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SYMPOSIUM: Independence Under Siege: Unbridled Criticism of Judges and Prosecutors - A Panel Discussion Sponsored by the Brooklyn Women's Bar Association

Authors

Hon. Cheryl E. Chambers, Joan G. Wexler, David N. Dinkins, Michael A. Cardozo, Zachary W. Carter, Hon. Judy Harris Kluger, and Hon. Abraham G. Gerges

**INDEPENDENCE UNDER SIEGE: UNBRIDLED
CRITICISM OF JUDGES AND PROSECUTORS,
A PANEL DISCUSSION SPONSORED BY THE
BROOKLYN WOMEN'S BAR ASSOCIATION,
NOVEMBER 21, 1996**

The following panel discussion, addressing the issue of criticism of judges and prosecutors, includes the transcripts of several notable panelists who were kind enough to permit the *Journal of Law and Policy* to publish their remarks.

The Editorial Board and Staff of the *Journal* supplemented the transcripts with footnotes and commentary as a way to provide background material for the speakers' statements and to offer a starting point for readers to begin research on some of the issues raised. The additional footnotes and commentary are those of the *Journal* and do not necessarily represent the opinions of the speakers.

Introduction

Hon. Cheryl E. Chambers

Moderator

Dean Joan G. Wexler

Panelists

Hon. David N. Dinkins

Michael A. Cardozo

Zachary W. Carter

Hon. Judy Harris Kluger

Additional Remarks

Hon. Abraham G. Gerges

The Brooklyn Women's Bar Association is very pleased to have a number of distinguished panelists here today. I'm not going to introduce them, I'm going to have Dean Joan G. Wexler formally introduce them to you in just a moment. But first, I'd like to offer our statement of purpose.

The Brooklyn Women's Bar Association is committed to civil discourse and to providing a forum to discuss issues and subjects of great importance to the bar and the bench. Tonight we are discussing the current controversy over judicial and prosecutorial independence.¹

Better communication between segments of society is needed to lower the tone of criticism and avoid the temptation to personalize this controversial issue that so ignites our passions. When our

* The author is a Judge of the Criminal Court of the City of New York and a former Special Assistant District Attorney in the Kings County District Attorney's Office. She is a graduate of Boston University School of Law.

¹ Specifically, politicians have recently been critical of New York City Criminal Court Judge Lorin Duckman, U.S. Federal District Court Judge Harold Baer and Bronx District Attorney Robert Johnson. Administrative charges will be filed against Judge Duckman by the New York State Commission on Judicial Conduct based upon allegations by Governor Pataki that Judge Duckman has displayed a bias against prosecutors and has made "disparaging comments toward women and black people in his court." James Dao, *Conduct Panel Plans Charges Against Judge*, N.Y. TIMES, Apr. 23, 1996, at B1; Clifford J. Levy, *Pataki Calls for Judicial Panel to Remove a Brooklyn Judge*, N.Y. TIMES, Feb. 29, 1996, at B1. Similarly, Judge Baer came under political criticism after his evidentiary decision to exclude drug evidence from trial. "Clinton Administration officials suggested that Judge Baer might be asked to resign if he did not change his mind, and Congressional Republicans called for the judge's impeachment." Don Van Natta, Jr., *A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, § 1, at 23; see Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1. Bronx District Attorney Johnson has been criticized by Mayor Giuliani for his decisions regarding charges against people accused of killing police officers. Jan Hoffman, *Mayor Criticizes Manslaughter Charge in Officer's Death*, N.Y. TIMES, May 24, 1996, at B3.

political leaders and the media seek to galvanize support or create controversy by painting the judiciary and prosecutors as pro-criminal, lacking in common sense or indifferent to the demands of sound judgment, they tarnish and undermine the credibility of our system of justice by destroying the moral authority of our courts and our prosecutors.

Judges and prosecutors, however, are not immune from or above criticism. As public servants, as the guardians of the balance between liberty and the law, judges and prosecutors must be accountable. We believe discussions about our system of justice should be civil, thoughtful and well informed. To this end, we present this panel discussion.

We selected an exceptional moderator, Brooklyn Law School's Dean Joan G. Wexler, to guide us through our discussion this evening. Let me tell you a little about Dean Wexler. Joan G. Wexler is the seventh and current Dean of Brooklyn Law School. She is the first woman to head the law school in its nearly one-hundred year history. Dean Wexler is a 1974 graduate of Yale Law School, where she was Articles Editor of the *Yale Law Journal*. She graduated from Cornell University in 1968 with highest honors and distinction, and received a Masters of Arts in Teaching degree from Harvard University in 1970. Dean Wexler is a former clerk to Federal Judge Jack B. Weinstein and a former associate in the firm of Debevoise and Plimpton.

Dean Wexler joined the Brooklyn Law School faculty in 1985 after serving on the faculty of New York University School of Law. She was Brooklyn Law School's Associate Dean of Academic Affairs from 1987 to 1994. She serves on a number of boards and committees including the Board of Directors of the Federal Bar Council Foundation and the New York State Bar Association's Committee on Children and the Law. Dean Wexler is currently the Vice-President of the Association of the Bar of the City of New York, where she has served on numerous committees. She has published extensively in the areas of family and matrimonial law and is a frequently sought after lecturer and public speaker. It gives me great pleasure to introduce Dean Joan Wexler.

Good evening. Thank you Judge Chambers for inviting me to join you tonight. I'm delighted to be here to moderate this hot topic discussion, with this most distinguished and knowledgeable panel.

As Judge Chambers has told you, disagreement with judicial and prosecutorial decisions has taken on an increasingly confrontational and personal tone, as individual judges and prosecutors are criticized for their decisions in particular cases. Now, I would not have the temerity to suggest to you that all opinions made by judges and prosecutors are sacrosanct. For one thing, if that were the case, it would put me and a whole lot of law school professors, not to mention our appellate judges, out of work. What I would suggest, however, is that there is a point at which such criticism reaches intimidation, and debates over judicial philosophy deteriorate into exercises of partisan politics. When that point is reached, the independence and credibility of our judicial system is jeopardized, and the reputation of all three branches of government is undermined.

Now, to start us off tonight, we have with us the Honorable David Dinkins, former Mayor of our fair city. Currently, he is a professor at the Columbia School of International and Public Affairs and a Senior Fellow of the Barnard Columbia Center for Urban Policy. Prior to becoming Mayor, he had a long career in public service. He was a member of the New York State Assembly, President of the New York City Board of Election and City Clerk and President of the Borough of Manhattan. Mr. Dinkins serves on numerous boards and committees that are involved in advocating for children, education, compassionate urban policy and tolerance. He also was the first male member of the National Women's Political Caucus. But most important to me, he is a graduate of Brooklyn Law School.

* Dean, Brooklyn Law School; J.D., Yale University; M.A.T., Harvard University; B.S., Cornell University.

Our second panelist is Michael A. Cardozo. Mr. Cardozo is President of the Association of the Bar of the City of New York and is a litigation partner at the law firm of Proskauer, Rose, Goetz and Mendelsohn. He has also been chair of the Executive Committee of the Fund for Modern Courts, the Task Force on the Appellate Division and the Joint Committee on Judicial Administration. Although he does a wide variety of different types of commercial litigation, he spends a substantial amount of his time representing both the National Basketball Association and the National Hockey League. Rumors are that after his term of office at the city bar, he will be a free agent. I can tell you that he is a wonderful president so I hope that the members of this bar association will consider him for office.

