

1998

## Forward: Is There a Threat to Judicial Independence in the United States Today?

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### Recommended Citation

Maria L. Marcus, *Forward: Is There a Threat to Judicial Independence in the United States Today?*, 26 Fordham Urb. L.J. 1 (1998).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol26/iss1/6>

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# YALE LAW SCHOOL CLASS OF 1957 REUNION WEEKEND

## IS THERE A THREAT TO JUDICIAL INDEPENDENCE IN THE UNITED STATES TODAY?

### FOREWORD

*Maria L. Marcus\**

My Yale Law School Class of 1957 reunion was featuring a panel discussion by six federal judges on judicial independence. The panelists were all former classmates, and solidarity dictated that I attend. I was rewarded by a witty and graceful disagreement on the issues.

The Class of 1957 was particularly well qualified to engage in an exploration of these disagreements. Out of a total of 141 LL.B. graduating students,<sup>1</sup> eight became Article III federal judges.<sup>2</sup>

Approval of judicial independence as an abstract proposition would only skim the surface of a multi-layered subject. What kind of criticism, issuing from which sources, could have a deleterious effect on such independence? In 1996, the Association of the Bar of the City of New York released a statement urging that while public debate and fair comment on the substance of a judicial opinion are appropriate, personal attacks on the judge writing the opinion are “pernicious.”<sup>3</sup> Does this eminently reasonable position also apply where a particular judge repeatedly engages in unwarranted behavior, such as berating only prosecutors appearing

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1. Bulletin of Yale University Law School for the academic year 1957-1958.

2. See *Roundtable Discussion: Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 31 (1998). This represented approximately 1% of the total number of active Article III federal judges in the nation. See *id.*

3. Press release dated February 1, 1996. The City Bar Association’s statement was issued in response to personal attacks on U. S. District Court Judge Harold Baer because of his initial decision on a motion to suppress made in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated* 921 F. Supp. 211 (S.D.N.Y. 1996). The Bar Association statement emphasized that personal attacks impugn the judicial process and subvert public confidence in the judicial system.

before him and improperly dismissing cases?<sup>4</sup> Are there systemic solutions that effectively deal with such behavior, so that public criticism of the individual judge is unnecessary?<sup>5</sup>

Conversely, can fair comment on the substance of a decision also be pernicious if it emanates from the authority that does the judicial appointing?<sup>6</sup> Is press criticism of a decision's content desirable even if it fails to present both sides of the issue?<sup>7</sup>

Criticism that comes from the public presents a still more complex balance of interests. Where public outrage centers on a sentence given to a criminal defendant, rather than a particular evidentiary ruling,<sup>8</sup> could the outcry in some instances have an edu-

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4. A Brooklyn Criminal Court judge, Lorin M. Duckman, was removed from the bench by a five-to-two ruling of the New York Court of Appeals for willfully disregarding the law in disposing of criminal charges in sixteen cases, and for a five-year history of abusive behavior towards prosecutors. See Richard Perez-Pena, *Court Backs Ouster of Judge Assailed for Lenient Rulings*, N.Y. TIMES, July 8, 1998, at A1; Gary Spencer, *Court of Appeals Removes Duckman; Dissents Stress Threats to Independence*, N.Y. L.J., July 8, 1998, at 1. The dissenting judges expressed concern that Judge Duckman's conduct had received particularly harsh scrutiny and sanction because he had angered New York State Governor George E. Pataki, New York City Mayor Rudolph W. Giuliani and others by his bail ruling in a domestic violence case involving a defendant who ultimately murdered his former girl friend. The New York Court of Appeals majority decision responded, "Plainly, wrongdoing in connection with initiating an investigation could not insulate an unfit judge . . ." See Spencer, *Court of Appeals*, at 1. Removal would not "imperil" judicial independence, the majority concluded. "Indeed, on the merits of this case, the judiciary, the bar and the public are better served when an established course of misconduct is appropriately redressed . . ." *Id.*

5. Appellate review may provide a variety of corrective mechanisms. See, e.g., *United States v. Chaney*, 477 P.2d 441 (1970), where the Supreme Court of Alaska commented on sentences of one year, with the possibility of parole after ten days, for defendants convicted of forcible rape and robbery. Although state law prohibited appellate increase in the trial court's sentence, the Supreme Court expressed its disapproval in a written opinion to guide future decision-makers. For an example in the federal system, see *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8<sup>th</sup> Cir. 1976), where the circuit court in a complex environmental dispute found that the district judge had "assumed the mantle of the advocate" and shown "great bias." *Id.* at 185. The solution was a remand for retrial before a different district court judge.

