postings. But it would hardly be sensible to prohibit attorneys from discussing the case and legal issues with

disciplinary action); GRESSMAN ET AL, *supra* note 24, at 969-70 (noting that disbarment or suspension by state bar will lead to a show cause order from the Court, as may a "significant disciplinary sanction" short of those).

168. Ex parte blogging could theoretically be employed in the federal courts of appeals and the state courts, but it seems much less probable in those courts. First, there is less publicity around appeals in these courts as opposed to United States Supreme Court cases, and the judges are thus less likely to expect to find information about them online. Second, there are probably fewer blogs specializing in coverage of these courts, so judges will be less likely to visit sites that might inadvertently expose them to postings about their cases. (This reasoning may not hold, however, for a court dealing with specialized subject matter, such as Tax Court.) But most importantly, judges in the state courts and lower federal courts are subject to a prohibition on receiving ex parte communications, *see supra* Part II.C, so that judges and their clerks should arguably avoid reading any ex parte blogging they encounter by chance.

169. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2002).

potential amici or other inquirers merely to prevent future blog posts. A reasonable compromise would have to be reached between the extremes of inadvertent assistance and intentional use of a third party as a mouthpiece. Presumably, in light of the existing ban on violating the ethics rules by acts of another, courts have some experience in making this type of distinction, and that caselaw should be available to guide lawyers. Furthermore, members of the Supreme Court bar are already accustomed to strategically planning the level of involvement that different categories of attorneys will have in communicating to the Court, because Supreme Court rules currently require that an amicus brief disclose whether a party's counsel wrote it, and whether there was any outside funding of its production.[170] A new rule limiting their participation in blogging by third parties should not be too difficult for them to manage.

An additional line-drawing problem is that the proposed rule could be interpreted to cover law review articles, newspaper editorials, or statements made in interviews with the media, if these materials were published online by a media or law review website. Depending on the forum, these types of statements may not allow the speaker as much control over the timing, form, and tailoring of the argument as does a blog post, and thus may pose less of a risk of unfair influence on the Court. Moreover, an automatic and complete gag order on the parties and amici in every Supreme Court case would be more than is necessary to prevent the harms of ex parte blogging. Thus, it might be desirable to include an exemption to the rule for statements published online by a news organization. However, with the ongoing changes in the journalism industry and the increasingly mainstream character of some blogs, any distinction between the conventional media and bloggers would have to be carefully crafted and might not remain meaningful in the long term. Furthermore, as the online presence of law reviews grows and their content comes to share the timely and tailored nature of blogging, it may be appropriate and necessary that the rule cover them as well.

Third, the proposed rule might not be constitutional. The Court has so far been protective of speech on the Internet,[171] a forum in which "any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox."[172] Even aside from the Court's potential concern about suppressing speech in this promising new forum, an ex parte blogging rule would be subjected to the same heightened scrutiny that the trial publicity rule underwent in *Gentile*,[173] and its survival would not be assured. Under *Gentile*,

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170. SUP. CT. R. 37.6 (2007).

171. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004) (affirming grant of preliminary injunction against enforcement of the Child Online Protective Act); Reno v. ACLU, 521 U.S. 844 (1997) (holding provisions of the Communications Decency Act to be unconstitutionally overbroad).

172. *Reno*, 521 U.S. at 870.

173. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075-76 (1991) (Rehnquist, C.J., opinion of the Court).

the lawyers representing parties and amici, as officers of the court, have a diminished right to speak publicly concerning their pending cases, and "'a fiduciary responsibility not to engage in public debate that will . . . obstruct the fair administration of justice.'"[174] And as in *Gentile*, the state here has a "substantial . . . interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity."[175] But the publicity rule in *Gentile* was narrowly tailored to prohibit only that speech with a substantial likelihood of materially prejudicing a proceeding. The proposed ex parte blogging rule contains no similar explicit limitation. It might therefore prohibit speech that for whatever reason—its bland restatement of arguments already fully explored in the briefing, its unpersuasive content or style, or its low chance of ever being seen by a Justice or clerks—poses only a small risk of actual prejudice to the proceeding.

Although *Gentile* held that lawyers' speech could be restricted before it reached the level of "clear and present danger," the Court did not indicate whether the "substantial likelihood of material prejudice" standard was the minimum acceptable under the First Amendment.[176] A lower threshold of risk might be held to justify restricting the extrajudicial speech of lawyers in pending cases,[177] but it is doubtful that the First Amendment would allow lawyers to be silenced on a showing of highly attenuated risk. On the other hand, were the proposed rule to include a "substantial likelihood of material prejudice" element, its usefulness would be significantly diminished. For the same reasons already discussed above with regard to the existing publicity rule,[178] instances of ex parte blogging would rarely be found to meet that standard.