Our third panelist is Zachary Carter. Mr. Carter is the United States Attorney for the Eastern District Court of New York, our home court here in Brooklyn. For the topic we are discussing tonight, I don't think there are any perspectives that we should consider that Mr. Carter does not have personal knowledge about. He is not only now the United States Attorney, he has been an Assistant United States Attorney of the Eastern District and the Deputy Chief of the Criminal Division. He has served in the Kings County District Attorney's Office as Executive Assistant District Attorney. He was Executive Assistant to the Deputy Chief Administrative Judge of the courts within the City of New York, and he has been a Criminal Court Judge, a United States Magistrate Judge and a practicing lawyer.

Our final speaker is the Honorable Judy Harris Kluger. Judge Kluger is currently the Administrative Judge to the Criminal Court of the City of New York. She was appointed to that court in 1988 and served as Deputy Supervising Judge in Manhattan for several years. Judge Kluger began her career as an Assistant District Attorney here in Kings County, where she became Chief of the Sex Crimes and Domestic Violence Unit and later Bureau Chief of the Criminal Court Bureau. If one of our goals tonight is to discuss how to communicate with the public about the judicial process, Judge Kluger has a unique perspective. In 1993, she was selected to preside in the newly created Midtown Community Court, which was an experiment in constructive, accessible, community-based justice. That court has received considerable attention and acclaim

for its approach, which has made the judicial system more understandable to the members of the local community. So, we welcome Judge Kluger for her thoughts.

I am delighted to be here. Let me first say what I say to audiences very often these days: now that I have been elected a private citizen—that's what happened—I go where I wish and I'm here because I choose to be. I really want to be with you—it's a subject that I care a lot about. A lot of good people, and good friends, are here on this panel and out there (in the audience). So, Dean Wexler, President Goldman, Judge Chambers, distinguished fellow panelists, friends and fellow New Yorkers, it's a pleasure to join you tonight to discuss the crisis of our criminal justice system—the demonization of our judges and district attorneys, and the constant attack on the independence of our judges and prosecutors.

Some of our most prominent public officials have chosen to target our very system of justice, with the cheap prize of instant public approval in their sights. "King Henry VII boasted that he ruled England with his laws, and his laws with his judges."¹ Dean John D. Feerick² reminded us of the tale of one English judge who was prodded by the crown to give up his opinion or his position. Said the judge, "From my place, . . . I care little. I am old and worn out in the service of the crown: but I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give."³ The King replied, "I am determined . . . to have twelve Judges who will be all of my mind as to this matter,"⁴ to which the judge replied,

* Professor, Columbia School of International and Public Affairs; Mayor, New York City, 1990 through 1993; J.D., Brooklyn Law School; B.S., Howard University.

¹ John D. Feerick, *Leslie H. Arps Memorial Lecture, Judicial Independence and the Impartial Administration of Justice*, 51 REC. ASS'N B. CITY N.Y. 233, 236 (1996).

² John D. Feerick is currently Dean of Fordham Law School. He is also the former President of the Association of the Bar of the City of New York.

³ Feerick, *supra* note 1, at 236.

⁴ Feerick, *supra* note 1, at 236.

“Your Majesty, . . . [you] may find twelve Judges of your mind, but hardly twelve lawyers.”⁵

In New York City today, some political leaders attempt to turn back the hands of time to medieval Europe, as if they were cloaked with the power of the throne, as if the idea of an independent judiciary, beyond the power of either the legislature or the executive branches, had never existed; but such a system does exist, thanks to the Framers of the U.S. Constitution. It’s up to us to ensure that an unfettered and unencumbered judiciary is not merely a neglected concept found in a dusty treatise on jurisprudence. It’s up to us to guarantee that due process of law is more than a mere formality, to be adhered to or not adhered to, depending on convenience. It’s up to us to guarantee that bail is understood not as an excess of liberal government policy but as a constitutionally protected right.⁶

Montesquieu, in *The Spirit of Laws*,⁷ observed that if the judiciary were joined to the legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If the judiciary were joined to executive power, the judge could have the force of an oppressor.⁸ Here, in our city, the debate by our highest elected officials over our judges and our district attorneys borders on arbitrary oppression. Each development has been more frightening than the last. Some leaders have become accustomed to telling us that government is not the solution to society’s problems, but the cause. Now, they have amended the indictment to include our courts and our district attorneys.

⁵ Feerick, *supra* note 1, at 236.

⁶ U.S. CONST. amend. VIII. The Eighth Amendment states that “[e]xcessive bail shall not be required . . .” *Id.*

⁷ 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., Colonial Press 1899).

⁸ *Id.* at 152. The translation as it appears in *The Spirit of Laws* reads: [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id.

Earlier this year, Mayor Giuliani decided not to reappoint to full terms two incumbent New York City judges, despite recommendations by his own Mayor's Committee on the Judiciary and the independent Judiciary Committee of the Association of the Bar of the City of New York that they be reappointed to full terms.⁹ As mayors, both Ed Koch and I agreed to reappoint all judges approved by these committees. We opted not to substitute our judgment for that of the impartial experts. We chose merit over politics.¹⁰ Unfortunately, our successor chooses otherwise.¹¹

Shortly thereafter, the Mayor and the Governor began a series of attacks on the federal and state judiciary, including Federal District Court Judge Harold Baer and New York City Criminal Court Judge Lorin Duckman.¹² Then, the Governor, with the Mayor as his cheerleader, removed Bronx District Attorney Robert Johnson from the prosecution of the slaying of a police officer because the District Attorney allegedly failed to seek capital punishment fast enough.¹³ The Mayor also blasted District

⁹ John D. Feerick, *Judicial Independence and the Impartial Administration of Justice*, N.Y. L.J., Apr. 3, 1996, at 2; Dan Morrison, *Rudy Snub Puts Judge Off Bench*, NEWSDAY, Dec. 28, 1996, at A4.

¹⁰ David Firestone, *Giuliani and Ex-Mayors Intensify Battle Over Judicial Demotions*, N.Y. TIMES, Dec. 28, 1995, at A1 (recounting the merit screening process for judges instituted by Mayor Koch and continued by Mayor Dinkins).

¹¹ Daniel Wise & Matthew Goldstein, *Mayor's Action on Judges Stirs Dissent*, N.Y. L.J., Dec. 26, 1995, at 1 (recounting Mayor Giuliani's demotion of two Brooklyn criminal court judges to one-year terms on the civil court bench based upon his view that their performances were unsatisfactory, despite satisfactory recommendations by the Mayor's Advisory Committee and the Judiciary Committee of the Association of the Bar of the City of New York).

¹² John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST, Mar. 14, 1996, at A3 (reporting criticism by both Governor Pataki and Mayor Giuliani of Federal District Court Judge Harold Baer's decision to exclude from evidence 80 pounds of cocaine and heroin discovered by police from evidence, and similar criticism directed at New York City Criminal Court Judge Lorin Duckman for freeing a defendant hours after a jury had convicted him of attacking his former girlfriend); Robert C. Gottlieb, *Death Penalty Law on Trial*, NEWSDAY, Mar. 22, 1996, at A53 (describing criticism by Governor Pataki and Mayor Giuliani against Judges Baer and Duckman over their recent rulings as "[j]udge bashing").

