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SILENCE IS NOT GOLDEN:

THE JUDICIARY AND FREEDOM OF EXPRESSION OFF THE BENCH

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"Imagine the frustration of being a judge. You may be the subject of constant criticism, but you can never defend yourself: that's the rules." [1]

I INTRODUCTION

Every day in New Zealand, the judiciary makes an appearance in the media: a sound bite from a judgment, an excerpt from a sentencing report, or television footage of court proceedings. Everyone quickly weighs in with fact and opinion: the man on the street, the Member of Parliament, the academic, the accused, the lawyer, the journalist. Yet one actor is remarkably silent in the public debate: the judge.

This essay will examine the rights of expression judges have off the bench, the legal rules that govern such conduct, and the policy reasons for restricting extra-judicial speech. Because of the powerful and very public nature of the judicial office, a judge's conduct out of court is bound to be the subject of scrutiny and comment. Extra-judicial conduct can affect the discharge of the judicial office and can reflect negatively upon a particular judge or the judiciary in general.

The judiciary is founded on the principles of independence and impartiality, but these principles in turn rest heavily on the public's confidence in judges. Recognition of the importance of public confidence in the judiciary is the first step in recognising that judges have an equally strong obligation to be more open, upfront and accessible. The traditional view that requires judges to be "insulated"[2] from the public is no longer acceptable.

This essay will argue that the freedom of expression of judges off the bench is too strictly limited, and that a better balance between the traditional notions of "rules" regarding extra-judicial speech and the more open texture of the modern judge's role in the community must be found. The values that limit freedom of expression for judges and the complacency that maintains these limits need to be re-examined. This essay proposes a test to assist judges in deciding when extra-judicial expression is appropriate, and when it is not. The test asks whether the conduct in question is so

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[1] Interview with Chief District Court Judge Young in Rosemary McLeod "Judgement Days" (18 March 2001) *Sunday Star-Times* Wellington C1. Chief Judge Young has since been appointed to the High Court.

clearly destructive of the judicial responsibilities of impartiality and independence that it would create in the public a perception that the judge's ability to execute the judicial office is sufficiently undermined.

II CASE STUDIES

Three recent events highlight the need for a re-examination of extra-judicial expression.

The first is an article on the sentencing of two women convicted of killing a toddler.[3] The report centres on the sentences given to the two women, and reports strong criticism of the apparent lightness of the sentences given by Durie J. The police inspector who headed the investigation, the head of the Women's Refuge, and a spokesperson from the Sensible Sentencing Trust all express their disappointment with the Judge's sentencing. The article includes a short excerpt of the judgment, reporting the Judge's comments on the need for children to be protected and nurtured, and expressing his "suspicions" about some of the evidence presented before him. The article does not include any of Durie J's reasoning for the sentences given, or any direct comment from him about sentencing. Is Durie J allowed to face his critics, to explain his judgment and the rules on sentencing?

The second recent news story concerns the surprise resignation of "popular" District Court Judge Tony Christiansen.[4] It includes speculation on the real reason for the resignation, a complaint by a court worker of inappropriate behaviour by the Judge in his motel room. The article states the Judge cited "personal reasons" and the "strains of the job" as being behind his decision to leave the bench. The article also quotes the acting Attorney-General as saying the Judge resigned in order to prevent bringing the judiciary into disrepute. The acting Attorney-General said he did not think Judge Christiansen had done anything which could have resulted in charges and applauded the Judge for leaving the bench and therefore bringing the matter to a close. Is the public satisfied with these answers? If Judge Christiansen did not do anything that

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[2] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.

[3] Erin Kennedy "Lillybing's Death 'Preventable'" and "Namana may be out in Four Years" (16 June 2001) *The Dominion* Wellington.

[4] Rachel Grunwell and Nick Maling "Judge Quits after Motel Incident" (17 June 2001) *Sunday Star-Times* Wellington A1.

could result in a criminal charge, is the public losing a valuable member of the judiciary for no good reason?

The third event occurred in June 2001, when three Court of Appeal judges agreed, at the request of the Minister of Justice, to be present at a closed-door briefing by the Government. The briefing was designed to persuade Member of Parliament Nandor Tanczos to drop his objections to the Crimes (Criminal Appeals) Amendment Bill. An opinion piece in the *Evening Post* alleged that when the judges briefed Tanczos in private, at the request of the Government, the "separation of powers went to hell."[5] Is this "political manipulation" at its worst,[6] or were the judges simply providing valuable expertise on an important piece of legislation?

The above examples highlight the reality in New Zealand: outside their judgments, judges are elusive. Judges rarely speak off the bench, whether to defend themselves or the judiciary from attack.

Currently in New Zealand there are no written guidelines or rules concerning extra-judicial conduct. There is also no judicial commission in New Zealand to consider complaints of inappropriate conduct. The Beattie Report, a comprehensive study of the court system in New Zealand, recommended such a commission in 1978.[7] Presently, a complaint may be referred to the Chief Justice, or a retired judge may be asked to inquire into the allegation. If necessary, a complaint may be reported to the Minister of Justice.[8] As the Beattie Report highlighted, the current system is problematic because there is a "lack of public knowledge of the way in which a complaint considered justified can be brought forward."[9]

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[5] Steven Price "Dangers in Judges Briefing Tanczos" (19 June 2001) *The Evening Post* Wellington 6.
[6] ACT New Zealand "Goff Using Appeal Court Judges like Own Officials" (12 June 2001) Press Release.
[7] Beattie, Sir David Stuart *Report of Royal Commission on the Courts, 1978* (EC Keating Government Printer, Wellington, 1978).
[8] *Report of the New Zealand Judiciary 1999* (Wellington, 1999) 9-10: Complaints against judges in New Zealand are listed in a small section of the annual *Report of the New Zealand Judiciary*. In 1999, there were no complaints made against Court of Appeal judges, four complaints against High Court judges, and 24 complaints against District Court judges. The *Report* does not outline the complaints in any detail nor does it explain how they were investigated (or by whom). One High Court judge was "counselled" about body language, and one District Court judge apologised to a litigant for conduct in court. The other 26 complaints were found to be "without substance."
[9] RL Young "Judicial Independence and Accountability in New Zealand" (1998) 45 Federal Lawyer 40, 45.

III THE ARGUMENT FOR WRITTEN GUIDELINES

As this essay will show, there is a need for the judiciary in New Zealand to seriously consider the substantive limits on its freedom of expression. These limits should be formalised, lest critics insist that judicative discipline is "wishful error."[10] There are other reasons for formalising restrictions in writing. Firstly, the public cannot, as things currently stand, assume judges will always do the right thing, or even know what the right thing is. Secondly, written guidelines would allow limitations on conduct to be made accessible to all members of the judiciary.