One argument for the constitutionality of the proposed rule as it stands would be that ex parte blogging, like ex parte communication generally, poses such an intrinsic danger to the administration of justice that no specific showing of prejudice is required to justify discipline. If the simple existence of an ex parte blog post is bound up in an appearance of unfairness and injury to the rights of the opposing party, regardless of whether the Court's decision is affected, then a rule prohibiting all such speech would be narrowly tailored to serve the state's interests.

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174. *Id.* at 1074 (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring)).

175. *Id.* at 1076.

176. *Id.* at 1070-71, 1075.

177. The Fourth Circuit has upheld a publicity rule that contained a "reasonable likelihood" standard rather than the "substantial likelihood" standard of *Gentile*. *See In re* Morrissey, 168 F.3d 134, 140 (4th Cir. 1999); *see also* Jason P. Beaulieu, Note, *The First Amendment Challenge of the "Reasonable Likelihood" Standard for Restricting Lawyer Speech*, 59 MD. L. REV. 1309, 1319-21 & n.110 (listing eleven states as having adopted a "reasonable likelihood" standard).

178. *See supra* Part II.A.

Alternatively, ex parte blogging could be seen as a type of adjudicative speech in which the attorneys are choosing to make their statements outside of court to circumvent the rules governing briefing.[179] If ex parte blogging is conceptualized as essentially adjudicative speech, despite occurring outside the formal processes of the justice system, regulation would be necessary to protect the legitimacy of the adjudicative process.[180] A prohibition would therefore be narrowly tailored to prevent the subversion of the justice system, and presumably it would be constitutional.[181]

Thus, while there is a valid concern that the proposed rule might unduly infringe on the free speech rights of attorneys, a rule prohibiting ex parte blogging could well be permissible under the First Amendment. If the scope of the prohibition were to be confined to particularly dangerous speech (or if all ex parte blogging is inherently dangerous), it would probably be constitutional. There is an additional incentive, then, to draft the rule narrowly, to avoid sweeping in speech to the media or to outside parties that may pose little threat to the fair administration of justice.

Finally, constitutional concerns could be avoided if the regulation of ex parte blogging took the form of a voluntary "best practices" guideline, rather than a formal rule of professional conduct.[182] Such a solution would preserve more flexibility for litigants to respond to the variety of circumstances that might arise either from continuing technological and social change or from the unique facts of a case. However, being nonbinding, it would require a high degree of consensus among attorneys as to the contours of appropriate practice, along with strong individual commitment to abiding by that standard.

D. *An Open Invitation to Blog*

Just as the state bars or the Supreme Court could change the rules to prohibit ex parte blogging, they could choose to go in the other direction. They could announce that blogging directed at the Court by attorneys involved in the litigation is ethically acceptable for both attorneys and the Court. A formal announcement would eliminate the asymmetry in knowledge of the tactic, although the discrepancies in skill and opportunities between regular Supreme Court practitioners and others would remain. Indeed, if ex parte blogging became a routine feature of litigation before the Court, it would disadvantage

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179. *See supra* note 62 and accompanying text.

180. *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 757-59 (2004) (describing "direct legitimacy" justification for limitations on adjudicative speech).

181. *Cf. Gentile*, 501 U.S. at 1071 (Rehnquist, C.J., opinion of the Court) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.").

182. Professor Berman favors this approach, believing it will be less likely to "stifle" valuable speech. *See* E-mail from Douglas Berman, *supra* note 80.

resource-limited litigants relative to business interests more than is presently the case.[183] Engaging in shadow-briefing would entail more work—after all, blog posts don't write themselves.

An open invitation to blog would probably reduce some of the harms associated with ex parte communications. In and of itself, a public statement that ex parte blogging was not considered sufficiently dangerous to justify regulation might reduce the public perception of impropriety. If the profession's considered conclusion is that the practice is tolerable, the larger society might respect that judgment. And by clearing the way for attorneys to post freely, both sides would be encouraged to make their pitches—potentially decreasing the unfairness and distortion of having only one side talking. Attorneys could even be required to provide notice of their blogging to opposing counsel and the Court[184]—surely a viable time, place, and manner restriction on their speech, and one which would incorporate the due process rationale underlying the traditional prohibition on ex parte communication.

On the other hand, permission to blog and a notice requirement would not erase all of the evils of ex parte communications. Because it would be infeasible to require the Justices to consider every blog post,[185] it would remain arbitrary and unpredictable which posts a Justice actually viewed; the Court might still be exposed to unbalanced arguments. The Justices' impartiality would still be questionable, and the danger of flawed information undergirding the case's disposition would still remain. An open invitation is thus a partial solution to the problem of ex parte blogging, but not a complete cure.