¹³ Bill Alden, *No Added Protection for Capital Defendant*, N.Y. L.J., Aug.

Attorney Johnson for failing to slap the accused with murder charges, railing against legal experts who disagreed with his view of the case, branding them, and I quote, "academic idiots" who give "ridiculous opinions . . . because they like to see their dumb names in the paper."¹⁴ The Mayor even offered to prosecute the case himself, saying "if the District Attorney would like to swear me in and turn the case over to me, I'll take it over and prosecute the darn case."¹⁵ These are quotes.

At the federal level, Judge H. Lee Sarokin of the Third Circuit Court of Appeals said he resigned because political attacks had hampered his ability to render independent decisions.¹⁶ The Republican candidate for president took credit for that resignation.¹⁷ I believe that virtually every member of the legal profession would say to the Mayor, the Governor and any elected official who had interfered with our justice system: Hands Off!

A free and independent judiciary and criminal justice system is not the privilege of generations past, but the birthright of generations to come. Judges and district attorneys, whether elected or appointed, are not the tools of the people who appoint them, of officials who can embarrass them or even of the people who elect them. It is up to a judge to implement the rule of law, not to read

7, 1996, at 1 (reporting that after the indictment of Angel Diaz for the first degree murder indictment of New York Police Officer Kevin Gillespie, Governor Pataki removed Bronx District Attorney Robert Johnson from the case because Mr. Johnson stated that it was not his "present situation" to seek the death penalty against Mr. Diaz); Daniel Wise, *Appellate Court Hears Challenge to Removal of Bronx Prosecutor*, N.Y. L.J., Dec. 4, 1996, at 1 (reporting that Governor Pataki's removal of Johnson stemmed from his "impermissible policy" never to seek the death penalty).

¹⁴ Vivian S. Toy, *Prosecutor is Berated by Giuliani*, N.Y. TIMES, May 25, 1996, § 1, at 23.

¹⁵ *Id.*

¹⁶ *Gavel-to-Gavel Politics*, NATION, July 1, 1996, at 3 (recounting Judge H. Lee Sarokin's belief that the political right's ferocious attacks upon his record resulted in his inability to judge independently).

¹⁷ Neil MacFarquhar, *Federal Judge to Resign, Citing Political Attacks*, N.Y. TIMES, June 5, 1996, at B4 (reporting Republican presidential candidate Bob Dole's criticism that Judge Sarokin was being "too liberal" in his treatment of criminals, referring to Judge Sarokin's decision to release a man indicted for killing a police officer based on the prosecution's mishandling of evidence).

public opinion polls, not to adopt partisan viewpoints and not to kowtow or curry favor with a temporary political leadership. Rather, we expect our judges to be principled advocates of permanent justice, which they render without fear or favor.¹⁸

Not that our courts always do justice. American constitutional history is replete with opinions that today we find more than objectionable. Consider the *Dred Scott v. Sandford*¹⁹ decision. Consider the *Plessy v. Ferguson*²⁰ decision. The rule of law and the decisions made by our courts and by our district attorneys are not sacrosanct—but they carry with them the weight of our state and federal constitutions—and with each dispassionate enunciation of law, we shore up the fragile foundations of our democracy. My point is not that public officials can never question the judgment of a judge; but I do mean that great care and discretion must be exercised regarding who is doing it, how and when.

Free speech is a vital right.²¹ Inappropriate pressure to affect an outcome is dead wrong. Our judges are not protected by a cloak of invincibility, nor should they be. However, a judge exercising his or her discretion is not tantamount to a judge violating his or her oath of office. When our elected officials act as judge, jury and prosecutor they don't help reduce crimes, they increase problems. They view justice through different prisms depending on the direction of the political wind. That is exactly why our judiciary must be independent—to protect the ends of justice from the means

¹⁸ N.Y. JUD. LAW Canon 3(A)(1) (McKinney 1992) ("A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.").

¹⁹ 60 U.S. (19 How.) 393 (1857) (holding that Blacks were not citizens of the United States), *overruled* by the Thirteenth and Fourteenth Amendments of the U.S. Constitution. See generally DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (1981).

²⁰ 163 U.S. 537 (1896) (validating the separate but equal doctrine by permitting racial segregation on public transportation), *overruled* by *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). See Paul G. Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1145, 1151-56 (1954). See generally CHARLES A. LOFGEN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

²¹ U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press" *Id.*

of politics. Furthermore, the system must also be widely perceived as independent—for those on the bench to rule without fear of the hand of the Mayor or the Governor who can make them and who can break them—and for our people in general to keep faith in the fair hand of the law.

When, and if, a judge does act truly inappropriately by breaking the law, or by abdicating his or her oath, then I say throw the bum out! But, as much as it may appease public anger or sorrow, we cannot tailor our laws to fit the pattern of public opinion. No matter how terrible the crime, no matter how justified our outrage over that crime, we cannot force our judges or our district attorneys to bow to the pressure of political power. Media monopoly does not give our elected leaders a monopoly on wisdom. Elective office is a solemn vow, not a shining crown, and the voice of the people is not always a voice of reason. After all, that is why we have a system of laws and not a tyranny or mob rule. You and I know that the law is not easy or simple or clear cut. Judicial decisions are complex and controversial—they can be misinterpreted and disliked. Indeed, democracy itself is difficult. No doubt, at times, the weary seek easy answers and swift justice that claims to be sure.

I am reminded of Winston Churchill's description of "democracy [a]s the worst form of Government except all those other forms that have been tried"²² Our democracy is imperfect; it is a work in progress. As members of the legal profession and as concerned Americans, we must ever strive to make our system and our society better and more just. In the meantime, we must protect the fragile balance of liberty and law.

I thank you for listening.

²² Winston Churchill said:

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

THE OXFORD DICTIONARY OF MODERN QUOTATIONS 55 (Tony Augarde ed., 1991).

Thank you. It's a pleasure to be here. I'm going to give my own perspective on this issue, and a perspective from someone who, for twenty-five years, has worked to reform and improve the court system, and also the perspective of someone who is the President of the Association of the Bar which was founded in 1870, on the theme of strengthening the judiciary and getting rid of corrupt judges. I thought I would start by first asking the question, what is it that we mean by prosecutorial or judicial independence? It seems to me what we mean is the ability of a judge or a prosecutor to decide the matter on the merits as he or she thinks best, without any other influence over the decisionmaker other than the facts before him or her.

The judge or the prosecutor has to decide the case on the merits, and not be swayed by pressure. But we are a democracy, and with a democracy comes the right for people to criticize. There have to be checks. And I think the issue that we have to be concerned with is, where is the line? Where is it and when is it that people overstep the line, and what can we do about it? Let me set the stage, in my view, by just citing a couple of, what I think, are egregious examples of where the politicians and the media have crossed the line, and then I will talk about what I think we should do about it.