Such guidelines can take different forms. A comprehensive code of conduct like the American Bar Association's *Model Code of Judicial Conduct* consists of broad statements of principle as well as specific authoritative rules.[11] A document such as the Canadian Judicial Council's *Ethical Principles for Judges* is advisory only, and includes general standards of behaviour to which all judges should strive.[12]

Rather than a detailed code like the American Bar Association's *Model Code*, the New Zealand judiciary would benefit from the more general approach of the Canadian Judicial Council's *Ethical Principles*. Codification of every potential off the bench situation is impractical as well as undesirable.[13] Guidelines based more broadly on core principles are more flexible and adaptable to different situations over time. Certainly, previously accepted judicial practices change over time. For example, involvement in politics by judges was not discouraged as late as the 1960s, whereas

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[10] DF Dugdale "A Polite Response to Mr Justice Thomas" (1993) 23 VUWLR, 128.

[11] American Bar Association, *Model Code of Judicial Conduct* <http://www.law.sc.edu/freeman/cjc51.htm>. For example: Canon 2, Rule C: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."
The ABA does not provide any mechanism of enforcement, but all fifty states now have permanent judicial commissions to hear and investigate complaints. On a federal level, Congress and the Judicial Conference have mechanisms for handling complains against federal judges. See Jeffrey M Shaman, Steven Lubet and James J Alfini *Judicial Conduct and Ethics* (2 ed, Michie, Charlottesville, 1995), Foreword.

[12] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa, 1998) <http://www.cjc-ccm.gc.ca/english/ethic_e.pdf>. For example, Principle 6D(3)(a): "Judges should refrain from membership in political parties and political fund raising."
Although the *Ethical Principles* are advisory only, the Canadian Judicial Council has the power to initiate formal investigations under amendments to the Judges Act in 1971 to determine whether a judge should be removed from office.

[13] The *Model Code* is intended to govern conduct of judges both on and off the bench and to be binding upon them. It is very comprehensive in its scope, and deals with matters from facial expression and

now there may be said to be a convention against political activity by the judiciary.[14] In a modern context, in Canada it is presently no longer considered appropriate for judges to accept positions on boards of schools, hospitals or charitable foundations because such organisations are now involved regularly in litigation and matters of public controversy.[15]

A more principled approach rather than a code would assist in providing useful direction in grey areas, even if definitive answers were not given. Minimum standards for judicial conduct in dealing with the media, for example, or for discussing judgments in public, would be valuable to assist judges before there are problems.

Formalising limitations would also challenge judges to think about the limits of extra-judicial expression. Written guidelines would encourage greater consideration by judges of their accountability to the public, as well as their right to freedom of expression. Certainly, a general guide might not give enough guidance to some judges, who may invariably say inappropriate things off the bench. But this risk is worth the effort to preserve freedom of expression as well as judicial independence and impartiality.

Perhaps most importantly, the public needs to see that judges have thought carefully about extra-judicial conduct, and have considered their role within the wider community. Judges must promote transparency, both on and off the bench, to further enhance public confidence.

While the form that such guidelines on extra-judicial conduct could take is important, the substance of those guidelines is the key issue in this essay. What are the current legal limitations on judges speaking off the bench? Before examining in detail the factors which must be considered in formulating a test for off the bench conduct, it is important to understand the ambit of freedom of expression under the New Zealand Bill of Rights Act 1990 (BORA). In particular, what are the boundaries of freedom for judges? Is the judiciary's access to the BORA limited in any way? If so, are these limitations justified in a free and democratic society?

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body language of a judge (*Model Code*, Canon 3(5)), to fund-raising for charities (*Model Code*, Canon 4C(3)(b)(i)).

[14] Mr Justice Thomas *Judicial Ethics in Australia* (The Law Book Company, Sydney, 1988) 35.

IV NEW ZEALAND BILL OF RIGHTS ACT 1990

A Generally

The New Zealand Bill of Rights Act 1990 (BORA) was drafted to affirm and protect New Zealand's commitment to human rights on a national level. It draws from other human rights documents, particularly the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights (ICCPR). The BORA is neither entrenched, nor is it supreme law.[16] The BORA does not impliedly repeal or revoke any enactment held to be inconsistent with it.[17]

Although the BORA passed through the usual legislative process, it has emerged as a unique piece of legislation. Since the early 1990s, the view has developed through case law and jurisprudence that the BORA "requires development of the law where necessary"[18] and, in line with the approach taken to other human rights documents, calls for a generous interpretation rather than a strict legalistic construction.[19]

In order to determine whether unjustifiable or unreasonable limits have been placed on judges that have the effect of curtailing their freedom of expression, it is important to first determine whether section 14 of the BORA is broad enough to encompass extra-judicial "expression."

B Section 14: The Ambit of the Freedom

> **Freedom of Expression** - Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

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[15] *Ethical Principles*, above, 36.

[16] Although the BORA is not *legally* entrenched, there is a practical sanctity about it. It would be politically dangerous for any government to repeal it, or to breach it intentionally; in this sense, the BORA is *practically* entrenched.

[17] Bill of Rights Act 1990 (BORA) s 4. Unlike in Canada, where the Courts have the power to declare legislation invalid if it is inconsistent with the Canadian Charter of Rights and Freedoms, Courts in New Zealand are bound by section 4 to acknowledge the validity of all legislation enacted by Parliament. See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 (CA).

[18] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 (CA) Cooke P.

The White Paper that preceded the BORA proposed freedom of expression as a provision of "central importance" in a democratic state.[20] As drafted, freedom was intended to allow "individual fulfilment through self expression" and "to advance knowledge and reveal truth."[21] In *Moonen v Film and Literature Board of Review*, the Court of Appeal described the right to freedom of expression under section 14 as being "as wide as human thought and imagination."[22]

Section 14 was drafted to cover various forms that expression might take, including "written and oral communications, newspapers and electronic media, and public and private gatherings."[23] The ICCPR, to which New Zealand's commitment is affirmed in the long title of the BORA, establishes that the right includes the:[24]

> freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of...choice.

International case law also stresses the broad ambit of the freedom of expression. In *R v Kopyto*, the significance in a democratic society of freedom of expression was strongly emphasised by Cory JA:[25]

> [a] democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions...the very lifeblood of democracy is the free exchange of ideas and opinions.

Freedom of expression includes "not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative."[26] In *R v Keegstra*, Dickson CJ said that apart from the rare cases where expression is communicated in a physically violent form, the fundamental nature of freedom of expression ensures that:[27]

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[19] *Noort*, above, 268 Cooke P.
[20] *A Bill of Rights for New Zealand: A White Paper* (1985), 79. Freedom of expression was cl 7 of the draft bill.
[21] *A White Paper*, above, 79.
[22] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 (CA).
[23] Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 173.
[24] ICCPR art 19(2)
[25] *R v Kopyto* (1987) 24 OAC 81, 90.
[26] *Redmond Bate v DPP* (1999) 7 BHRC 375, 383.
[27] *R v Keegstra* [1990] 3 SCR 697, 729.

> if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. In other words, the term "expression" as used in...the [Canadian Charter of Rights and Freedoms] embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.