There would, however, be some social benefits gained from promoting ex parte blogging to offset the costs of the tactical asymmetries between groups and the damage that would be caused by tolerated ex parte communication. Blogging by attorneys intimately familiar with the Supreme Court's cases may well enhance and stimulate public debate about constitutional law in this country. Although Professor Cass Sunstein and others have voiced strong criticisms of the nature and effects of blogging on our national conversation,

183. Professor Thornburg believes that permitting appellate judges to conduct independent research into the facts of the case would mean that "the comparative wealth of the parties [would be] less likely to distort the information available to the court." Thornburg, *supra* note 142, at 197; *see also id.* at 188-89. However, in the context of ex parte blogging, it would be precisely the inequalities of counsel which would be perpetuated by authorizing the Court to access their online arguments.

184. Such notice would be consistent with the provision in some states' rules that exempt written communication from the ex parte prohibition if copies are promptly sent to opposing counsel. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 5-300(B)(4) (2008); N.Y. COMP. CODES R. & REGS., tit. 22, § 1200.41(b)(2) (2009). For a similar notice proposal in the context of appellate judicial research of facts, see Thornburg, *supra* note 142, at 191.

185. If the Justices were required to view every post that a party or amicus wrote, their workload would multiply, erasing the advantage gained by structuring the formal briefing and setting word limits on it.

fearing that it encourages insular ideologies,[186] this negative view is not universal. Instead, blogging is seen by many as advancing the public intellectual debate.[187]

Blogging engages and informs citizens and may be a valuable corrective to the poor quality of "constitutional dialogue" in the conventional media.[188] The discussion of legal and political issues in blogs can be of high quality because a blog offers enough space to say something complex, as opposed to the sound-bite coverage typical of some forms of mainstream media.[189] Moreover, the postings on blogs represent a diverse array of views—blogs pose low barriers to entry because they aren't filtered by editors,[190] needn't appeal to a mass market,[191] and don't "require . . . connection[s] with . . . established media outlet[s]."[192] Finally, the very existence of an energetic debate in the blogosphere may pressure conventional media to improve their substantive coverage of political and legal issues.[193]

Not only is blogging potentially valuable to the public debate, but participation by attorneys is also particularly desirable. Their expertise with legal matters makes them uniquely situated to educate the public about our Constitution and our justice system,[194] and they can serve as an avenue for the dissemination of legal academic ideas to the broader public.[195] Furthermore, their comments may be of special interest to the public because so many important social and political issues in this country are played out in the courts at some point.[196]

So lawyers as a whole can make a significant contribution to the national conversation by blogging—but would blogging by those attorneys actually involved in Supreme Court cases add anything? Perhaps. The attorneys engaged in litigating cases before the Court are intensely familiar with the facts and issues connected with their cases, and thus would be quintessential experts,

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186. CASS SUNSTEIN, REPUBLIC.COM (2001); *see also* Bakker, *supra* note 86, at 217 n.10 (2007) (citing scholars and commentators holding views similar to Sunstein's).

187. *See, e.g.*, Bakker, *supra* note 86; Gail Heriot, *Are Modern Bloggers Following in the Footsteps of Publius? (And Other Musings on Blogging by Legal Scholars . . .)*, 84 WASH. U. L. REV. 1113, 1121-26 (2006); Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1131-34 (2006); Larry E. Ribstein, *The Public Face of Scholarship*, 84 WASH. U. L. REV. 1201, 1204-05 (2006); E-mail from Douglas Berman, *supra* note 80.

188. Bakker, *supra* note 86, at 241, 254-60.

189. Heriot, *supra* note 187, at 1122.

190. Kerr, *supra* note 187, at 1133.

191. Heriot, *supra* note 187, at 1123.

192. Kerr, *supra* note 187, at 1132; *see also* Bakker, *supra* note 86, at 250 ("Though it can be difficult to break through to the 'A-list' of bloggers, it does regularly occur; compared to the world of traditional media columnists, it happens at lightening [sic] speed.").

193. Bakker, *supra* note 86, at 262-63.

194. Heriot, *supra* note 187, at 1121-22; Ribstein, *supra* note 187, at 1205.

195. Heriot, *supra* note 187, at 1124.

196. Kerr, *supra* note 187, at 1132.

capable of accurately informing the public. And the public may be particularly interested to hear from the lawyers inside a case, heightening overall public awareness of the relevant issues. Indeed, with their reputation on the line before both the public and possibly the Court, those attorneys would have a strong incentive to write high-quality, albeit one-sided, posts.[197] Therefore, allowing attorneys representing parties and amici to participate in online discussions of their cases would probably promote intelligent and informed public debate about the nation's legal affairs to some extent—while at the same time, unfortunately, triggering some of the harms of ex parte communications.