Recent press reports say the Governor says the legislature overruled five court of appeals decisions last term.¹ That is an

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¹ See, e.g., Gary Spencer, *OCA Cheers Legislative Session*, N.Y. L.J., July 18, 1996, at 1 (quoting Governor Pataki as saying that "[t]his year alone we have succeeded in overturning five Court of Appeals decisions"). *People v. Damiano* was essentially repealed by a statute permitting judges to submit annotated verdict sheets to juries. 87 N.Y.2d 477, 663 N.E.2d 607, 640 N.Y.S.2d 451 (1996); see N.Y. CRIM. PROC. LAW § 310.20 (McKinney 1993 & Supp. 1996). *People v. McNair* was essentially repealed by a statute permitting judges to offer

irresponsible and erroneous statement, because, as those of you who follow this issue know, the court of appeals was interpreting a statute passed by the legislature, and in four of the five decisions that the Governor has cited, the Office of Court Administration supported a change in legislation. Nevertheless, the Governor says the legislature overruled the court of appeals.² I think that is irresponsible and misleading, as Judge Simons said as recently as yesterday.³ Second example: the Governor said for a judge to set bail at \$10,000.00 for a cop killer is an outrage—no discussion of what the purpose of bail is; no discussion of the fact that it took three months for this alleged cop killer to post bail; and no discussion of the rest of the requirements in the bail statute.⁴

electronic monitoring as a condition of probation. 87 N.Y.2d 772, 665 N.E.2d 167, 642 N.Y.S.2d 597 (1996); see N.Y. PENAL LAW § 65.10(4) (McKinney 1987 & Supp. 1996). *People v. Page* was essentially repealed by a statute affording judges broad discretion to substitute alternate jurors for tardy jurors. 88 N.Y.2d 1, 665 N.E.2d 1041, 643 N.Y.S.2d 1 (1996); see N.Y. CRIM. PROC. LAW § 270.35(2)(a) (McKinney 1993 & Supp. 1996). *People v. Bolden* was essentially repealed by a statute which states that pretrial delay cannot be charged to prosecutors when the defendant absconds. 81 N.Y.2d 146, 613 N.E.2d 145, 597 N.Y.S.2d 270 (1993); see N.Y. CRIM. PROC. LAW § 30.30(4)(c) (McKinney 1992 & Supp. 1996). *People v. Keindl* was essentially repealed by a statute eliminating the requirement in a case of continued sexual abuse against a child that the child who is repeatedly molested recall the actual dates of abuse. 68 N.Y.2d 410, 502 N.E.2d 577, 509 N.Y.S.2d 790 (1986); see N.Y. CRIM. PROC. LAW § 30.10 (McKinney 1993 & Supp. 1997).

² Spencer, *supra* note 1, at 1 (stating that for three of the five court of appeals decisions that Governor Pataki cited as having been repealed by statute, court officials had pursued changes in legislation akin to those which ultimately resulted).

³ Gary Spencer, *Simons Retires, and Court Loses a Calming Intellect*, N.Y. L.J., Jan. 2, 1997, at 1. Judge Simons stated that Governor Pataki's criticism of the court would be potentially "debilitating" and that, "[t]he courts rely upon the respect that the public has for them and the respect that they give our decisions . . . If somebody is misconstruing our decisions and telling the public over and over again that we're pandering to criminals, it certainly could weaken the Court." *Id.*

⁴ Mark Mooney, *Detective Bailed Out Suspect in Cop Slaying*, DAILY NEWS, Oct. 17, 1996, at 24 (stating that Detective Robert Rivers, Jr., posted \$10,000.00 bail to release his accused nephew, Anthony Rivers, notwithstanding "outraged pleas" from Governor Pataki that Anthony Rivers be charged with murder and

The media, I think, egged on by the politicians, has been equally outrageous. While we all have our favorite stories, the one or two that particularly get my blood boiling are the following. You may remember the school gun case where the appellate division found that a student would have to be reinstated even though he had been found with a gun in his pocket.⁵ The newspaper reports in the popular press failed to note that in an earlier proceeding the judge had found no probable cause for the finding of the gun, and most importantly the city had not appealed that decision—it was *res judicata*. So when the issue came before the appellate division, it wasn't a question of whether or not there was probable cause—that had been determined. But the *Daily News* said, "What were these judicial kooks thinking? . . . The Appellate Division put the 'rights' of a gun-toting teenager above the safety of all the youngsters[,] . . . which would make perfect sense if the judges had been wearing straitjackets instead of robes."⁶ That goes beyond the pale. Another editorial called them judicial loonies.⁷

If this is what the public press says, what is it that the average citizen is supposed to think? Why is this bad? Obviously it's bad if it has the effect of causing judges or prosecutors, depending upon the case, to decide something not on the merits. Our judges are very courageous, but they're also human beings. And if you beat people over the head long enough and loud enough, sometimes they

kept incarcerated). Anthony Rivers was charged with criminally negligent homicide following the death of Officer Vincent Guidice, who fell on a mirror and fatally impaled his leg as he attempted to intervene in an altercation between Rivers and his girlfriend, Gloria Virgo. *Id.* See generally N.Y. CRIM. PROC. LAW § 150.30(4) (McKinney 1992) (enumerating the various procedures and limitations for the administration of bail).

⁵ *In re Juan C. v. Cortines*, 223 A.D.2d 126, 647 N.Y.S.2d 491 (1st Dep't 1996) (holding that a student who had been illegally searched by a school security guard could not be suspended for gun possession).

⁶ Editorial, *Junk Justice Aims at Schools*, DAILY NEWS, Sept. 19, 1996, at 46 (commenting on an appellate division decision holding that the search of a 15-year-old high school student, and subsequent seizure of a gun, was improper).

⁷ See Michael Finnegan et al., *Gov Eyes Law to Expel Gun-Toting Students*, DAILY NEWS, Sept. 20, 1996, at 7 (quoting Governor Pataki as saying "[i]t is lunacy" that an appellate division ruling placed the rights of a gun-toting teenager above the safety of other students).

stop doing what they think is right.⁸ But I think there's another equally important concern related to these improper attacks in the judiciary and that is the reality that they are causing the public to lose confidence in the system that we have, which, as David Dinkins said, may not be the best system in the world but we haven't figured out a better way.⁹ And if the public starts lacking confidence in our judicial system, anarchy can be the result.

Now what are we going to do about it? I don't think there's been enough talk about what the bar and the judiciary can do about these improper attacks. I'm afraid it's pretty easy for us all to reach a consensus that it's wrong. One thing I don't think we should do—and some disagree—is I don't believe that judges should speak out other than through their opinions. I think the press—and we've seen examples of it already—will twist their words. It is demeaning, and that is the wrong way to address this problem. But, I understand their frustration because they say: "Who is speaking for us?"

That's what brings us to a discussion of the bar associations, like your bar association, like the bar association of which I am president. The bar associations have a responsibility to step up to the plate and defend the judges when they're improperly attacked. Now, how do we do that? It seems to me that there are a number of different levels. There must be an immediate response when there's an improper attack. And unfortunately, as lawyers, we have the habit—the proper habit—of saying we can't speak until we know the facts. But what we do know without knowing a single

⁸ See, e.g., Elaine Song, *The Battle Over Baer*, CONN. LAW. TRIB., Apr. 15, 1996, at 1 (discussing Federal District Court Judge Harold Baer's decision to exclude 80 pounds of cocaine evidence, which became an issue in the 1996 presidential campaign); Editorial, *A Federal Judge Backs Down*, ROCKY MTN. NEWS, Apr. 4, 1996, at A60 (discussing Judge Baer's decision to reverse his previous ruling that 80 pounds of cocaine evidence was inadmissible, after pressure from many politicians). See generally Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993); W.F. Rylaarsdam, *Judicial Independence—A Value Worth Protecting*, 66 S. CAL. L. REV. 1653 (1993).