6. One of the grievances against King George III incorporated in the Declaration of Independence was that he "made Judges dependent on his Will alone, for the tenure of their offices . . ." During the debates that accompanied ratification of the United States Constitution, proponents emphasized that permanent judicial appointment was crucial because it would prevent dependence on the executive and legislative branches. THE FEDERALIST Nos. 51 (James Madison), 78 (Alexander Hamilton).

7. Media comment can accurately summarize a decision, yet engage in a one-sided polemic on it that manipulates public opinion. Judges cannot reply to press tirades to defend themselves. See ABA CODE OF JUDICIAL CONDUCT Canon 3, § 9; City Bar statement, *supra* note 3.

8. Such rulings can be misunderstood by those who lack information about the context, or about procedural rules and precedents.

cational value for the sentencing judge because it underlines the gravity of the offense?<sup>9</sup> Or should such educational efforts be confined to more subtle manifestations, such as the court observer group ACAE (“Attack on Crime Against the Elderly”) which mobilizes senior citizens to attend certain criminal trials to remind judges of the past and potential victims of those who prey on the aged?<sup>10</sup>

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9. In one instance, six men met a woman in a Massachusetts tavern. They later raped and sodomized her in a wooded area and destroyed her car. See *Commonwealth v. Tarr*, No. 76300-324, at 14-19 (Super. Ct. first criminal session Oct. 5, 1981). Five of the men pleaded guilty to rape, unnatural rape and malicious destruction of property. See *Aldoupolis v. Commonwealth*, 386 Mass. 260, 261, 435 N.E. 2d 330, 331 (1982), *cert. denied* 459 U.S. 864. They were given suspended prison terms of three to five years. See *id.* Among the reasons cited by the judge for suspending the sentences was that the victim, who had attempted suicide, was unable to testify. See *L.A. TIMES*, Nov. 27, 1981, at 22; *N.Y. TIMES*, Oct. 19, 1981, at A20. Another reason was that the Assistant District Attorney had recommended a light sentence. See *id.* Finally, the trial judge reasoned that the defendants were first offenders from “very close, supportive families.” and that neither restraint nor correction was needed. *Commonwealth v. Tarr*, *supra*, at 2-4 (Super. Ct. second criminal session Oct. 9, 1981). Responding to hundreds of enraged phone calls, the Governor called a press conference and stated: “I don’t blame people for being mad . . . I appointed this judge. I want to know, and the people have a right to know, why five men who pleaded guilty to raping a woman only have to dig into their pockets for \$5.00 once a week as punishment.” *L.A. TIMES*, Nov. 27, 1981, at 22. Four days after the initial sentencing, the trial judge revoked the suspensions and reinstated prison terms. See *Aldoupolis*, 386 Mass. at 261, 435 N.E.2d at 331. There was no reference to public or political pressures. See *Commonwealth v. Tarr*, No. 76300-324, at 4-5 (second criminal session). He cited a possible infirmity against suspended sentences for certain crimes under Massachusetts statutes. See *id.* at 5. The Supreme Judicial Court of Massachusetts subsequently ruled that the trial judge had the power to suspend the sentences as well as to revise and revoke them. See *Aldoupolis*, 386 Mass. at 267, 268, 435 N.E.2d at 334. The court stated that there was no double jeopardy problem. See *id.* It should be noted that the United States Supreme Court has recently emphasized that re-sentencing in non-capital cases does not violate the principle of double jeopardy. See *Monge v. California*, — U.S. —, 118 S. Ct. 2246 (1998).