Freedom of expression has a wide ambit and aims to protect a rich variety of forms of expression. Under this broad reading of section 14, anything judges say off the bench can be considered "expression" under the BORA. Durie J could express his personal views on the current sentencing laws. Judge Christiansen might publicly discuss the intimate details of his resignation. The three Court of Appeal judges could begin openly lobbying Members of Parliament on the Crimes (Criminal Appeals) Amendment Bill. These are all clearly forms of expression under the BORA. But necessarily, the BORA incorporates limits to the potentially broad scope of freedom of expression.

Firstly, section 4 states that if another enactment is inconsistent with the rights and freedoms listed in the BORA, then the other enactment prevails. Secondly, subject to section 4, section 5 of the BORA recognises that rights and freedoms are subject to "justified limitations." Are there any enactments regarding extra-judicial free speech?

C Legal Limitations on Judicial Freedom of Expression

1 Section 4: Other Enactments

There are statutes and rules of the common law that relate to a judge's conduct in court. Under provisions of the Judicature Act 1908, the judges of superior courts were to hold office during good behaviour and be removed only by Parliament (rather than at the will and pleasure of the Crown). This provision on tenure was superseded by section 23 of the Constitution Act 1986, which states that judges of the High Court shall only be removed by the Crown on the grounds of misbehaviour or incapacity to discharge the functions of the judicial office. Section 7 of the District Courts Act 1947 provides for the removal of a district court judge by the Governor-General for inability or misbehaviour. Section 18 of the Oaths and Declarations Act 1957 requires judges to act without "fear or favour, affection or ill will."

There is no legislation in New Zealand that deals explicitly with judicial conduct off the bench, however there are long recognised conventions and practices affecting judges' behaviour out of court. Most of these have been reduced to "informal rules of judicial conduct"[28] concerning conflict of interest, outside employment, associations, public comment on judgments, and general behaviour.

For example, upon appointment, it is convention that a judge resign from any political party of which he or she is a member. It is convention that a judge not comment on his or her judgment once it is written.[29] It is also convention that judges not publicly defend themselves or their decisions.[30]

Reference is sometimes made to the so-called *Kilmuir Rules* governing judicial appearances in the media. The *Rules* derived their name from a letter written in 1955 by Lord Kilmuir LC to the Director-General of the BBC, responding to a request for interviews relating to a project about "great Judges of the past." Denying the BBC's request, Lord Kilmuir stressed the importance of keeping judiciary insulated from "controversies of the day." He wrote that a judge must "keep silent [so] his reputation for wisdom and impartiality remains unassailable... [E]very utterance which he makes in public... must necessarily bring him within the focus of criticism."[31]

This approach was confirmed in *R v Commissioner of the Police of the Metropolis*, where a writer from *Punch* was charged with contempt for lambasting the Court of Appeal in an article. In his judgment, Lord Denning beseeched the public to understand:[32]

> all we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to...criticisms [and] cannot enter into public controversy. Still less into political controversy.

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[28] Patricia L Cumming "Governing Judicial Conduct" (1996) 45 UNBLJ 23, 24.
[29] Hon John Doyle "Judicial Standards: Contemporary Constraints on Judges – The Australian Experience" (2001) 75 ALJ 96, 98.
[30] Interview with research counsel for Chief Judge Young (the author, Wellington, 30 March 2001). The counsel confirmed Chief Judge Young was referring to "convention only" in his interview with the *Sunday Star-Times* (see Rosemary McLeod "Judgement Days" (18 March 2001) *Sunday Star-Times* Wellington C1).
[31] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.

There is no legislation governing judicial conduct off the bench, but there are many conventions and practices that have applied up until now. According to the qualification on rights in section 5, are these long recognised conventions and informal rules reasonable and justified in restricting the freedom of expression of judges off the bench?

2 *Section 5: Justified Limitations*

(a) Prescribed by law

A component of the inquiry into justified limitations on rights set out in section 5 of the BORA is to determine what limits are "prescribed by law."[33] In *Ministry of Transport v Noort*, Richardson J defined limits "prescribed by law" as those restrictions that are:[34]

> adequately identifiable and accessible by members of the public, and further are formulated with sufficient precision to enable citizens to regulate their conduct and to foresee the consequences which a given action may entail.

In a recent case before the European Commission on Human Rights, the Court echoed this definition and confirmed that limits must be accessible and precise in order to allow individuals to regulate their conduct.[35]

The limit will be prescribed by law if it is expressly provided for in a statute,[36] if it is a common law rule,[37] or if it important in making the statute "workable."[38] The requirement of "prescribed by law" ensures that interference with rights is justified by

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[32] *R v Commissioner of Police of the Metropolis, ex parte Blackburn* (No 2) [1968] 2 QB, 155 (CA) Lord Denning MR.
[33] This requirement was derived from the Canadian Charter on Rights and Freedoms, which itself relied heavily on the ICCPR and the ECHR. These three important pieces of rights legislation state that the right to freedom of expression may be subject to limitation prescribed by law.
[34] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.
[35] *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, 249.
[36] *Noort*, above, 283 Richardson J.
[37] *Sunday Times v United Kingdom* (1979) 58 ILR 491, 524; also *R v Therens* (1985) 18 DLR (4th) 655, 680.
[38] *Beadle v Allen* (9 November 1999) High Court New Plymouth AP 42/98, 23 Potter J.

reference to "objective criteria"[39] which are accessible, certain, and clear. Without these criteria satisfied, arbitrary interference with rights and freedoms could result.

(b) Are limits on extra-judicial conduct "prescribed by law"?

The limits on extra-judicial conduct are not clearly defined. As discussed above, the legislation states that judges may be removed for misbehaviour, inability, or incapacity, but no limits are set out to define these categories. The principle of judicial independence is arguably "prescribed by law" due to its constitutional importance,[40] but again the limits on conduct to protect that independence are not easily determined.

The informal rules governing extra-judicial conduct are not codified, or even found in common law. As AW Bradley wrote, the rules regarding extra-judicial conduct are founded to a large extent upon "an untidy mass of non-legal rules, customary practices and political expectations."[41]

Extra-judicial conduct is a subject whose substance is "drawn largely from unprovable perceptions of opinion" within the judiciary and the public.[42] There is a large disparity in judicial activity; Chief Judge Young gave a lengthy interview to the *Sunday Star-Times*[43] but other judges are rarely interviewed by the media. Chief Judge Young also said he regularly speaks to service clubs, but what does he speak to them about? What should he not speak to them about?

The restrictions on judicial conduct are not adequately identifiable or accessible by judges or any other individuals, and are certainly not formulated with sufficient precision to enable judges in particular to regulate their conduct and to foresee the consequences.[44] The absence of any concrete definition of the restrictions on judicial conduct off the bench means any limits on extra-judicial conduct, including expression, are not expressly or impliedly "prescribed by law" in the context of the BORA. Section 5 of the BORA states that rights and freedoms may be subject "*only*" to limits

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[39] *Hashman*, above, 251.
[40] *Hashman*, above, 250: "Law" is a concept that can comprise written as well as unwritten law.
[41] AW Bradley "Judges and the Media – the Kilmuir Rules" [1986] Public Law 383, 383.
[42] Mr Justice Thomas *Judicial Ethics in Australia* (The Law Book Company, Sydney, 1988) 2.
[43] Rosemary McLeod "Judgement Days" (18 March 2001) *Sunday Star-Times* Wellington C1.
[44] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.

prescribed by law. If none of the current restrictions on extra-judicial conduct are accessible, certain and clear, section 5 cannot apply. There are no legal limits on judicial freedom of expression.