⁹ Hon. David N. Dinkins, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, A Panel Discussion Sponsored by the Brooklyn Women's Bar Association, 5 J.L. & POL'Y 517, 522 (1997).

fact is, what is the purpose of bail, and what is the purpose of the exclusionary rule. We can get that word out within five minutes of the improper attack, and we've got to do better in doing that.

We also have to, when something happens improperly, speak up and speak up loudly. About a month ago, the Governor appointed his counsel, Michael Finnegan, to be on the Commission on Judicial Nominations that selected people for the New York Court of Appeals.¹⁰ Our association felt that was wrong, and we put out a press release within three hours saying the Governor was wrong.¹¹ Not surprisingly, the Governor did not change his mind, despite the obvious eloquence of the press release. But, I think he may think twice the next time, and that's really the point.

There are issues we know are coming. We know that when the Commission on Judicial Conduct comes down with its ruling on Judge Lorin Duckman there is a substantial likelihood that the Governor is going to repeat his call that Judge Duckman should be removed from office by the legislature.¹² The Governor has made clear that he's not sure about that, but he may.¹³ So we should be

¹⁰ Daniel Wise, *Pataki Action is Denounced by City Bar*, N.Y. L.J., Sept. 13, 1996, at 1 (citing differing views about controversy surrounding the appointment of Michael Finnegan to the State Commission on Judicial Nominations); *Today's News Update*, N.Y. L.J., Oct. 10, 1996, at 1 (noting the objections among bar groups and law deans to the appointment of Finnegan to the New York State Commission on Judicial Nomination).

¹¹ Wise, *supra* note 10, at 1.

¹² See Matthew Goldstein, *Judge's Courtroom Tactics Focus of Hearing*, N.Y. L.J., Dec. 17, 1996, at 1 (basing this position on the belief that New York City Criminal Court Judge Lorin Duckman has a history of ignoring the rules of criminal procedure and being biased against prosecutors); Matthew Goldstein, *Removal of Judge From Bench Can Proceed by Varied Routes*, N.Y. L.J., Feb. 29, 1996, at 7 (citing Governor Pataki's statement that he will request Judge Duckman's removal, in the event that the Commission on Judicial Conduct fails to recommend it); George E. Pataki, *Governor Responds to Bars' Resolution*, N.Y. L.J., Mar. 18, 1996, at 2 (defending Governor Pataki's decision to refer Judge Duckman to the Commission on Judicial Conduct, to investigate whether Duckman believes that domestic violence is not a crime, rendering Duckman unfit to sit on the criminal bench).

¹³ Pataki, *supra* note 12, at 2 (stating Governor Pataki's view that if sufficient evidence indicates that Judge Lorin Duckman believes "that domestic violence is not a crime" then removal from the bench is a suitable resolution).

prepared to deal with that. And, in fact, I brought with me, for those of you who are interested, a report that we have already prepared that says the Judge Duckman case should go no further, and explains why.¹⁴

At the same time that we are coming to the defense of the judges and defending the system, we have to be careful, it seems to me, not to go too far. Not every judge's decision is right, as people have said. We shouldn't get in the habit of everyone picking up the newspaper and seeing "Bar Association Defends," so that people start saying: "Oh, the bar association, what do you think?" We shouldn't be afraid responsibly to say when we think a process is wrong when we encourage appeals. There are ways to be far more evenhanded in the criticism of judges, and we should lead the way.

We also have to do better in educating the public, and this is very difficult. We have to try and get into the schools and explain what is going on. We have to explain, not to just the readers of the *New York Law Journal*, which is easy, and not just to the readers of the *New York Times*, which is relatively easy—we have to talk to the popular press, to the radio and television and cable news shows. That's where news is made. It's very difficult. I've had a lot of frustration in my modest effort to do it, but I think bar associations have to constantly try to do that.

Let me throw out one other provocative suggestion: even when you are a lawyer elected mayor or governor, you're still subject to the responsibilities that a lawyer has. One of those responsibilities is that you can't improperly criticize a judge.¹⁵ And, in this

¹⁴ See generally TASK FORCE ON JUDICIAL SELECTION AND COURT MERGER OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JUDICIAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE: THE JUDGE LORIN DUCKMAN CASE SHOULD NOT BE REFERRED TO THE STATE SENATE (June 1996) (on file with *Journal of Law and Policy*) (discussing the Association of the Bar of the City of New York's disapproval of legislative intervention in cases of judicial misconduct and its position that responsibility should be given to the New York State Commission on Judicial Conduct, which is highly qualified to deal with such affairs).

¹⁵ N.Y. JUD. LAW DR 8-102(B) (McKinney 1992) ("A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1996) ("A lawyer

borough, in fact, the court of appeals upheld the censure of the former District Attorney in Brooklyn, when she improperly criticized a judge, knowing that what she said was wrong.¹⁶ Now, we have to be very careful in exercising this power, but disciplinary authorities have authority over public officials who are lawyers who abuse their trust.

Let me end with one last thought: what are the institutional changes, if any, that should be made to increase judicial independence? Federal District Court Judge Harold Baer has lifetime tenure—that does give him a degree of independence that our state court judges do not enjoy. On the other hand, there is a very good case that can be made that if the judge is in fact a bum, there should be an opportunity to throw him or her out. It's an issue that deserves serious debate as to the price that has to be paid for judicial independence. And I will suggest to you one other solution which I know may not be too popular among many here. If a judge is subject to election pressures or appointive pressures, it is inevitable that the possibility may creep into his or her mind as a difficult case is being decided: "Will this affect my ability to be re-elected or re-appointed?" That's human nature.

If, in fact, we adopt the system that we have for selecting judges in the New York State Court of Appeals—a process that we are seeing unfold right now, where political leaders nominate people to a judicial nominating committee, which then presents candidates to a nominator, and in cases of re-election, if the person is found qualified, presents the one name—I believe there could be

shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (1996) (stating the same rule as New York's DR 8-102(B)).

¹⁶ *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991). Elizabeth Holtzman, then District Attorney of Kings County, received a letter of reprimand for making false accusations against Judge Irving Levine. *Id.* at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. The court of appeals affirmed the appellate division in finding that Ms. Holtzman violated DR 8-102 and 1-102(A)(6) by "releas[ing] to the media . . . a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant" *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

a substantial increase in judicial independence without sacrificing the ability left to someone's term to get rid of the bum.

So, in conclusion, I would urge that judges should only speak out through their opinions. The bar must be much more vigilant and much more outspoken in trying to defend against improper attacks, and at the same time offer constructive criticism. And, I think we should take a look at making some institutional changes on how we select judges, which I think would help with respect to judicial independence.

Thank you.

We look to judges and prosecutors to make decisions for us that we are not in a position to make for ourselves because we have vested interest in controversies in which we are embroiled as civil litigants; because we have vested interest in controversies in which we have an emotional stake, such as situations in which we are relatives of crime victims, or we are victims of crime ourselves or when we are accused of crime. We look to judges and prosecutors to be neutral arbitrators of law and fact and to make decisions in good faith that are based on considerations only of law and facts, experience, good judgment and fairness. And we expect of both judges and prosecutors that they will arrive at their decisions by drawing on reserves of character and courage and a willingness to make decisions that are conscientious in the face of criticism.