E. *Regulate the Court*

Sometimes, the best response to troubling speech is for the audience to "avert[] their eyes."[198] If the Justices do not read ex parte blog posts, the impartiality of the justice system will be preserved. Although no one dictates rules to the nation's highest court, it could undertake the task of ex parte regulation itself,[199] either by subscribing to the Code of Judicial Conduct or by adopting internal practices to encourage adherence to a similar ex parte principle. Law clerks at the Court are already reputedly asked to sign a pledge of confidentiality,[200] and surely the Justices have other expectations of their clerks' conduct. Clarifying that deliberately viewing blog posts concerning pending cases is unacceptable in chambers—and announcing publicly that the Justices have done so, both to remove the incentive for advocates to post and also to reduce the public perception of unfairness—would be a simple and largely effective answer to the ex parte blogging problem. Such self-imposed discipline would also have the advantage that it could also extend more broadly to cover material from law reviews and newspapers as necessary, without triggering concerns about unconstitutional restrictions on speech.

CONCLUSION

Sometimes doing nothing is the best option. Sometimes it is merely the easiest. Ex parte blogging is an instance in which inaction would be easy, but not particularly good. Blogging about the Court's cases is already underway, and it has begun to have an indirect impact on the Court, as the saga of the *Kennedy* decision demonstrates. More troubling than the events in *Kennedy*,

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197. *See* Ribstein, *supra* note 187, at 1205.

198. Cohen v. California, 403 U.S. 15, 21 (1971).

199. *Cf.* Marianne M. Jennings & Nim Razook, *Duck When a Conflict of Interest Blinds You: Judicial Conflicts of Interest in the Matters of Scalia and Ginsburg*, 39 U.S.F. L. REV. 873, 923 (2005) (endorsing self-regulation by individual Justices to handle conflicts of interest).

200. ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 16-17 (2006).

though, attorneys for parties and amici are sometimes posting arguments online about the merits of their cases—arguments to which the Court may well be directly exposed. If the ethics code and the Court do not clarify whether such ex parte blogging is permissible, there will be an uneven transition toward an eventual consensus on its propriety. As a result, the disparities between counsel who appear regularly before the Court and those who do not, and consequently, between different groups of litigants, will distort advocacy (and thus possibly outcomes) in undesirable ways. Instead of doing nothing to guide lawyers, it would be better to elicit a conscious decision from the profession as to whether ex parte blogging is acceptable.

An open declaration that ex parte blogging is not unethical might partially ameliorate at least some of the ills associated with ex parte communications, and it would encourage the beneficial participation of attorneys in the public discussion about our Constitution and our justice system. Yet would the improvement in the public debate outweigh the social harms entailed by ex parte blogging? To adopt this approach, the legal community would need to be confident that the enrichment of the public debate resulting from contributions by the attorneys involved in pending cases would be worth compromising the fairness of our legal system and aggravating the power differentials between have and have-not litigants.

Ideally, the members of the Court and their staff would refrain from reading any blog post relating to a pending case, whether written by attorneys involved in the case or not. If attorneys could rely on the Justices' self-restraint, it would allow the profession to have the best of both worlds. Lawyers could speak out as they saw fit, enriching the public dialogue without danger of tainting the judicial process. Alternatively, if attorney conduct were regulated to prevent lawyers from engaging in ex parte blogging, while the Court also avoided the material, judicial self-regulation would provide another layer of protection for the impartiality of the Court's decision-making process. However, the legal community is not in a position to bring about either scenario—the Court alone has the power to regulate itself. Thus, it becomes attractive for the profession to attempt to exert control over attorneys' blogging, despite the costs and difficulties of regulating their online conduct.

A rule to prohibit ex parte blogging by attorneys would need to be carefully drafted to restrict its scope to the set of truly problematic statements, but this is not an impossible task. Given that it would level the playing field between different types of litigants, foster public confidence in our justice system, and protect the integrity of the Court's decisions, it would be a worthwhile task. However, it is also not one to be lightly undertaken, as ex parte blogging sits at the delicate intersection of competing concerns regarding free speech, effective service to clients, and the fair administration of justice. There are difficult choices to be made, but the phenomenon of ex parte blogging raises serious ethical issues that must be considered by the legal community. This Note offers a starting point for the necessary conversation

about how best to respond to the challenges and opportunities created by this distinctive new mode of communication.