But the reality is that the majority of judges are still silent off the bench, despite having a legal right to freedom of expression, and despite the law making it difficult for judges to be removed from the bench. Why are judges not speaking up?

V SELF-CENSORSHIP

Judges in New Zealand are constrained by the expectations of fellow judges, the profession and the public to act "judicially." [45] Doyle CJ writes, "most judges accept that [restrictions on conduct] are binding, and not observed merely as a matter of choice."[46] Although judges have legal rights to express themselves off the bench, they often choose not to. The reality is that the limits imposed on judges are self-imposed. The judiciary censors itself.

Judges err on the side of caution to avoid the risk, inconvenience, and misunderstanding thought to accompany speaking outside the courtroom. These self-imposed limitations have a "chilling effect" on the freedom of expression[47] as the possible risks or inconvenience of speaking out triumph over the fundamental right to freedom of expression. This suggests that judges seem complacent about their rights as citizens. Grant Huscroft argues that New Zealanders have "never seriously challenged [their] expectations and assumptions about freedom of expression, and...are the worse for it."[48] The judiciary is "worse" for accepting blanket limitations on its right to speak off the bench. Judges, as citizens of New Zealand, are "worse" for not taking an interest in their right to freedom of expression.

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[45] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co, North Ryde, 1993), 237.
[46] Hon John Doyle "Judicial Standards: Contemporary Constraints on Judges – The Australian Experience" (2001) 75 ALJ, 98.
[47] Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 176.
[48] Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" above, 172.

Judges have the legal right to speak out on the "controversies of the day."[49] And certainly, most judges would agree that the values codified in the BORA must be upheld. But should judges be able to say anything they want? Even though they have a legal right to do so, should judges meddle in the partisan politics of daily life, for example? Should boundaries be drawn around judicial free speech?

Rights "do not exist in a vacuum."[50] They can be abrogated to take into account public interest, as well as the rights of individuals and the community. Although it is necessary to recognise the importance of human rights and freedoms as affirmed by the BORA, it is also equally necessary to recognise that the standards placed on judges are more stringent than those placed on the rest of the public. Judges are like "supercitizens" because of the extensive authority they have over the lives of their fellow citizens. [51] Theirs is a higher standard. To strive for "pure" freedom of expression would be a dangerous course:[52]

> [J]udges render judgments; they do not provide services...[T]he purpose of independence is to ensure not that they are comfortable, but that they are impartial in the execution of their office.

Some values must necessarily be seen as "predominating" over freedom of expression.[53] These are the values of independence, impartiality, and public confidence.

VI "PREDOMINATING VALUES"

A Independence

The principle of judicial independence is one on which the judicial institution is founded. Doyle CJ writes that the scope of judicial independence can be debated, but "there is no doubt about its fundamental importance."[54] John Locke endorsed judicial

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[49] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.
[50] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.
[51] Beverley Smith "Judicial Free Speech in Canada" (1996) 45 UNBLJ 161, 162.
[52] Judicial Conduct Committee of the Canadian Judicial Council *Public Inquiry into the Conduct of Mr Justice Jean Bienvenue (Superior Court of Quebec) in R v Theberge* (Ottawa, 1996), 52 <http://www.cjc-ccm.gc.ca> (last accessed 12 July 2001).
[53] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 (CA) Tipping J for the Court.
[54] Hon John Doyle "Judicial Standards: Contemporary Constraints on Judges – The Australian Experience" (2001) 75 ALJ 96, 97.

independence to ensure that the law would not "be varied in particular cases, but [be the same] for rich and poor, for the favourite at court and the countryman at plough."[55]

The common law concept of judicial independence began when the judiciary in England won security of tenure with the Act of Settlement 1700. In order to ensure judges remained independent of other agencies, and the Crown in particular, the Act made it extremely difficult to remove judges from their offices for political or other reasons. Since then, there has been only one Parliamentary removal of a judge in the United Kingdom.[56]

The principle of independence means that the judiciary cannot be seen to be under the influence of anyone. It protects judges from executive interference and political entanglements. In many countries, this principle is constitutionally entrenched.[57] In the 1994 Hamlyn lectures, Lord Mackay of Clashfern, the Lord Chancellor, stated:[58]

> What do I mean by the independence of the judiciary? I mean that...a judge deciding a case should do so without any influence being brought to bear upon him to decide it one way or another by any agency outside himself.

New Zealand lacks a single written constitutional document that creates the judiciary and defines what its powers are,[59] but the principle of judicial independence remains fundamental and is protected in other ways. Judicial tenure is protected by the Constitution Act 1986 and by the District Courts Act 1947. Judicial salaries are protected by statute to ensure judges do not have to seek remuneration elsewhere; judicial salaries cannot be reduced,[60] and budget supply for them is guaranteed.[61]

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[55] Peter Laslett (ed) *Second Treatise on Government* (Cambridge University Press, Cambridge, 1988), s 142 at 363.
[56] Canadian Judicial Council <http://www.cjc-ccm.gc.ca> (last accessed 2 June 2001)
[57] See *Harris v Minister for the Interior* [1952] 2 SALR 428: the South African appellate court ruled the constitution of that country did not allow for the Parliament to be its own court. The judiciary is trained in law and outside the influence of others, and is the only body able to provide "honest and efficient" management of the law. See also *Liyanage v The Queen* [1967] 1 AC 259: the Privy Council ruled it was unconstitutional for the government of Ceylon (Sri Lanka) to usurp the power of the judiciary. The institution of the judiciary is founded on the fundamental principle of independence.
[58] Rt Hon The Lord Mackay of Clashfern *The Hamlyn Lectures 45th Series: The Administration of Justice* (Stevens and Sons, London, 1994) 12.
[59] The Constitution Act 1986 takes note of the continuing existence of the three branches of government, but does not actually establish them.
[60] Constitution Act 1986, s 24.
[61] Judicature Act 1908, s 9A(1)

B Impartiality

Impartiality is a core value of judicial office. John Locke wrote that the adjudication of disputes by neutral judges is the most important benefit of civilisation.[62]

The independence of the judiciary is closely linked with notions of impartiality. "The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'."[63] The objective of having an impartial judiciary is to maintain an institution that is not only free from influence by others, but also as non-partisan as possible. The right to be tried by an independent and impartial tribunal is an integral part of the principles of justice, and is protected by section 25(a) of the BORA. Section 18 of the Oaths and Declarations Act 1957 codifies impartiality: judges must "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will." Section 10(2) of the European Convention on Human Rights subjects freedom of expression to "such formalities, conditions, restrictions or penalties for maintaining the authority and impartiality of the judiciary."