I think that both judges and prosecutors should be required to—and we reasonably should expect that they will—make decisions even in controversial cases, in the face of criticism. I think that judges and prosecutors of average courage can be expected to perform that way. But when judges particularly are faced with criticism that rises to the level of relentless calls for their removal from the bench, then we are asking them not to act with courage, but to act with heroism. And while we should reasonably expect that judges will act with courage, day in and day out, it's asking a bit much of judges who are human, and prosecutors who are human, to engage in daily acts of heroism—which is what you're asking of a judge when you are asking him or her to make decisions that jeopardize his or her very livelihood.

At bottom, it seems to me that what we have to ask ourselves—as practitioners before the bar, and as persons who litigate against prosecutors who make discretionary decisions

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affecting clients—what kind of judge or prosecutor do we want to face in the middle of the night when we have a client, or when we have a loved one, whose fate is to be determined by someone who is making an important discretionary decision about his or her life?

I have sat in criminal court in the middle of the night with a two-hundred case calendar—many of the cases involving allegations of domestic violence where I've been called upon to make determinations both involving bail and whether or not to issue orders of protection. I've sat in situations in which I have been required to determine whether or not someone accused of a homicide should be detained without bail. I've sat in situations in which the equity stacked in one direction or another. Having judges faced with those kinds of decisions, as I know that judges are, night in and night out, day in and day out, we have to ask ourselves whether or not we would want to appear before a judge who the day before has been subjected to the most blistering criticism on the front page of the *New York Post*.¹

What if your young son, who may have made the mistake of associating with a friend whom you had been counseling him not to associate with for ages, rode with that friend as the passenger of a car that turned out to be stolen, and that car happened to collide with a citizen and either injured or killed that person? You need to

¹ Such criticism may have a profound impact upon the judge and the judicial system. For example, Federal District Court Judge Harold Baer was the subject of a front-page article under the title of "Junk Justice" after excluding evidence in a recent criminal trial. Rick Hampson, *Junk Justice? Evidence Rulings Spur Debate*, CHI. SUN-TIMES, Feb. 4, 1996, at 57. Specifically, the judge excluded 80 pounds of cocaine and heroin from evidence, reasoning that the fact that the defendants fled upon the officers' approach did not constitute probable cause to search the vehicle in which the drugs were found. Fred Kaplan, *New York Officials Bash Judges' Rulings*, BOSTON GLOBE, Apr. 9, 1996, at 3. As a result of the subsequent public outcry, "many lawyers said that they will not be surprised if Baer finds reasons to rule that the drug evidence is admissible." John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST, Mar. 14, 1996, at A3. Should such criticism continue to be heaped upon judges, many fear that judges will start to alter their decisions to shield themselves. In fact, "many lawyers said that . . . they now see signs of defendants being subjected to higher bail, rulings that lean heavily toward the prosecution and tougher sentences when found guilty." *Id.*

ask yourself whether or not you would want your son's fate, with respect to whether or not he's going to be detained, determined by a judge who is overly concerned about a level of criticism that I think we would all agree would be unreasonable.

David Dinkins said that "the voice of the people is not always a voice of reason."² And it's for that reason that we leave to key discretionary decisionmakers and the criminal justice system those decisions that we simply cannot make for ourselves. We look to judges and prosecutors in the middle of the night, under tremendous pressure to evaluate cases on their merit, based on their judgment of the facts and of the law, to determine whether or not, in fairness, a defendant is to be released on bail or detained—whether or not a defendant is to be charged or not. We should hope that an atmosphere is allowed to persist that permits judges to exercise their discretion, free of unreasonable criticism, free of calls for removal from the bench if they make a decision with which one political figure or another disagrees.

I believe that criticism of the judiciary and of prosecutors is, at the same time, healthy. I think that a civil debate about the decisions—whether it's in the area of bail or charging decisions, or whether or not the death penalty should be sought or not—are matters that should be debated in a free society. I think that judges and prosecutors, if they are wise and if they are secure, can reasonably take into account constructive criticisms—the views of their neighbors, the view of the citizenry in general, as to whether or not a decision makes sense in fairness and justice, and in common sense. But, it seems to me, that we should encourage our political leaders not to make every single decision an occasion for referendum on whether or not a particular judge should continue to serve, or whether or not a particular prosecutor should continue to hold office. That I consider to be unreasonable.

Thank you.

² Hon. David N. Dinkins, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors, A Panel Discussion Sponsored by the Brooklyn Women's Bar Association*, 5 J.L. & POL'Y 517, 522 (1997).

*Hon. Judy Harris Kluger**

Thank you Dean Wexler and members of the panel and friends and colleagues. I have deep professional roots in Brooklyn, and it's a pleasure to be back here and speak to all of you on this important and very timely topic. The cornerstone of our justice system is judicial independence, and the essence of being an independent judge is the ability to decide cases on the facts and law, without any extraneous influences, and without the fear that an unpopular decision will result in a personal attack on your integrity, intellect and ability.

Recently, the courts, and judges in particular, have come under intense public criticisms. Almost daily, there is some type of news coverage that second guesses judges and their decisions. The phrase "junk justice"¹ has become part of our everyday language. There is no doubt that public confidence in the court system is directly

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¹ "Junk Justice" refers to the tabloid title given to seemingly unjust outcomes resulting from the release of apparently guilty defendants by judges due to legal technicalities. Recently, this title has been used primarily to refer to cases in which judges have excluded highly incriminating evidence due to the exclusionary rule—that is, evidence which is excluded from trial because it was "obtained unconstitutionally by the police." Rick Hampson, *Junk Justice? Evidence Rulings Spur Debate*, CHI. SUN-TIMES, Feb. 4, 1996, at 57. An example of such a case is the highly publicized decision regarding a warrant used to search the residence of Meloin Gardner. The search was found unconstitutional and evidence dismissed because the search was conducted at 6:30 P.M. while the warrant had specified police "could enter 'at any time of the day.'" *Id.* The presiding judge considered night and daytime searches to be fundamentally different, since there are heightened safety concerns at night, when more people are likely to be present at home. *Id.* However, the exclusionary rule is not the only technicality implemented by judges which has precipitated the outcry of so-called "junk justice." In March 1996, an appellate judge overturned a conviction for car theft citing that "[the judge] did not approve in writing the substitution of an alternate juror. He did approve the switch orally, but the court noted the law demands written consent. . . . The *New York Post*, in a front-page headline, called it 'Junk Justice.'" Fred Kaplan, *New York Officials Bash Judges' Rulings*, BOSTON GLOBE, Apr. 9, 1996, at 3.

related to the public's perception of the quality of the judiciary. While no one likes to be criticized, judges understand that courts are a public institution, and therefore, a certain level of scrutiny is expected, and sometimes even warranted. However, the mean-spirited tone, the personal attacks and the frequent factual and legal inaccuracies in accounts of judicial decisions are particularly disturbing.²

Recently, a newspaper published an article about a domestic violence tragedy. The article inaccurately reported that the judge released the defendant without bail on a prior case involving the same parties. The account was completely false. The defendant was never before the court, and the issue of bail was never addressed. This was particularly disturbing, since the reporter was given an accurate account of the facts by the judge.³ But, in a rush to blame someone—the judge—for this terrible tragedy, the facts were ignored. Although a corrected version of the events was printed several days later, deeper into the newspaper—basically at the urging of the court's communications director—the damage was done.⁴

Bail decisions have increasingly come under attack.⁵ If a defendant commits a new crime while released on bail, the judge who set the original bail is often criticized, and the critics ignore

² Attacks upon judges have been particularly harsh in tone. For example, a newspaper reported that Governor Pataki "blasted" an appellate judge for allowing a child to carry a gun to school, calling the decision "lunacy." Michael Finnegan et al., *Gov Eyes Law to Expel Gun-Toting Students*, DAILY NEWS, Sept. 20, 1996, at 7.