For a full discussion of the *Aldoupolis* case, see Eve Kunen, Comment, *The Effect of External Pressures on Sentencing Judges*, 11 *FORDHAM URB. L.J.* 263 (1982). Kunen notes that the Massachusetts Rules of Criminal Procedure provided at Rule 29 that trial judges may upon their own motion, within sixty days after the imposition of sentence, revise or revoke it “if it appears that justice may not have been done.” *Id.* at 282 (discussing *ALM MASS. R. CRIM. P. R. 29* (1997)); see also *Commonwealth v. McNulty*, 42 Mass. App. 955, 680 N.E.2d 129, *review denied* 425 Mass. 1106 (1997) (holding that a judge may act on own to revise sentence within sixty days).

10. See Kunen, *supra* note 9, at 292-293. The Supreme Court has recognized the importance of victim impact statements put into evidence at sentencing. See *Payne v. Tennessee*, 501 U.S. 808, 825-826 (1991) (admission of such statements not a violation of the eighth amendment) For further discussion, see Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 *FORDHAM URB. L.J.* 601 (1998).

As Professor H. L. A. Hart has noted, "community condemnation" is expressed not only in legislative grading but also in the particular sentence levied by the trial judge.<sup>11</sup> One court, affirming the educative value of the expression of public sentiment, stated: "[N]o court should change its determination solely because what it believes to be an appropriate ruling is criticized by the press, prosecutor or public. On the other hand, if criticism is justified it would be equally improper to stubbornly adhere to an inappropriate ruling solely to manifest judicial machismo."<sup>12</sup> Yet, as one of the defenders of Justice Chase argued during the unsuccessful attempt to impeach the Justice:

[W]ould you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be . . . popular judges; judges who look forward, in all their decisions, not for the applause of the wise and good . . . but of the rabble, or any prevailing party?<sup>13</sup>

State judges are vulnerable to criticism because of possible voter reaction in an election or the reaction of reappointers. By contrast, federal judges are constitutionally insulated during good behavior<sup>14</sup> and none have ever been impeached for the content of a judicial decision.<sup>15</sup> Nevertheless, some federal judges have expressed un-

Mob domination of trial and sentencing violates a defendant's due process rights. See *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923). However, letters or petitions to a sentencing judge are public prerogatives. See, e.g., *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976) (judge received and took into account letters detailing defendant's prior charitable and philanthropic works). At sentencing, judges are free to consider information emanating from individuals outside the courtroom. See *Williams v. New York*, 337 U.S. 241, 245 (1949). Due process could, however, be implicated where defendants are deprived of the opportunity to rebut negative information. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (capital case); *People v. Perry*, 36 N.Y.2d 114, 119, 324 N.E.2d 878, 880, 365 N.Y.S.2d 518, 521 (1975) (non-capital case).

11. See H. L. A. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 437-38 (1958).

12. *People v. Wright*, 104 Misc.2d 911, 915, 429 N.Y.S.2d 993, 997 (Sup. Ct. N.Y. County 1980) (citation omitted) (finding by one judge that a defendant is persistent felony offender not binding on later sentencing judge exercising discretion).

13. *Official Conduct of Judge Chase*, in 3 *ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856*, 258 (1857) (statement of Rep. Martin). As Professor Philip B. Kurland has observed, provisions protecting judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged." Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 *U. CHI. L. REV.* 665, 698 (1969).

14. U.S. CONST. art. III, § 1.

15. See CHIEF JUSTICE WILLIAM REHNQUIST, *GRAND INQUESTS* 119 (1992). Erroneous rulings simply constitute reversible error, and standing alone present no ground for impeachment; *RAOUL BERGER, IMPEACHMENT* 235 (1973).

easiness about the threats and promises arising from external pressure.<sup>16</sup> The panel discussion below illustrates this dilemma.

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16. See, e.g., Stephen B. Bright, *Hanging the Judge; Demagogues, Politicians Chip Away at U.S. Court System*, ARIZ. REPUBLIC, June 8, 1997, at H1 (“So long as I was the focus of criticism for my own opinions, I was resigned to take the abuse no matter how unfair or untrue, but the first moment I considered whether or how an opinion I was preparing would be used (politically) was the moment I decided I could no longer serve as a federal judge.” (quoting letter of Third Circuit Judge H. Lee Sarokin to President Clinton, explaining that attacks on the federal judiciary had made it impossible for him to continue on the bench)).