A judge should not sit on a case if the reasonable person, informed of all the circumstances, would detect any bias on the part of the judge.[64] Pecuniary interest in the subject or outcome of a case[65] or bias through predetermination may threaten impartiality. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte*, it was revealed that Lord Hoffman, who sat on the original case, had close connections with Amnesty International, one of the more prominent groups protesting Pinochet's human rights record and extradition. The House of Lords found

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[62] Peter W Hogg *Constitutional Law of Canada* (3 ed, Carswell, Toronto, 1992) 168.
[63] *R v Lippe* [1991] 2 SCR 114, 139 (SCC) Lamer CJC.
[64] *S & M Motor Repair Pty Limited v Caltex Oil (Australia) Pty Limited* (1988) 12 NSWLR 358. The Court of Appeal was split on the test. Kirby J thought the test for bias should be the reasonable person; Clarke and Priestly JJ felt the test should be the reasonable person with inside knowledge and a good understanding of the law.
[65] *Dimes v Grand Junction Canal* (1852) 10 ER 301. It was discovered that the Lord Chancellor held shares in the plaintiff's company, and his ruling was subsequently voided.

that Lord Hoffman should have been dismissed from hearing the case. They reconvened with a new panel of judges.[66]

C Public Confidence

Public confidence in the judiciary is tied inextricably to those values of independence and impartiality. In a democracy, the enforcement of judicial decrees and orders ultimately rests upon public cooperation. This level of cooperation, in turn, depends on the perception that judges decide cases independently and impartially. If this confidence were lost, the judicial system could not function. Should the citizenry conclude, even erroneously, that cases were decided on the basis of favouritism or prejudice rather than according to law and fact, then something stronger than the court system would be necessary to enforce judgments. The judiciary may be founded on the principles of independence and impartiality, but without public confidence in the system, these principles are meaningless.

The principles of independence, impartiality, and public confidence are critically dependent on one another. Together, they maintain and strengthen the judiciary. To preserve these principles, judges need to aspire to a higher standard of conduct. How should this affect their ability to express themselves off the bench? How should *judicial* freedom of expression be defined?

VII JUDICIAL FREEDOM OF EXPRESSION

The New Zealand Court of Appeal has examined the balancing act between upholding rights and freedoms and acknowledging reasonable limits on those rights. It enables judges to explore the interaction between the BORA and apparently inconsistent statutes. It allows judges to determine an appropriate set of limits on a right in cases where limits are obviously intended but not specified. In *Ministry of Transport v Noort*,[67] the Court of Appeal expanded on the test set out in the Canadian case of *R v Oakes*[68] to determine what are reasonable limits on rights and freedoms.

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[66] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No.2) [1999] 2 WLR 272.

[67] *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA)

[68] *R v Oakes* (1986) 26 DLR 4th 200: acceptance of the *Oakes* test in New Zealand appeared in the judgment of Richardson J in *Noort*, above, 284.

The Court of Appeal in *Moonen v Film and Literature Review Board* recently clarified the test.[69] Here, the test assists in determining whether the traditional unwritten restrictions on extra-judicial speech are justified.

Firstly, it is important to identify the objective that the judiciary is endeavouring to achieve by heavily restricting freedom of expression off the bench. This objective, as discussed above, revolves entirely around the judiciary appearing independent and impartial at all times.

Secondly, the importance and significance of maintaining the appearance of independence and impartiality must be assessed. The public's confidence in the independence and impartiality of the judiciary is crucial lest the public begin to doubt the judiciary's ability to judge. If a judge says or does something off the bench that suggests to the public that he or she is under the influence of a particular group, or that the judge's ability to hear and decide a case could be biased, the institution of the judiciary suffers.

Thirdly, the way in which the objective is achieved must be assessed. This involves applying a proportionality test. Currently, the judiciary insists on maintaining the appearance of independence and impartiality by remaining virtually silent and unseen outside the courtroom. As Tipping J remarked in *Moonen*, "a sledge hammer should not be used to crack a nut" when it comes to balancing rights and freedoms with reasonable limitations, and there must be "as little interference as possible" with the freedom.[70] The almost total self-censorship of the judiciary off the bench is not a rational or proportionate solution to concerns about independence and impartiality. The restrictions placed on extra-judicial conduct do not interfere with freedom of expression as little as possible; rather, the restrictions interfere almost completely with the freedom.

To be valid, the restrictions on judicial freedom of expression must also be justifiable in light of the objective. Certainly, extra-judicial expression needs to be restricted in some way if the values of independence and impartiality are to be upheld. For example, the independence of judges would necessarily be questioned if they

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[69] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (CA)

began to join the fray as combatants in the political forum. The need for some limits on judicial free speech does not mean, however, that full censorship is justified. The current restrictions are neither proportionate nor rational. By remaining silent, the New Zealand judiciary risks damaging the public confidence that is so crucial to its survival.

The values of independence, impartiality, and public confidence, which are so important to the survival of the judiciary, must be revisited with an eye to freedom of expression.

VIII "PREDOMINATING VALUES" REVISITED

A Independence Revisited

Some commentators insist that discretion is "vital" to the independence of the judiciary,[71] and that the "moment [a judge] steps into controversy, or even indicates that he [or she] has views, all respect for the law itself will collapse."[72] If independence of the judiciary is risked, the argument goes, so is the rule of law.

The principle of independence has also been used to protect those judges who speak too candidly. The California Supreme Court publicly censured a judge who consistently used racial and ethnic epithets against African-Americans, Filipinos, and Mexicans.[73] In his dissent against the majority's decision to discipline the judge, Justice Mosk argued that "when judges at any level are to be disciplined for their manner of expression, however primitive, then we no longer have an independent judiciary in California."[74] Quebec Supreme Court Justice Jean Bienvenue defended his derogatory comments against women and Jews by arguing that judicial independence must take precedence over the values of individuals.[75]

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[70] *Moonen*, above, 16.
[71] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co, North Ryde, 1993), 237.
[72] Bernard Levin (28 February 1986) *The Times* in Mr Justice Thomas *Judicial Ethics in Australia* (The Law Book Company, Sydney, 1988) 34.
[73] *In re Stevens* (1982) 31 Cal 3d 403, 404 (Cal SC).
[74] *In re Stevens*, above, 408.
[75] Judicial Conduct Committee of the Canadian Judicial Council *Public Inquiry into the Conduct of Mr Justice Jean Bienvenue (Superior Court of Quebec) in R v Theberge* (Ottawa, 1996), 17. <http://www.cjc-ccm.gc.ca> (last accessed 12 July 2001). In 1996, Bienvenue J made derogatory

Certainly, judges have complete liberty to decide the cases that come before them. "Judicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal."[76] Judges do not have to be popular; they simply have to dispense justice, free of any outside interference or influence.

It seems strange, therefore, that an institution that prides itself on its independence, and that places great historical and contemporary weight on its ability to supervise and adjudicate issues of law independent of outside influences, chooses to silence itself. Would not full judicial independence include being free to say whatever one thought appropriate, rather than restricting oneself to silence? Recently, a judge of the Court of Appeal of New South Wales was strongly criticised for describing, outside the courtroom, a law as unjust.[77] The judge's controversial comments were seen as a threat to the separation of powers and a breach of judicial independence. But judicial independence has nothing to do with quiet subservience to perceived injustice, nor with silencing a personal view. To avoid speaking out on "controversies of the day"[78] seems to suggest that judges lack the authority to speak their minds. But a judge's right to express himself off the bench does not come by way of permission from the legislature or the executive. In this sense, silence is the antithesis of judicial independence.