³ Jose Lambiet et al., *Man Shoots Ex, Kills Self*, DAILY NEWS, Oct. 12, 1996, at 7 (reporting erroneously that Bronx Criminal Court Judge Laura Safer Espinosa had previously released Louis Cordero without bail on a prior harassment charge before he shot his wife and then killed himself).

⁴ Don Gentile, *Threats, Then Ex Was Shot*, DAILY NEWS, Oct. 13, 1996, at 13. This article attempted to correct a previous article which had erroneously reported that Judge Laura Safer Espinosa had released Louis Cordero on a prior occasion without bail or a harassment charge. "In fact," the paper notes, "Cordero had not been arrested and did not appear before the judge." *Id.*

⁵ See Daniel Wise, *26 Bar Groups Join to Defend Judiciary*, N.Y. L.J., Mar. 8, 1996, at 1 (describing Governor Pataki's criticism of New York City Criminal Court Judge Lorin Duckman's decision to lower the bail of a defendant who subsequently killed his former girlfriend).

any discussion of New York State law which prohibits preventative detention.⁶

It's easy for outsiders who have minimal contact with the daily volume of cases that come across a judge's bench to second guess our decisions. One of the positive aspects of responsible scrutiny and criticism is that it can identify problems and galvanize the need and the attention for procedural, systemic or legislative changes. We all welcome that kind of input. A good example is some of the attention that has been focused on domestic violence cases—that highlighted the need to strengthen the laws regarding orders of protection.⁷ And there were some very, very well-reasoned articles and discourse on the issue of orders of protection and their deterrent effects which resulted in a change in legislation.⁸

⁶ N.Y. CRIM. PROC. LAW § 510.30 (McKinney 1995) (setting criteria for determining whether bail or recognizance will be applied in criminal cases).

Unlike federal law, which sets out standards that permit a court to commit a defendant for preventive detention to reasonably assure the safety of the community . . . the sole objective to be considered when a New York court exercises discretion in choosing between jail and bail, and in the case of the latter the form and amount thereof, is 'the kind and degree of control or restriction that is necessary to secure [the principal's] court attendance when required

Peter Preiser, Practice Commentary, N.Y. CRIM. PROC. LAW § 510.30 (McKinney 1995).

⁷ See, e.g., Alice McQuillan et al., *He Was Freed to Kill: Judge Released Obsessed Stalker*, DAILY NEWS, Feb. 14, 1996, at 5 (discussing the highly publicized case of Galina Komar, a battered woman who was murdered after Judge Lorin Duckman released her boyfriend, Benito Oliver, who was in prison for beating Ms. Komar); Matthew Purdy & Don Van Natta, Jr., *Before the Murder: A Judicial Journey; An Abuse Union, a Testy Judge and a Chaotic System That Failed*, N.Y. TIMES, Mar. 14, 1996, at B1 (same). See also Lynette Holloway, *Police Say Man Killed Ex-Girlfriend and Himself*, N.Y. TIMES, Dec. 31, 1996, at B4 (reporting murder of a Bronx woman, who was stabbed by her former boyfriend despite an order of protection against him); Clifford Krauss, *Man Fatally Shoots His Wife in Her Manhattan Office*, N.Y. TIMES, Nov. 2, 1996, at 27 (discussing Pasquella Coppola's murder of his wife, despite an order of protection forbidding him from coming near her).

⁸ See generally Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533 (discussing the deterrent effects of mandatory arrest on domestic violence offenders). See also Jan Hoffman, *Pataki Signs Bill Seeking to Combat Domestic*

The criminal court where I sit is one of the biggest and busiest in the country. Last year, over one million appearances were scheduled in that court and a half million were processed. With heavy case loads and inadequate facilities, judges and court personnel function under conditions that are less than ideal, to say the least. Some of our critics have never spent one minute in our courts. Do they know that on any given day a judge handles between 150 and 200 calendar cases, each involving different issues and parties who deserve the judge's time and attention? Some court parts worked until seven, eight and nine o'clock at night, just to finish their calendars. Many crucial decisions have to be made in minutes and sometimes in seconds.⁹

Violence, N.Y. TIMES, Aug. 9, 1996, at A1 (citing Assemblywoman Susan John's hope that legislative changes surrounding orders of protection, including the institution of mandatory arrest provisions, "could have a deterrent effect").

See, e.g., N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 1992 & Supp. 1997) (creating mandatory arrest where defendant has committed a felony (other than larceny) against a family or household member; or defendant has violated an order of protection; or defendant has committed a misdemeanor which constitutes a family offense and the victim has not requested that there be no arrest); N.Y. PENAL LAW § 215.51(b)-(d) (McKinney 1988 & Supp. 1997) (violation of an order of protection constitutes criminal contempt in the first degree, a class E felony); N.Y. PENAL LAW § 215.52 (McKinney 1988 & Supp. 1997) (adding crime of aggravated criminal contempt, a class D felony, defined as a violation of an order of protection where defendant intentionally or recklessly causes physical injury or serious physical injury to the person for whom the order was issued).

⁹ See, e.g., Jorge Fitz-Gibbon, *Court Tries Patience Justice's Wheels Slow*, DAILY NEWS, Sept. 17, 1995, at 1 (noting that citywide the number of criminal cases has increased 249% since 1985; in the Bronx criminal cases increased from about 50,000 in 1993 to 61,189 in 1994, while courtrooms are overburdened and employees overworked); Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A29 (noting that there has been a disproportionate increase in the caseload of state, criminal and family courts, yet New York State courts and judges lack basic tools such as computers, fax machines and digital phones); Douglas Martin, *Rising Pressure in Criminal Court: The View from the Bench*, N.Y. TIMES, Feb. 16, 1987, § 1, at 29 (describing a Manhattan Criminal Court judge's daily caseload, and noting that an average arraignment took less than four minutes each); *Justice Decayed: The City's Crumbling Courts*, N.Y. L.J., Jan. 14, 1993, at 9 (documenting the physical deterioration in the city's courthouses and its impact on the attitudes of judges, the bar and the public). See generally

As criticism of the judiciary has increased, so has the temptation for judges to speak out and respond to that criticism. But it's important to remember that we are bound by rules of conduct that limit how we can respond to criticism.¹⁰ We are more restricted than the public officials and the members of the press in what we can say. A judge cannot comment on a pending case.¹¹ In view of what's happened over the last year or so, there has been a suggestion that these rules be changed and judges be allowed to comment publicly, even on pending cases.¹² I think before such a change is made, we should all stop and think. Is that what we want from our judges? To enter the public fray? To appear on television? To be interviewed in the press? To discuss rulings while cases are pending? Wouldn't that cast out on our impartiality, on our objectivity? What would that do to judicial independence?

The public needs to be aware that judges' work and professional lives are under a very different set of rules than those who criticize us. We can't enter the public fray, nor should we in the same way as others. The rules are intended to keep the judges independent and immune from the political trends that can change daily. It has been very encouraging to hear Mr. Cardozo and the bar associations speak about speaking out for judges. The newly formed Joint Commission to Preserve the Independence of the Judiciary¹³ is heartening to us, and I hope that they will be

DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* (1990) (recounting the pressures on a Manhattan Assistant District Attorney in New York's criminal justice system).

¹⁰ N.Y. JUD. LAW Canon 3(A)(6) (McKinney 1992) (stating that while a judge "should abstain from public comment about a pending proceeding in [any] court," a judge is not prohibited from "making public statements in the course of [his or her] official duties or from explaining for public information the procedures of the court").

¹¹ *Id.*

¹² Abraham G. Gerges, *Allowing Judges to Answer Back*, N.Y. L.J., Nov. 14, 1996, at 2 (arguing that the Code of Judicial Conduct should be amended to permit judges to make public comments and to respond to criticism).

¹³ The Joint Committee to Preserve the Independence of the Judiciary is a non-partisan group which originated in a statement published in the *New York Law Journal* on March 8, 1996. Daniel Wise, *supra* note 5, at 1. The joint committee, consisting of 26 bar groups and six law school deans, stated its

speaking out quickly on issues that relate to the courts. The public has to understand the criminal justice system and the court system. Judges are accountable to the public and we are in the public eye and we are not immune from criticism. But the discourse should be informed, productive and fair-minded.

Thank you.

mission "to develop proposals for insuring the independence of the judiciary from partisan attack and to coordinate timely responses to intemperate or misleading attacks upon individual judges or the judicial system" and to "initiate efforts to foster public awareness and understanding of the workings of the legal system and the importance of an independent judiciary." Daniel Wise, *supra* note 5, at 1. Since its inception, the joint committee has issued statements urging presidential candidates to cease making personal attacks on judges. *Candidates Urged to Halt Judge Attacks*, N.Y. L.J., Oct. 3, 1996, at 2. The joint committee has also recommended that Governor Pataki reconsider the appointment of his counsel, Michael Finnegan, to the Committee on Judicial Nomination. *Concern Expressed with Pataki Appointee*, METROPOLITAN CORP. COUNS., Nov. 1996, at 50.

ADDITIONAL REMARKS

*Hon. Abraham G. Gerges**

The Framers of the U.S. Constitution, with great vision, carefully and specifically separated the branches of government to secure independence. The Framers ensured that a democratic government would survive and that our citizenry would be protected from unreasonable governmental interference. Judicial independence is truly one of the cornerstones of a democratic nation.¹

To guarantee the requisite independence and impartiality of the judiciary, the Framers granted life tenure to federal judges to insulate the judiciary from the vicissitudes of politics.² The judiciary, however, while independent of the executive and the legislative branches of government, is nonetheless influenced by these branches. The executive branch, at the federal and state levels, has great power to shape the judiciary through the often partisan appointment process.³ The legislature enacts the laws, thereby establishing the framework from which the judiciary must operate. Because the judiciary is already shaped by the other branches of government and must operate within the framework

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¹ See generally THE FEDERALIST No. 78 (Alexander Hamilton) (stating that an independent judiciary is essential to public justice and democracy).

² U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

³ See Hon. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904 (1996) (surveying various methods of partisan and non-partisan judicial selection and appointments).

created by them, any further encroachment on its independence would violate the very essence of democratic process.⁴

It is important to understand that judges are bound by their oath of office to uphold laws, even unpopular ones. The exclusionary rule is certainly one body of law that the public does not comprehend and, consequently, decries.⁵ A better understanding by the public of this, and other, often arcane rules of law would certainly be of benefit.

Criticism of the judiciary is a vital component of our democracy and system of justice. The stridency of the criticism of late, however, undermines the credibility of and erodes public faith in the judiciary. Certain segments of the media and politicians eager for publicity seize upon the sensational aspects of legal rulings.⁶

⁴ U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

⁵ The exclusionary rule "commands that where evidence has been obtained in violation of the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant." BLACK'S LAW DICTIONARY 564 (6th ed. 1990). See *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states via the Fourteenth Amendment).

⁶ See, e.g., Jan Hoffman, *Mayor Criticizes Manslaughter Charge in Officer's Death*, N.Y. TIMES, May 24, 1996, at B3 (describing the criticism of Bronx District Attorney Robert Johnson by both Mayor Giuliani and Governor Pataki for his refusal to pursue "top charges" against a defendant allegedly responsible for the death of a police officer); Neil MacFarquhar, *Federal Judge to Resign, Citing Political Attacks*, N.Y. TIMES, at B4 (reporting the resignation of Judge H. Lee Sarokin of the U.S. Court of Appeals for the Third Circuit due to criticism of his liberal stance on criminals' rights by top Republicans, including Bob Dole); Matthew Purdy & Don Van Natta Jr., *Before the Murder, A Judicial Journey; An Abusive Union, a Testy Judge and a Chaotic System that Failed*, N.Y. TIMES, Mar. 14, 1996, at B1 (reporting Governor Pataki's criticism of New York City Criminal Court Judge Lorin Duckman's decision to lower bail for Benito Oliver, charged for assaulting his girlfriend, thus enabling him to murder her while free on bail); Don Van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1 (noting the mounting political criticism faced by U.S. Federal District Court Judge Harold Baer by President Clinton, Bob Dole, House Speaker Newt Gingrich and Governor Pataki, for his ruling to suppress evidence and a videotaped confession in a Washington Heights drug case).

The public is then treated to a superficial, slanted account which is used to garner the most attention. Everyone agrees that the public has a right to know. The public also has a right to an explanation for the legal basis of a particular ruling. Unfortunately, this explanation is rarely, if ever, provided by the ratings-hungry media or crusading, vote-thirsty politicians. The public's fears about crime are easily inflamed. Some of the media is at fault for failing to convey a complete assessment of a case. In the effort to sell newspapers or garner higher ratings, the media does the public a disservice. The public has the right to expect balanced reporting and responsible journalism.

It should be remembered that the very fact that parties are in court before a judge means that there has already been a breach of the public order. Individuals are not in court, whether as defendants, witnesses, victims or grieving family members because they want to be there. It is because they are compelled due to untenable circumstances. Members of the judiciary, to the best of their ability, attempt to distribute justice evenhandedly. Judges cannot undo the events or turn back the clock.

It must be remembered that our purpose is to dispense justice. Judicial office is a public trust that must be preserved for future generations. No one disputes that the justice system should be more effective and more productive but we cannot sacrifice the quality of justice. Just as doctors are concerned about the quality of patient care while health management organizations are concerned about cost-effectiveness, judges must be concerned with the quality of justice—not the number of cases disposed of but the manner of their disposition.

If there had been freedom of speech, freedom of the press, and an independent judiciary, there would not have been a Holocaust or Apartheid. It is vital that this independence be preserved to secure the future of our democracy.