The principle of judicial independence is firmly founded on ensuring that judges decide cases fairly, according to the law, and irrespective of political pressure. Independence from the legislature and the executive, as well as from special interest groups or individuals with private agendas, is what must be guarded against. There is much scope for extra-judicial free speech without putting judicial independence at risk.

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comments about women in a judgment, and repeated those comments to reporters in several interviews afterwards. He maintained that "when [women] decide to degrade themselves, they sink to depths to which even the vilest man could not sink." The CJC recommended Bienvenue J be removed from office.

[76] *Sirros v Moore* [1974] 3 WLR 459, 467 (CA) Lord Denning MR.

[77] Athol Moffitt "Judges, Royal Commissioners and the Separation of Powers" [May 2000] *Quadrant*.

[78] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.

B Impartiality Revisited

Without impartiality, there can be no confidence in the administration of justice, and the system would cease to operate effectively.[79] Traditionally, any conduct or speech by judges outside the courtroom could be seen to threaten that impartiality. Such a view of impartiality assumes neutrality, both in and out of court.

In 1994, Justice Angers, a Court of Appeal justice from New Brunswick, wrote an open letter to the Prime Minister of Canada criticising proposed legislative controls on gun ownership.[80] He was strongly criticised by the Canadian Judicial Council as having compromised his impartiality by embarking on a "highly partisan attack upon a proposal which...could well come frequently before [Justice Angers] for interpretation or enforcement."[81]

Angers' open letter did not affect his "impartiality" in any real way. The judge wrote that he had "forty years of using guns for recreation,"[82] and his strong personal views on gun legislation were only made public because he was inspired enough to write the letter. Justice Angers was partisan long before he wrote the letter. This case, and the Canadian Judicial Council's response to it, highlights one of the realities of the judicial office. It is a mistake to insist that judges must be, or even can be, completely free of ideological beliefs and political values. Judges are humans, not robots. Practically, impartiality can not be insisted on as an absolute ideal.

If one accepts that the identities and ideologies of judges affect what happens in the courtroom, one must also admit that judicial conduct outside the courtroom cannot be neutralised either. Accepting a judicial appointment cannot practically mean one automatically gives up one's ideology and political values upon doing so. Judicial decision-making involves choice, not just interpretation. Thomas J writes that it is a

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[79] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385; Lamer CJC in *R v Lippe*, above, 139; Le Dain J in *R v Valente* [1985] 2 SCR 673, 689.
[80] JC Angers "Gun Controls and Democracy" (1996) 45 UNBLJ 183.
[81] Judicial Conduct Committee of the Canadian Judicial Council "File 94-147" (1996) 45 UNBLJ 185, 187.
[82] Angers, above, 183.

mistake to place too much faith in the idea of an "impersonal law." Judges make "fresh judgments" based on personal perceptions in every case.[83]

But impartiality need not be threatened by reality. True impartiality is less about the absence of personal views and opinions than the capacity to prevent such views and opinions from interfering with the ability to act on different points of view. "Whether or not a judge [is] biased... becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind."[84] A more liberal, and honest, approach to impartiality is needed.

C Public Confidence Revisited

There is another important reason for encouraging a less conservative approach to extra-judicial conduct. An acceptance of the values of independence and impartiality is an obligation that comes with the judicial office, but so is the obligation of preserving and improving public confidence. If the public does not respect the judiciary, it will not respect their authority to adjudicate. The judiciary is a "fragile bastion"[85] indeed when one understands that the success of the judiciary is wholly dependent on the public's confidence in it. Necessarily, maintaining public confidence is key.

In the case mentioned above regarding the judge from California disciplined for making racial slurs off the bench, the court acknowledged the offending judge had performed his judicial duties "free from actual bias against any person regardless of race."[86] Justice Mosk, in his dissent, was deeply offended that the judge should have been disciplined. But the majority recognised that public perception of the judge was the most important factor. Although the judge had not in fact let his prejudice affect

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[83] Hon JB Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 VUWLR Monograph 5, 51-52. Shortly afterwards, DF Dugdale, barrister and solicitor of the High Court, wrote "polite response" to Thomas J in which he sharply criticised the judge's approach. Dugdale wrote that Thomas' "bold self-confidence...needs to be subjugated to the judicial oath." DF Dugdale "A Polite Response to Mr Justice Thomas" (1993) 23 VUWLR 125, 128.

[84] Judicial Conduct Committee of the Canadian Judicial Council *Public Inquiry into the Conduct of Mr Justice Jean Bienvenue (Superior Court of Quebec) in R v Theberge* (Ottawa, 1996), 41. <http://www.cjc-ccm.gc.ca> (last accessed 12 July 2001).

[85] Keith Mason "A Time to Keep Silence, and a Time to Speak" [2000] Balance 12, 14.

[86] *In re Stevens* (1982) 31 Cal 3d 403, 404 (Cal SC).

his work to any noticeable degree, the mere appearance of prejudice was enough to threaten the judiciary.

Some judges, while recognising the fundamental importance of public confidence in the judiciary, are nevertheless wary of the judiciary's need to be accountable to the public. Lamer CJC writes that judges owe accountability to the law, not to "electors."[87] "Any deviation from norms of judicial speech which results in public scrutiny erodes public respect."[88] The *Kilmuir Rules* insists judges must not do anything, such as appear in the media, which could bring them within the "focus of criticism."[89]

With respect, this is a mistaken approach. The citizens to whom judges are accountable are their *constituents*, not their electors. Independence and impartiality requirements exist to protect judges from executive interference and political entanglements, but such requirements do not need to impair public perception of the judiciary. On the contrary, independence and accountability are complementary, rather than conflicting, ideals.[90]

Recently, judges have increasingly begun to write less cryptic and technical judgments in an attempt to become accessible to a broader audience.[91] This should be applauded. Judges should be encouraged to communicate more directly with the public in order to maintain and improve the legitimacy of the institution. The public cannot be expected to respect decisions made by judges who perpetuate an institution shrouded in mystery. The judiciary need not get its legitimacy from secrecy or a lack of understanding. That legitimacy need only come from adherence to the law, and the maintenance of independence, impartiality, and public confidence.

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[87] Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 13.
[88] Beverley Smith "Judicial Free Speech in Canada" (1996) 45 UNBLJ 161, 166.
[89] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.
[90] A booklet on New Zealand High Court Judge Appointments prepared by the Attorney-General's Judicial Appointments Unit states in its "Qualities of character" section that a successful candidate will have impartiality, independence, and acceptance of public scrutiny. It acknowledges these things can co-exist. The Attorney-General's Judicial Appointments Unit *High Court Judge Appointments* (Wellington, 1999), 7.
[91] Peter McCormick "Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship" (1996) 45 UNBLJ 139, 139.

The public should be able to see the functioning of the court, not just in the limited sphere of open courtrooms and published judgments, but through judicial conduct off the bench. The public should understand that judges have ideologies and personal beliefs in addition to extensive legal experience and knowledge. The public must see that judges are people who have been given real powers in society.

Society must resist any attempt to insulate official power from public scrutiny. Public criticism is the lifeblood of a healthy democratic society. Judges, both individually and collectively, must respect the public's trust and respond to its criticisms. A silent judiciary does nothing to enhance public confidence.

Certainly, judges must take care that neither their speech nor their conduct transgresses principles of impartiality and independence. A liberal test can accommodate these principles, as well as maintaining and revitalising public confidence in the judiciary.

IX THE TEST

The current restrictions on extra-judicial speech, although not prescribed by law and difficult to define, have resulted in the silence of the judiciary off the bench. These restrictions produce the twin problems of unreasonably limiting freedom of expression and seriously threatening the public's confidence in the judiciary. But what should be the standard of conduct? A practical test must be developed to define the boundaries of extra-judicial conduct, while upholding judicial freedom of expression, maintaining independence and impartiality, and enhancing public confidence in the judiciary. The following approach would be helpful:

Is the conduct so clearly destructive of the judicial responsibilities of impartiality and independence that it would create in the public a perception that the judge's ability to execute the judicial office is sufficiently undermined?

This approach requires the judge considering whether to speak off the bench, or the public, media, or disciplinary board analysing extra-judicial expression after the fact, to take several important steps before considering whether to speak off the bench.

Firstly, the conduct must be "clearly destructive" of judicial responsibilities. This sets a high threshold for proving whether such conduct should be restricted and therefore goes a long way in protecting judicial independence. Anything less than "clearly destructive" would not be considered inappropriate. Secondly, the values of "impartiality and independence" are singled out as prime considerations. As shown above, these values are key to the foundation and maintenance of the judiciary. Thirdly, that the conduct would create a "perception" of inability highlights an understanding that real impartiality is virtually impossible to obtain. The appearance of impartiality is a more practical goal. Fourthly, execution of the "judicial office" is the focus, that is, the ability of the judge to do his or her job on the bench. This highlights the high standard required of judges in the performance of their duties. Fifthly, public perception must be "sufficiently undermined," again setting a high threshold test for restricting off the bench conduct in order to preserve and enhance the right to freedom of expression.

Who is the "public" for the purposes of this test? The concept of maintaining public confidence necessarily involves some element of community views, and the determination of what is therefore appropriate or inappropriate extra-judicial speech thus requires the judge to refer to what he or she conceives to be the views of the community at large.

Any test for judicial conduct must rely on a reasonable person standard. The reasonable person is the average person in the community, dispassionate and fully apprised of the circumstances of the case. This does not mean that evidence of the public's perception will be determinative of the issue. Judicial opinions may be controversial and still satisfy a reasonable person standard. Judges are entitled to their own ideas and need not follow the fashion of the day or meet the strictures of political correctness; they should not be required to ensure that their remarks are acceptable to every sector of the population. It is an objective standard of conduct which could reasonably create in the public a perception that the judge's ability to execute the judicial office is be sufficiently undermined, as opposed to conduct which is, and often must be, unpopular with part of that public. This avoids questions of morality or propriety. The apprehension of bias must be "a reasonable one, held by reasonable and

right minded persons, applying themselves to the question and obtaining thereon the required information."[92]

This test solves the twin problems mentioned earlier. On one hand, for expression to be restricted, it must be "clearly destructive" of judicial responsibilities. This strict test stresses a respect for freedom of expression, and leaves much room for extra-judicial speech. On the other hand, the test does not undervalue the importance of the public's confidence in the judiciary; in fact, the test hinges on the perception of the public.

By formulating a test for extra-judicial expression, it is possible to draw a line between speech that should be restricted, and speech that should be protected. Such a test has not yet been developed by the judiciary in New Zealand.

X APPLYING THE TEST

The test outlined above favours a relaxing of the traditional rules governing judges speaking off the bench. But easing the limits on extra-judicial conduct is not about creating unrestricted judicial licence. How might the test work in practical terms?

A Media Interaction

Judges should be encouraged to work with the media. The judiciary must recognise the importance of the news media and work with them to heighten public knowledge, respect, and confidence of the judiciary. Certainly, this process works both ways; the media must face the judiciary with informed and accurate reporting. Ground rules for appearing in media should be firmly laid down due to the "uncontrolled nature of the process."[93]

Chief Judge Young expressed great frustration with the public for "misapprehending almost everything about the system."[94] But it is judges who are best

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[92] *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369, 394.
[93] John Sopinka "Must a Judge be a Monk – Revisited" (1996) 45 UNBLJ 167, 172.
[94] Rosemary McLeod "Judgement Days" (18 March 2001) *Sunday Star-Times* Wellington C1.

suited to provide correct information and set a constructive tone about the administration of justice. Who better to shed some reasoned light on a current debate than the very people the public trusts to administer justice? Judges are well equipped to explain the law, and they should not be deterred from doing so.

Discussion of current or pending cases could indicate prejudgment and impartiality, and should be avoided. While judges cannot comment to the media on the merits of pending cases, they should feel free to explain legal terms, procedures and concepts so that the media report relevant issues intelligently and accurately. Discussion of legal issues of contemporary relevance should be encouraged.

B Civic and Charitable Activities

Many judges currently make public speeches to clubs and legal conferences, and write legal texts and academic works. This activity should not cease, although caution must always be taken in choosing both topic and message. Some issues, like highly controversial political issues, should clearly be avoided.

Involvement in educational, religious, charitable, cultural, and civic organisations should not be restricted, as long as that involvement is not for economic or political advantage. As well, judges should be mindful of the organisation's potential to be involved in litigation, where judicial involvement could destroy perceptions of independence or impartiality. Speaking and writing on the law and on the procedure of courts should be encouraged, as should comment and discussion on controversial current legal issues. As long as the perception of impartiality and obedience to the law is upheld, such off the bench expression will not offend the test proposed above.

C Political Activity

Political endorsements should be avoided lest there is a perception by the public that a judge is abusing the prestige of the office. Likewise, expressing personal opinions on controversial current political issues would offend the proposed test.

XI CASE STUDIES REVISTED

It is useful now to return to the three factual scenarios discussed at the start of the essay, and examine them in the light of the proposed test. Durie J's sentencing of the two women convicted of killing a child in their care was harshly criticised in a national newspaper. Should Durie J have been interviewed for the article as well?

The range of expression available to Durie J in such a situation was large. For example, he might have made himself available to the reporters to clarify certain points of his judgment. A clear explanation or amplification of his decision, in non-legal terms, would have been very useful. Sentencing is currently a very contentious issue in New Zealand. As the article suggests, many feel judges are being soft on offenders. Applying the test set out above, an explanation by Durie J of his decision would not be "highly destructive" of the public's perception of judicial impartiality or independence. The Judge would be informing the public of the legal rules he must follow. Even if he expressed some personal comment on the merit of the law, he would still be stressing his impartiality because he applied the law as he must. Rather than undermining the public's confidence in the judiciary, Durie J would be seizing a valuable opportunity to set a constructive tone for the debate on sentencing. By helping the reporter to explain the rules of sentencing, he would be helping the public better understand the system.

Judge Christiansen resigned from the District Court amid rumour and speculation of criminal activity. He was quoted as saying the "strains of the job" forced him to leave. The public is left with a sense of unease: if Judge Christiansen did nothing wrong, why did he resign so suddenly? Are the reasons he gave valid?

This story does little for public confidence in the judiciary and is a good example of a situation where it might have been better for the judge to speak up rather than remain silent. Judge Christiansen, or perhaps the Chief District Court Judge, might have made themselves available for comment to clarify the situation and to elaborate on or deny any rumours. If criminal conduct did occur, the above test is easily satisfied as such conduct is "clearly destructive" of judicial responsibilities. If the Judge did in fact do something inappropriate, possibly illegal, he should confront

the issue and admit his mistake. Such a public admission would increase confidence in the judiciary, not diminish it.

If the rumours have no basis, Judge Christiansen has two choices available to him: he can remain silent or he can exercise his right to speak off the bench. The Judge's silence, and the silence of his colleagues, in itself creates in the public a *perception* that the judge's ability has been sufficiently undermined. The test is not satisfied, however, because the Judge's inaction cannot be said to be clearly destructive of his responsibilities of independence and impartiality. In this way, the test does not punish the choice to remain silent. Alternatively, Judge Christiansen might speak out publicly to set the record straight. This option is most satisfying because it would bolster public confidence in a judiciary that is willing to make such matters transparent. While potentially painful and embarrassing, there must be a certain amount of "public relations" to the job of a judge; as shown above, public accountability is the linchpin of the system.

The third example involved three Court of Appeal judges who attended a closed-door briefing by the Government to persuade a Member of Parliament to reconsider his stance on an upcoming Bill. Is this a case of the "executive calling on the judiciary to lobby the legislature"?[95]

All members of the judiciary have the right to express their views on the "controversies of the day." But by agreeing to meet privately with a Member of Parliament in order to discuss a proposed piece of legislation with benefits for these judges, the judges struck at the heart of any appearance of impartiality. There were certainly other options available to them: they might have attended the select committee hearings on the bill, or they might have sent public officials to provide any relevant information to the Member of Parliament. The judges should have insisted any briefing or advocacy by them have been in an open, non-party forum. Applying the test, their conduct was clearly destructive of judicial independence. It creates in the public a perception that the judges have a very personal interest in the Bill, and that they are able to influence the government to promote its passing. This in turn suggests

[95] Steven Price "Dangers in Judges Briefing Tanczos" (19 June 2001) *The Evening Post* Wellington 6.

the judges' abilities to remain independent of political manipulation have been sufficiently undermined.

Even after applying the proposed test to determine if extra-judicial conduct should be limited in a certain situation, judges are faced with a wide range of possible options. In an effort to assist the judiciary, the case for written guidelines on extra-judicial conduct is compelling. It is time for the judiciary in New Zealand to define what is acceptable extra-judicial speech and what is not, rather than simply relying on the traditional notions of the "insulated" judge.[96] Complacency is irresponsible and dangerous.

XII CONCLUSION

The judiciary is a "fragile bastion."[97] It rests primarily upon constitutional conventions and long standing practices. The rules regarding extra-judicial conduct are founded to a large extent upon "an untidy mass of non-legal rules, customary practices and political expectations."[98]

The "golden rule...that silence is always [the best] option"[99] continues to apply in New Zealand today. But it is a rule that threatens the rights and freedoms of judges, as well as public confidence in the judiciary. Judicial self-censorship is dangerous because it serves to restrict judges from imparting information and opinions in the public sphere. The judiciary cannot justify restricting its freedom of expression without compromising this fundamental right beyond what is reasonable or necessary.

As Hon John Doyle writes, an individual cannot "sensibly" join the judiciary and then flout and disregard the principles that preserve and maintain the institution.[100] Judges therefore need to be singled out for special treatment with respect to their freedom of expression, but there is still much room to challenge traditional notions of extra-judicial speech.

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[96] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.
[97] Keith Mason "A Time to Keep Silence, and a Time to Speak" [2000] Balance 12, 14.
[98] AW Bradley "Judges and the Media – the Kilmuir Rules" [1986] Public Law 383, 383.
[99] *R v Commissioner of Police of the Metropolis ex parte Blackburn (no 2)* [1968] 2 QB, 157 (CA) Edmond Davies LJ.
[100] Hon John Doyle "Judicial Standards: Contemporary Constraints on Judges – The Australian Experience" (2001) 75 ALJ 96, 97.

Balancing freedom of expression with the prestige of the office does not have to be a question of extremes, a choice between keeping judges in ivory towers or allowing them to say what they want.[101] Extra-judicial conduct should be restricted only when it is so clearly destructive of the judicial responsibilities of impartiality and independence, that it would create in the public a perception that the judge's ability to execute the judicial office is sufficiently undermined. A judiciary that is open to communication, and necessarily, to scrutiny, enhances public knowledge about and confidence in the justice system.

As with all freedoms, there will be those judges who will speak in a way that includes the "irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative."[102] Protecting judicial expression may come at a high price, but it is worth the risk to have an accountable and fully independent judiciary. The risk of embarrassment should not be reason enough to restrict a fundamental freedom.[103]

Chief Judge Young is ever concerned with defending the judiciary from a public that "misapprehend[s]" it.[104] In a speech at the 11th Commonwealth Law Conference in Vancouver, he asked "who else will speak for [the judiciary] and present the balanced picture?"[105] Ultimately, the answer is that no one but the judiciary is capable of doing so. Judges must challenge themselves and each other to define what is acceptable extra-judicial expression and what is not. That is the ultimate preservation of judicial independence, impartiality and public confidence. Judges must support and promote their right to speak out, even on the "controversies of the day."[106]

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[101] Headline for an interview with a judge: "Judge Duckman and Wife Speak Out: We Wept for Galina. Couple cried when abuser killed lover. He vows not to resign. Wife says he never beat her. His records show another side to story." (28 February 1996) *New York Daily News* New York 1.

[102] *Redmond Bate v DPP* (1999) 7 BHRC 375, 383.

[103] It may be that the cases of judicial indiscretion off the bench are rare. In Canada, the Canadian Judicial Council reports that since its inception in 1971, only five complaints have led to formal investigations. Only once have they recommended the removal of a federal court judge. Canadian Judicial Council Annual Report 1999-2000 (Ottawa, 2000), 12 <http://www.cjc-ccm.gc.ca> (last accessed 12 June 2001).

[104] Rosemary McLeod "Judgement Days" (18 March 2001) *Sunday Star-Times* Wellington C1.

[105] RL Young "Judicial Independence and Accountability in New Zealand" (1998) 45 Federal Lawyer 40, 41.

[106] AW Bradley "Judges and the Media – The Kilmuir Rules" [1986] Public Law 383, 385.

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